

(2014) 06 BOM CK 0148

In the Bombay High Court

Case No : Arbitration Petition (L) No. 890 of 2014

Mumbai Metropolitan Region Development Authority

APPELLANT

Vs

Reliance Energy Limited

RESPONDENT

Date of Decision : 24-06-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(5), 9
Electricity Act, 2003 — Section 158, 173, 174, 86(1), 86(1)(f)
Metro Railways (Construction of Works) Act, 1978 — Section 1(3), 32(1)(a)
Tramways Act, 1886 — Section 15, 4(1)(a)

Citation : (2014) 06 BOM CK 0148

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : E.P. Bharucha, Senior Advocate a/w Dr. Birendra Saraf a/w Firoze Bharucha a/w Amitabh Sharma a/w Raj Panchmalia a/w Peshwan Jehangir, Shiranshu Thplyal a/w Ms. Anushka Sarda a/w Shreya Rastogi i/b M/s. Khaitan and Co, Advocate for the Appellant; Iqbal Chagla, Senior Advocate a/w Ms. Anjali Chandurkar a/w D.J. Kakalia a/w Ms. Bhavna Singh a/w Paresh Patkar i/b M/s. Mulla and Mulla and C.B.and C. for Respondent No. 1, Mr. Janak Dwarkadas, Senior Advocate i/b M/s. Mulla and Mulla for Respondent No. 2, Mr. J.J. Bhatt, Senior Advocate i/b Avinash Joshi for Respondent No. 3, Advocate for the Respondent

Final Decision : Dismissed

Judgement

R.D. Dhanuka, J.—By this petition filed u/s 9 of the Arbitration and Conciliation Act, 1996, the petitioner seeks that the effect, implementation and/or operation of the board resolution dated 29/05/2014 passed by the respondent No. 3 (Mumbai Metro One Pvt. Ltd.) be stayed and injunction restraining the respondents from revising/charging the amount higher than the initial fares agreed by the respondents as per terms of the concession agreement and notified by the Government of Maharashtra vide notification dated 03/09/2013. Some of the relevant facts for the purpose of deciding this petition are as under:-

2. The Government of Maharashtra authorized the Mumbai Metropolitan Region

Development Authority (hereinafter referred to as MMRDA) as the project implementation agency for the implementation of a rail based Mass Rapid Transit System (MRTS) along the Versova-Andheri-Ghatkopar corridor through a concession on public private partnership format and approved the said project under the provisions of Indian Tramways Act 1886.

3. On 21st August 2004, MMRDA invited proposals for selection of a bidder for development and operation of the said project on Build, Own, Operate and Transfer (BOOT) basis. The consortium comprising of M/s. Reliance Energy Ltd. and M/s. Veolia Transport S.A., respondent Nos. 1 and 2 respectively submitted their bids. Vide its resolution dated 14/06/2006, the Government of Maharashtra awarded the said tender to the said consortium. On 20/06/2006 the MMRDA issued a letter of intent to the said consortium. The said consortium thereafter incorporated respondent No. 3 i.e. Mumbai Metro One Pvt. Ltd. (hereinafter referred to as the said company) as the "special purpose vehicle" to implement the said project. The respondent No. 1 and 2 hold 69% and 5% of the equity share capital of the said company respectively and the MMRDA holds 26%. It is case of the MMRDA that the said company has been funded by way of (i) Viability gap funding by the Central Government of approx. Rs. 552.5 crores out of total Rs. 650 crores and (ii) Equity participation of Rs. 133.1 crores invested as an equity shareholder of 26% into of respondent No. 3.

4. On 7th March 2007 MMRDA and the said company entered into the Concession Agreement for implementation of the said project on the terms and conditions recorded therein. Under the said agreement, the concession is granted to the said company for a period of 35 years commencing from the appointed date during which the said company has been authorized to develop, to operate and to maintain the said project in accordance with the provisions of the said agreement. "Fare and Fare schedule" are defined under the said agreement respectively as under:

"Fare" means the toll/charge(s) levied on and payable by the commuters of MRTS Project in accordance with the provisions of Indian Tramways Act, 1886 (Bombay Amendment 1948), provisions of the Fare Schedule and provisions of this Agreement.

"Fare Schedule" means the Resolution No. MUT-1004/1671/158/2004/LD-10 dated 19th August 2004 issued by GOM in exercise of the powers conferred by the Indian Tramways Act 1886 (Bombay Amendment Act 1948) in respect of the levy and collection of the toll from Commuters and a copy of which is at Schedule-L.

5. Under article 6.1 of the said agreement, it is provided that the said company is entitled to collect the fare from the users of the project in accordance with the fare schedule set forth in schedule-L and in accordance with Art. 6.5 of the said agreement. Under article 6.2 it is provided that the said company is not entitled to any revision of fare or other relief from MMRDA or any Government agency

except in accordance with the said express provisions of the said agreement.

6. Under article 6.5.1 it is provided that the regulation and revision of fare may be done in such manner as detailed in Schedule-L annexed to the said agreement. Article 6.5.2 provided that the said company may approach the Government of Maharashtra for any upward revision of the fare beyond those permitted in the fare notification in the event of any unanticipated rise in the operative cost of the said project.

7. Under article 8.1(x), it is obligation of the said company to comply with all applicable permits and laws in the performance of their obligation under the said agreement. Under article 8.1(xiii), it is obligation of the said company to levy and collect fares from users of the said project at the rates in accordance with the said agreement and to regulate the traffic on the said project in accordance with the applicable laws. Article 37 of the said agreement provides for arbitration clause for resolution of disputes between the parties.

8. Under schedule-L of the said Concession Agreement, Fare Schedule is provided. It is stated that the Fare Schedule means the resolution dated 19/04/2004 issued by Government of Maharashtra in exercise of the powers conferred by the Indian Tramways Act 1886 in respect of the levy and collection of the fares from commuters and includes any subsequent notifications issued from time to time to give effect to the provisions of the said agreement. It is provided that the fare to be charged to the users of the said project(2003-04 level) (i) Rs. 6 upto 3 kms. (ii) Rs. 8 between 3 kms to 8 kms. (iii) Rs. 10 beyond 8 kms. It is also provided that the fare revision shall be indexed @ 11% every fourth year. It is stated that the fare notification based on the said principles for entire concession period is under issue by the Government of Maharashtra. That will form part of the Concession Agreement.

9. On 07/03/2007 MMRDA, Reliance Energy Ltd., Veolia Transport S.A. and Mumbai Metro One Pvt. Ltd. entered into a Shareholders Agreement. Under the said Shareholders Agreement, the MMRDA and the consortium of respondent No. 1 and respondent No. 2 became shareholders of the said company i.e. Mumbai Metro One Pvt. Ltd. All the three parties have appointed Directors on the board of the said company.

10. Clause 7.3.5.1 provides for decisions on specified matters. It is provided that when any decision has to be taken in relation to any of the specified matters at a board of directors level, it shall only be considered duly passed if a MMRDA director and a director nominated by preferred bidder have voted in favour of such resolution. Under clause 7.3.5.2 the " Specified matters" and Clause 7.3.5.2(h) provides for "Any change in the business". Clause 7.3.5.2(n) provides that save and except for the optimal use of the assets or interests of the company including for purpose of execution of the project, putting to use the assets or interest of the company in any other manner. Clause 20.1 of the said Shareholders Agreement provided for dispute resolution by arbitration.

11. There are separate Memorandum of Association and Articles of Association of the said company providing for objects of the said company and other related provisions.

12. On 14/12/2007 the State of Maharashtra in exercise of powers conferred by Section 4(1)(a) of the Tramways Act 1886, authorized the construction and maintenance of a tramway in the Versova-Andheri-Ghatkopar MRTS corridor by the MMRDA or any other company established by it and to enter into an agreement on the conditions specified in the schedule appended to the said order. The said order also made provision for demand for tolls, fares leviable by MRT administration or concessionaire.

13. On 16/10/2009 by exercising powers u/s 1(3) of the Metro Railways (Construction of Works) Act, 1978, the Central Government after consultation with State Government declared that the provisions of the said Act shall extend to various metropolitan areas mentioned therein including Mumbai (hereinafter referred to as the said Act of 1978). By a separate notification the Central Government declared that the provisions of Metro Railways (Operation & Maintenance) Act 2002 shall extend to the metropolitan areas mentioned therein including Mumbai.

14. On 14/01/2011, by exercising powers u/s 7(1) of the Metro Railways (Operation & Maintenance) Act 2002 (hereinafter referred to as the said Act of 2002), Central Government appointed Commissioner of Railway Safety, Western Circle Mumbai to act as Commissioner of Metro Railway safety in respect of Metro Railway in Mumbai metropolitan area.

15. By a letter dated 19th March 2012, MMRDA referred to the notification dated 16/10/2009 issued by Government of India and advised the respondent No. 3 company to follow the Metro Act for the said corridor and made it clear that the matter regarding the applicability of the Metro Act thus stood clarified. Copies of the notifications dated 16/10/2009 are enclosed alongwith the said letter.

16. The Central Government filed an affidavit on 14/12/2012 in W.P. 1984/11 filed by the respondent No. 3 company in this Court. It is submitted in the said affidavit that with the notification dated 16/10/2009, the said project has come under the purview of Metro Railway (Construction of Works) Act 1978 and Metro Railways (Operation & Maintenance), Act 2002 and that Metro Railway cannot be regarded as tramway in view of the distinct differences between the two systems mentioned therein. It is also mentioned that the Metro Railway being a railway under List-I Entry 22 of the Constitution, the said project is governed by the said two Acts. The operation of those Acts has been extended to the metropolitan area of Mumbai vide notifications dated 16/10/2009.

17. MMRDA by letter dated 28/08/2013 to the said company, recorded that MMRDA vide letter dated 19/03/2012 had advised the respondent No. 3 company to follow Metro Act (Amendment) Act, 2009 for obtaining clearance. MMRDA made reference to State Government to issue notification recognizing the said

company as Metro Rail Administration. By the said letter, the MMRDA designated the said company provisionally as Metro Rail Administration and authorized the said company to discharge functions under Metro Act in respect of the said project till the final communication was received from the Government.

18. On 3rd September, 2013 Government of Maharashtra issued an order in exercise of powers conferred u/s 15 of Indian Tramways Act, 1886 and in accordance with Section VIII of the schedule appended to the Government order dated 14th December, 2007 and accorded approval to the schedule appended as Annexure-1 to that order showing the maximum fare or toll that could be charged in respect of metro line one and directed that the same shall form part of the concession agreement. The schedule appended to the said letter shows the maximum fare or toll that could be charged in respect of the said project for the year 2003-04 to 2044-45.

19. On 18/11/2013 the Central Government in exercise of powers conferred by section 32(1)(a) of the said Act of 1978 added the Metro Alignment of Mumbai Metro Line One in respect of the Metropolitan area of Mumbai to the schedule of the said Act.

20. On 26th November, 2013 the said company stated that the fare was to be fixed in accordance with section 33 of the said Act of 2002. The said project was at the advance stage of completion and proposed to be opened for commercial operation shortly. The said company requested the Central Government to constitute the Fare fixation Committee u/s 34 of the said Act of 2002 for the purpose of recommending the fare for the carriage of passengers from traveling one station to another under the said project.

21. On 28/11/2013 the said company requested the Central Government for clarification u/s 87 of the said Act of 2002 and informed that the said project was at advanced stage of completion and the company proposed to call upon CMRS shortly for necessary inspection and approval.

22. By letter dated 29th November, 2013 the Central Government recorded that out of Rs. 471 crores as special central assistance, gap funding support of Rs. 310 crores from Central Government had already been disbursed to MMRDA. It was clarified that all the metro rail projects were taken up so far by the Ministry of Urban Development who are non-government metro railway projects and no notification u/s 87 had been issued for any of those projects as it was not required since the project had already been approved by the Government.

23. By letter dated 9/12/2013 the respondent no. 3 company requested the Central Government to expedite appointment of Fare Fixation Committee as the said company proposed to commence the project shortly. It is contended in the said letter that in view of the applicability of the Central Metro Acts to the Mumbai Metro Line One Project, the provisions of Indian Tramways Act, 1886 have been superseded and thus the Government of Maharashtra could not take any decision in fixation of fares on any application of the respondent no. 3

company. It is also contended that the original fare as envisaged in the concession agreement has lost its relevance due to abnormal increase in various economic indices which was earlier not catered in the detailed project report. It is stated that the said company has thus no option but to approach the Central Government for recommendation of fare by a Fare Fixation Committee.

24. Respondent no. 3 by letter dated 20th December, 2013 requested the Government of Maharashtra to inform the Ministry of Urban Development, Government of India that the State Government was taking appropriate steps to nominate its representative on the Fare Fixation Committee and requested to expeditiously proceed to nominate Government of Maharashtra's representative on the said committee.

25. By letter dated 9/12/2013, the respondent No. 3 company contended that as per concession agreement, it was expected to approach the Government of Maharashtra to address increase in various economic indices but after notification of Central Metro Acts and its applicability to the project, the company had no option but to approach the Central Government for recommendation of fare by a Fare Fixation Committee as Government of Maharashtra could not take any decision in that matter.

26. By letter dated 13/01/2014 to the Central Government, respondent No. 3 informed that the project was in final stage of completion and that the company would be approaching the commissioner of metro railways safety for obtaining the safety clearances for opening the project for commuters. The respondent No. 3 requested the Central Government to expedite the constitution of Fare Fixation Committee u/s 34 of the said Act of 2002.

27. By letter dated 7/02/2014 the central government after referring to the letters dated 26th November, 2013 and 9th December, 2013 addressed by respondent No. 3 company and letter dated 6th December, 2013 of MMRDA, informed the Government of Maharashtra that the State Government Notification for implementation of the project under Tramways Act is deemed to have been superseded with effect from 18th November, 2013 and the fare fixation shall be governed by the relevant provisions of Section 33 and 34 of the Act of 2002. It is also stated that the respondent No. 3 company has now become the Metro Railway Administration u/s 2(1)(j)(ii) of the said Act of 2002. It is stated that as per Section 33 of the Act, respondent No. 3 can fix the fare afresh after obtaining the recommendation of Fare Fixation Committee, however that would not apply to the initial fares which are governed by first proviso to Section 33 of the Act of 2002.

28. In the said letter it is clarified that for the initial fare fixation, no Fare Fixation Committee's recommendation is necessary. For subsequent fare revision, Fare Fixation Committee is a must u/s 33 and 34 of the Act of 2002. Central Government informed that it had decided to constitute a Fare Fixation Committee in terms of section 34 of the said Act to recommend subsequent revision of fare

and the ministry was proposing the name of a retired Judge as chair person of the committee and is also nominating a member on behalf of Government of India. Central Government requested the state of Maharashtra to nominate a suitable member at appropriate level to represent Government of Maharashtra in the said committee.

29. In the month of May 2014 the respondent No. 3 Company circulated agenda for the 42nd meeting of Board of Directors of the company to be held on 29/05/2014. Item No. 5 of the agenda provided for " fixation of fare on initial opening of Mumbai Metro Line-One". In the said agenda the respondent No. 3 mentioned various reasons as to why the rates proposed in the said agenda were to be fixed as fare on initial opening of Mumbai Metro Line-1. The respondent No. 3 proposed to fix initial opening fare between Rs. 10 to Rs. 40. The respondent No. 3 vide letter 28/05/2014 to the MMRDA had already contended that once 2002 Act applies, there could be no question of application of Section 15 of the Indian Tramways Act 1886 or the provisions of the Concession Agreement related to fare and the said Act conferred the power on the respondent No. 3 to fix the fare for initial opening of the line. The respondent No. 3 rejected the request of the MMRDA for withdrawal of agenda item No. 5 from the said meeting as untenable.

30. The Board of Directors of respondent No. 3 held a meeting on 29th May 2014. In the said meeting eight directors voted in favour of the resolution and the remaining 3 directors who were appointed by the MMRDA voted against the resolution. There is an endorsement made on the resolution disclosing reasons for dissent. It is stated that in view of articles 82 and 83 of the Articles of Association, the dissent should be treated as dissent to a specified matter and hence the resolution must be treated as "not having been duly passed." It is also stated that the proposed fare structure was not as per the fare structure notified by the State Government.

31. By letter dated 06/06/2014 addressed to the respondents, the MMRDA contended that under provisions of Concession Agreement and provisions of the Act, respondent No. 3 company had agreed to charge the initial fares fixed and agreed upon by the said company and any revision of initial fares subsequently has to be in the manner prescribed under article 6 read with Schedule-L of the Concession Agreement. It is also contended that the initial fares fixed and agreed by the respondent No. 3 company under the Concession Agreement are in no manner inconsistent with the provisions of the Metro Operations Act and any revision in fares may be now done only on recommendation of the Fare Fixation Committee. In the said letter it is also contended that any change or deviation of activities from the provisions of the Concession Agreement would tantamount to being a change in the business of the company and thus would be a specified matter and any resolutions regarding specified matters shall be considered duly passed if a MMRDA director and a director nominated by the consortium have voted in favour of such resolution. The MMRDA called upon the company to cease

and desist from acting upon pursuant to purported board resolution in any manner whatsoever. MMRDA also called upon the company to amicably resolve the dispute through direct negotiations in terms of article 37(1)(d) of the Concession Agreement.

32. By letter dated 7/06/2014, respondent No. 3 company contended that the resolution passed by respondent No. 3 had been duly passed and the same is legal, valid and binding and requested to confirm a mutually convenient date in order to engage in direct negotiations to amicably resolve the dispute sought to be raised by the MMRDA,.

33. By letter dated 12/06/2014 addressed to the Ministry of Urban Development, Government of India, the Government of Maharashtra after referring to the letters dated 07/02/2014, 14/02/2014 and 17/04/2014, informed the decision of the Government of Maharashtra to nominate Mr. Subodhkumar as the member to represent the Government of Maharashtra on the Fare Fixation Committee to be constituted by the Central Government. In the said letter, the Government of Maharashtra did not deal with the other issues raised in those letters by the Central Government.

34. The respondent No. 3 thereafter commenced the operation of Metro line on 08/06/2014 initially on promotional fare of Rs. 10/- for the period of 30 days. Mr. Bharucha learned senior counsel appearing for the MMRDA invited my attention to articles 3.4, 6.1 to 6.5.2, Schedule-L of the Concession Agreement and submits that under the said Concession Agreement the MMRDA and the respondent No. 3 company had already agreed the initial fare required to be collected from the users of the said MRTS project. The respondent No. 3 has agreed and undertaken to implement the project in accordance with the terms and conditions set forth in the agreement. It is submitted that the company has agreed that the company would not be entitled to any revision of fare or other relief from MMRDA or any Governmental agency except in accordance with express provisions of the said Concession Agreement. The regulation and revision of fare can be done only in the manner as detailed in Schedule-L annexed to the said Agreement. If the company seeks any upward revision of the fare beyond those permitted in the fare notification in the event of any unanticipated rise in the operating cost of the project, the company can approach the Government of Maharashtra for any such upward revision. Learned senior counsel submits that since the initial fare is already fixed by parties under the Concession Agreement, revision of such fare if at all can be done by the Fare Fixation Committee under Sec. 33 of the Act of 2002 and not by the respondent company itself. It is submitted that since there is no inconsistency in the agreement regarding collection of fare and the right of the company to seek revision of fare therein with the provisions of the said Act of 2002, parties would be governed by the provisions of the Concession Agreement and not under Sec. 33 of the Act of 2002.

35. Learned senior counsel also placed reliance on article 8.1(xiii) of the

Concession Agreement and would submit that company is under an obligation to levy and collect fares from users of the MRTS project at the rates in accordance with the Concession Agreement and regulate the traffic on the said project in accordance with the applicable laws. It is submitted that the respondent No. 3 thus cannot collect any fares from the users other than what is already agreed upon in the Concession Agreement.

36. Learned senior counsel placed reliance on Art. 11-A.1 of the Concession Agreement and would submit that the company had acknowledged that prior to the execution of the Concession Agreement the company had adequately made an independent evaluation of the traffic volume, specifications, standards, site and all the information provided by MMRDA and had adequately assessed to their satisfaction the nature and extend of such difficulties, risks and hazards likely to arise or may be faced by them in course of performance of its obligation. It is submitted that the company thus could not seek any revision of fare based on the anticipated loss or on other similar grounds.

37. Learned senior counsel submits that in so far as order dated 3rd September 2013 issued by the Government of Maharashtra u/s 15 of the Indian Tramways Act 1886 and in accordance with Section VIII of the schedule appended to the Government Order dated 14th December 2007 is concerned, the Government of Maharashtra has by that order only reiterated the fare in toto which was already fixed by the parties under the Concession Agreement. It is submitted by the learned senior counsel that the Central Government in exercise of powers under Sec. 32(1)(a) of the Metro Railways (Construction of Works) Act 1978 by notification dated 18/11/2013 had added the metro alignment of Mumbai Metro Line-1 in respect of metropolitan area of Mumbai. It is submitted that the Government notification issued on 3rd September 2013 under the provisions of Section 15 of Indian Tramways Act 1886 was thus binding on the respondent No. 3 company and was valid and subsisting. Learned senior counsel submits that there was no question of respondent No. 3 company fixing any initial fare by the purported resolution.

38. Mr. Bharucha learned senior counsel then submits that even if Section 33 of the Act of 2002 is made applicable after the respondent No. 3 company was designated as "Metro Railway Administration", fixation of fare on the initial opening of metro railway by such Metro Railway Administration is not mandatory. It is submitted that respondent No. 3 could not have exercised such discretion under proviso to Section 33 of the Act of 2002 in view of the parties already having fixed the initial fare under the Concession Agreement which is approved by the State Government.

39. Mr. Bharucha learned senior counsel also placed reliance on Section 103 of the said Act of 2002 and would submit that the provisions of the said Act would apply if any provision of the Concession Agreement is inconsistent with the provisions of the said Act of 2002, however in this case there being no inconsistency in so far as provision for collection and fixing of fare is concerned,

provisions of the Concession Agreement would be applicable and not Section 33 of the Act.

40. In so far as letter dated 07/02/2014 of the Government of India Ministry of Urban Development to the Government of Maharashtra is concerned, it is submitted that in the said letter the Government of India did not consider the fact that the initial fare had been already fixed by the parties under the Concession Agreement. The Government officer has not appreciated the provisions of Section 33 and 34 of the Act of 2002 properly while interpreting those provisions and clarifying that for initial fare fixation, recommendation of Fare Fixation Committee was not necessary.

41. Learned senior counsel for MMRDA then placed reliance on Clause 2.1, 2.2 and definition of "Business" under the Shareholders Agreement dated 07/03/2007. Learned senior counsel also placed reliance on Clause 7.3.5.1 and 7.3.5.2(h) & (n) and would submit that fixation of initial fare revision would be "specified matters" and in view of the directors of the MMRDA having voted against the resolution to decide the fare, such resolution cannot be considered as duly passed and thus cannot be acted upon. It is submitted that any action on the part of the respondent No. 3 beyond the "Business" defined under the Shareholders Agreement contrary to the manner prescribed would be illegal and not binding on the MMRDA.

42. Mr. Bharucha learned senior counsel then submits that the project in question being a public project and is commissioned for the benefit of public at large and MMRDA being an "authority" and also being a shareholder to the extent of 26%, views of MMRDA ought to have been considered by the respondent No. 3 company before passing any such resolution. It is submitted that if the respondent No. 3 is allowed to charge and recover exorbiting fare to the users, it will have serious repercussion on the operation of the metro line and would also affect not only the business of the company but also public at large. Learned senior counsel submits that the fares agreed by the parties hereto under the Concession Agreement is in line with the fare being collected by Metro Railway Administration in other states whereas the fare proposed by the respondent No. 3 is exorbitant and thus resolution on that ground also deserves to be stayed.

43. Learned senior counsel submits that in the event of this Court not granting any stay of the operation of the impugned resolution and if such resolution is set aside by the arbitral tribunal, the reimbursement of the excess fare in the mean while collected by respondent No. 3 to the individual users would be impossible. Learned senior counsel submits that the petitioners are willing to nominate their nominee arbitrator even today and if arbitral tribunal in terms of the agreements is constituted, such tribunal can decide the validity of resolution in question expeditiously and till such time respondent No. 3 shall not be permitted to collect the fare as proposed in the resolution. It is submitted that in the event of the respondent No. 3 company succeeding in the arbitration proceedings and the validity of the resolution is upheld, company would be always entitled to claim

compensation.

44. Mr. Chagla, learned senior counsel appearing for Reliance Energy submits that prior to 16/10/2009 the parties were governed by the Indian Tramways Act. Notification issued by the State of Maharashtra on 03/09/2013 purporting to approve the fare u/s 15 of Indian Tramways Act 1886 is illegal as such powers are superceded in view of applicability of Act of 2002 and could not have been exercised by the State of Maharashtra. It is submitted that in view of the fact that the Act of 1978 and 2002 are extended to Mumbai Metro as far back as on 16/10/2009, fare except fare for initial opening of metro can be fixed only by the Fare Fixation Committee to be constituted u/s 34 of the said Act of 2002.

45. It is submitted that the company had addressed various letters from time to time requesting the Central Government to constitute the Fare Fixation Committee as the project in question was ready for operation. The petitioner however did not nominate any member of such Fare Fixation Committee for quite some time. The Central Government ultimately by letter dated 07/02/2014 clarified the position that the respondent No. 3 company having become the Metro Railway Administration as per the provisions of Act of 2002 and in view of the Section 33 of the Act, the company could fix the fare afresh after obtaining the recommendation of the Fare Fixation Committee. It was also clarified that the said procedure however would not apply to the initial fares which are governed by the first proviso to Section 33 of the said Act.

46. Learned senior counsel submits that though the State of Maharashtra replied to the said letter of 07/02/2014 to the Government of India, there was no protest that the such clarification issued by the Central Government was incorrect in any manner whatsoever. It is submitted that even on the proposed resolution in the meeting held on 29/05/2014, MMRDA did not raise any such objection. The only objection raised was that the issue of fixation of fare was a specified matter and three directors of the MMRDA had voted against such resolution and that the proposed fare structure was not as per the fare structure notified by the State Government.

47. Learned senior counsel submits that the State Government nominated member of the Fare Fixation Committee only after four months and thus cannot be allowed to urge that the fare on the initial opening of the metro railway could not have been fixed by the respondent No. 3 company. Learned senior counsel also invited my attention to the Order purported to have been passed by the Government of Maharashtra u/s 15 of the Indian Tramways Act on 3/09/2013 and would submit that the Government has approved the fare for the entire concession period of 35 years and even for the period when the metro line was not even put in operation and also for the period prior to the date of the agreement. Such fixation of fare by the State of Maharashtra even otherwise cannot be construed as fare for initial opening of the metro railway.

48. It is submitted by the learned senior counsel that to the extent the provisions

of the Concession Agreement and the Shareholders Agreement are inconsistent with the Act of 1978 and of 2002, such provisions of the agreements are nugatory and not binding on the respondent No. 3 company in view of Section 103 of the Act of 2002. Learned senior counsel submits that the respondent No. 3 has not fixed any initial fare but has fixed fare for initial opening of the metro railway under proviso to Section 33. Such exercise of power is under the statute and not under the provisions of the Concession Agreement. It is submitted that under the provisions of Indian Tramways Act there is no provision for fixation of initial fare. The only provision is regarding fixation of fare. Once metro Acts are applicable, the provisions of the agreements which are inconsistent with the provisions of these two Acts and particularly the provision for fixing of fare have to be given a go by and the same can be fixed only in accordance with Section 33 of the Act of 2002.

49. Learned senior counsel placed reliance on various paragraphs in the affidavit in reply in support of the submission that the fare for initial opening of metro fixed by the respondent No. 3 is totally reasonable considering the tariff charged for auto rickshaw, buses, local trains, taxis. It is submitted that if the fare which are fixed by the respondent No. 3 company till the fare is fixed by the Fare Fixation Committee is not allowed to be recovered, the company would suffer tremendous loss. The company is not responsible for any delay in commencement of operation of the metro line.

50. In so far as issue of "specified matters" raised by the MMRDA is concerned, learned senior counsel submits that fixation of fare and/or in any event fare for initial opening of metro cannot be construed as change in business and thus cannot be construed as specified matter under the provisions of Concession Agreement and/or Shareholders Agreement or under Articles of Association of the company. It is submitted by the learned senior counsel that sub-clause (h) and (n) of clause 7.3.5.2 of the shareholders agreement thus would not apply to the resolution passed by the respondent no. 3 company. It is submitted that the resolution thus passed by the respondent no. 3 company in the meeting held on 29th May, 2014 is valid and is binding.

51. Learned senior counsel submits that in view of the applicability of the Metro Acts, fare for initial opening of metro could be fixed only u/s 33 of the Act of 2002 and not by the State Government or by the parties under the concession agreement. The learned senior counsel placed reliance on the judgment of Supreme Court in case of Gujarat Urja Vikash Nigam Ltd. Vs. Essar Power Ltd., and in particular paragraphs 7 to 10, 14, 24, 34, 35, 59 and 60 which reads thus:-

7. The respondent-company and the Board tried to settle the above dispute amicably. The State Government also intervened in the matter but to no avail. After protracted correspondence, on 14th November, 2005 the respondent-company called upon the appellant-Nigam to refer the disputes arising from the aforesaid agreement to the arbitrator Mr. Justice A.M. Ahmadi, retired Chief

Justice of India. On the other hand, the Nigam approached the Gujarat Electricity Regulatory Commission, Ahmedabad (hereinafter in short "the Commission") by Application No. 873 of 2005 made u/s 86(1)(f) of the Electricity Act, 2003 (hereinafter in short "the Act of 2003").

8. Since the Nigam did not send its approval for appointment of Mr. Justice A.M. Ahmadi as arbitrator, the respondent-company approached the Gujarat High Court by filing an application u/s 11(5) and (6) of the 1996 Act, and by the impugned judgment dated 15.6.2006 the learned Single Judge, Gujarat High Court, has appointed Mr. Justice A.M. Ahmadi, retired Chief Justice of India, as the sole arbitrator for resolving the disputes. Aggrieved, this appeal by special leave has been filed by the Nigam before us.

9. Mr. K.K. Venugopal, learned senior counsel for the appellant, has relied on Section 174 of the Act of 2003 which states:

174. Act to have overriding effect-Save as otherwise provided in Section 173, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

10. He has also invited our attention to Section 173 of the Act of 2003 which states:

173. Inconsistency in laws-Nothing contained in this Act or any rule or regulation made thereunder or any instrument having effect by virtue of this Act, rule or regulation shall have effect in so far as it is inconsistent with any other provisions of the Consumer Protection Act, 1986 (68 of 1986) or the Atomic Energy Act, 1962 (33 of 1962) or the Railways Act, 1989 (24 of 1989).

14. Shri K.K. Venugopal also relied on Section 158 of the Act of 2003 which states:

158. Arbitration-Where any matter is, by or under this Act, directed to be determined by arbitration, the matter shall, unless it is otherwise expressly provided in the licence of a licensee, be determined by such person or persons as the Appropriate Commission may nominate in that behalf on the application of either party; but in all other respects the arbitration shall be subject to the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996).

24. The main question before us is whether the application u/s 11 of the Act of 1996 is maintainable in view of the statutory specific provisions contained in the Electricity Act of 2003 providing for adjudication of disputes between the licensee and the generating companies.

34. Section 174 provides that the Electricity Act, 2003 will prevail over anything inconsistent in any other law. In our opinion the inconsistency may be express or implied. Since Section 86(1)(f) is a special provision for adjudicating disputes between licensees and generating companies, in our opinion by implication

Section 11 of the Arbitration and Conciliation Act, 1996 will not apply to such disputes i.e. disputes between licensees and generating companies. This is because of the principle that the special law overrides the general law. For adjudication of disputes between the licensees and generating companies there is a special law namely Section 86(1)(f) of the Electricity Act, 2003. Hence the general law in Section 11 of the Arbitration and Conciliation Act, 1996 will not apply to such disputes.

35. It is well settled that where a statute provides for a thing to be done in a particular manner, then it has to be done in that manner, and in no other manner. Section 86(1)(f) provides a special manner of making references to an arbitrator in disputes between a licensee and a generating company. Hence by implication all other methods are barred.

59. In the present case we have already noted that there is an implied conflict between Section 86(1)(f) of the Electricity Act, 2003 and Section 11 of the Arbitration and Conciliation Act, 1996 since u/s 86(1)(f) the dispute between licensees and generating companies is to be decided by the State Commission or the arbitrator nominated by it, whereas u/s 11 of the Arbitration and Conciliation Act, 1996, the Court can refer such disputes to an arbitrator appointed by it. Hence on harmonious construction of the provisions of the Electricity Act, 2003 and the Arbitration and Conciliation Act, 1996 we are of the opinion that whenever there is a dispute between a licensee and the generating companies only the State Commission or Central Commission (as the case may be) or arbitrator (or arbitrators) nominated by it can resolve such a dispute, whereas all other disputes (unless there is some other provision in the Electricity Act, 2003) would be decided in accordance with Section 11 of the Arbitration and Conciliation Act, 1996. This is also evident from Section 158 of the Electricity Act, 2003. However, except for Section 11 all other provisions of the Arbitration and Conciliation Act, 1996 will apply to arbitrations u/s 86(1)(f) of the Electricity Act, 2003 (unless there is a conflicting provision in the Electricity Act, 2003, in which case such provision will prevail.)

60. In the present case, it is true that there is a provision for arbitration in the agreement between the parties dtd. 30.5.1996. Had the Electricity Act, 2003 not been enacted, there could be no doubt that the arbitration would have to be done in accordance with the Arbitration and Conciliation Act, 1996. However, since the Electricity Act, 2003 has come into force w.e.f. 10.6.2003, after this date all adjudication of disputes between licensees and generating companies can only be done by the State Commission or the arbitrator (or arbitrators) appointed by it. After 10.6.2003 there can be no adjudication of dispute between licensees and generating companies by anyone other than the State Commission or the arbitrator (or arbitrators) nominated by it. We further clarify that all disputes, and not merely those pertaining to matters referred to in Clauses (a) to (e) and (g) to (k) in Section 86(1), between the licensee and generating companies can only be resolved by the Commission or an arbitrator appointed by

it. This is because there is no restriction in Section 86(1)(f) about the nature of the dispute.

52. Mr. Chagla learned senior counsel then submits that the MMRDA did not raise any objection about the validity of the directions issued by the Central Government to the State Government vide letter dated 7th February, 2014 it is submitted that though the said letter was replied by the State Government, there was no objection to the directions issued by the Central Government about fixation of the initial fare by the respondent no. 3 company.

53. Mr. Bhatt, learned senior counsel appearing for the respondent no. 3 company submits that since the Fare Fixation Committee was not constituted u/s 34 of the Act of 2002 and the company was ready to operate metro line in all respect, company had made repeated request to the Central Government to constitute the Fare Fixation Committee. State Government however delayed the appointment of their nominee member to such committee. The Central Government accordingly issued a clarification as far back as on 7th February, 2014 that initial fare could be fixed by the respondent no. 3 company itself. Learned senior counsel submits that under proviso to section 33 of the Act of 2002 the metro Railway Administration is empowered to fix the fare without recommendation of Fare Fixation Committee on the initial opening of the metro railway. The resolution thus passed by the respondent no. 3 was exercising rights under proviso to section 33.

54. learned senior counsel submits that the purported fare under the concession was for the entire concession period could never be considered as fare for initial opening of metro railway. The directives/clarification issued by the Central Government on 7th February, 2014 is never challenged by the MMRDA. The fare would be ultimately fixed by the Fare Fixation Committee u/s 33 of the Act of 2002. It is submitted that the petitioner being one of the shareholder having participated in the board meeting cannot oppose the resolution on the ground that the same was not in accordance with the concession agreement, which obligation and right of the party to fix fare is superceded by section 33 of the Act of 2002.

55. Learned senior counsel submits that metro railway has been opened by the respondent no. 3 who is Metro railway Administration as defined u/s 2(j) with sanction of the Central Government after complying with all the formalities. Recommendation of the Fare Fixation Committee would be binding on parties u/s 37. Learned senior counsel submits that in view of section 33 of the Act of 2002, no reliance can be placed by MMRDA on Article 6 of the Concession agreement. It is submitted that under Schedule L to the concession agreement, no initial fare was fixed but maximum fare was fixed and that also for entire concession period. The said schedule is no more applicable to the parties.

56. Learned senior counsel submits that Section 33 of the Act of 2002, does not provide for the revision of the fare. The only exception provided u/s 33 is for

fixation of fare for initial opening by Metro Railway Administration. Learned senior counsel submits that in view of applicability of Section 33, powers which vested u/s 15 of Indian Tramways Act are no more available and could not have been exercised. Learned senior counsel submits that both the Metro Acts were made applicable to Mumbai Metro vide two separate notifications dated 16/10/2009 and not by notification dated 18/11/2013. By the letter dated 18/11/2013 only alignment is notified and provisions for fixation of fare u/s 33 is not made applicable for the first time by the said notification.

57. It is submitted that prejudice if any to be caused to the MMRDA in view of the resolution passed by the respondent No. 3 is not at all shown in the petition. It is submitted that if the resolution is stayed by this Court, respondent No. 3 would not be able to operate metro line which has to be operated on reasonable commercial principles. If stay is not granted, the Fare Fixation Committee while fixing fare can consider the fare already collected by the company during the interregnum period and can fix the fare accordingly. No amount has to be refunded to any users. It is submitted that the balance of convenience is in favour of respondent No. 3 and the MMRDA also being one of the shareholder would not be affected in any manner whatsoever.

58. Mr. Bhatt learned senior counsel submits that once the respondent No. 3 was ready to operate metro line in all respect and the contract being on "Build, Own, Operate and Transfer" basis, respondent No. 3 was bound to commence operation and had rightly fixed the fare for initial opening of metro line. Learned senior counsel also referred to and relied upon the affidavits filed by respondent No. 1 and also respondent No. 3 in support of the plea that the fare for initial opening of the metro line fixed by respondent No. 3 are more than reasonable and not exorbitant. In respect of other issues raised by the MMRDA, learned senior counsel adopted the submissions made by Mr. Chagla learned senior counsel for Reliance Energy. Mr. Dwarkadas learned senior counsel for respondent No. 2 adopted the submissions made Mr. Chagla and Mr. Bhatt learned senior counsel.

59. In rejoinder Mr. Bharucha learned senior counsel submits that the fare fixed in the Concession Agreement which is binding on all the parties itself had provided for opening fare and thus only such fare can be collected by company till the fare is finally decided by the Fare Fixation Committee and not the other fare as resolved by the impugned resolution. It is submitted that even if article 6.5.1 has become inconsistent now, it was not inconsistent when the Concession Agreement was signed and thus fare already fixed are binding on the parties and are not inconsistent with Section 33 of the Act of 2002. Learned senior counsel submits that since respondent No. 3 has started operation of metro with promotional fare of Rs. 10/- for the period of 30 days and free travel to children for few days or fare @ Rs. 5/- during non peak hours for some time no prejudice would be caused to the respondent No. 3 if the company recovers fare at the same rate or at the rates fixed under the Concession Agreement and approved

by the State Government till the fare is fixed by the Fare Fixation Committee or till validity of the resolution is adjudicated upon by the arbitral tribunal. Balance of convenience is in favour of the MMRDA and also members of committee and thus this Court shall grant interim measures in favour of MMRDA as prayed.

Reasons and Conclusion:

60. In so far as validity of the resolution dated 29/10/2014 passed by the respondent no. 3 is concerned, the same can be conclusively decided only by the arbitral tribunal. In this proceedings u/s 9 of the Arbitration and conciliation Act, 1996 this court has to take a prima facie view in the matter. This court also has to see whether any case is made out for grant of interim measures by the petitioner MMRDA. I shall first prima facie decide the issue whether the respondent no. 3 company could have fixed the fare for the initial opening of the metro railway under proviso to section 33 of the Act of 2002 at all.

61. It is not the case of the MMRDA that the provisions of the Act of 1978 and 2002 are not at all applicable to the parties. The submission of the MMRDA is that the provisions of these two Acts were made applicable at the most w.e.f. 18/11/2013 and the agreement fixing fare having been already entered into prior thereto and duly approved by the State Government, such fare could not be given a go-bye. It is also case of the MMRDA that since there is no inconsistency in the provisions for fixing fare under the Concession Agreement and u/s 33 of the Act of 2002, provisions of Concession Agreement would apply and not section 33 of the Act of 2002.

62. u/s 1(3) of Metro Railways (Construction of Works) Act, 1978 and Section 1(2) of the Metro Railways (Co-operation and Maintenance) Act, 2002, the provisions of these two Acts may be extended to the metropolitan area and metropolitan city except the metropolitan city of Calcutta with effect from such date as may be specified in the notification and thereupon the provisions of the said two Acts shall apply to that metropolitan area or metropolitan city accordingly. Both the notifications were issued on 16/10/2009 declaring that the provisions of said two Acts shall extend to the metropolitan areas mentioned therein including Mumbai with effect from the date of publication of those notifications in the Official Gazette. By notification dated 18/11/2013 issued by the Ministry of Urban Development under the provisions of Act of 1978, the Metro alignment of Mumbai Metro Line One is added in respect of the metropolitan area of Mumbai to the schedule of the said Act. I am thus not inclined to accept the submission of Mr. Bharucha, learned senior counsel that the provisions of the said Act stood extended only with effect from 18th November, 2013.

63. A perusal of section 103 of the Act of 2002 makes it clear that the provisions of the said Act shall have effect notwithstanding anything inconsistent contained in any enactment other than the said Act or in any instrument. The question that arises is whether right of fixation of fare agreed under the Concession Agreement

is inconsistent with section 33 of the Act of 2002 and if so, whether section 33 would apply and not the Concession Agreement providing for fixing fare.

64. It is not in dispute that prior to the date of applicability of the two metro Acts, all the rights and obligations of the parties were governed by the Concession Agreement, Shareholders Agreement and Articles and Memorandum of Association of respondent no. 3. In the concession agreement parties had fixed certain fare which the company could recover from the users. A perusal of the Concession Agreement and in particular article 8.1(x) and (xiii) makes it clear that the respondent no. 3 has to comply with all the applicable laws in performance of their obligation under the said agreement.

65. The respondent no. 3 is under an obligation to levy and collect fares from users of the MRTS Project at the rates in accordance with the agreement and regulate the traffic in accordance with the applicable laws. In my prima facie view once the provisions of Act of 2002 are extended to the project in question, fare that can be fixed and collected by the Metro Railway Administration can be only in accordance with the recommendation made by the Fare Fixation Committee constituted u/s 34 of the said Act. A perusal of section 33 clearly indicates that the Metro Railway Administration is empowered to fix the fare without recommendation of Fare Fixation Committee on the initial opening of the Metro Railway. In my prima facie view since the Fare Fixation Committee was not constituted though the respondent no. 3 had repeatedly called upon the Central Government to constitute, such fare could be fixed on the initial opening of the metro railway only by the respondent no. 3 company. Upon constitution of Fare Fixation Committee, further fares can be fixed only by such Fare Fixation Committee.

66. In my prima facie view, the fares fixed and notified under Schedule-L to the Concession Agreement cannot be construed as fare for the initial opening of the metro railway. A perusal of Schedule-L prima facie indicates as if the fare for the entire concession agreement is fixed by the parties. It is not in dispute that the said fares were provided in the agreement when the provisions of the two Metro Acts were not extended to the Mumbai Metro Railway. It is also not in dispute that when the said two Acts were extended, the Mumbai Metro Railway was not opened by respondent no. 3 company. A perusal of Schedule-L also prima facie indicates that the rates provided therein were even for the period prior to the execution of the agreement. In my view thus the fare for initial opening of the metro railway till the fare is decided by the Fare Fixation Committee could be done only by the respondent no. 3 and not by the State Government.

67. In my prima facie view upon the applicability of the Metro Acts to the project in question, the provisions for fixing fare or the schedule L appended thereto has to be given a go-bye and such right is substituted by the provisions of section 33 of the Act of 2002. In my view there is inconsistency in the Concession agreement providing powers to the parties to fix fare and the powers prescribed u/s 33 of the Act of 2002 to Fare Fixation Committee. In my prima facie view and

on reading of section 103 of the Act of 2002, provisions for fixing fare under the concession agreement would not apply but section 33 of the Act would apply. In my view Mr. Chagla, and Mr. Bhatt learned senior counsel appearing for respondent nos. 1 and 2 are right in their submission that the fare for the initial opening of the metro railway was not decided by agreement under the Concession Agreement and were decided for the first time by passing the resolution in the meeting held on 29th May, 2014.

68. A perusal of the record prima facie indicates that the clarification issued by the Central Government vide letter dated 7th February, 2014 to this effect is not objected by the MMRDA or by the State Government though there was a response to the said letter by the State Government in the month of June 2014.

69. In so far as submission of Mr. Bharucha, learned senior counsel that the State Government has not decided any fare by order dated 3rd September, 2013 but has reiterated what is stated in the Concession Agreement is concerned, in my prima facie view since from the date of publication of notification dated 16/10/2009, provisions of the Metro Acts were extended to Mumbai Metro One, State Government could not have exercised any powers u/s 15 of the Indian Tramways Act, 1886. Central Government has already clarified this issue in its letter dated 7th February, 2014 that respondent no. 3 could fix the fare afresh after obtaining the recommendation of the Fare Fixation Committee in view of section 33 of the Act, however the same would not apply to the initial fares which are governed by the first proviso to the Section 33 of the said Act.

70. A perusal of the record prima facie indicates that the respondent no. 3 had written several letters to the Central Government for constitution of Fare Fixation Committee. One of the member of such committee has to be nominated by the State Government. The State Government nominated the member to that committee recently. The company was ready to commence operation of metro line in all respect and was bound to commence operation of metro for the convenience of members of public and also for recovery of their cost and other entitlement in terms of the agreement. In my prima facie view, the respondent no. 3 therefore is right in deciding the fare for opening of metro railway in the board meeting till the fare is decided by the Fare Fixation Committee.

71. Supreme Court in case of Gujarat Urja Vikas Nigam Limited (supra) has held that where a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner. After considering the provisions of section 174 of the Electricity Act, 2003 which provided that the said Act would prevail over anything inconsistent in any other law, Supreme Court held that had the Electricity Act, 2003 not being enacted, there could be no doubt that the arbitration would have to be done in accordance with Arbitration and Conciliation Act, 1996. Since the Electricity Act, 2003 had come into force, after that date all the adjudication of the disputes between the licencees and the generating companies could only be done by the State Commission or the arbitrator appointed by it under the Electricity Act. In my view the provisions u/s

174 of the Electricity Act, 2003 considered by the Supreme Court is in pari materia with section 103 of the Act of 2002. In my view the principles of law laid down by the Supreme Court in case of Gujarat Urja Vikas Nigam Ltd. (supra) would be squarely applicable to the facts of this case.

72. The next question that arises is whether fixation of fare for initial opening of metro by the respondent no. 3 company was a "specified matter" under the provisions of the agreement entered into between the parties or under Articles of association and whether resolution dated 29/05/2014 can be considered to have been duly passed though the MMRDA directors having voted against the resolution under Clause 7.3.5.1. Question also arises whether fixation of fare for initial opening of metro by the company would amount to change in business. In my view since parties to the agreements are governed by the provisions of the two Metro Acts in view of the said two Acts having been extended to the project in question after execution of the agreements, to the extent there being inconsistency between any provisions under the Concession Agreement and the two Metro Acts, to that extent parties would be governed by the provisions of the two Metro Acts and not the Concession Agreement entered into between the parties.

73. A perusal of the definition of "Business" under the provisions of Shareholders Agreement prima facie indicates that the fixation of fare for initial opening of metro would not amount to any change in business. Though the directors nominated by the MMRDA have voted against the resolution, in my prima facie view, the resolution cannot be considered as not duly passed by the company. Eight directors voted in favour of the resolution and three directors voted against it. In my prima facie view decision on agenda item No. 5 taken by the respondent No. 3 company is not on specified matters and in particular under Clause 7.3.5.2(h) or (n). In my prima facie view thus there is no merit in the submission of Mr. Bharucha learned senior counsel for MMRDA that there was any decision on specified matters and the directors nominated by MMRDA having voted against the resolution, the same cannot be treated as passed.

74. In so far as the reasonableness of the fare as fixed by the respondent No. 3 company is concerned, though all the parties have advanced their submissions on the said issue, in my view in this proceedings u/s 9, this Court cannot decide whether the fare fixed under proviso to Section 33 by respondent No. 3 is reasonable or not and the same can be adjudicated upon in the arbitration proceedings. The issue thus raised by both the parties on the reasonableness of fare is kept open.

75. In so far as issue of balance of convenience raised by both parties is concerned, both parties are ad-idem that the fare will have to be ultimately decided by the Fare Fixation Committee. The fare already fixed by the respondent No. 3 company under proviso to Section 33 can always be considered by the Fare Fixation Committee while recommending the fare u/s 33 of the Act of 2002. In my prima facie view, Mr. Bhatt learned senior counsel appearing for

defendant No. 3 company is right in his submission that even if the resolution passed by the respondent No. 3 is ultimately set aside by the arbitral tribunal, the Fare Fixation Committee can always consider the amounts towards fare already recovered by the respondent No. 3 while recommending the fare u/s 33 of the Act in view of the contract having awarded on Build, Own, Operate and Transfer basis and the concession period being 35 years. Similarly effect on recovery of fare due to promotional offer, concessional rate or free travel offered by company voluntarily can also be considered by the Fare Fixation Committee while recommending fare u/s 33 of the Act of 2002. The question of refund to the individual users may not arise. I am thus not inclined to accept submissions of Mr. Bharucha learned senior counsel for MMRDA that balance of convenience is in favour of MMRDA and not the respondents.

76. In my prima facie view there is no merit in the submission of learned senior counsel for MMRDA that initial fare was already fixed by agreement and was binding on the parties though provisions of Metro Acts were extended to the Mumbai Metro One.

77. Considering the provisions u/s 36 of the Act of 2002 which provides that Fare Fixation committee shall submit its report along with recommendations to the Metro Railway Administration not exceeding three months, in my prima facie view, the fares fixed by the respondent No. 3 can be in force till the fare is decided by the Fair Fixation Committee or till validity of the resolution in question is considered by the arbitral tribunal. No prejudice thus would be caused to the MMRDA if the Metro Railway Administration is permitted to recover fare according the resolution dated 29/05/2014 during the pendency of submission of report and recommendation by the Fare Fixation Committee or till such time the arbitral tribunal renders an award.

78. Parties are directed to constitute the arbitral tribunal at the earliest and to seek expeditious disposal of the arbitral proceedings on the dispute having arisen. Learned counsel appearing for parties have agreed that dispute arising under the Concession Agreement and also the Shareholders Agreement can be referred to the same arbitral tribunal. Statement is accepted. In view of the statement made by both the parties, this Court need not go into the issue as to whether MMRDA has invoked arbitration agreement under one agreement or both the agreements. This Court expects the Central Government to issue directives to the Fare Fixation Committee to recommend the fare expeditiously considering the urgency involved in the matter.

79. It is made clear that the observations made in this order are prima facie and are made for the purpose of deciding this application u/s 9 of the Arbitration and Conciliation Act 1996. The arbitral tribunal may decide the matter on its own merits without being influenced by the observations made in this order.

80. In my view the petition is devoid of merits and is accordingly dismissed. No order as to costs.