IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

COMMERCIAL ARBITRATION PETITION (L) NO. 35274 OF 2024

Atul Projects India Pvt. Ltd. ...Petitioner
Versus
1. Nima Developers Private Limited
2. India Farmers Private Limited ... Respondents

WITH

INTERIM APPLICATION (L) NO. 1461 OF 2025
[FOR INTERVENTION]
IN
COMMERCIAL ARBITRATION PETITION (L) NO. 35274 OF 2024

Oberoi Realty Limited ... Applicant / Intervenor

In the matter between :

Atul Projects India Private Limited ... Petitioner
Versus
Nima Developers Private Limited & Anr. ... Respondents

Mr. P. Chidambaram, Senior Advocate *a/w Dinyar Madon, Senior Advocate, Cyrus Ardeshir, Senior Advocate, Kausar Banatwala, Ziyad Madon, Manini Roy, Neuty N. Thakkar, Vaishali Dedhia, Nisha Waghmare, Dipsy Sequiera, i/b Tushar Goradia, for Petitioner.*

Mr. Aspi Chinoy, Senior Advocate a/w, Mr. Rohaan Cama *a/w Pheroze Mehta, Krishna Balaji Moorthy, Bhakti Mehta, Letishiya Chaturvedi, i/b Wadia Gandhi & Co., for Applicant.*

Mr. Darius Khambata, Senior Advocate, *a/w Karl Tamboly, Karan Rukhana, Deeksha Jani, Niket Jani, i/b Jani & Parikh, for Respondents.*

CORAM : SOMASEKHAR SUNDARESAN, J.

Reserved on : March 17, 2025

Pronounced on : July 23, 2025

JUDGEMENT :

Context and Factual Background:

1. This Petition is an appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996 ("***the Act***") impugning an Order dated October 24, 2024 ("***Impugned Order***") passed by the Learned Arbitral Tribunal refusing to grant interlocutory relief to the Petitioner.

2. The Petitioner, Atul Projects India Pvt. Ltd. ("***Atul***") entered into a Memorandum of Understanding dated November 29, 2014 ("***Atul MoU***") with Respondent No. 1, Nima Developers Pvt. Ltd. ("***Nima***") to develop 5,00,000 square feet of residential area on 12.5 acres of land that Nima was entitled to in Village Marve, Malvani and Aksa ("***Subject Land***"). The Subject Land forms part of a larger tract of 100 acres of land ("***Larger Land***"), which had been leased to Nima by Respondent No. 2, India Farmers Pvt. Ltd. ("***India Farmers***") by a sub-lease dated one day before the date of MoU i.e. on November 28, 2014 ("***Sub-Lease Deed***").

3. India Farmers, in turn, had been a lessee of ~114 acres of marshy land for 999 years demised to it by the Governor of Bombay Presidency (predecessor to the State of Maharashtra), pursuant to a reclamation lease deed dated July 7, 1956 ("***Lease Deed***"). The Lease Deed had stipulated

targets for reclamation of marshy land, with stipulated deadlines, for cultivation of agriculture.

4. The history of events in between the Lease Deed and the Atul MoU would matter for appreciation of the core controversy between the parties in these proceedings. This is outlined below:-

A) The Collector, Mumbai Suburban District sought to terminate the Lease Deed on *April 26, 1993*;

B) The Additional Commissioner, Konkan Division set aside the termination by the Collector by an Order dated *March 30, 1994*;

C) The Revenue Minister, State of Maharashtra set aside the Additional Commissioner's revocation of the termination by an Order dated *May 18, 1998* ("***Revenue Minister Order***"), thereby confirming the termination effected by the Collector on April 26, 1993;

D) India Farmers filed Writ Petition No. 1029 of 1998 ("***WP 1029***") challenging the Revenue Minister Order;

E) A Show Cause Notice dated *March 19, 2002* ("***2002 SCN***")

was issued to India Farmers during the pendency of WP 1029 and that too was challenged by amending WP 1029;

F) WP 1029 was allowed by a Learned Single Judge of this Court by an Order dated *March 23, 2004* ("***SB Judgement***"), setting aside the Revenue Minister Order and the 2002 SCN;

G) The SB Judgement was appealed by the Government of Maharashtra in Appeal No. 766 of 2004 ("***Appeal 766***");

H) The Atul MoU was executed on *November 29, 2014* during the pendency of Appeal 766. The Atul MoU explicitly records that Atul has been shown all the litigation over the Larger Land and that Nima has title to such land. However, Clause 3 explicitly provided that the parties would convince the Government of Maharashtra to withdraw Appeal 766. On the withdrawal or disposal of Appeal 766, the Atul MoU would become binding. If Appeal 766 were to not get disposed in six months, Atul would be entitled to a refund of the amounts spent or, *at its option*, continue with the arrangement set out in the Atul MoU until such time as it deems fit. Once India Farmers and Nima received a clear

title with a favourable Order, the Atul MoU would be incapable of termination unless any default in obligation is committed;

I) Under Clause 4 of the Atul MoU, the parties agreed that Atul would have a right to develop 5,00,000 square feet of residential area on 12.5 acres of land. On the remaining part of the Larger Land, Atul would have a right of first refusal ("***ROFR***") in relation to any development, such ROFR being exercisable within one month of the offer for development being made by Nima;

J) Various milestones were agreed under Clause 6 of the Atul MoU. In the first stage, the parties were to first take efforts to get the Government of Maharashtra to withdraw Appeal 766 and get clear and marketable title to the land. The parties also agreed to fence the property and register the Sub-Lease Deed and the Development Agreement. The layout of 100 acres was to be prepared. In the next stage, the parties were to work on obtaining permits for development of residential property with the applicable approvals being obtained. It is in the final stage that the

parties would make a layout of the land and demarcate portions of land for specific purposes;

K) Under Clause 7 of the Atul MoU, Atul was to pay Rs. 43 crores to Nima in three stages – the first payment of Rs. 3 crores on signing of the Atul MoU; the next Rs. 12 crores on the withdrawal of Appeal 766 or a favourable decision in the matter i.e. "*on obtaining absolute clear title*". Other milestones were agreed, both for payment and for taking actions – effectively, the execution of a Development Agreement was envisaged at a later stage;

L) On *December 1, 2014*, the parties agreed to a higher payment at specific stages supplementing the Atul MoU;

M) On *November 2, 2015* (a year after the Atul MoU), Atul, Nima and India Farmers executed a Deed of Confirmation, a tripartite document ("***Confirmation Deed***") binding all three parties. Mr. Manish Majithia, director of both Nima and India Farmers, duly authorised to bind both the Respondents, appears to have represented that within six months, there would be clear title to the Larger Land and Atul would be put in joint possession of 12.5 acres;

N) In Clause 6, the Confirmation Deed makes an explicit reference to a plan for joint development. Should the area shown in the plan fall under any *reservation*, any residential zone equivalent to the same area reserved would be provided by the Respondents to Atul touching the proposed road out of the 114-acre plot;

O) Clause 9 of the Confirmation Deed provides that if after the payment of Rs. 5 crores by Atul, there is no significant progress, Atul has the option of withdrawing from the project with refund along with interest at 18% after the first month, and a bungalow worth Rs. 15 crores would be mortgaged to Atul and interest at the rate of 18% would kick in from the expiry of six months until clear title is obtained;

P) Finally, in Clause 11 of the Confirmation Deed, it is made clear that India Farmers and Nima cannot terminate any of the documents or terms unless there is a payment default on Atul's part;

Q) At Exhibit J to the Petition, a map indicating the layout of the Subject Land is enclosed – this would come in for some controversy as would be seen later;

R) It is apparent from the record that Appeal 766 was first allowed and the SB Judgement was set aside by a Learned Division Bench of this Court. That was carried by Nima in Civil Appeal 5947 of 2007 to the Supreme Court, which remanded the case back to this High Court by an Order dated February 24, 2011. That eventually came to be dealt with by a judgement dated *October 1, 2019* ("***DB Judgement***"), in which a Learned Division Bench of this Court took note of the Government of Maharashtra's efforts to monitor reclamation work through the decades and its allegations of breach of the lease conditions by allegedly not adhering to the end-use of the lease, and upheld the SB Judgement to the extent of finding that the Revenue Minister Order ought to be set aside;

S) However, the DB Judgement found that 2002 SCN ought not to have been quashed since it raised an independent issue of mortgaging government land to banks to raise finances. Instead, the DB Judgement held, the Respondents ought to have been asked to respond to the 2002 SCN. Therefore, effectively the DB Judgement confirmed the quashing of the adverse findings starting with the

Collector's adverse Order dated April 26, 1993 culminating in the Revenue Minister Order, but revived the 2002 SCN that had been quashed in the SB Judgement. The 2002 SCN also had a direction not to create any interest in the land without the prior permission of the Government of Maharashtra – these are the proceedings that were revived by the DB Judgement;

T) On *July 28, 2020* (nearly ten months later), Nima would write to Atul stating that the DB Judgement had confirmed that the proceedings based on allegations of violation of the lease deed stood quashed and that Nima's title was now clear. The DB Judgement had not been challenged in the Supreme Court by the Government of Maharashtra. Therefore, the letter asserted that Indian Farmer's rights to the land stood firmly established, and called on Atul to pay the Rs. 12 crore payable as a non-refundable security deposit under the Atul MoU within 14 days, failing which it would be presumed that Atul was not interested in pursuing the Atul MoU, which would stand terminated;

U) On *August 24, 2020*, Atul replied to Nima asserting that

merely because the Government of Maharashtra did not file a special leave petition in the Supreme Court it could not be said that Indian Farmer's title is clear;

V) Neither of the aforesaid two letters made a reference to the 2002 SCN having been revived or its status. On *September 7, 2020*, Nima replied to Atul calling upon Atul to perform the Atul MoU and ended by hoping that wiser counsel would prevail and Atul would comply with the Atul MoU (in paragraphs 6 and 9);A little before this exchange of correspondence between July 2020 and September 2020, proceedings under the 2002 SCN had been underway. On November 27, 2019, written submissions of India Farmers had been filed before the Collector, Mumbai Suburban District and a personal hearing had been conducted on December 16, 2019. It appears that on *September 18, 2020*, less than ten days after Nima had called on Atul to perform the Atul MoU, the Collector, Mumbai Suburban District passed an Order dealing with the 2002 SCN and holding India Farmers guilty of violating the lease conditions by mortgaging the property in favour of Indian Bank, which had led to recovery proceedings – contrary to India

Farmers' assertion that the loan had been repaid. The Collector held that the land had been given for reclamation with the sole objective of making it cultivable. That not having been done and the land having been mortgaged without the consent of the Government, the lease was forfeited and re-possession was directed;

W) On *September 23, 2020*, it is apparent that re-possession was attempted. This led to Writ Petition (L) No. 3607 of 2020 ("***WP 3607***") being filed by India Farmers. As it now transpires, on *September 23, 2020*, the property cards were mutated to record the name of Government of Maharashtra as the owner of the Larger Land;

X) On *September 24, 2020*, noting that legal possession was with the Government of Maharashtra while physical possession was still with India Farmers, this Court directed that *status quo* be maintained until the next date;

Y) In these proceedings, Atul would claim that these developments were entirely behind its back and the Respondents had not extended the courtesy of intimating Atul. On the contrary, the Respondents had been asserting

that the title was completely in the clear and called upon Atul to pay another Rs. 12 crores;

Z) On *October 16, 2023*, India Farmers took two simultaneous actions. It executed a Memorandum of Understanding with Oberoi Realty Ltd. ("***Oberoi MoU***") for development of the Subject Land under Regulation 33(8) of the Development Control Promotion Regulation, 2034 ("***DCPR 2034***") made under the Maharashtra Regional and Town Planning Act, 1956 by the Municipal Corporation of Greater Mumbai ("***MCGM***") or under the Information Technology ("***IT***") policy entailing development for IT and IT-enabled service ("***ITES***") units as well as for non-IT and non-ITES units;

AA) On the same date i.e. on October 16, 2023, a three-way instrument was executed internally among India Farmers, Nima and Mr. Manish Majithia, purporting to terminate the Sub-Lease Deed ("***Sub-Lease Termination Deed***") – Mr. Majithia himself purporting to sign on behalf of each of the three parties. The upshot of this action is that Nima's entitlement to the Larger Land was meant to be cut out of the linkage to India Farmers', thereby leaving Atul with no

basis to claim performance from Nima. It is seen from the record that it was on *April 9, 2024*, that the fact of this purported cancellation was intimated to Atul by advocates of Nima in the course of trading notices to each other;

BB) On *December 18, 2023*, Nima wrote to Atul purporting to terminate the Atul MoU on account of non-payment of the sum of Rs. 12 crores by Atul pursuant to the demand made on July 28, 2020 and September 7, 2020. This letter made no mention of Nima no longer having a sub-lease in its name and that the Atul Transaction Documents had been frustrated. By this letter, Nima stated that the Atul MoU had been terminated on July 28, 2020 and it was "***once again***" being terminated "***with immediate effect***". The amount of Rs. 5.51 crores paid until then by Atul to Nima was refunded by a cheque enclosed with the letter;

CC) On *December 28, 2023*, the Government of Maharashtra issued a notification changing the status of the land to a No-Development Zone ("***NDZ Land***");

DD) Atul invoked arbitration under Clause 19 of the Atul MoU on *February 21, 2024*, and filed a Section 9 Petition on *May*

29, 2024, which was converted into an Application under Section 17 by an Order of a Learned Single Judge dated *July 24, 2024*. It is in disposal of the Section 17 Application that the Impugned Order was passed on *October 24, 2024*;Meanwhile, by an Order dated September 19, 2024 ("***New Revenue Minister Order***"), it is stated the then incumbent Revenue Minister, Government of Maharashtra passed an Order leading to a closure of the 2002 SCN and the consequent proceedings to take possession of the Larger Land in favour of India Farmers;

EE) The Impugned Order was challenged by way of this Petition. A Learned Single Judge (*R.I. Chagla J.*) took note of the Respondents' submissions that contentions raised in this Petition by Atul had not been raised before the Learned Arbitral Tribunal. The matter was stood over to *December 4, 2024* for consideration of *ad interim* relief, permitting an Affidavit from the Respondents. On *December 3, 2024* (the eve of the next hearing date) the Respondents served the Revenue Minister's Order dated September 19, 2024 on Atul;

FF) On December 4, 2024, the matter was stood over to *December 11, 2024*. On that date, the Learned Single Judge arrived at a *prima facie* view that the Oberoi MoU had been executed before the Atul MoU had been terminated. Taking note of the submission that the Oberoi MoU that had been tendered during the Section 17 proceedings before the Learned Arbitral Tribunal had been substantially *redacted* (portions not intended to be read being masked), Atul had been unable to assail the Oberoi MoU in that forum, the Learned Single Judge was pleased to direct that the Oberoi MoU be tendered in this Court in a sealed cover, and that until the Petition was disposed of, the Oberoi MoU shall not be acted upon;

GG) On January 17, 2025, the Petition came up before me. Oberoi Realty Ltd. ("***Oberoi***") moved Interim Application (L) No. 1461 of 2025 ("***Intervention Application***") seeking to be impleaded in the Petition. Essentially, Oberoi's contention was that its interests were hampered by the Learned Single Judge's restraint on the Oberoi MoU being acted upon. Oberoi was desirous of filing a Reply to the Petition. I passed an Order stating that the non-redacted

Oberoi MoU that was in a sealed envelope would be examined by me in Chambers, after which a view would be taken on whether to issue notice on the Interim Application;

HH) On February 10, 2025, I passed an Order *inter alia* stating the following:

> *Having considered the MoU,* ***prima facie, in the interest of transparency and access of all parties to all the material on record, I am inclined to****:-*
>
> *(a)* ***issue notice to the Petitioner*** *on the Intervention Application; and*
>
> *(b)* ***issue notice to the Respondents in the Section 37 Appeal to let the Petitioner have access to the MoU so that the Section 37 Appeal can be considered with full transparency*** *and access to all relevant material by all parties.*
>
> ***[Emphasis Supplied]***

II) Atul filed an Affidavit in Reply to the Intervention Application taking the stance that Oberoi was not related to Nima and India Farmers and that applying the principles laid down in ***Cox and Kings***[1], it was not necessary to make

[1] *Cox and Kings v. SAP India Pvt. Ltd. & Anr. – 2023 INSC 1059*

Oberoi a party. It was contended by Atul that it was not necessary to implead Oberoi and that Oberoi was not a party to the arbitration proceedings;

JJ) Thereafter, when the proceedings were taken up, consensus appeared to have evolved among the Learned Senior Counsel for the parties to address the Court on the main Section 37 Petition. The matter was then heard on multiple dates with all parties, including Oberoi being present on all dates;

Section 17 Application – Reliefs Sought:

5. At the threshold, it would be instructive to notice the reliefs sought by Atul in the Section 17 Application. Atul desired a direction to Nima, India Farmers and Mr. Manish Majithia, to deposit a sum of Rs. 10 crores; and to stay the effect and operation of the purported termination of the Atul MoU, the letter dated December 1, 2014 and the Confirmation Deed (collectively, "***Atul Transaction Documents***"), by way of the letters dated July 28, 2020 and December 18, 2023 and to injunct the Respondents from communicating the purported termination to third parties. Atul also sought a full disclosure of the nature of the third party rights purported to have already been created (as communicated by Advocates of Nima by letter dated April 9, 2024). Atul also

prayed for tendering of the Sub-Lease Termination Deed. Another prayer was for disclosure of every document and deed executed in respect of the land since April 1, 2020. Finally, it was prayed that the Respondents be injuncted from presenting any proposal for development of the land.

Impugned Order:

6. The Learned Arbitral Tribunal was satisfied on a number of counts for refusing relief in the Section 17 Application. They may be summarized thus:-

A) The Learned Arbitral Tribunal was satisfied that the Larger Land came to be classified as a No Development Zone ("***NDZ***"). The Learned Arbitral Tribunal ruled that since no residential development could at all take place on the Larger Land, there is no scope for specific performance. The Learned Arbitral Tribunal also ruled that it would not be possible to direct Nima and India Farmers to effect development for IT and ITES purposes on the Larger Land to suit the requirements of Atul. It was held that no interim relief could be granted since no such final relief was possible, since the designated user of the land had totally changed;

B) The second view of the Learned Arbitral Tribunal was that *prima facie*, Atul was not ready and willing to perform on the Atul

MoU. Atul was to make a non-refundable deposit of Rs. 43 crores in stages – the first payment of Rs. 3 crores was made and Rs. 12 crore was payable when the revenue matter was resolved in Court. The letter dated December 1, 2014 entailed a further sum of Rs. 18 crores. The Confirmation Deed entailed payment of Rs. 2 crores on its execution and another Rs. 3 crores against "*almost work of title by Revenue Department and / or by Court is clear* [sic]". The Learned Arbitral Tribunal held that both these were to be done within six months. However, the Learned Arbitral Tribunal found that Atul had only paid a total of Rs. 5.51 crores and defaulted on paying the further amounts when due. Considering the transcript of an exchange that took place on October 17, 2019 on WhatsApp, the Learned Arbitral Tribunal found that Atul had indicated the need to reduce the area, and the Respondents had even proposed to go with the reduction, but Atul did not react further. The upshot of this analysis is that Atul's conduct was not equitable by not taking any action for long and allowing another to deal with the property, disentitling relief at this stage on equity grounds under Section 17 of the Act;

C) The Learned Arbitral Tribunal also found that the precise

area of 12.5 acres on the Larger Land had not been identified and marked by the parties. Citing a few judgements, the Learned Arbitral Tribunal held that where the exact area is not identified and the boundaries were unclear, no decree could lie. The upshot appears to be that no relief would be forthcoming under the Atul Transaction Documents, which are lacking a crystallised bargain in material particular, since the area of 12.5 acres has not been specifically marked on the 100 acres of the Larger Land. The Learned Arbitral Tribunal has specifically held that Atul had no rights over the Larger Land and therefore it could not have been given land for residential use. Effectively, the view appears to be that the Atul Transaction Documents do not lend themselves to specific performance and therefore the Section 17 Application would not get any traction;

D) The Learned Arbitral Tribunal has also ruled that the letter of July 28, 2020 is a termination letter rather than a notice to terminate, and to consider whether it was waived by issuance of the letter dated September 7, 2020 (which called for performance), there ought to have been a pleading claiming waiver. The Learned Arbitral Tribunal held that the Atul MoU had been terminated on

July 28, 2020 and Atul did not react until it invoked arbitration on February 21, 2024;

E) The Learned Arbitral Tribunal accepted the statement made by Counsel for the Respondents that third party rights had already been created. The Learned Arbitral Tribunal held that third parties who are not party to the arbitration agreement could not be added in the arbitration proceedings. The Learned Arbitral Tribunal held that it could not pronounce upon the validity of the Oberoi MoU since Oberoi was not a party;

F) The Learned Arbitral Tribunal held that the restoration of the 2002 SCN and the direction contained therein, not to deal with the Larger Land without the prior consent of the Government of Maharashtra, cannot be regarded as a stay on creation of third party rights by a court of law. The mere issuance of a Show Cause Notice is not a fetter, and it is only when there is an outcome in the proceedings pursuant to the Show Cause Notice that there could be a fetter. However, if Atul was of the view that the 2002 SCN was a fetter on title, that alone would be ground for not being able to enforce the Atul Transaction Documents since there would be a fetter on implementing them;

G) In view of such findings, the Section 17 Application was comprehensively and completely dismissed without any relief.

Analysis and Findings:

7. Mr. P. Chidambaram, Learned Senior Counsel made submissions on behalf of Atul; Mr. Darius Khambata, Learned Senior Counsel on behalf of the Respondents and Mr. Aspi Chinoy, Learned Senior Counsel represented Oberoi. Each of Mr. Chidambaram and Mr. Khambata has presented written notes in aid of their submissions – and the exchange went on up to the stage of a written response even to the written submissions in sur-rejoinder.

8. These proceedings have been very intensely contested with submissions by Learned Senior Counsel for both sides over multiple rounds, each seeking to raise a plethora of nuanced points, with accommodation of time being sought by each side after each round of submissions by the other. Submissions were made on four different dates of hearing, lasting between February 26, 2025 and March 17, 2025. To be fair, the issues raised by them involve consideration of a long and complicated history of factual developments, and indeed nuanced consideration of inter-related facets of the matter that were pleaded or argued by each side at different stages of this litigation.

9. I have had the benefit of their well-referenced written notes on arguments to navigate the voluminous record generated by the parties in the proceedings before the Learned Arbitral Tribunal. I find that apart from the issues presented to the Learned Arbitral Tribunal and the manner of decision on them, the parties have also serious disputes over whether Atul has presented moving targets for the Respondents to meet in the manner in which contentions were presented to the Learned Arbitral Tribunal and to this Court.

10. For ease of structure to my opinion, I have dealt with the issues in the same sequence as has been dealt with by the Learned Arbitral Tribunal, as summarized above. Multiple strands of contentions have been presented and the response to each need not necessarily have a direct and independent bearing on the final outcome. I would therefore deal with the implications of the findings on these strands in a cumulative and holistic analysis at the end of the judgement.

11. At the threshold, it must be stated that Section 17 of the Act enables protection and preservation of the subject matter of the arbitration. The Atul Transaction Documents reduced to writing the terms on which the parties would pursue development of residential units on the Subject Land. For

purposes of the jurisdiction under Section 37 of the Act, which is a statutory appeal over decisions taken under Section 17 of the Act, the core question to ask is whether any of the material findings in the Impugned Order are summary in nature and defiant of reason, as discernible from the record. Whether the view of the Learned Arbitral Tribunal is a reasonable and plausible view or whether it is implausible or perverse on any facet would need to be seen.

12. In the peculiar facts of this case, such consideration would also extend to whether the Learned Arbitral Tribunal was presented with all that had to be considered in order to return reasonable findings, or whether the Impugned Order is not a duly informed decision in view the Learned Arbitral Tribunal not having had access to the necessary material. This facet would gain significance, particularly in the context of the Oberoi MoU. A connected issue would be whether the Learned Arbitral Tribunal ought to have asked for a greater disclosure of the Oberoi MoU before arriving at the decision that it was not relevant.

No Development Zone and its implications:

13. At the threshold, the Learned Arbitral Tribunal was pleased to return a finding that the designation of the Larger Land as NDZ undermined everything that the Atul Transaction Documents stood for. The change of

status of the Larger Land as a NDZ with effect from December 28, 2023 would, at first blush appear to undermine the Atul Transaction Documents, which was essentially meant for carrying out redevelopment for residential purposes.

14. However, it is indeed clear from the material on record that the NDZ status does not mean the end of road for residential development of any nature whatsoever. Rule 8.1.3 of DCPR 2034 indeed provides for development of IT and ITES units to be developed on NDZ land. The Impugned Order records that the Learned Counsel for Atul failed to show any provision of law that would enable residential development in NDZ land. This perhaps led to the Learned Arbitral Tribunal not having assistance on the nuance in this regard, but what is clear is that development of an IT park in NDZ also entails "allied services" and "support services", which include the need for those working in the IT park to have access to residential accommodation and to allied commercial establishments.

15. This facet of the matter has not been noticed or rather can be said to have escaped attention in the analysis contained in the Impugned Order. Therefore, in my opinion, it cannot be ruled out that the Atul Transaction Documents being a commercially-agreed transaction to develop residential accommodation could have potentially been accommodated and reconciled

with the NDZ classification. Suffice it to say, the NDZ classification by itself would not be the end of the for the Atul Transaction Documents. Therefore, this element of the analysis can be said to be inaccurate.

16. Notably, the Oberoi MoU would itself deal with this very facet of the policy going by its description of the transaction. However, the Oberoi MoU was, for all practical purposes, not shared with the Learned Arbitral Tribunal. The manner of redacting of the Oberoi MoU is dealt with subsequently in this judgement. Suffice it to say, had the Oberoi MoU been available to the Learned Arbitral Tribunal, I have no doubt in my mind that the Learned Arbitral Tribunal would not have returned the findings that it did on the NDZ issue or at least in the manner that it has done.

Was Atul Ready and Willing to Perform?

17. Whether Atul was truly ready and willing to perform the Atul Transaction Documents is a key element in resolving the issues raised in these proceedings. Atul's key contention is that the obligation to pay Rs. 12 crores did not arise at all until there was clear and marketable title to the Subject Land, which could have only been achieved if there was a resolution of Appeal 766 in favour of India Farmers and Nima, or if they managed to convince the Government of Maharashtra to change its stance and perspective on the merits of pursuing those proceedings. Having examined

the record, the key driver for the Learned Arbitral Tribunal to take a view on whether there is a failure on Atul's part to demonstrate readiness and willingness to complete the Atul Transaction Documents is the reliance placed on a transcript of WhatsApp messages exchanged between Mr. Atul Patel and Mr. Manish Majithia on October 17, 2019. The Learned Arbitral Tribunal has examined the transcript produced in the proceedings (Page 502) to arrive at a view that Atul was not really ready and willing to perform the Atul Transaction Documents and had sought accommodation on its terms in view of the financial and market conditions prevalent in October 2019 after the DB Judgement came about.

18. Atul would contend that the WhatsApp transcript would only show negotiations and discussions and unless a firm position came about, the terms of the Atul Transaction Documents would have continued. The Respondents would contend that the issue at hand was not whether the Atul Transaction Documents were amended but whether Atul was ready and willing to perform the Atul Transaction Documents in the terms contracted.

19. Mr. Chidambaram would brand the WhatsApp chat transcript as "gibberish" that is unworthy of consideration as evidence, bearing in mind that at the stage of Section 17 proceedings, the Learned Arbitral Tribunal ought to have only examined how to preserve the subject matter of

arbitration rather than render firm findings on whether a party is ready and willing to perform. Mr. Khambata would contend that the WhatsApp conversation speaks to Atul's own desire to renegotiate the transaction and the difficulties he was then facing in the market, which would then point to the Learned Arbitral Tribunal's view on the absence of readiness and willingness on Atul's part to perform the contract was a reasonable and plausible view.

20. The transcript is evidently colloquial, with a strong vernacular rendition of the English language, but that is an element that afflicts even the Confirmation Deed (recall the reference to "***almost work of title being clear***". This Court cannot undermine the ability of the Learned Arbitral Tribunal to exercise its discretion in discerning a *prima facie* position on whether Atul was ready and willing to perform the Atul Transaction Documents in the very same terms as contracted. Whether the Atul Transaction Documents was amended is not the point in issue – whether it was Atul's desire to have the Atul Transaction Documents modified to enable him to still get some part of the bargain, is a question that the Learned Arbitral Tribunal is entitled to consider. However, what needs to be considered is whether the stage at which the WhatsApp conversation was had, was a stage when Atul was obliged to make payments on the premise that the title was absolutely clear.

21. While the WhatsApp transcript alone may not have a definitive bearing to render all other areas of consideration irrelevant, but discounting for the colloquial usage of English, it would be totally open to the Learned Arbitral Tribunal to draw a reasonable inference on the readiness and willingness to perform. The transcript would indicate, a *prima facie* position (a firm final conclusion can be drawn in arbitration proceedings eventually) that Mr. Patel was open to scaling down the area of development to reduce the financial burden at that time, which Mr. Majithia too was willing to consider. The WhatsApp transcript also shows that the parties had disagreement even on that very day about whether Nima and India Farmers could be said to have clean title. Atul presented a dual proposition – if the title were not clear, then nothing would be payable, and if title were clear, then the "*problem is market & payment*". He would say "if due & not payable then will agree to reduce my area….but can't commit nowadays". To my mind, going by the style of conversation, the words "not payable" indicates that if Atul is unable to pay, he would agree to reduce his area, but it was difficult to commit. However, he did reject the proposition that the milestones for him to pay, had been reached.

22. In my opinion, no fault can be found with the Learned Arbitral Tribunal in interpreting this conversation on WhatsApp, which is in fact in

writing. When dealing with the conduct of commercial parties, one must have regard to reading the language deployed by men of commerce in a manner that they would have meant. It would not be appropriate to bring to bear standards of legally-drafted correspondence when interpreting what is a ready indicator of the state of mind of the person authoring such a message. In my opinion, no fault can be found with the Learned Arbitral Tribunal's reliance on the WhatsApp message or in its interpretation of the same. This element would go into the mix of what is to be considered in the course of an appropriate decision under Section 17 of the Act. The readiness and willingness to perform has indeed been shown as eroded, in about a fortnight after the DB Judgement. Whether the DB Judgement actually firmly and clearly lifted the cloud on title is a separate issue and that is dealt with separately.

Was Precision of Subject Matter Absent?

23. One of the key findings of the Learned Arbitral Tribunal is that the instruments constituting the Atul Transaction Documents are agreements to agree and not a firm and crystallised agreement. Towards this end, one key area of controversy is whether the 12.5 acres of land on which residential development was to take place in terms of the Atul Transaction Documents had been identified and marked on a layout for the parties to know what

precisely was the area on which they would effect residential development. Towards this end, the parties have had bitter disputes about the existence of a layout plan. Atul would contend that the layout was well known to the parties and had been identified. The contention is that Atul's advocates inadvertently did not append it to the Section 17 Application (the Section 9 Petition originally filed) but were willing to tender it in the arbitration proceedings but the Learned Arbitral Tribunal simply refused to let them tender it.

24. In my opinion, the material on record would not lend itself to a sweeping conclusion that there was nothing earmarked in the instruments constituting the Atul Transaction Documents. Clause 6 of the Confirmation Deed records that the plot area of 50,500 square metres "as shown in plan" is for joint development. Should any portion of it fall in a reservation when town planning takes place, the Respondents would provide any residential zone area of the same size touching the proposed road. A plain reading of Clause 6 of the Confirmation Deed would indicate that there was a plan and that did indicate the area.

25. That apart, the role of an architect, one Mr. Ashwin Zhaveri and M/s H.M. Zaveri & Sons is writ large on the Confirmation Deed. It appears unlikely that a commercial party would agree to part with serious money for a

residential development without so much as a plan to indicate the layout of the Larger Land and which part of the Larger Land would comprise the Subject Land, and where to locate the residential development. The value of development, particularly for residential units could vary widely when one is considering the sizeable value of monies contracted to be parted with between the parties.

26. Whether there was an identified plan and earmarked land would certainly present a question of fact, and to my mind it cannot be summarily concluded that the Atul MoU or the Confirmation Deed was simply without any idea whatsoever of where the 12.5 acres of land would lie on the Larger Land. Evidence would need to be led – perhaps of Mr. Zaveri too and not just the contesting parties. Whether the plan sought to be exhibited by Atul is the plan that was referred to in Clause 6 of the Confirmation Deed would have been a matter of evidence. Answering that would call for a more detailed probe at the stage of the final hearing. Pending that, what interim arrangements are needed ought to have been considered. Therefore, to my mind, the Atul Transaction Documents cannot be entirely wished away as being so inchoate and vague that it would not lend itself to enforcement and execution, even if such a statement were to be made purely as a *prima facie* finding.

27. A letter from the solicitors to the Respondents dated April 9, 2024 would come in for some analysis across the issues involved in this judgement. In Paragraph 24 of that letter, it is asserted on behalf of the Respondents that Atul was to fence and build a compound wall but defaulted in doing so. If there had been a contracted obligation to fence an area and build a compound wall, it would stand to reason that the area of land to be fenced would have to be identified. That too would reasonably point to it being more probable than not, that the parties knew which precise piece of land would constitute the Subject Land. Therefore, it does not appear reasonable to wish away the Atul Transaction Documents away as a bunch of documents with no clue as to which parts of the Larger Land would constitute the Subject Land. If the fencing was to be of the Larger Land, and that too by Atul, it would beg the question as to whether Atul's claim for protection on the Larger Land, premised that it had a ROFR on it, would have carried greater weight than what has been ascribed to the issue by the Learned Arbitral Tribunal.

28. Another relevant element is whether the subject matter of protection is just the Subject Land or the Larger Land. Atul would contend that it has a ROFR over development of the Larger Land. This is seen in Clause 4 of the Atul MoU. Therefore, when presented with a prayer for preservation of the subject matter of the dispute that is subject to arbitration, Atul would

contend, the subject matter of protection includes its entitlement to the Larger Land and the ROFR it enjoys on it. This too is not an argument that can be summarily wished away. However, whether interim relief, when moulded, must cover only the Subject Land or the Larger Land is entirely a matter in the discretion of the Learned Arbitral Tribunal based on its perception of the strength of the view on the *prima facie* case, perception of grave injury and balance of convenience.

29. If it was found that there was hesitation in performing even the obligations in relation to the Subject Land, due to financial and market constraints, and that Atul was seen as being willing to truncate its entitlements even to the Subject Land, it would be totally open to make no interlocutory arrangements, subject of course, to whether the time to perform had arrived and the pre-conditions to performance obligations had been met.

Was the Atul Transaction Documents Terminated on July 28, 2020?

30. One area of hot contest between the parties is whether the Atul Transaction Documents was terminated on July 28, 2020. The Learned Arbitral Tribunal has returned a summary view that they were terminated on that date. The Respondents hope to have a declaration of Atul being hopelessly barred by limitation by indicating that the termination took effect on July 28, 2020 and arbitration was invoked only on February 21, 2024.

The April 9, 2024 letter from the solicitors of the Respondents asserts so in so many words. The effect of suspension of limitation periods between March 15, 2020 and February 28, 2022 at the instance of the Supreme Court in *Suo Motu* Writ Petition 3 of 2020 does not seem to have been factored in.

31. That apart, leaving limitation aside, the perceived delay could influence a reasonable assessment of whether interim protection ought to be granted. With that in mind, I have examined the assertion of termination having been effected way back on July 28, 2020. It is clear from the letter issued on that date (and this was nearly ten months after the DB Judgement) that Atul was called upon to pay a sum of Rs. 12 crores failing which there would be an automatic termination of the Atul Transaction Documents. This letter called upon Atul to perform within 14 days and did sound an ultimatum. However, this letter also invited Atul for a conversation on the subject. Atul did not accept the position that the conditions to be met for payment obligations to be triggered had been met. Atul replied on August 24, 2020 denying that the stage for payment of Rs. 12 crores had arrived.

32. Thereafter, Nima issued another letter dated September 7, 2020 which would indicate, *prima facie*, that the Respondent did not intend (then) for the July 28, 2020 letter to have been a termination letter. This letter again called upon Atul to perform the Atul Transaction Documents. It was stated

explicitly that Nima hoped wiser counsel would prevail on Atul and it would perform the obligations demanded of it in accordance with terms agreed between the parties. If the July 28, 2020 letter was an inexorable termination, there would have been no room for the letter dated September 7, 2020 asking for compliance. Neither had Atul performed the actions demanded within 14 days of July 28, 2020 nor was Nima's letter dated September 7, 2020 (in response to Atul's letter of August 24, 2020) in the vein of asserting that the Atul Transaction Documents already stood terminated. On the contrary, the threat of legal action if wiser counsel did not prevail on Atul, could point to potential action for specific performance being initiated by the Respondents not being ruled out.

33. Therefore, in my opinion, it cannot be reasonably held with the certitude found in the Impugned Order that that there had been a termination of the Atul Transaction Documents on July 28, 2020, or for that matter, on September 7, 2020. Indeed, it was on December 18, 2023 that Nima actually terminated the Atul Transaction Documents and enclosed a cheque for the Rs. 5.51 crores received until then from Atul. By this time, the Respondents had achieved the commercial and financial security from the Oberoi MoU (executed in October 2023). It was on December 18, 2023 that the election to terminate was clearly made and the potential to litigate for

specific performance was conclusively shelved. Arbitration was invoked by Atul in February 2024 and in the interregnum, mediation was attempted for what was evidently a commercial dispute. Both parties could equally be accused of remaining silent for three years since July / September 2020. The Respondents, of course, were battling a renewed effort by the Government of Maharashtra to take possession of the Larger Land – indeed, far from absolute title, even mutation entries indicating taking of possession on paper were passed, taking back the land in purported cancellation of the Lease Deed. The Oberoi MoU was executed in October 2023 and the Atul Transaction Documents were explicitly terminated in December 2023.

34. It appears to me that the reference to these dates by the Learned Arbitral Tribunal is in the context of articulating the fact that Atul sought to invoke arbitration much later (in February 2024 – perhaps after becoming aware of the risk that the ship was sailing), and this weighed with the Learned Arbitral Tribunal on the decision not to grant interim relief. That is understandable. However, it cannot be ruled at this stage for any purpose of the arbitration proceedings that the Atul Transaction Documents stood terminated on July 28, 2020.

Relevance of the Oberoi MoU:

35. The Oberoi MoU is a very important element of these proceedings. The Oberoi MoU was executed on October 16, 2023 along with the Sub-Lease Termination Deed. The two instruments executed simultaneously on the same day appear to be a device structured to bring to an end, the interests of Atul. The Sub-Lease Termination Deed (signed by Mr. Majithia for himself; for Nima and for India Farmers) was a self-executed instrument that would enable the Respondents to contend that Nima had no title to the Larger Land, which was part of the land leased by the Government of Maharashtra to India Farmers and sub-leased by India Farmers to Nima. Third party interest in the hands of Oberoi was created in parallel.

36. In the letter written by solicitors of the Respondents on April 9, 2024, there is an assertion that the Sub-Lease Termination Deed had been executed. The effect of the Sub-Lease Termination Deed would be an internal document executed to be self-serving to one of the parties to the instruments constituting the Atul Transaction Documents.

37. One of the reliefs sought in the Section 17 Application is a full disclosure of all documents executed in relation to the land covered by the Atul Transaction Documents. There is no doubt that the execution of the Oberoi MoU was necessarily required to be part of the assessment and

adjudication by the Learned Arbitral Tribunal. A redacted version of the Oberoi MoU was purportedly brought on record by the Respondents – "purportedly" because, in my opinion, the document tendered by the Respondents was as good as not producing anything at all.

38. I have already outlined the flow of events in these proceedings before my predecessor who had called for the Oberoi MoU to be produced without any masking for consideration by the Court, but in a sealed cover i.e. not for being shared with Atul. As stated earlier, I have gone through it. I am left with no doubt in my mind that if this document had been called for by the Learned Arbitral Tribunal just like my predecessor had called for it, the Learned Arbitral Tribunal would have taken a significantly different view of the matter. A number of conclusions drawn by the Learned Arbitral Tribunal, in my opinion, would have well stood undermined, had the Learned Arbitral Tribunal seen the Oberoi MoU in its entirety. That the Learned Arbitral Tribunal had been prevented from getting a full picture is evident from the manner in which a glimpse of the Oberoi MoU was purported to be provided to the Learned Arbitral Tribunal, if the manner of redacting could even be regarded as leading to even a "glimpse".

39. A careful examination of the redacted Oberoi MoU would show that what was a 33-page document was presented as a six-page document. Of the four pages of recitals that are replete with the history of the transactions over the same land, just one page with a large black patch on it was filed. The provisions, including the definitions and the operative provisions contain references to the Atul Transaction Documents. These ought to have been part of the mix for consideration by the Learned Arbitral Tribunal so that it could consider an appropriate relief even if it were to be of the view that *prima facie*, Atul has not been able to show a strong demonstration of having been ready and willing to perform. Unfortunately, the end result is that the entire evidence that would have enabled an informed decision by the Learned Arbitral Tribunal had been kept away from the Learned Arbitral Tribunal.

40. Indeed, Section 19 of the Act makes it clear that arbitral tribunals are free to conduct proceedings in such manner as they deem appropriate. This would include the power to determine admissibility, relevance, materiality and weight of any evidence. Since Section 37 envisages a statutory right to appeal from decisions refusing to grant an interim measure, if it appears to the Section 37 Court that a certain decision on the manner of allowing evidence has been unreasonable or implausible, leading to a rejection of the interim relief under Section 17, an intervention may be made. It is apparent

that the Learned Arbitral Tribunal took a view on the basis of the redacted Oberoi presented by the Respondent – six out of 33 pages, of which two are title pages and two are the signature pages and one page is the schedule to show that a third party interest has been created on the same land. By adopting such an approach, the Learned Arbitral Tribunal was led to believe that the rest of the Oberoi MoU would be totally irrelevant to a decision under Section 17 of the Act. In my opinion, the contrary is true.

41. The situation in hand is not even that the Learned Arbitral Tribunal was fully shown what the Oberoi MoU entailed, with an application being made for keeping it confidential – neither the Learned Arbitral Tribunal nor Atul were any wiser about the contents of the Oberoi MoU and its import for the matter at hand. This is not to suggest that the Learned Arbitral Tribunal must necessarily have seen the Oberoi MoU behind the back of Atul. Dealing with a similar situation in a writ petition involving development of property, the declaration of the law by a Learned Division Bench of this Court, in the case of ***Sonali Ashok Tandle***[2] would be apt to cite:

[2] *Sonali Ashok Tandle vs. Rannka Lifestyle Ventures – 2023 SCC OnLine Bom 1918*

18. Pausing briefly for a moment, we note that the previous Division Bench accepted without comment the tendering of some documents in sealed cover by the 1st Respondent. This Court has previously thoroughly deprecated this practice.[1] So has the Supreme Court, most recently in Madhyamam Broadcasting Ltd. v. Union of India[2] We specifically disapprove of this and do not permit it. It undermines the legitimacy of the adjudication process in any system based on an adversarial proceeding. The simplest general principle is that anything that the Court can see, the opposing party must be allowed to see. Any exceptions must be narrowly tailored, whether under the Evidence Act or some other governing law. Nothing in this matter invites a single one of the exceptions in the Evidence Act regarding privilege, i.e., immunity from disclosure. In other jurisdictions, most particularly in the UK limited disclosures or non-disclosures are permitted. But such 'Closed Material Proceedings' are now governed by statute and always subject to judicial oversight. They are mostly in cases of national security, immigration, etc. It is never for a party to decide for itself what it will or will not disclose — most especially when there is an order of the Court ordering and compelling disclosure on affidavit. Where there are private disputes between two parties and a Court has ordered a party to make a disclosure on Affidavit of some material, there is simply no question of that party putting in anything 'in sealed cover'. As a matter of law, that is non-compliance with a judicial order. In a given case, it will invite action in contempt. If immunity from disclosure is sought, that is an application that must be made to a court and must receive a judicial order. No litigant can disadvantage the opponent by

> *squirrelling some information into the court record 'in sealed cover'. No party is entitled can rely on such 'sealed cover material' to the prejudice of the other side, and no court should permit it. To do so flies in the face of every concept of fair justice and openness and transparency in the decision-making process. It is time to bury this thoroughly pernicious practice.*

42. ***Madhyamam Broadcasting***[3] referred to by the Learned Division Bench was a case of denial of reasons for refusal to provide approval for broadcasting of a television channel on the ground of national security. The facts involved in this Appeal involve no element of national security – it is a private dispute between two builders about the manner of dealing with development of the land. The land covered by their agreement forms subject matter of another agreement, which is alleged to have been executed when their agreement subsisted. There is nothing sensitive about the content that would impinge on public interest, necessitating hiding of the same.

43. Therefore, in my view, the Learned Arbitral Tribunal was deprived of a full picture by the manner of redacting of the Oberoi MoU. It is only appropriate that the Learned Arbitral Tribunal and Atul should know what is in the Oberoi MoU, since the contents speak for themselves. There are provisions in it that actually relate to the Atul Transaction Documents.

[3] *Madhyamam Broadcasting Ltd. Vs. Union of India – (2023) 13 SCC 401*

Perusal of these provisions would have enabled Atul to make submissions on the state of mind of the Respondents and the appropriate interlocutory measures necessary in the circumstances. The Learned Arbitral Tribunal would have benefitted from the contents of the Oberoi MoU to discern the precise factual position involved and the Respondents' own position on whether Atul had any rights over the Subject Land or the Larger Land. All of this has escaped adjudicatory attention because of the approach adopted.

44. Another facet of the Oberoi MoU is whether it could have at all been executed without violating a requirement of law. This facet is integrally connected to whether the 2002 SCN posed a fetter on free and marketable title to the Larger Land. I have dealt with that facet where I deal with the import of the 2002 SCN, which in turn is directly linked to whether the DB Judgement resulted in free, marketable and clear title to the Larger Land. All of these have been dealt with in the next section.

Did the 2002 SCN Constitute a Fetter on Title?

45. It is apparent that under the Atul Transaction Documents, until the cloud over Nima's title to the Subject Land was lifted, no further payments in addition to the monies already paid, were due. Equally, the Atul Transaction Documents were incapable of termination only after the title became free and

marketable and the parties registered a proper development agreement.

46. The key issue that arises for consideration is whether the DB Judgement comprehensively enabled free and marketable title to the Subject Land in Nima's possession as a sub-lessee. Clause 4 of the Confirmation Deed (executed on November 2, 2015) has weighed with the Learned Arbitral Tribunal. Clause 4 is a follow-on provision to Clause 3, which provides that Nima has undertaken work to clear the title to the Subject Land such that possession of the entire land with title would be clear for submissions to be made to the MCGM for the redevelopment. For carrying out such work (to have title cleared), Atul was to pay Rs. 2 crores on execution of the Confirmation Deed and Rs. 3 crores "*against* ***almost work of title*** *by revenue department and / or by court* ***is clear***". Clause 4 goes on to say that Nima has promised that the procedure would be completed in six months with clear title and then the parties would execute registered documentation for the development.

47. The DB Judgement indeed struck down the earlier view of the Collector, which had been endorsed in the Revenue Minister Order, that in terms of the factual matrix set out in these instruments, the Lease Deed had been violated. The DB Judgement, however, restored the 2002 SCN. In doing so, the DB Judgement did not effect any carve-out to the terms on

which the 2002 SCN stood entirely revived.

48. A careful reading of the 2002 SCN would show that apart from it being a show cause notice, it also doubled up as an interim order that contained prohibitions on alienating any portion of the Larger Land without the consent of the Government of Maharashtra. Therefore, it would not be possible to state that the DB Judgement emphatically cleared all cloud over title. It did clear the cloud arising of the Collector's original view that had been expressed on April 26, 1993 and had culminated in the Revenue Minister Order of May 18, 1998. However, the DB Judgement revived the 2002 SCN. Indeed, the 2002 SCN dealt with alienation that arose by way of creation of encumbrances on the land in favour of Indian Bank, without permission of the Government of Maharashtra. On this ground too, the Lease Deed could have been cancelled, as indeed occurred later, in fact, contemporaneously with the September 7, 2020 Notice to Atul asserting that the title was clear. However, the 2002 SCN having doubled up as interim order containing prohibitions on dealings in the land, and specifically having been revived by the DB Judgement, contained a direction, which too was revived, not to deal freely with the Larger Land. Therefore, in my opinion, it would not be possible to hold with any certitude that the DB Judgement cleared all cloud over title to the Subject Land.

49. The language of the Confirmation Deed has to be seen in the light of the aforesaid facts. The usage of the words "***almost*** work of title....is ***clear***" would indicate that the commercial agreement between the parties was that if a substantial element of the title being clear was achieved, the payment under Clause 4 would be triggered. This is the nature of the language used through the Atul Transaction Documents (in one place "lapse" is spelt as "laps") and the authors of these instruments have presented the Learned Arbitral Tribunal with a serious challenge in interpreting their true intent just as they did with their WhatsApp chats.

50. It would be a plausible and reasonable *prima facie* finding that while the DB Judgement did not result in a full, free and clear title to the Larger Land, it did potentially present a situation where the title was almost clear, triggering the payment instalment due under Clause 4 of the Confirmation Deed. However, the payment of Rs. 12 crores due under Clause 7 of the Atul MoU was linked to "***obtaining absolute clear title***". Certainly, the DB Judgement, which revived the 2002 SCN could not be regarded as conferring absolute clear title. *Prima facie*, the Confirmation Deed supplemented the Atul MoU and did not override the Atul MoU. This facet of nuance does not appear to have been presented to the Learned Arbitral Tribunal and analysis of this nature is not found in the Impugned Order. Therefore, the view that

the DB Judgement rendered absolute clear title appears to me as being summary in nature, particularly since the 2002 SCN containing a prohibition on dealing with the land was explicitly revived by the DB Judgement.

51. In the ordinary course, it would be trite to say that the mere issuance of a Show Cause Notice is not a fetter unless an adjudication is made on such notice. However, where the Show Cause Notice doubles up as an interim order, and what is revived by an explicit Court Order (that remained unchallenged) is the entire Show Cause Notice without pruning the fetter on free and marketable title, with the greatest respect to the Learned Arbitral Tribunal, it would not be possible to concur that the DB Judgement led to conferment of absolute and clear title on Nima for the Larger Land, and thereby the Subject Land.

52. Indeed, the 2002 SCN could be said to have been pruned in its content in relation to its basis – the creation of encumbrance in favour of banks without consent of the Government of Maharashtra. On the remaining facts that formed subject matter of the Revenue Minister Order, there was an adjudication already by the DB Judgement. However, it is reasonable to attribute the retention of the directions (not to transact in the land without government approval) to the remaining basis i.e. the creation of encumbrance without consent. That residual basis too could still have led to

cancellation of the Lease Deed (as it indeed would later). In short, at this stage, the factual developments that transpired later would show that Atul had made a fair point – that the amount of Rs. 12 crore under the Atul MoU was not due since absolute title had not been obtained.

53. When the first purported termination letter dated July 28, 2020 was issued, the situation had not changed. Similar was the case on September 7, 2020, when Nima hoped better sense would prevail and again called upon Atul to perform on the Atul Transaction Documents. Worse, an adverse order was actually passed by the Collector on September 18, 2020, ten days after the letter dated September 7, 2020, calling upon Atul to perform the payment obligation. In fact, it is an admitted position that on September 23, 2020, the State officials attempted to take physical possession even while they took paper possession by making mutation entries actually changing the title to the Larger Land to the name of the Government of Maharashtra.

54. Looking at these contemporaneous developments, it would be impossible to hold that in July 2020 or in September 2020, Nima and India Farmers had clear title to the Larger Land. On September 24, 2020, this Court had directed in WP 3607 that *status quo* be maintained. While it is trite law that a mutation entry would not necessarily be determinative of title in a conclusive manner, and admittedly, physical possession was in the hands

of the Respondents, the *status quo* that was to continue would at best have been the *status quo* obtaining after giving effect to the DB Judgement. Therefore, it cannot be said that absolute and clear title in favour of the Respondents was in existence.

55. The Oberoi MoU and the self-executed tripartite Sub-Lease Termination Deed of October 16, 2023 would follow three years later. The final clearance of the fetter on free and marketable title would cease only on September 19, 2024 when the then incumbent Revenue Minister would discharge the 2002 SCN and hold emphatically in favour of the Respondents. Curiously, this Order of the Revenue Minister putting a final end to the controversy (for the first time) was not even placed before the Learned Arbitral Tribunal, which only had the DB Judgement and the redacted Oberoi MoU to go by.

56. There has been a dispute during this Appeal about Atul's access to the Order of the Collector passed on September 18, 2020. This document was indeed handed in by the Respondents as part of their Compilation of Documents in the course of the arbitration proceedings. Mr. Khambata would place strong reliance on the fact that Atul did not rely on the aforesaid Order dated September 18, 2020 despite it being available during the arbitration. In my opinion, at worst one could draw a conclusion of poor

strategy or even folly for not relying on that Order in the proceedings. However, that instrument and the consequential action to take possession and the direction to maintain *status quo* are all part of the record. Whether Atul failed to make a better argument in the arbitral proceedings by relying on this Order would not change the legal position and status of whether there was absolute clear title when the Oberoi MoU was executed. The Order of September 18, 2020 was to the knowledge of the Respondents on September 24, 2020, when they informed this Court in WP 3607 that the Order had not even been served on the Respondents. Atul was not informed about these developments at that time. Had he been informed and yet kept quiet, the analysis would change. Yet, the Respondents had contended before the Learned Arbitral Tribunal that they had validly terminated the Atul Transaction Documents on July 28, 2020 for non-payment of the Rs. 12 crores, which was payable against absolute and clear title being available.

57. The Order of September 18, 2020 and the attempt at taking possession on September 23, 2020 and the Order in WP 3706 on September 24, 2020 are all part of one continuum of events and form an integral part of the material on record. Atul not having made submissions based on these developments, which only came in through a Compilation of Documents, cannot render this Court handicapped when dealing with whether there was

absolute and clear title. If Atul did not rely on them in the proceedings and only relied on the revival of the 2002 SCN, these developments were a consequence of the revived 2002 SCN.

58. Indeed, the sequence of events set out by Mr. Khambata in his written submissions are instructive. After the *status quo* order in WP 3706, the Additional Commissioner, Konkan Division passed an Order dated October 15, 2020 staying the Collector's Order dated September 18, 2020. This Order staying the Collector's Order was set aside by the Divisional Commissioner on June 25, 2021. In fact, the Collector was directed to hear the matter afresh and take into account a Government Resolution dated June 26, 2018 to examine if unauthorised mortgages could be regularised by paying twice the prescribed charges.

59. On January 19, 2022, the Collector ruled that such Government Resolution would not apply. This Order was upheld by the Additional Commissioner on July 4, 2022. The matter meandered on without there being absolute and clear title until October 31, 2023, when the then incumbent Revenue Minister passed the New Revenue Minister Order to aside the Additional Commissioner's Order dated July 4, 2022, thereby bringing to an end the Collector's Orders dated January 19, 2022 and September 18, 2020. This was a comprehensive closure for the first time to

the cloud on the title. The events of this period explain the silence on the Respondents' part, with Atul, from following through on the letters dated July 28, 2020 and September 7, 2020.

60. What is piquant is that the New Revenue Minister Order was passed a fortnight after the Oberoi MoU was executed on October 16, 2023. Therefore, when the Oberoi MoU was executed, the cloud had continued, but within a fortnight of the execution of the Oberoi MoU, immediately after its execution, this new position was secured by way of the New Revenue Minister Order dated October 31, 2023. Therefore, *prima facie*, it can be said that the cloud posed by the 2002 SCN came to an end on October 31, 2023 while the truly effective termination by the Respondents, with the refund cheque of Rs. 5.51 crores took place only thereafter, on December 18, 2023.

61. By this time, indeed it could be said that there was absolute and clear title for the first time, although a review petition was also filed before the Revenue Minister, which was disposed of finally on September 19, 2024. It is this Order of September 19, 2024 that was not at all available to the Learned Arbitral Tribunal and was given to Atul for the first time on December 3, 2024.

Conclusions and Directions:

62. Based on the aforesaid analysis, a conspectus of the inter-play of the various findings, and their relevance for the final outcome, would be necessary. Needless to say, every single observation set out above is *prima facie* in character. In my opinion, on a number of facets the Impugned Order contains summary findings, primarily because the Learned Arbitral Tribunal appears to have been handicapped by not having had access to the Oberoi MoU. Therefore, I have been persuaded that the Impugned Order deserves to be set aside by way of a remand, with the provision of the Oberoi MoU, appropriately redacted. This is the only course that would be appropriate and meet the ends of justice and fairness. In my opinion, the summary nature of many critical findings that have come about, would warrant a remand. I have given my anxious consideration as to whether this Court could itself take a view, but I am constrained to note that a number of inter-connected facets have emerged in this case, not all of which can appropriately be dealt with for the first time by the appeal court without the benefit of analysis and findings from the forum of the first instance.

63. In my opinion, the Oberoi MoU must necessarily be handed over in an appropriately redacted form (as directed below) to the Learned Arbitral Tribunal. As regards commercial interests of Oberoi, I have taken care to

stipulate below what ***must*** be redacted in the Oberoi MoU, and what ***must not*** be redacted:-

A) Nothing in the Recitals A to O shall be redacted;

B) Nothing in the Definitions Section shall be redacted;

C) Nothing in Clause 2 (Transaction) shall be redacted;

D) In Clause 3.1 (Clause 3.1.1 to Clause 3.1.9) the amounts denominated in rupees in figures and words shall be redacted, and nothing else shall be redacted;

E) In Clause 3.2 (Clause 3.2.1 to Clause 3.2.7) the references to the percentages of revenue sharing shall be redacted, and nothing else shall be redacted;

F) In Clause 4 (Clause 4.1 to Clause 4.6.4) and in Clause 5 (Clause 5.1 to Clause 5.6) all amounts denominated in rupees in figures and words, and to percentages of revenue sharing shall be redacted, and nothing else shall be redacted;

G) In Clause 6 (Clause 6.1 to Clause 6.8), nothing shall be redacted except for the percentages of expense sharing, which corresponds with the percentage of revenue sharing. It is made clear that the percentages relating to anything other than the aforesaid shall not be

redacted; and

H) Nothing in Clause 7 and Clause 8 shall be redacted.

64. An authenticated copy of such redacted Oberoi MoU conforming to the foregoing shall be filed before the Learned Arbitral Tribunal by the Respondents and a copy shall be served on Atul within a period of four weeks from the upload of this judgement on the website of this Court. Atul shall be entitled to file an application seeking interim reliefs of such nature as advised on the basis of its review of such redacted Oberoi MoU having become available to it, and the Learned Arbitral Tribunal shall consider the same and deal with such application, uninfluenced by whatever has been held in the Impugned Order.

Summary of Conclusions:

65. A summarisation of my findings, to provide a comprehensive *prima facie* thesis underlying my opinion that setting aside coupled with a remand is necessary, is set out below:-

A) The land leased by the Government of Maharashtra to India Farmers was over ~114 acres, of which India Farmers leased 100 acres to Nima, which in turn executed the Atul Transaction Documents for 12.5 acres towards residential development;

B) It is difficult to conclude in the manner done in the Impugned Order that there was no earmarking whatsoever of the 12.5 acres of land that constituted the Subject Land. The Confirmation Deed in particular, refers to a plan. The Atul Transaction Documents entail involvement of an architect. Atul has annexed a map at Exhibit J and claims that inadvertently the plan was not annexed to the Section 9 Petition, which was converted into the Section 17 Application. The Respondents contest the very existence of such a plan. This dichotomy in positions would have led to a triable issue and that would have to be dealt with in the arbitration proceedings after examining evidence. However, the Respondents have persuaded the Learned Arbitral Tribunal to conclusively hold that there was no plan whatsoever. In my opinion, such a firm conclusion even on a *prima facie* basis would not tenable. It would not be possible to conclude that the Atul Transaction Documents were an inchoate set of instruments with no clarity whatsoever on where the Subject Land was meant to be located within the Larger Land, with serious monies changing hands. For dealing with the Section 17

Application, in my opinion, a greater scrutiny of this issue is warranted – the conclusion appears to be summary;

C) The Notice of termination dated July 28, 2020 called upon Atul to pay Rs. 12 crores within 14 days, failing which termination would take place. That very letter called for a conversation. Atul denied the contents of that letter on August 24, 2020. On September 7, 2020, yet another letter was issued by Nima calling upon Atul to perform and hoping better sense would prevail to avoid unnecessary litigation. This letter, inherently calling for performance, would indicate at least *prima facie*, that the July 28, 2020 letter was not a conclusive termination. The copious deliberations on the purported absence of a pleading on waiver of the termination are, in my opinion, unnecessary. These two letters speak for themselves. The Respondents did not have an evident intent to terminate the Atul Transaction Documents at that time, and could have even sued for specific performance, particularly when the September 7, 2020 letter actually called upon Atul to perform. In their eventual termination letter dated

December 18, 2023, the Respondents claim to have terminated the Atul Transaction Documents "once again" and with "immediate effect". This is untenable. For the reasons set out above, the clear and comprehensive termination took place only on December 18, 2023, when a cheque for refund of Rs. 5.51 crores was enclosed. It is evident that this firm step of termination was taken only after securing the New Revenue Minister Order, which too had followed a fortnight after the Oberoi MoU was executed;

D) The DB Judgement of October 1, 2019 revived the 2002 SCN, which was not merely a Show Cause Notice but also a direction prohibiting dealing with the Larger Land without government approval. This is clearly not consistent with a position of absolute and clear title. The Atul MoU required payment of Rs. 12 crore only on obtaining absolute and clear title. The Confirmation Deed used the ambiguous "***almost***....***clear***" language, which has led to an inference by the Learned Arbitral Tribunal that the DB Judgement conferred clear title. Be that as it may, on neither of the two dates competing for the termination date, namely, July 28,

2020 and September 7, 2020, did absolute and clear title exist. Therefore, the obligation to pay Rs. 12 crores on either of these dates cannot be said to have arisen;

E) The actual termination was effected on December 18, 2023, with a refund of Rs. 5.51 crores being enclosed. However, by this time, the Oberoi MoU was already executed on October 16, 2023. Therefore, *prima facie*, the Oberoi MoU was executed before the Atul Transaction Documents were effectively terminated. This would have necessitated a closer examination of what kind of interim relief would be appropriate. However, with the Oberoi MoU not having been given to the Learned Arbitral Tribunal except in such a redacted form that rendered it meaningless in substance, the range of facts that ought to have been analysed has missed adjudication;

F) The cloud over title appears to have been truly lifted on September 1, 2023 and eventually on October 31, 2023. Indeed, the Oberoi MoU was executed on October 16, 2023, and the clearing of the cloud took place in a fortnight thereafter. The Learned Arbitral Tribunal not having had the benefit of seeing any provision worth its name in the

Oberoi MoU, the Impugned Order has no analysis on the validity of executing the Oberoi MoU. Such execution was effected during the subsistence of the Atul Transaction Documents as also during the subsistence of the *status quo* order of this Court passed in WP 3607. The Impugned Order has simply recorded that the Learned Arbitral Tribunal has accepted the statement made by Respondents' counsel, on instructions, that third party rights had already been created. After the Oberoi MoU, redacted as above, is made available, the Learned Arbitral Tribunal would be able to revisit this facet and take a clear view;

G) The Oberoi MoU, with the specific redacting directed earlier in this judgement must be released to Atul and to the Learned Arbitral Tribunal within a period of four weeks from the upload of this judgement on the website of this Court. Atul shall be entitled to file an application seeking appropriate reliefs after having examined the Oberoi MoU as directed above;

H) Whether the NDZ classification of the Larger Land has an inexorable necessary implication of no residential development at all being possible is a question that the

Learned Arbitral Tribunal has to consider. The finding that the NDZ could never entail residential development at all appears to be inaccurate. Indeed, the DCPR 2034 enables residential development although incidental to development for IT and ITES units. Indeed, the Oberoi MoU entails elements of non-IT and non-ITES development and indeed residential development. These facets would need a non-summary examination and towards this end, the provision of the Oberoi MoU would enable the Learned Arbitral Tribunal to examine how residential development is still possible and has actually been envisaged;

I) The WhatsApp chat transcript does indicate that on October 17, 2019, Atul appears to have expressed apprehension about having to pay Rs. 12 crore and was willing to prune the size of his entitlements under the Atul Transaction Documents. However, at this stage, absolute and clear title had not been obtained – the DB Judgement revived the 2002 SCN and with it, the fetter on dealing with the Larger Land. There is nothing wrong with the Learned Arbitral Tribunal seeking to interpret the WhatsApp chat and it cannot be totally dismissed as "gibberish". However, the

very same WhatsApp chat transcript also contains Atul's assertion that the milestone to pay the Rs. 12 crores had not been reached. Therefore, the parties were engaged in a fluid conversation, and greater scrutiny of the factual position obtaining then would be necessary, without which the adverse inference drawn from the WhatsApp chat transcript would be summary in character. In view of the other findings such as the implication of the DB Judgement, this facet would need to be revisited more comprehensively.

66. I have given my anxious consideration to the standard of review to be adopted in exercise of the jurisdiction under Section 37 when considering a challenge to an Order passed under Section 17 of the Act. I am conscious of the light-touch approach necessary in this jurisdiction. The state of the law has been summarised succinctly by a Learned Single Judge of this Court (*Manish Pitale J.*) in Paragraph 27 to Paragraph 29 of ***Max Healthcare Institute Ltd. Vs. Touch Healthcare Private Ltd. & Ors.***[4] Even while the scope for interference would be tempered and measured, also bearing in mind the legislative objective of limited interference by the Court under the Act, if the Impugned Order misses considering material facets of the matter, or

[4] *Commercial Arbitration Petition (L) No. 20533 of 2023.*

considers what must not be considered, the scope of review would lend itself to examining the perversity that may emerge from the Order impugned.

67. For the reasons set out above, it is apparent that on multiple counts, the views taken in the Impugned Order are implausible. The contents of the multiple termination letters from the candidates speak for themselves, and yet a firm view has been arrived at that the Atul Transaction Documents were terminated on July 28, 2020. The Oberoi MoU, presented in the manner it was, clearly indicates that there was significantly more than what met the eye. The full document now having been seen by me, I would be remiss if I did not take note of its contents and refrained from taking the consequential action from what is disclosed in it. The *status quo* directed by this very Court having been in operation when the Oberoi MoU was signed, also cannot be ignored. The sweeping conclusion about residential development being impossible on NDZ land adds to the mix above. Therefore, for the various reasons articulated in this judgement, I am of the view that there is no option but to interfere with the Impugned Order.

Oberoi's Intervention Application:

68. I am also conscious that the Learned Arbitral Tribunal has held that it has no jurisdiction to hear contentions of Oberoi, which would be necessary

for considering the Oberoi MoU. Oberoi has sought to be impleaded in these appellate proceedings, which have led to a remand. Therefore, Oberoi is willing to subject itself to the proceedings so that it can be heard and the manner of impact on its interests can also be considered. Curiously, Atul has opposed allowing impleadment of Oberoi stating that it is not a party to the arbitration agreement – curious because Atul seeks reliefs that would have an impact on Oberoi, and it would only be appropriate that Oberoi is heard.

69. Meanwhile, the law on the power of the Learned Arbitral Tribunal to join veritable parties has made a significant forward movement in a recent judgement of the Supreme Court in ***ASF Buildtech***[5]. It has been made clear even that the Learned Arbitral Tribunal can implead a non-signatory party, without the role of a reference court, on its own motion, if the requisite factors are found.

70. In the instant case, the Oberoi MoU has interceded into the subject matter of the Atul Transaction Documents before they were terminated. The execution of the Oberoi MoU has been followed by the resolution of the dispute with the Government of Maharashtra as envisaged therein, within a fortnight. This is precisely the approach that had been envisaged in the Atul Transaction Documents as well, but with a six-month expectation from Nima,

[5] *ASF Buildtech Pvt. Ltd. Vs. Shapoorji Pallonji and Co. Pvt. Ltd. – 2025 INSC 616 – See Section C(ii)*

the deadline being extendable by Atul.

71. Oberoi has volunteered to be impleaded in this Appeal, and disposal of this Appeal has led to a remand. Therefore, this is not a case where an arbitral tribunal is seeking to bind a third party to its proceedings – instead, the third party is volunteering to join the proceedings.

72. The Oberoi MoU is being directed to be introduced into the evidence before the Learned Arbitral Tribunal, with appropriate redacting as directed above. The Learned Arbitral Tribunal would have the benefit of getting a complete and holistic picture with Oberoi's participation. In any case, Oberoi's entry into the fray has led to Oberoi's interests being aligned with the interests of the Respondents in the very same subject matter of the arbitration agreement. The Oberoi MoU makes many references to the Atul Transaction Documents and to Atul – not just recitals of history. Therefore, making Oberoi a party, and directing the Oberoi MoU to be considered without the inhibition of Oberoi being a non-signatory, would meet the ends of justice and would also not hurt Atul. Atul, of course, is *dominus litis*. If the impleadment had been permitted by this Court, Oberoi would have been heard in these appellate proceedings. Oberoi not having participated in the Section 17 proceedings, and coming in the appellate stage would have skewed the position. However, going by the same framework in which the Learned

Arbitral Tribunal considered the matter, this judgement has been rendered. Since a remand is being directed, it is only appropriate that the Learned Arbitral Tribunal considers Oberoi's Impleadment Application too and takes an appropriate view.

73. Section C(ii) in ***ASF Buildtech*** is a comprehensive summary of the law on the subject, but in this regard, just the following extracts are noteworthy :-

> *123. What can be discerned from the above is that the recourse to doctrine of implied powers would be permissible, if without it, it is impossible to effectuate a final power, and such exercise of implied power would effectuate and advance the object of the legislation.*
>
> *124. Cox and Kings (I) (supra) has elaborately acknowledged* ***the unique complexities posed by contemporary business transactions to the traditional framework of arbitration****. Historically, arbitration gained prominence in the context of straightforward and linear bilateral transactions under the mercantile system of law. While over the past century,* ***the nature of modern commercial transactions has undergone a profound transformation with the involvement of multifaceted obligations between multiple parties and***

complex contractual structures more sophisticated than the linear parent- subsidiary type of organization, that has rendered the traditional dyadic paradigms of business obsolete, particularly in areas such as construction contracts, financing transactions, reinsurance contracts, the framework of arbitration has, to a significant extent remained unchanged, leading to a mismatch between procedural form and commercial substance.

125. For arbitration to remain a viable and effectively alternative mechanism for dispute resolution, it is imperative to ensure that commercial reality does not outgrow this mechanism. The mechanisms of arbitration must be sufficiently elastic to accommodate the complexities of multi-party and multi-contract arrangements without compromising foundational principles such as consent and party autonomy. The approach of courts and arbitral tribunal in particular must be responsive to the emerging commercial practices and expectations of the parties who submit themselves to it.

[Emphasis Supplied]

74. In view of the foregoing, in my opinion, this is a fit case for the Impugned Order to be set aside with a remand for a reconsideration on merits on the basis of the findings rendered above. On remand, with the benefit of the Oberoi MoU, to be redacted in the manner directed above, the Learned Arbitral Tribunal would be in a better position to consider whether and what appropriate interim reliefs are warranted.

75. With the aforesaid conclusions and directions, this Appeal is ***finally disposed of***. I am conscious that the parties will need some time to assess the findings in this judgement and consider their respective positions. Therefore, I have provided a period of four weeks from the upload of this judgement on this Court's website for the Oberoi MoU, redacted as directed above, to be provided by the Respondents to Atul and to the Learned Arbitral Tribunal.

76. The protective arrangement obtaining as of today in favour of Atul shall continue for a further period of two weeks from the expiry of the aforesaid four-week period, within which the appropriately redacted Oberoi MoU is required to be sent to Atul. This would enable Atul to review the same and make an appropriate application to the Learned Arbitral Tribunal within such period.

Shraddha

77. The issue of costs for this round of litigation is deferred for consideration by the Learned Arbitral Tribunal when it hears the arbitration proceedings finally.

78. All actions required to be taken pursuant to this order, shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]

Shraddha