IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 785 OF 2016

Jolly Brothers Pvt. Ltd. ...Petitioner

Versus

Surendra Nath Jolly And 2 Ors. ...Respondents

Mr. Zal Andhyarujina, *Senior Advocate a/w Mr. Chirag Kamdar, Ms. Ishani Khanwilkar, Ms. Sameeksha Yadav, Mr. Tanish Amin i/b MDP Associates, for the Petitioner.*

Mr. Nitin Thakkar, *Senior Advocate, a/w A. S. Pal, Siddharth Mehta, Midhunkumar Allu, Sanjana Das i/b Siddharth Mehta***,** *for the Respondent Nos.1A, 1C, 2 and 3.*

Mr. Ranit Basu *a/w Maitri Malde, Dua Shaikh, Harshada Nirmal i/b Bridgehead Law Partners, for Respondent No. 1B.*

CORAM : SOMASEKHAR SUNDARESAN, J.

DATE : FEBRUARY 24, 2026.

JUDGEMENT :

Context and Factual Background:

1. This is a Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 ***("the Act")***, impugning an Arbitral Award dated October 10, 2015 ***("the Impugned Award"),*** by which the Learned Arbitral Tribunal has dismissed the Petitioner's contention that a Memorandum of Understanding dated December 7, 2006 ***("MOU")***

for transfer of land is subsisting and is amenable to specific performance.

2. The MOU was executed between the Petitioner, Jolly Brothers Pvt. Ltd. ***("Company")*** and the Respondents, certain members of the wider Jolly Family ***("Jollys")***, by which, a particular parcel of land admeasuring about 4.1 acres ***("Subject Land")*** was meant to be surrendered by the Jollys in favour of the Company on the terms and conditions set out therein.

3. The wider family of which the Jollys were a part, had been involved in various internal disputes and differences. The wider Jolly Family was classified under three different branches, loosely called the "Pune Group", the "Bangalore Group" and the "Hyderabad Group". The Respondents, the Jollys, fall within the "Hyderabad Group".

4. When the Company was under the control of the wider Jolly Family, certain transactions had been effected with an entity called Jaycee Homes and Hotels Ltd. ***("Jaycee")***, which resulted in Jaycee claiming the existence of an oral agreement with the Pune Group for purchase of 16 acres of land, with a sum of Rs. 29.5 lakhs having been received by the Pune Group from Jaycee.

5. When disputes among the constituents of the wider Jolly Family got settled, land was distributed among the three groups. Approximately 14 acres of land came to vest with the Jollys. Separately, another 6 acres of land owned by the wider Jolly Family was meant to come to the Jollys, but on physical verification it was found that only 4.1 acres of land (which is the Subject Land) was actually available. The Jollys were given possession of the Subject Land and they also took over the liability of Rs. 29.5 lakhs paid by Jaycee to the Pune Group, when it was part of the larger Jolly Family.

6. It is against this backdrop that the MOU was executed between the parties for the surrender of the Subject Land by the Jollys in favour of the Company. It is common ground that when the MOU was signed, the Company was already in the hands of new owners. The other plot of land admeasuring 14 acres in the same vicinity was also transacted between the parties and was smoothly transferred also by way of surrender for Rs. 7 crores and the parties have no quarrel over it.

7. The MOU provided for a sum of Rs. 3.90 crores being the consideration payable for surrender of the Subject Land by the Jollys to the Company. A sum of Rs. 80 lakhs was marked as earnest money but deposited in escrow with solicitors of the Jollys. If Jaycee were to obtain

an injunction against the surrender, the Company had a right to terminate the MOU. If Jaycee did not institute any suit by June 30, 2007, the money kept in escrow would be released to the Jollys. On the same day, an Escrow Agreement was executed, and the amount of Rs. 80 lakhs was deposited with the solicitors of the Jollys.

8. Jaycee would indeed file Suit No. 1075 of 2007 ("***Suit***") and move Notice of Motion No. 1520 of 2007 seeking interim reliefs, claiming the existence an oral agreement to acquire the Subject Land. The Company, as well as the Jollys, were made defendants in the Suit by Jaycee. On April 26, 2007, the defendants in the Suit would seek time to take instructions and the Jollys would assure the Court that *status quo* would be maintained until the next date. The *status quo* was extended from time to time. On July 17, 2007, the Jollys wrote to the Company asking what it proposed to do, indicating that it would not be proper to lock up the property in litigation interminably.

9. On October 19, 2011, four years later, the Court framed limitation as a preliminary issue and adjourned the Notice of Motion *sine die*, and continued the *ad interim* protection pending disposal of the Notice of Motion. The Company submits that on July 5, 2012, the Jollys verbally indicated their intent to terminate the MOU and on July

6, 2012 issued a notice to terminate the MOU ("***Termination Notice***"), and on their instructions, the Escrow Agent returned a payment instrument for Rs. 1.14 crores, towards refund of the escrow amount along with earnings. On July 12, 2012, the Company returned the payment instrument and called for the Termination Notice to be withdrawn. On July 16, 2012, the Jollys stood by the Termination Notice and on their instructions, the Escrow Agent replied indicating that since the cheque had been returned without encashing it, going forward, the money would lie in the current account.

10. The disputes and differences led to an Arbitral Tribunal being constituted. The Company moved the Court hearing the Suit to get a clarification that the *ad interim* relief did not restrain a transfer of interests by the Jollys to a third party keeping the interests of Jaycee intact. On September 11, 2012, the Learned Single Judge hearing the Suit clarified that its earlier order conveyed the *prima facie* impression that a concluded contract with Jaycee was in existence. The Court directed that the Subject Land must be preserved. Eventually, on April 29, 2013, the Court passed a firm interim order restraining the Jollys from any alienation of the Subject Land and from disturbing the *status quo* directed on July 27, 2007. By this time, the Learned Arbitral

Tribunal had been formed and deadlines to complete pleadings had been fixed.

11. The Company was the claimant in the proceedings and sought a declaration that the MOU is subsisting and that the Termination Notice was illegal. The Company sought a direction to the Jollys to get the Suit dismissed, the *status quo* order vacated, and to hand over the Subject Land. In the alternate, damages quantified at Rs. 86.77 crores with interest at 18% and refund of the escrow amount with interest at 18% per annum was sought.

12. The Impugned Award came to be passed, rejecting the claim for specific performance and damages. This Petition was filed with an application for condonation of delay. A Learned Single Judge held the condonation request to be unnecessary by an order dated April 29, 2016, which was challenged in the Supreme Court. By an order dated August 24, 2023, the Supreme Court upheld the condonation of delay and expedited the hearing of the Petition.

Contentions of the Parties:

13. The Impugned Award essentially holds that the MOU was a contingent contract. The Learned Arbitral Tribunal found that the

Company had a right to terminate the MOU but even if it did not terminate the MOU, the Escrow Agent would return the amounts deposited if the transaction did not get completed by June 30, 2007. The Learned Arbitral Tribunal found that the Company did not offer to deposit the balance sum of Rs. 3.10 crores, and therefore neither party had been in a demonstrable position being able to perform the MOU. The injunction by this Court in the Suit was held to have rendered the final surrender against payment of balance consideration incapable of performance.

14. I have heard Mr. Zal Andhyarujina, Learned Senior Advocate on behalf of the Company; Mr. Nitin Thakker, Learned Senior Advocate on behalf of the Jollys and Mr. Ranit Basu for Respondent No. 1(b), who substantially adopted and made submissions aligned with those by Mr. Thakker. With their assistance, I have reviewed the Impugned Award and the material forming part of the record.

15. Mr. Andhyarujina would attack the Impugned Award as being perverse, contrary to the MOU and having applied the law in such a grossly incorrect and perverse manner that it ought to shock the conscience of this Court. He would submit that the only contingency in Clause 2.2 of the MOU was the right of the Company to terminate the

MOU, but by no stretch could this option to terminate, make the MOU itself a contingent contract. The right to terminate was not an obligation, and the Learned Arbitral Tribunal has turned the optionality and right on its head and found fault with the Company for not having terminated the MOU. He would submit that Section 31 of the Indian Contract Act, 1872, ("***Contract Act***") relied upon by the Learned Arbitral Tribunal has no application to the facts of this case.

16. Mr. Andhyarujina would also submit that the contract has been wrongly interpreted, and that too by such a degree that it would render the Impugned Award perverse and patently illegal. He would also submit that the Learned Arbitral Tribunal was wrong in treating the interim injunction as coming in the way of performance of the MOU by such degree that it was incapable of performance. The upshot of the submission is that the parties ought to have waited for the outcome in the Suit and it is only if there were a permanent injunction that it could be held that the MOU was incapable of performance.

17. It is also contended on the Company's behalf that there are inherent contradictions in the Impugned Award – in between Paragraph 18 and 21 in relation to time being of the essence of the contract. The Jollys had extended the MOU from time to time and therefore it cannot

be held that the deadline of June 30, 2007 was sacrosanct. Contradictions are also alleged in relation to the treatment of earnest money referred to in the MOU. Even if Rs. 80 lakhs were to be deposited in escrow, the MOU squarely referred to it as "earnest money" and therefore, the Learned Arbitral Tribunal is accused of having muddled its approach to treatment of this amount. Mr. Andhyarujina would contend that apart from the finding that the MOU was validly terminated being wrong the Learned Arbitral Tribunal was also wrong in contending that the Company did not allege breach by the Jollys, which is contrary to the Company's pleaded case and evidence.

18. Mr. Nitin Thakker, on behalf of the Jollys would submit that the Impugned Award rightly notices that the parties entered into the MOU with eyes open about the role of Jaycee and the advance that had been received by the Pune Group. As part of the family separation, the Jollys had taken over the corresponding obligations connected with the advance received from Jaycee and the parties consciously recorded how they would deal with the situation with Jaycee. Mr. Thakker would submit that the provisions of Clause 2.2 have been correctly interpreted and indeed there is no contradiction at all between Paragraphs 18 and 21. The parties had agreed to a timeline of June 30, 2007 and indeed they extended performance from time to time during the pendency of

the *status quo* order, but when it became clear five more years later that the position was not changing at all, the Jollys were entitled to call off the MOU.

19. Mr. Thakker would submit that it is not the Company's case that it is willing to accept a Deed of Surrender from the Jollys on an as-is-where-is basis and paying the balance sum of Rs. 3.10 crores against such surrender, taking on the responsibility of dealing with Jaycee. On the contrary, the Company has prayed that the Jollys should defend the Suit, have it dismissed, and only then would the Company pay the balance sum. This, he would submit, is an acknowledgement by the Company that the MOU was incapable of being performed. Therefore, the Learned Arbitral Tribunal was right, he would submit, in holding that a party with a right to terminate a contract in a given eventuality, is choosing neither to terminate nor perform and keeping the MOU that has become incapable of performance in a limbo.

Analysis and Findings:

20. At the threshold, it should be noted that what lies at the core of the controversy is the interpretation of Clause 2.2 of the MOU. How this provision should be interpreted and whether the Learned Arbitral Tribunal has interpreted it in a manner so perverse that it strikes at the

root of the matter, rendering the Impugned Award manifestly arbitrary is the examination to be conducted. The Section 34 Court must be mindful of the scope of review in its jurisdiction. Weighing of the evidence and interpretation of the contract lies in the domain of the Arbitral Tribunal and the Section 34 Court must not lightly interfere and substitute one plausible view taken by the Learned Arbitral Tribunal with another potentially plausible view that is canvassed before it. The jurisdiction is not an appellate jurisdiction but one that is bounded by the provisions of Section 34, which has now been interpreted in innumerable judgements.

Clause 2.2 of the MOU:

21. Without prolix invocation from judgements on how Section 34 is to operate, it would be appropriate to first extract Clause 2.2(a) in its entirety, in order to consider the submission of the Company that the Impugned Award has returned findings outside the scope of the contract and in a manner so perverse that it ought to shock the conscience of this Court. The Arbitral Tribunal has wide leeway in interpretation of contract but to consider the contention, the Section 34 Court would need to examine what the bare contractual provisions entail. Therefore, it is vital to set out what Clause 2.2(a) entails.

22. Before doing so, it must be mentioned that Clause 1.1 of the MOU entailed an agreement by the Jollys to surrender the Subject Land to the Company. Clause 2.2(b) entails execution of a Deed of Surrender by the Jollys, as a completion action to perfect the Company's title to the Subject Land, along with an indemnity and a declaration in favour of the Company, alongside handing over "*vacant and peaceful possession*" of the Subject Land. Subject to the aforesaid actions being effected by June 30, 2007, the balance sum of Rs. 3.10 crores was to be paid by the Company to the Jollys as under:

> *Clause 2.2*
>
> *2.2 The said aggregate amount of Rs.3,90,00,000/(Rupees Three Crores Ninety Lakhs Only) shall be paid by the Company to SN Jolly Group jointly as under:*
>
> *a) Rs.80,00,000/- (Rupees Eighty Lacs Only) as earnest money and deposit to be kept in escrow with M/s. Kanga & Company, Advocates & Solicitors (Escrow Agents) which amount shall be deposited by the Escrow Agents in fixed deposit for a period up to 30th June, 2007 (the said sum of Rs.80,00,000/- together with interest is hereinafter called "Escrow Account") on the following terms and conditions:*
>
> > *(i) If Jaycee Home and Hotels Limited file any legal proceedings in a Court of Law against S. N. Jolly Group and/or the Company and if they get an injunction restraining S. N. Jolly Group from surrendering the said 4.1 Acres of the said*

> ***property to the Company, by 30th June, 2007****, the* ***Company shall be at its option entitled to terminate this agreement within a period of 30 days from the date of injunction order is served upon them*** *and* ***in that event, the Escrow Agents shall refund the Escrow Amount*** *to the Company* ***and this Memorandum of Understanding shall stand cancelled*** *SUBJECT HOWEVER,* ***if the Company fails to intimate its non acceptance of Surrender under the Memorandum of Understanding within the stipulated period of 30 days from the date of service of copy of injunction order****, on the Company,* ***then the Escrow Agents shall hand over Escrow Amount to the Company*** *without any intimation to S. N. Jolly Group* ***and this Memorandum of Understanding shall stand cancelled****.*
>
> *(ii)* ***If Jaycee Homes and Hotels Limited do not file a suit and do not get an injunction till 30th June, 2007, then the Escrow Agents shall be entitled to pay the Escrow Amount to the S. N. Jolly Group*** *at the time of completion as hereinafter mentioned.*
>
> ***[Emphasis Supplied]***

23. A plain reading of the foregoing would indicate that at the time of executing the MOU, the parties had contemplated June 30, 2007 as the completion deadline. If by this date, Jaycee did not move Court and obtain an injunction, the transaction would be completed with the amounts lying in escrow being released to the Jollys. If Jaycee were to initiate litigation and it were to obtain an injunction, the Company would have a right to walk away from the transaction, by issuing such a

notice of termination within 30 days of the injunction being served on the Company. If the Company were to not intimate such termination i.e. if it were to not positively communicate the non-acceptance (*the clause phrases it in the double-negative*) of the surrender made *under* the MOU within the said 30-day period, the escrow amount would be released *to the Company* and not to the Jollys.

24. The upshot of this provision, negotiated and crafted by men of commerce, is clear even from a plain reading of the provision. By June 30, 2007, the parties intended to complete the transaction in terms of the MOU. In the absence of any interference by any Court at Jaypee's instance, the parties would complete the surrender – this would entail execution of the Deed of Surrender and release of the escrow amount and the payment of the residual amount of Rs. 3.1 crores. If there were an injunction with or without a termination from the Company, the transaction would be called off. In other words, while the Company is said to have had an option to terminate the MOU positively, the same provision was also subject to the requirement that the escrow amount would be returned back to the Company if the Company failed to positively exercise such option.

25. The use of the double negative phrase "*if the Company fails to intimate its non acceptance of Surrender under the Memorandum of Understanding*" would indicate that option to terminate was indeed with the Company but if the Company chose not to so positively opt to terminate, in view of the injunction, the Jollys could not force the Company to complete the transaction. Therefore, without any notice to the Jollys, the Escrow Agent was obliged "*to hand over*" the escrow amount to the Company and the MOU would "*stand cancelled*".

Clause 4 of the MOU:

26. It is also noteworthy that Clause 4 of the MOU, which deals with completion provides for the Company having a right to extend time for performance of the actions set out in Clause 2.2(b) i.e. the execution of the Deed of Surrender, the indemnity and declaration in favour of the Company. Clause 4.1(a); Clause 4.1(c) and Clause 4.1(d) of the MOU, are a corollary to Clause 2.2(a)(i) and Clause 2.2(a)(ii) and read thus:

> *4. Completion*
>
> *4.1 The transaction contemplated hereunder shall be completed in the following manner:*
>
> *(a) On or before 30th June, 2007 the Company shall pay to S.N. Jolly Group the balance sum of Rs.3,10,00,000/. (Rupees Three Crores*

Ten Lacs Only) as specified hereinabove, ***and the Escrow Agents shall pay the Escrow Amount to S.N. Jolly Group upon S.N. Jolly Group complying with all its obligations specified in clause 2.2 (b) above****;*

(c) ***In the event S.N. Jolly fails to comply with any of the conditions specified in clause 2.2(b) above on or before 30th June 2007****, the* ***Company shall*** *at* ***its sole discretion, extend the time for such compliance****.* ***If S.N. Jolly Group fails to comply with any of its obligations within the stipulated time or such extended time, the Company shall be entitled to terminate this MOU and in such event, the Company shall be entitled to refund of Escrow Amount****. In the alternative,* ***the Company shall at its option, be entitled to seek specific performance of this Agreement. In the event of the Company opting to file proceedings for specific performance of the contract the Escrow Agents shall continue to hold the Escrow Amount*** *and comply with the orders of the Court with respect of Escrow Amount.*

(d) ***In the event the Company fails to make payment of the balance amount, despite S.N. Jolly Group fulfilling all its obligations specified in clause 2.2(b) above, on or before 30th June 2007*** ***or such extended time****, then* ***S.N. Jolly Group shall be entitled to terminate the contract and forfeit earnest money and shall be entitled to receive Escrow Amount*** *and the Escrow Agents shall be entitled to pay the same to S.N. Jolly Group without any reference to the Company OR* ***in the event of S.N. Jolly Group seeking specific performance of the contract. The Escrow Agents shall hold Escrow Amount*** *subject to the orders of the Court.*

[Emphasis Supplied]

27. It is obvious that if there were no impediment to the completion, and either party defaulted, there could be enforcement by the non-defaulting party. Each party also had a right to terminate the MOU in such event. It would appear that extension of time was contemplated as the Company's discretion, but this is where there is otherwise no impediment to completion. Likewise, the money kept in escrow although meant to be earnest money, was to be kept in escrow subject to outcome in proceedings.

Arbitral Tribunal's Conclusion:

28. The aforesaid analysis of Clause 2.2 of the MOU, and the resultant outcome, is what has been reached by the Learned Arbitral Tribunal even if in somewhat different language. The parties indeed mutually agreed to keep extending the timeline beyond June 30, 2007, but the aforesaid framework was not disturbed. The extension only meant that the drop-dead deadline of June 30, 2007 was postponed from time to time and eventually in 2012, the Jollys called off further efforts to wait for the dispute with Jaycee to be resolved. Since the parties extended the deadline by mutual consent, the Learned Arbitral Tribunal had to examine evidence to see what the parties intended by the conduct. The Learned Arbitral Tribunal framed 15 points for

determination and the parties led evidence. The outcome in the Impugned Award, of course, also after examining evidence and hearing the parties, is aligned with what to my mind is discernible, even from a plain reading of Clause 2.2(a) of the MOU.

29. Therefore, it is in this context that the Learned Arbitral Tribunal's analysis of Clause 2.2(a), and the assault on the Impugned Award on behalf of the Company, has to be tested.

30. The Learned Arbitral Tribunal chose to first articulate its reasoning on applicable law in Paragraph 12 of the Impugned Award and explained the provisions of Section 31, 32,39, 55 and 63 of the Contract Act. While any articulation of a pure point of law where arguable elements are involved, can be made points of contention, one must examine how the Learned Arbitral Tribunal has applied the law and appreciated the facts.

31. The Learned Arbitral Tribunal went on to hold in Paragraph 15 as follows:

> *15. Why should there be a specific provision in the contract in respect of option to continue the contract? As stated, when the option holder opts not to terminate the contract, he has to perform and demand performance from the Other Party. If by reason of obstacle or fetter performance is not possible, then the contract must expressly*

*provide for continuance of the contract notwithstanding the fetter as, in the absence of such an express provision, the contract becomes inoperative on the happening of the Event [injunction in this case]. According to Mulla & Pollock, 14 th edition at page 781, "**unreasonable postponement will entitle the vendor to terminate the contract for sale of land**". A contractual option not to terminate implies performance option.*

[Emphasis Supplied]

32. I do not find anything wrong in this analysis. Indeed, as will be seen later in this judgement, not only did the MOU not provide for the MOU having to be persisted with despite that being impossible without violating Court orders, the Company's own position is that its obligation to perform its part of the MOU would not arise until the Suit was finally decreed in favour of the parties.

33. Thereafter, under the head "Consideration of Merits", the Learned Arbitral Tribunal has, among others, stated the following in Paragraph 18 of the Impugned Award:

*"18. ... . Clause 2.2(a)(i) has two parts. The first part makes it clear that the MOU shall stand cancelled if Jaycee obtains an injunction from the competent Court by 30th June 2007 restraining the Respondents from surrendering 4.1 acres. It is important to note that Rs. 80 lacs was not paid by the Claimant Company to the Respondents as advance or as earnest money. **This circumstance shows that time was of the essence of the contract**. Further that was the reason why*

there is no provision for liquidated damages in the MoU which shows that time was the essence. The first part of Clause 2.2(a)(i) is the matrix provision in the MoU. The second part of Clause 2.2(a)(i) which begins with expression, Subject However, refers to the direction to the Escrow Agent. It says that if the Claimant Company did not intimate its intention to terminate the MoU, even then the Escrow Agent suo moto would return the escrow amount of Rs.80 lacs, within 30 days of the service of the Order of injunction (see: Para 2(a) of the Written Submissions filed on behalf of the Claimant). In this second part, there is no direction to the Escrow Agent as to what should the said Agent do if the Claimant opts not to terminate the MoU and upto what date they should hold on to the sum of Rs.80 lacs. In fact, no such contingency is provided for in the entire MoU. Clause 2.2(a)(ii) provides for a converse situation, viz. that if Jaycee do not file a suit and obtain injunction by 30th June 2007, then the Escrow Agent shall be entitled to pay the escrow amount to the Respondents in pursuance of Clause 4.1(d) and to the Claimant Company in pursuance of Clause 4.1(c)."

[Emphasis Supplied]

34. Even a plain reading of the analysis of the Learned Arbitral Tribunal would indicate that its reasoning in relation to interpretation of Clause 2.2(a)(i) is a fair and reasonable one. As explained above, that Jaycee had the potential to pose a hurdle was a facet known to the parties when they executed the MOU. The parties provided for consequences of Jaycee's anticipated efforts. The parties provided for leeway of 30 days after June 30, 2007 to deal with any such eventuality.

As a matter of fact, the parties gave each other time until 2012 and when the MOU was stuck with no progress, the Jollys terminated the MOU.

35. The Company's contention is that even if the MOU could not be performed, it was entitled to tie down the Jollys to an MOU that could not be implemented until the final outcome in the Suit. It is also the Company's contention that until a final favourable outcome in the Suit was reached, the MOU ought to be kept alive and subsisting and the parties' reference to "injunction" is to be read as a final permanent injunction and could never bring within its scope an interim injunction. I am unable to accept this extreme proposition. The parties have consciously not chosen to qualify the term "injunction" in Clause 2.2 with the words "permanent" or "temporary". What is to be seen is whether there was an injunction before completion under the MOU. The deadline was June 30, 2007. The status quo restraint came up on April 26, 2007. It was extended from time to time. Eventually, a firm interim order too came about in 2012. The Learned Arbitral Tribunal's reading of the contingency of an injunction having come about cannot be faulted.

36. Mr. Andhyarujina would point to specific sentences in the Impugned Award by which the Learned Arbitral Tribunal's views are

sought to be assailed as being informed by a wrong position in law. He would point to the reference in Paragraph 19 of the Impugned Award, to the "option" having made the MOU a "contingent contract". Even if one were to treat this as an error, it does not subvert or undermine the wider firm view of the Learned Arbitral Tribunal and the approach adopted by the Learned Arbitral Tribunal, of examining how Clause 2.2(a) of the MOU would operate in the light of the status quo order of April 2007. In particular, Paragraph 20 of the Impugned Award is noteworthy, and is extracted below:

> *20. Now coming to the concept of Option u/s.39 of the Indian Contract Act, as stated above, one needs to understand that option is a sub-sect of waiver. The option holder is entitled to waive the wrongful repudiation. The Option Holder is free to accept wrongful repudiation and terminate the contract or opt to continue it notwithstanding such wrongful repudiation and claim damages [i.e. affirm the contract]. But, as stated, there is no third choice, viz. to affirm the contract and be absolved of tendering further performance. However, in this case, the word "option" is a misnomer. Neither party was in a position to tender performance once an Order of Interim Relief was passed. The Claimant was neither in a position to pay/deposit the balance amount and nor were the Respondents in a position to surrender. In fact, the said Order dated 27th July 2007 was an obstacle to the performance. Hence this is not a case of contractual excuse for non- performance by the Respondents. The Claimant never intended to pay the consideration of Rs.3.90 crores and take the subject land subject to all risks. There is no express provision in the MoU providing for consequences and effect of the Order of Interim Relief dated 27h July 2007 (when earlier ad-interim Order of status quo was continued with an*

observation that there was prima facie concluded contract with Jaycee). With such an Order, parties could not have undertaken further performance. Therefore, in our view, Clause 2.2(a)(i) contemplated a right to terminate the MoU on grant of Injunction and that too by 30th June 2007. Before concluding on the question of Option, one more point needs to be stated. There is nothing in Clause 2.2(a)(i) of the MoU which states that the word "Injunction" would mean permanent injunction as alleged in the Statement of Claim. In our view, the legal effect of the Order(s) of Status Quo was restraining the Respondents from surrendering 4.1 acres, which in effect amounted to Injunction. Lastly, option not to terminate does not imply unilateral right to extend the contract, in the absence of an express provision in the MoU. The need for express provision arises because both the parties were obstructed from further performing the MoU by the said Orders of the High Court. The very fact that no such express provision was made in the MoU stating as to what would happen if Injunction is granted, shows that Clause 2.2(a)(i) gave only a right to terminate the MoU to the Claimant as right not to terminate will not arise in the teeth of the Order of Injunction, which puts a fetter on the performance by both the parties. Thus, what was foreseen was that in the event of Injunction, the MoU would stand cancelled.

37. For purposes of assessing if this reading by the Learned Arbitral Tribunal of the MOU is out of sync with the provisions that no reasonable person would take such a view and to see if the Learned Arbitral Tribunal's view would shock this Court's conscience, I have set out my own view on Clause 2.2(a) of the MOU. My reading of the provision is quite aligned with the substance of what the Learned Arbitral Tribunal has stated. Put differently, the Learned Arbitral Tribunal's interpretation of contract is an eminently plausible and

logical reading of the MOU. I see no scope for interference by returning a finding that the interpretation of the MOU by the Learned Arbitral Tribunal is patently illegal or perverse.

Time Being of the Essence:

38. While much was said on behalf of the Company about the analysis of the Learned Arbitral Tribunal in relation to whether time was of the essence of the MOU, to my mind this is not really relevant for the validity of the Impugned Award. I have carefully compared Paragraph 18 and Paragraph 21 of the Impugned Award, which Mr. Andhyarujina would contend shows inherent contradictions. Mr. Thakker would contend that there is no inherent contradiction and on the contrary the reasoning in the two paragraphs is quite aligned. Having examined the two paragraphs from the perspective of time being of the essence, indeed, in Paragraph 18, there are two iterations of time being of the essence. This is reiterated in Paragraph 21. Indeed, the parties extended the time for performance all the way until 2012 and thereafter the Jollys called off the MOU.

39. To my mind, the analysis on time being of the essence is not really determinative of the outcome. What is apparent is that the parties indeed extended the drop-dead date of June 30, 2007 but did

not alter the other terms of the MOU. In that sense, Mr. Andhyarujina may be right in stating that the Learned Arbitral Tribunal was in error in declaring that time was of the essence. However, this does not turn the needle in the Company's favour simply because even if time were not of the essence, the parties only postponed the cancellation of MOU for over five years. I have also considered whether such error would undermine the reasoning and rationale in the Impugned Award, and I find that nothing would turn on this facet. Arguably, the parties postponed the event of calling of the MOU and after a reasonable period, the Jollys called it off.

40. In fact, in Paragraph 18, the Learned Arbitral Tribunal has rightly noticed that the MOU does not contain any outer date until which the Escrow Agent ought to wait. When asked what according to him would be the life of the MOU in the context of the submissions made, Mr. Andhyarujina would submit that it could not be forever and evidence ought to be examined to ascertain a reasonable period for which the parties must wait. However, from the record, the Company has sought to get over this anomaly by contending that it is only a permanent final injunction that would be relevant for Clause 2.2(a)(i) to lead to cancellation of the MOU. I have already explained why this is untenable and the Learned Arbitral Tribunal's identical view on this is

well-reasoned and calls for no interference. The Learned Arbitral Tribunal has also quite reasonably found that the parties appear to have had hope of a quick resolution when the issue of limitation was framed but the expectation of an early resolution was not met. The following extract is a reasonable interpretation of the evidence:

> *"However, on 19.10.2011* ***when the High Court adjourned the matter sine die, it became clear that the Injunction would continue and that all attempt had failed, However, the Order dated 19.10.2011 had framed the preliminary issue and the Respondents had hoped that the matter would be therefore heard expeditiously****. Ultimately,* ***after waiting for 10 months, on 6.07.2012 the Respondents terminated the MoU****. In the facts of the case, the Respondents were justified in terminating the MoU."*
>
> ***[Emphasis Supplied]***

Real Contingency is the Injunction:

41. I also find that any confusion about whether the Learned Arbitral Tribunal had intended to refer to the Company's right i.e. option to terminate the MOU under Clause 2.2(a)(i) as the contingency that would make the MOU a contingent contract is fully clarified by the Learned Arbitral Tribunal's views expressed in Paragraph 23, which makes the thinking and application of mind by the Learned Arbitral

Tribunal abundantly clear – the following words are pointed and specific:

> *"We have held that the **MOU was subject to condition subsequent**, **i.e. in the Event of Injunction before 30.06.2007** the **MoU would terminate**."*
>
> ***[Emphasis Supplied]***

No Default – Sheer Incapacitation:

42. Finally, the Learned Arbitral Tribunal has rightly noticed that there is no default on the part of the Jollys that caused the non-performance of the MOU – it was the Court's intervention, which was an anticipated possibility that led to the MOU being incapable of being performed. Therefore, the Learned Arbitral Tribunal has returned a reasonable finding that no case can be made out for damages. The Learned Arbitral Tribunal has also not held that the Company was in default. On the contrary, the Learned Arbitral Tribunal has held that the *parties* were "*incapacitated due to the Orders of the High Court*".

43. The Learned Arbitral Tribunal has also rightly noticed that having waited five years, the parties cannot be expected to wait for even longer with the MOU locking in value at 2007 levels for specific performance to be reasonable. This observation was made in the

context of Company having sought an award of specific performance, the execution of which could await the outcome in the Suit. In that context, the Learned Arbitral Tribunal held that it could not rewrite the MOU and keep the Jollys tied in at a price discovered by the parties in 2007.

44. It is also in this context that the Learned Arbitral Tribunal rightly held that in the absence of any default (and I must say, by either party), the finding of the Learned Arbitral Tribunal that no case for damages was made out, too is an impeccable finding.

45. Indeed, it was not the Company's case that it was willing to live with the risk of the injunction and deal with Jaycee on its own taking the Subject Land on an as-is-where-is basis. It is the Company's case that the injunction was indeed an impediment but that it was incumbent on the Jollys to keep trying to remove that impediment and only if they finally failed i.e. the Suit were to be decreed against them, that there would be an impediment. If that were so, it would follow that the Company ought to have paid the balance Rs. 3.1 crores too, but on that issue, it is the Company's case that no further amount was payable unless free and vacant possession was handed over in terms of Clause 2.2(b) of the MOU. That, to my mind, was an acknowledgement that the

Company's own showing was that it was not possible to hand over free and vacant possession and therefore, the implications of Clause 2.2(a)(i) have been rightly interpreted by the Learned Arbitral Tribunal.

46. In this context, there is no infirmity in the Learned Arbitral Tribunal's observations about the earnest money either. Indeed, the MOU refers to the sum of Rs. 80 lakhs as earnest money, but that was money to be kept in escrow and returned to the Company when the MOU would stand cancelled. In any case, it is nobody's case that the earnest money was sought to be forfeited.

Conflicting Position on Possession:

47. As regards the possession, the Company took a stand in its evidence that the Subject Land was already in its possession, in which event, the Company ought to have paid over the balance consideration. The Learned Arbitral Tribunal has commented on this dichotomy too in the following words in Paragraph 22 of the Impugned Award:

> *"Before concluding, it needs to be mentioned that in the evidence of CW1,* ***it was claimed that the possession of the suit land was with the Claimants.*** *However,* ***when the Power of Attorney was produced, it was conceded that the possession was with the Respondents.***"
>
> ***[Emphasis Supplied]***

48. The relevant inconsistency is therefore found in the contentions of the Company rather than in the Impugned Award. The Learned Arbitral Tribunal has rightly stated, in this context that it was not the Company's case that it had placed the balance consideration on the table. In fact, the Learned Arbitral Tribunal has righty held that the parties were frozen in their tracks by the Court's order of *status quo*, and that triggered the anticipated contingency contained in Clause 2.2(a)(i) and after waiting for a reasonably long period, the Jollys' issuance of the Termination Notice was fully legitimate, logical and rational.

Supreme Court in Satyabrata:

49. Finally, I must refer to Mr. Andhyarujina pointing to the reliance by the Learned Arbitral Tribunal on the Supreme Court's decision in ***Satyabrata***[1], being wholly misplaced. The Learned Arbitral Tribunal has simply stated that none of the case law cited were relevant and therefore the case was being decided on first principles. I have extracted Paragraph 18 of ***Satyabrata***, which reads thus:

> *"18. It must be pointed out there that* ***if the parties do contemplate the possibility of an intervening circumstance which might affect the***

1 *Satyabrata Ghose v. Mugneeram Bangur And Company And Another – (1953) 3 SCC 437*

> ***performance of the contract, but expressly stipulate that the contract would stand despite such circumstance, there can be no case of frustration because the basis of the contract being to demand performance despite the happening of a particular event, it cannot disappear when that event happens****. As Lord Atkinson said in Mattey V. Curling :*
>
> *"... a person who expressly contracts absolutely to do a thing not naturally impossible is not excused for non-performance because of being prevented by the act of God or the King's enemies... or vis major."*
>
> *This being the legal position, a contention in the extreme form that the doctrine of frustration as recognised in English law does not come at all within the purview of Section 56 of the Contract Act cannot be accepted."*
>
> ***[Emphasis Supplied]***

50. The submission that ***Satyabrata*** is a decision on frustration of contract and has no relevance to contingent contracts does not lend itself to reasonable acceptance. Indeed, the Learned Arbitral Tribunal has found that the MOU stood frustrated and the parties having waited for five years to see if it could still be performed, cannot change the position that it was incapable of performance. This is precisely a relevant element that rightly finds mention in the Learned Arbitral Tribunal's analysis. The Learned Arbitral Tribunal has found that the parties did not expressly stipulate that the MOU would be persisted with even if the contingency of the injunction at Jaycee's instance were to come about.

51. On the contrary, Clause 2.2(a)(i) expressly provided that the Escrow Agent would be entitled to return the monies lying in escrow to the Company and the MOU would stand cancelled, even if the Company were not to exercise its right to terminate the MOU within 30 days of receipt of notice of the injunction. The Company and the Jollys were defendants in the Suit. They had notice of the *status quo* order. That impediment was the basis for the Jollys being unable to hand over free and vacant possession, and that is the basis for the Company not being able to pay the residual amount of consideration.

52. ***Satyabrata*** deals with a situation where the contract expressly provides for persistence with the obligations despite Court orders. Therefore, the Learned Arbitral Tribunal is right in its view that the judgement has no relevance to this case. Paragraph 20 of the Impugned Award contains the following:

> *Lastly, option not to terminate does not imply unilateral right to extend the contract in the absence of an express provision in the MoU. The need for express provision arises because both the parties were obstructed from further performing the MoU by the said Orders of the High Court. The very fact that no such express provision was made in the MoU stating as to what would happen if Injunction is granted, shows that Clause 2.2(a)(i) gave only a right to terminate the MoU to the Claimant as right not to terminate will not arise in the teeth of the Order of Injunction, which puts a fetter*

on the performance both the parties Thus, what was foreseen was that in the event of Injunction, the MoU would stand cancelled.

[Emphasis Supplied]

Interpretation of Contract – Section 34:

53. In ***Dyna Technologies***[2], on the subject of interpretation of contract by an Arbitral Tribunal, the Supreme Court held thus:

> *25. Moreover,* ***umpteen number of judgments of this Court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists.*** *The courts need to be cautious and should* ***defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act****.*
>
> ***[Emphasis Supplied]***

54. To avoid prolixity, I am not reproducing the same principle enunciated in multiple judgements. Suffice it to say, this principle is articulated and adopted in ***UHL Power***[3], quoting from ***Parsa Kente Collieries***[4], ***McDermott International***[5], ***Rashtriya Ispat***

2 *Dyna Technologies Private Limited v. Crompton Greaves Ltd – (2019) 20 SCC 1*

3 *UHL Power Company Ltd. v. State of Himachal Pradesh – (2022 4 SCC 116)*

4 *Parsa Kente Collieries Limited v. Rajasthan Rajya Vidyut Utpadan Nigam Limited – (2019) 7 SCC 236*

5 *McDermott International Inc. v. Burn Standard Co. Ltd. and Ors. – (2006) 11 SCC*

Nigam[6] to hold that if a term of the contract has been construed in a reasonable manner, then the award ought not to be set aside. For the reasons set out above, in my view the analysis by the Learned Arbitral Tribunal is a reasonable and logical interpretation of the MOU and there is no basis for me to accept the competing alternate interpretation canvassed on behalf of the Company and substitute an eminently logical view taken by the Learned Arbitral Tribunal.

Conclusion and Costs:

55. Therefore, in my view, no case is at all made out to interfere with the impeccable Impugned Award. The comments on time being of the essence do not undermine the reasonable, logical and plausible analysis and outcome in the Impugned Award. There is no basis to hold that the reference to "injunction" in Clause 2.2(a) is to be somehow qualified as a reference only to a permanent injunction. The parties truly did not expressly provide for persisting with the MOU despite the injunction.

56. The analysis by the Learned Arbitral Tribunal that even if the Company were to not terminate the MOU upon the injunction coming about, the Escrow Agent would have had to return the amounts lying in

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6 *Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran – (2012) 5 SCC 306*

escrow, is an accurate reading and far from being a finding that is patently illegal, perverse or a shock to the conscience of this Court. Having waited for long and even gaining hope from the issue of limitation in Jaycee's pursuit of remedies in the Suit being framed as a preliminary issue, upon finding that there has been no progress, the Learned Arbitral Tribunal's finding that the Termination Notice was a logical outcome, cannot be faulted. Even while the arbitration proceedings were pending, the *status quo* order passed on an *ad interim* basis was firmly converted into an interim injunction. No fault can be found with the well-reasoned Impugned Award.

57. While these proceedings are not classified as one dealing with a "commercial dispute", in my opinion, costs ought to follow the event, considering the quality of the Impugned Award, the evident facts writ large on the face of the record, the stance adopted by the Company. However, considering how submissions have been kept structured, precise and within reasonable time limits, I am persuaded not to impose costs for this round of litigation.

58. The Petition is ***dismissed*** and no interference is made to the Impugned Award. Considering that the Impugned Award is one

granting no relief, there is no case for deferring the effect of this judgement.

59. 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.]