IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 08.11.2021

\+ **O.M.P. (I) (COMM.) 209/2021 and IA No. 7790/2021**

DLF HOME DEVELOPERS LIMITED ..... Petitioner

versus

SHIPRA ESTATE LIMITED & ORS. ..... Respondent

Advocates who appeared in this case:

For the Petitioner. : Mr Pinaki Misra, Senior Advocate with Mr Rajshekhar Rao, Senior Advocate with Mr Jatin Mongia, Ms Meghna Mishra, Mr Ankit Rajgarhia, Mr Arjit Benjamin and Ms Aishwarya, Advocates.

For the Respondent : Mr. Dayan Krishnan, Sr Adv, Mr. Ankur Chawla, Adv, Ms. Gauri Rishi, Adv, Ms. Srishti Juneja, Adv, Mr. Sanampreet Singh, Adv, For the Respondent No. 1.

Mr Lav Kumar Agrawal, Advocate for (Nominated Counsel) for R-5-Yamuna Expressway Industrial Development Authority.

Mr. Rajiv Nayar, Sr. Advocate Mr. Sandeep Sethi, Sr. Advocate Mr. Rishi Agrawal, Advocate Mr. Manish K. Jha, Advocate Mr. Karan Luthra, Advocate Mr. Ankit Banati, Advocate Ms.

Vishrutyi Sahni, Advocate Appearance on behalf of R4 - Indiabulls Housing Finance Limited

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

Introduction

1. The petitioner (hereinafter **'DLF'**) has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter the 'A&C Act') *inter alia*, praying that the respondents be restrained from selling, transferring, alienating or otherwise creating any third-party rights or interest, directly or indirectly, in the land admeasuring 73 acres [2,95,421 square meters] situated in Sector 128, Noida, District Gautambudh Nagar, Uttar Pradesh ('**the Sale Property'**), which is the subject matter of the Agreement to Sell dated 30.05.2021 (hereinafter '**the ATS**').

2. Respondents nos. 1 to 4 had entered into the ATS for selling the Sale Property to DLF. The Sale Property is owned by respondent no. 2 (hereinafter '**Kadam**') but is mortgaged to respondent no. 4 (hereinafter '**Indiabulls**') to secure financial loans extended by Indiabulls to respondent no.1 (Shipra Estates Limited), Shipra Hotels Ltd. and Shipra Leasing Private Limited. Indiabulls has since terminated the ATS in favour of DLF and has withdrawn its letter of no objection (NOC) on the ground that it has not received the agreed amount of ₹900 Crores within

the period stipulated therein. DLF claims that it is and was always ready and willing to perform its obligations under the ATS. DLF further claims that Indiabulls and Kadam have failed to perform their obligations and Indiabulls cannot terminate the ATS or withdraw its NOC. Essentially, DLF seeks specific performance of the ATS. And, it seeks an order restraining the respondents from selling transferring or alienating the Sale Property as an interim measure of protection for preserving its rights and remedies.

3. The present petition was initially heard along with three other petitions filed under Section 9 of the A&C Act [OMP(I) (Comm) 213/2021; OMP(I)(Comm) 222/2021; and OMP(I)(COMM) 225/2021] but seeking different reliefs. The counsels relied on documents filed in those proceedings in the course of their submissions and the same have been considered while outlining the factual context.

Factual background

4. Kadam is a wholly owned subsidiary of respondent no. 1, Shipra Estates Limited (hereinafter '**SEL**'). SEL owns approximately 98% of the issued and paid-up equity shares of Kadam. Respondent no. 3 (Mohit Singh) and Bindu Singh are individuals and hold 1% each of Kadam's issued equity shares as nominees of SEL. Kadam is also a part of Shipra group of companies.

5. On 31.03.2008, Kadam entered into a sub-lease agreement along with Jaypee Infratech Limited and Jaiprakash Associates Limited in respect of the Sale Property. In terms of the said sub-lease agreement,

Kadam enjoyed absolute and unrestricted right, title and interest in respect of the Sale Property.

6. SEL, Shipra Hotels Limited and Shipra Leasing Private Limited (hereinafter collectively referred to as '**the Borrowers**') sought financial assistance from Indiabulls and it sanctioned fourteen separate loans aggregating ₹2,478 crores in favour of the Borrowers. Eight loans were sanctioned in favour of SEL; four loans were sanctioned in favour of Shipra Hotels Limited; and two loans were sanctioned in favour of Shipra Leasing Private Limited. It is stated on behalf of SEL that against the aforesaid sanctioned loans, Indiabulls disbursed an aggregate amount of ₹1,686.15 crores to the Borrowers. SEL also claims that the Borrowers have paid a sum of ₹759 crores for repayment and servicing the aforesaid loans. In terms of the subject Loan Agreements, it was agreed that various securities would be created in favour of Indiabulls including by mortgage of immovable properties, pledge of shares, hypothecation of certain assets and personal guarantees by the promoters.

7. In terms of the Loan Agreements, the Borrowers executed twenty-two separate Pledge Agreements in terms of which shares of certain group companies were pledged to secure the loans advanced by Indiabulls. In terms of the Pledge Agreements, 100% shares of Kadam; 25% shares of SEL; 100% shares of Shipra Hotels Limited; 100% shares of Shipra Leasing Private Limited; 100% shares of Verve Homes Private Limited; and 100% shares of Regalia Properties Private Limited, were pledged in favour of Indiabulls by the concerned shareholders.

8. In addition to the above, six separate immovable properties were also mortgaged in favour of Indiabulls. This included the Sale Property, which was mortgaged by Kadam to Indiabulls on 25.01.2018. The mortgaged properties also included plot numbers GH-1B and GH-1C, Sector-43, Noida, Uttar Pradesh. These properties were mortgaged by Regalia Homes LLP and Verve Construction LLP, respectively, in favour of Indiabulls.

9. In terms of Clause 2.3 of the Loan Agreements, the Borrower companies were obliged to ensure a security cover by creating security interest in a manner so as to ensure that the value of the mortgaged properties would at all times be at least twice the amount due from the Borrowers.

10. Initial controversy arose, *inter alia*, between the parties as New Okhla Industrial Development Authority (NOIDA) cancelled the NOC to mortgage Plot No. GH-1B and 1C, Sector 43, Noida, Uttar Pradesh. This was on account of non payment of dues of ₹38,19,24,525/- as claimed by NOIDA. As noted above, the said properties were mortgaged by Regalia Homes LLP and Verve Construction LLP (two of the entities of the Shipra Group) in favour of Indiabulls. According to Indiabulls, the same impaired its security and also reduced its security cover below the threshold of twice the amount due from the Borrowers.

11. Indiabulls issued a Cure Notice dated 20.10.2020, *inter alia*, calling upon the Borrowers and other persons (including Kadam), who had provided the security cover, to cure the impairment of the securities

available with Indiabulls within a period of fifteen days. Indiabulls claims that no steps were taken by the concerned entities to cure the impairment or provide additional security to comply with the conditions of the Loan Agreements.

12. On 05.11.2020, Indiabulls issued fourteen separate Loan Recall Notices whereby it recalled the entire outstanding loan and demanded repayment of ₹17,63,61,85,815/- and tax deducted at source (TDS) of a sum of ₹28,49,15,141/-, within seven days from the date of receipt of notice. According to Indiabulls, the said amount was the liability outstanding at the material time. Thereafter, on 14.01.2021, Indiabulls issued a notice communicating its intention to invoke the pledge in respect of the shares pledged in terms of the Pledge Agreements.

13. Verve Construction LLP and Regalia Homes LLP filed separate Writ Petitions (being W.P.(C) 2686/2021 and W.P.(C) 2737/2021) before the Allahabad High Court impugning the action of NOIDA of cancelling/ revoking the permission to mortgage the properties in question. This Court is informed that the said petitions are pending.

Prior Litigation

14. The Loan Recall Notices as well as the notice invoking pledge of the shares, were subject matter of the proceedings before the Court. The Borrowers and Kadam *inter alia* claimed that there was no default of their obligations under the Loan Agreements entitling Indiabulls to recall the loans. The said proceedings are relevant to the limited extent that the

same set out the course of events that had led the parties to enter into the ATS.

15. The previous proceedings are briefly noted hereunder:

15.1 On 23.03.2021, the Borrowers and Kadam filed four separate petitions under Section 9 of the A&C Act [being OMP(I)(COMM) 113/2021 to 116/2021], *inter alia*, seeking orders restraining Indiabulls "*from transferring/selling/alienating and/or disposing off or creating any third party rights or otherwise parting with the shares pledged*" in its favour. These petitions were listed on 26.03.2021 and, a Coordinate Bench of this Court passed an order impleading New Okhla Industrial Development Authority (NOIDA) as a respondent and further, directed Indiabulls to maintain *status quo* with respect to the pledged shares mentioned in the petition. This includes the entire issued and paid up equity shares of Kadam (hereinafter the 'Pledged Shares').

15.2 In the meanwhile, cheques of an aggregate value of ₹75,03,86,792/- issued by the Borrowers were presented by Indiabulls and were dishonored. In view of the same, Indiabulls preferred applications for vacation of the above mentioned *ad interim* orders granted on 26.03.2021. On 08.04.2021, notice was issued on the said applications and the same were directed to be listed on 12.04.2021. On 12.04.2021, the applications were directed to be listed on 20.04.2021. Indiabulls challenged the said orders by filing appeals before the Division Bench of this Court [being FAO(OS)(COMM) 59/2021 to 62/2021].

15.3 By a common order dated 16.04.2021, the Division Bench of this Court disposed of the said appeals by suspending the order dated 23.03.2021 impugned in the aforementioned appeals and remanding the matter to the Single Judge, as the Court was of the view that it was incumbent on the Court to give reasons for passing the interim orders. During the said proceedings before the Division Bench, the learned counsel appearing for the Borrowers and Kadam expressed an apprehension that suspension of the orders dated 26.03.2021 passed under Section 9 of the A&C Act would leave Indiabulls free to invoke the pledge of shares in question and, this would irreparably prejudice the interest of the Borrowers and Kadam. In response to the aforesaid contention, it was stated on behalf of Indiabulls that "*the invocation of pledge of shares will be undertaken in a completely transparent manner, on a fair evaluation of the shares and that the same would also be placed before the learned Single Judge*". The Division Bench noted the aforesaid contention and also observed that any such invocation would be open to challenge before the Court.

15.4 On 16.04.2021, Indiabulls issued "*Notice for Sale of Pledged Shares*" (hereinafter '**the Sale Notice**') informing the Borrowers and other concerned persons that it would proceed to sell/dispose of/transfer the Pledged Shares -10,000 equity shares of Kadam (9800 pledged by SEL and 100 each by Mohit Singh and Bindu Singh) – which were cumulatively valued at ₹840 crores. Indiabulls further stated that although, one day prior notice was agreed to be a reasonable notice in terms of Clause 18.5 of the Pledge Agreements, however, it would sell the

shares only after 12 p.m. on 19.04.2021 in view of its commitment to maintain transparency and sell the shares on a fair valuation, as made before the Division Bench of this Court.

15.5 On receiving the aforesaid Sale Notice, Kadam filed an application [IA No. 5689/5690 of 2021] in its petition under Section 9 of the A&C Act [OMP(I)(COMM) 114/2021], *inter alia*, seeking an order staying the Sale Notice. The said application was listed on 19.04.2021 but no interim orders were passed by this Court and the matter was listed on the date already fixed – 20.04.2021.

15.6 In the meanwhile, the three Borrowers and Kadam filed four separate petitions under Section 11 of the A&C Act for appointment of an arbitrator to adjudicate the disputes between them and Indiabulls. The said petitions (Arb. P. Nos. 513/2021 to 516/2021) were listed on 20.04.2021. On that date, the Court issued notice in the said petitions and the matters were listed on 22.04.2021. The petitions under Section 9 of the A&C Act [OMP(I)(COMM) 113/2021 to 116/2021] were also listed on the said date. In those proceedings, the Court directed the counsels to take instructions with regard to the appointment of an arbitrator and for treating the petitions as applications under Section 17 of the A&C Act.

15.7 On 22.04.2021, this Court allowed the petitions filed by the Borrowers and Kadam under Section 11 of the A&C Act (Arb. P. Nos. 513/2021, 514/2021, 515/2021 and 516/2021), and appointed a former Chief Justice of India as the Sole Arbitrator.

15.8 In the proceedings relating to the petitions filed by the Borrowers and Kadam under Section 9 of the A&C Act [OMP(I)(COMM) 113/2021 – 116/2021], which were also listed on 22.04.2021, a statement was made on behalf of Indiabulls that it had sold the entire shareholding in Kadam to DLF for ₹900 crores. The same was disputed on behalf of the Borrowers/Kadam. In view of the controversy, this Court directed Indiabulls to produce the entire record relating to the sale of shares of Kadam in a sealed cover before the learned Arbitrator. This Court further directed that the Arbitrator would consider its effect on the prayer sought by the petitioner in terms of the observations made by the Division Bench in paragraph 10 of its order dated 16.04.2021. As noted above, in paragraph 10 of the order dated 16.04.2021, the Division Bench had noted the statement made on behalf of Indiabulls that the pledge of shares would be undertaken in a transparent manner on a fair valuation of the shares. The Court had also observed that since the *lis* between the parties was pending before the learned Single Judge, the invocation of pledge would "*obviously be open to challenge before the Court*". The petitions under Section 9 of the A&C Act were disposed of with the aforesaid directions and by directing that the same be considered as applications under Section 17 of the A&C Act.

15.9 Aggrieved by the aforesaid directions passed by the Court in its order dated 22.04.2021, Indiabulls preferred appeals before the Division Bench of this Court [being FAO(OS)(COMM) 71/2021 to 74/2021]. The said appeals were listed on 29.04.2021. After some arguments, Indiabulls sought to withdraw the appeals and stated that it would pursue its

contentions in appropriate proceedings. The appeals were, accordingly, dismissed as withdrawn.

15.10 Indiabulls filed Special Leave Petitions against the common order dated 22.04.2021 passed in Arb. P. Nos. 513/2021 to 516/2021. By a common order dated 06.05.2021 passed by the Supreme Court, the said Special Leave Petitions were allowed – leave was granted; the order dated 22.04.2021 passed by a Coordinate Bench of this Court appointing the Arbitrator was set aside; and, the matter was remanded to this Court to decide the petitions under Section 11 of the A&C, Act after a reply had been filed by Indiabulls. The Supreme Court also observed as under:

> "In the meanwhile, it will be open to either side to apply for urgent interim reliefs under Section 9 of the Arbitration and Conciliation Act. The Statement made by Mr. Rohtagi's client before Hon'ble Sh. T. S. Thakur, J. (Retd.) in the Section 17 application to continue until the learned Single Judge takes up and decides the Section 9 application. The Section 9 application will be decided on its own merits."

15.11 It is relevant to note that in the meantime, the matter had come up before the learned Arbitrator on 03.05.2021 and paragraph 8 of the procedural order passed by the Arbitral Tribunal, reads as under:

> "8. Mr. Rohatgi makes a statement at the bar that till the matters are disposed of by the Supreme Court and till the hearing of these Applications is resumed by this Tribunal, the Respondent shall not take any precipitate action in regard to the sale / transfer of the shares of Claimant Kadam Developers Pvt. Ltd. pledged with the Respondent. That submission is recorded making it unnecessary for this tribunal to pass any further orders at this stage."

15.12 In view of the aforesaid order dated 06.05.2021 passed by the Supreme Court, the petitions filed under Section 9 of the A&C Act before this Court [being OMP(I)(COMM) 113/2021 to 116/2021] were revived.

15.13 In addition to the said petitions, the Borrowers and Kadam filed a fresh set of petitions [OMP(I)(COMM) 154/2021 to 157/2021] under Section 9 of the A&C Act seeking further interim relief with regard to all securities including mortgaged properties as provided under the Loan Agreements. As noted above, the mortgaged properties also included the Sale Property owned by Kadam.

15.14 The said petitions were heard together and were disposed of by a common judgment dated 20.05.2021. The Court was of the *prima facie* view that an event of default had occurred as the security in respect of the immovable properties, which were mortgaged with Indiabulls had been impaired as the permission to mortgage was cancelled by NOIDA. The Court noted that there was a dispute with regard to whether the Borrowers had committed a financial default, however, without going into the said dispute, an event of default on the date of issuance of the legal notice had occurred as the security in respect of the immovable properties mortgaged to Indiabulls were impaired.

15.15 Next, the Court noted a statement made on behalf of Indiabulls that the shares of Kadam had been sold to DLF. The Court *prima facie* found that the sale of the Pledged Shares (the entire issued and paid up equity shares of Kadam) was done in a transparent manner. It noted that "*Indiabulls has disclosed the purchaser and also the amount at which the*

sale has been done". It was noted that Indiabulls had made an offer to the Borrowers to redeem the Pledged Shares on a payment of ₹900 crores. But the Borrowers had not done so. Insofar as the dispute regarding valuation of the shares is concerned, the Court observed that the same could be adjudicated only by the Arbitral Tribunal and the Court cannot interfere in this aspect. The Court further noted that a notice of invocation of pledge (Sale Notice) had been issued by Indiabulls to the Pledgors providing them an opportunity to redeem the Pledged Shares before proceeding with its sale. They had also failed to pay/deposit ₹900 crores, which was the stated sale consideration for the Pledged Shares. Accordingly, the petitions were dismissed as unmerited.

15.16 Although, the Court dismissed the petitions as unmerited; it clarified that all observations made by the Court were *prima facie* and only for the purpose of deciding the said petitions.

16. The Borrowers and Kadam have filed appeals against the Judgment dated 20.05.2021 before the Division Bench of this Court [being FAO(OS) (COMM) Nos. 78-80 of 2021] and the said appeals are pending.

The Prior Agreement of Sale of Shares of Kadam to DLF

17. After issuing the Sale Notice (Notice for Sale of Pledged Shares dated 16.04.2021), Indiabulls and DLF entered into an agreement dated 20.04.2021 (hereinafter '**the Agreement**') whereby Indiabulls agreed to sell the Pledged Shares to DLF for a consideration of ₹900 crores. Indiabulls and DLF also agreed that out of the said amount, DLF would pay ₹750 crores to Indiabulls and would infuse a sum of ₹1,50,22,85,089/-

in Kadam, which would be utilised by Kadam to repay the loans availed by Kadam from SEL. The parties also agreed that they would mutually discuss and negotiate the Share Sale Agreement within a period of twenty one days from the date of the Agreement subject to fulfillment of certain condition precedents including completion of the legal, financial and business due diligence of Kadam. DLF paid a sum of ₹100 crores as advance against the purchase consideration and the balance was agreed to be paid on the closing date. DLF was entitled to terminate the Agreement at any time prior to twenty one days from the date of the Agreement, including on account of non-fulfilment of the condition precedents. Indiabulls retained absolute right to terminate the Agreement at any time after thirty days. DLF claims that it pursued Indiabulls to enter into a definitive Share Sale Agreement as contemplated under the Agreement but Indiabulls failed to do so. Accordingly, by a notice dated 11.05.2021, DLF exercised its right to terminate the Agreement and, demanded refund of the advance of ₹100 crores made against the purchase consideration. Indiabulls accepted the same and refunded the sum of ₹100 crores on 15.05.2021.

Execution of the ATS and the events leading up to filing of the present petition.

18. DLF claims that thereafter, in May 2021, Kadam and Indiabulls approached it for an absolute sale of the Sale Property instead of DLF acquiring the same indirectly by acquiring the shares of Kadam (the Pledged Shares). However, Indiabulls claims that the promoters of the Shipra Group had approached it with the proposition to sell the Sale

Property to DLF and sought it's No Objection Certificate (NOC) for the sale of the Sale Property to DLF. On 26.05.2021, Indiabulls issued a letter communicating its NOC for entering into an agreement to sell the Sale Property to DLF. It, however, stipulated that the same was subject to deposit of ₹900 crores directly into its bank account within a period of 15 days from entering into the agreement to sell. Indiabulls further specified that the said no objection would be valid till 15.06.2021.

19. Thereafter, on 30.05.2021, the concerned parties entered into the ATS. In terms of the ATS, DLF agreed to purchase the Sale Property for a consideration of ₹1,250/- crores subject to the terms and conditions as set out therein. In addition, DLF also agreed to pay all charges due to respondent no. 5, Yamuna Expressway Industrial Development Authority (hereinafter '**YEIDA**'). Out of the aforesaid consideration, ₹1 crore was to be paid immediately and ₹899 crores was to be paid directly to Indiabulls upon execution and registration of the sale deed in respect of the Sale Property. The remaining ₹350 crores was to be paid by way of allotment of plots and/or built-up floors in the real estate project, which DLF proposed to develop on the Sale Property.

20. On 02.06.2021, Kadam and DLF signed an application for submission to YEIDA for issuance of permission for transfer of allotment rights with respect to the Sale Property.

21. On 07.06.2021, DLF sought certain clarifications from YEIDA for transfer of allotment rights concerning the Sale Property.

22. YEIDA responded by a letter dated 17.06.2021 clarifying the points raised by DLF. YEIDA also issued another letter on the same date addressed to Kadam informing it about the dues payable in respect of its application, and the outstanding lease rent. YEIDA also pointed out that a clear No Objection Certificate was not enclosed in favour of YEIDA *"relative to the mortgage approval issued by Authority in the favour of Indiabulls Housing Finance Ltd*".

23. In the meanwhile, on 03.06.2021, Indiabulls filed affidavits before this Court in the petitions filed by the Borrowers and Kadam under Section 11 of the A&C Act (Arb. P. Nos. 513/2021 to 516/221), which were pending at the material time. It was affirmed in the said affidavits that in view of the settlement talks, the agreement dated 30.05.2021 (ATS) was executed and an application had been made to YEIDA for transfer of the allotment rights of the Sale Property and therefore, nothing survived in the petitions and the same had become infructuous.

24. On 11.06.2021, the concerned parties also entered into a letter agreement extending the 'Long Stop Date' as mentioned in Clause 1.1 of the ATS by a further period of seven days from 14.06.2021.

25. On 18.06.2021, Kadam addressed a letter to YEIDA in response to YEIDA's letter dated 17.06.2021 seeking further two weeks' time to comply with the conditions.

26. Immediately thereafter, on 19.06.2021, DLF sent a letter to Kadam, SEL and Mr Mohit Singh expressing its concern regarding the said parties approaching YEIDA to seek an additional period of fifteen days to comply

with the conditions as stated in YEIDA's letter dated 17.06.2021. DLF emphasized that it was committed to complete the entire transaction but was unable to do so, due to non-completion of the Condition Precedents on the part of the Sellers (SEL, Kadam and Mr Mohit Singh). A copy of the said letter was also marked to Indiabulls.

27. Kadam responded to DLF's letter dated 19.06.2021 by its letter dated 23.06.2021, *inter alia*, stating that in terms of the understanding, Indiabulls had not issued an NOC in relation to the outstanding dues and settlement of their disputes and, the same was awaited. It also pointed out that in terms of the letter dated 17.06.2021 sent by YEIDA, NOCs were required from Indiabulls and Beacon Trusteeship Limited (the Security Trustee appointed by Indiabulls).

28. On 26.06.2021, Indiabulls sent a legal notice to DLF as well as to Kadam, SEL and Mohit Singh, *inter alia*, stating that the Sellers had failed to fulfil their obligations within the extended period (that is, till 21.06.2021). And, the NOC issued by it as well as the ATS stood terminated and dissolved as the timelines agreed between the parties had expired. Indiabulls also sent another letter dated 26.06.2021 to YEIDA requesting it not to transfer the Sale Property.

29. On 26.06.2021, DLF also sent a letter to YEIDA stating that all the conditions as set out in its letter dated 17.06.2021 were being complied with and requested YEIDA to not allow or grant any permission, consent or approval for sale and transfer of the Sale Property to any other party whether by invocation or mortgage or otherwise.

30. In the meanwhile, DLF also sent a legal notice dated 23.06.2021 to Kadam, SEL and Mohit Singh (respondent nos. 1 to 3) calling upon them to specifically perform their obligations under the ATS.

31. Thereafter, Indiabulls sent a notice dated 26.06.2021 invoking the pledge of shares of Shipra Hotels Limited.

32. DLF responded to Indiabulls' letter dated 26.06.2021 objecting to Indiabulls decision of withholding the consent for extension of the ATS. Indiabulls responded to the said letter dated 28.06.2021 reiterating its stand that its consent was conditional on receipt of money within the specified period of fifteen days.

33. On 01.07.2021, Indiabulls entered into an agreement (the Share Sale Purchase Agreement) with Creative Souls Technology India Ltd. and M3M India Pvt. Ltd. (collectively referred to as '**M3M**') for sale of the Pledged Shares (the entire issued equity shares of Kadam) for a total sale consideration of ₹900 crores. The said parties also agreed that out of the aforesaid sum, a sum of ₹749,77,14,911/- (Rupees Seven Hundred and Forty-Nine Crores Seventy-Seven Lakhs Fourteen Thousand Nine Hundred and Eleven Only) would be paid to Indiabulls on the Closing Date and, in addition, M3M would infuse a sum of ₹1,50,22,85,089/- in Kadam, which would be utilized for repayment of the loans availed by Kadam from SEL.

34. On the same date, that is, on 01.07.2021, M3M and Indiabulls entered into a Memorandum of Understanding, which provided that if Mr. Mohit Singh (respondent no. 3) consents to the sale of the Pledged Shares

as agreed between Indiabulls and M3M, SEL would be entitled to allotment of certain immovable properties to be developed by M3M on the Sale Property.

35. Indiabulls stated that on 03.07.2021, M3M paid the entire consideration of ₹749.77 crores by a bank transfer and the transaction for sale of the Pledged Shares was complete. On 05.07.2021, the Pledged Shares were duly credited in the Demat Account of M3M. On 03.07.2021, Indiabulls also informed the Borrowers and other concerned persons that the sale of 100% equity capital of Kadam was consummated.

36. In these proceedings, Indiabulls filed the statement of its bank accounts, which indicate that on 03.07.2021, it had received a sum of ₹749,77,14,911/- in fifteen tranches of ₹49 crores each and one tranche of ₹14,77,14,911/-. The documents also indicate that on the same date, Creative Souls Technology India Ltd. had received a sum of ₹749,77,14,911/- from M3M India Pvt. Ltd. and, the payment made to Indiabulls was from the said amount. The bank account of Indiabulls indicate that Indiabulls had prior to receipt of the aforesaid amount from Creative Souls Technology India Ltd., transferred a sum of ₹750 crores to another entity. There is some controversy with regard to this payment. Whereas, Indiabulls states that the said amount was paid to M3M; it is contended on behalf of Mr. Mohit Singh (respondent no. 3) that the said payments had been routed through another entity to M3M. However, there is no dispute and it is conceded by Indiabulls that the funds received by it on 03.07.2021 for the sale of Pledged Shares had in effect advanced by it to M3M.

Submissions

Submissions on behalf of DLF

37. Mr. Pinaki Mishra, learned senior counsel appearing for DLF contended that DLF was entitled to specific performance of the ATS and DLF is and always was ready and willing to perform its obligations. He submitted that Indiabulls and Kadam were required to comply with their obligations under the ATS and cannot frustrate the ATS by breaching the terms thereof. He submitted that Indiabulls had with *mala fide* intention engaged with DLF while at the same time negotiated the sale of the Pledged Shares with M3M. He pointed out that the stamp paper for the agreement to sell the Sale Shares to M3M was purchased on 27.05.2021. The stamp paper clearly indicates that it was for an agreement between Indiabulls and Creative Souls Technology India Ltd. Thus, on one hand, Indiabulls had entered into the ATS with DLF while on the other hand had, also firmed up its agreement with M3M. He stated that even though the consideration offered by DLF was higher, Indiabulls had terminated the ATS and had entered into an agreement with M3M for sale of the Pledged Shares. He submitted that the Sale Property was a marquee property, which was not easily available, therefore, damages would not adequately compensate DLF.

38. During the course of the arguments, he stated that DLF was ready and willing to pay ₹350 crores by cheque within a period of six months from the date of registration of the Sale Property instead of allotting a developed property (land, floor, space etc.) of the said value as

contemplated under the ATS. This would remove any uncertainty with regard to the quantum of consideration.

39. He also drew the attention of this Court to various clauses of the ATS. He referred to Clause 4 of the ATS, which sets out the Conditions Precedent for closing the sale of the Sale Property. He submitted that in terms of Clause 4.4. of the ATS, Kadam as well as Indiabulls had committed to satisfy the Conditions Precedent prior to the "Long Stop Date", which was defined to mean fifteen days from the date of the ATS or such further date as may be extended by DLF and Indiabulls. He stated that the same included Indiabulls issuing a consent and no objection for the sale of the Sale Property and Indiabulls releasing the mortgage in its favour. He submitted that Indiabulls had failed to issue the necessary NOC for securing the permission for transfer of the Sale Property, from YEIDA, which it was obliged to do. He also stated that the NOC dated 26.05.2021 issued by Indiabulls was an NOC enabling Kadam to enter into the ATS and the same did not constitute an NOC for seeking permission from YEIDA to transfer the Sale Property.

Submissions on behalf of Indiabulls

40. Mr. Sethi, learned senior counsel appearing for Indiabulls, countered the aforesaid submissions. He submitted that the NOC dated 26.05.2021 issued by Indiabulls was conditional on receipt of payment of ₹900 crores within a period of fifteen days and was valid till 15.06.2021. He submitted that since the transaction for sale of the Sale Property was not concluded within the stipulated period, the ATS had expired by efflux

of time. He referred to Clause 9 of the ATS and submitted that the Long Stop Date could be extended only by mutual agreement between DLF and Indiabulls and, the ATS could be terminated after the expiry of the Long Stop Date. Since the Long Stop Date was not extended beyond 21.06.2021, the NOC/ATS had expired.

41. Next, he submitted that the ATS involved numerous obligations, which could not be supervised by any Court and therefore, the relief of specific performance was barred under Section 14(b) of the Specific Relief Act, 1963. He also contended that the ATS could not be specifically enforced as it was by its nature determinable and damages was the only relief that could be claimed by DLF. He referred to the decisions of the Supreme Court in ***Indian Oil Corporation Ltd. v. Amritsar Gas Service & Others: 1991 (1) SCC 533*** and the decision of this Court in ***Rajasthan Breweries Ltd. v. The Stroh Brewery Company: 2000 (55) DRJ (DB)***, in support of his contentions.

42. He also relied on the decisions of the Supreme Court in ***K.S. Vidyanadam & Others v. Vairavan: 1997 (3) SCC 1; Citadel Fine Pharmaceutical v. Ramaniyam Real Estate Pvt. Ltd. &Anr.: 2011 (9) SCC 147***; ***His Holiness Acharya Swami Ganesh Dassji v. Sita Ram Thapar: 1996 (4) SCC 526*** and the decision of this Court in ***M/s Bharat Catering Corporation v. Indian Railway Catering and Tourism Corporation Limited (IRCTC) & Anr.: 2009 SCC OnLine Del 3418*** and ***Avantha Holdings Limited v. Vistra ITCL India Limited: 2020 SCC OnLine Del 1717*** in support of his contentions.

Submission on behalf of Shipra Group

43. Mr. Amit Sibal, learned senior counsel appearing for SEL, submitted that the action of Indiabulls was *mala fide* as it had attempted to sell the Pledged Shares for merely ₹900 crores despite executing the ATS for sale of the sole asset of Kadam (the Sale Property) for a sum of ₹1250 crores. He submitted that the Sellers had entered into the ATS with the understanding that the same constituted a full and final settlement of all dues with the Borrowers. However, thereafter, Indiabulls failed and neglected to take steps for releasing the Borrowers of their liabilities. It is in this context that Kadam had sought additional two weeks from YEIDA to comply with the conditions as stipulated by it. He submitted that the Sale Property was effectively sold for ₹1250 crores, out of which ₹900 crores would be made available to Indiabulls immediately and, it would continue to have a lien on properties of an aggregate value of ₹350 crores.

44. He pointed out that Indiabulls had also filed affidavits in the petitions filed by SEL and other Shipra Group entities affirming that the parties had finally resolved the disputes in terms of the ATS.

45. Next, he submitted that on 01.07.2021 and 02.07.2021, the Authorized Representatives of the Shipra Group of Companies offered a One Time Settlement of ₹1300 crores towards discharge of the entire dues of the Shipra Group payable within a period of one hundred and twenty days. However, that offer was summarily rejected by Indiabulls by its e-mail dated 02.07.2021.

Submission on behalf of Kadam

46. Mr. Dayan Krishnan, learned counsel appearing for Kadam submitted that there was no default or failure on the part of Kadam in performing its obligations. He submitted that Indiabulls had agreed to finally settle all disputes and discharge the Borrowers against a consideration of ₹1250 crores receivable in terms of the ATS. However, Indiabulls had failed to issue the NOC as required for securing YEIDA's permission for transfer of the Sale Property. He countered the contention that Kadam was responsible for delaying the permission from YEIDA. He submitted that Kadam had sought further time of two weeks from YEIDA by its letter dated 18.06.2021 as Indiabulls was dragging its feet for settling all litigations and discharging the Borrowers. Indiabulls had not issued the NOC as required by YEIDA and in addition, there were other compliances which required some time.

47. He also contended that the manner in which Indiabulls had proceeded was less than transparent and, it is apparent that the actions of Indiabulls were directed to grab Kadam's valuable property at less than its fair value. He submitted that apart from the offer from DLF, there were other offers available at a substantially higher value and Indiabulls was aware of the same. He submitted that in terms of the orders passed by this Court as well as the Division Bench of this Court, Indiabulls had committed that it would sell the Pledged Shares on a fair value and in a transparent manner. However, Indiabulls had neither disclosed the name of the purchaser nor disclosed the consideration for which the Pledged Shares were allegedly sold.

48. Further submitted that, in fact, no funds were received from M3M and, Indiabulls had entered into a circuitous transaction whereby money was made available to M3M, which was ostensibly used for purchasing the Pledged Shares. He submitted that although, the documents were created to show that Indiabulls had lent money to M3M against security of immovable property; the said documents would show that the security sought to be created was much after the funds had been disbursed and therefore, it is apparent that the said documents are a subterfuge.

49. He also countered the contention that ATS was in its nature, determinable.

Reasons & Conclusions

Sale of Sale Property and invocation of Pledge of Pledged Shares, not mutually exclusive

50. At the outset, it is necessary to state that Indiabulls has sought to interlink the controversy regarding termination of the ATS with the dispute raised by Shipra Group of entities in respect of its agreement with M3M for sale of the Pledged Shares. Some of the submissions made by the counsels for the parties were premised on the basis that the said transactions are mutually exclusive.

51. Mr. Sethi, had earnestly contended that the consideration payable under the three transactions viz. (i) the Agreement for sale of the Pledged Shares to DLF; (ii) the ATS for sale of the Sale Property to DLF; and, (iii) Share Sale Purchase Agreement dated 01.07.2021 for sale of the Pledged

Shares to Creative Souls Technology India Ltd., are essentially the same. There is no difference in the consideration receivable in terms of either of the three agreements. He contended that the Agreement dated 20.04.2021 with DLF and the agreement dated 01.07.2021 with Creative Souls Technology India Ltd. for sale of the Pledged Shares (100% equity shares of Kadam) would have rendered, mortgage of the Sale Property "*incapable of being separately enforced and infructuous*". He further contended that if in the alternative, the mortgage in respect of the Sale Property was enforced and the same was sold (as agreed under the ATS), the pledge in respect of the Pledged Shares would become infructuous with no value as the Sale Property was Kadam's sole asset.

52. This Court is unable to accept that the security interest of Indiabulls in respect of the two assets – Pledged Shares of Kadam and the Sale Property are mutually exclusive and enforcing one would render the other without any value. Admittedly, the Pledged Shares (shares of Kadam) and the Sale Property (land measuring 73 acres situated in Sector 128, Noida, Uttar Pradesh) are two distinct assets. The contentions advanced on behalf of Indiabulls erroneously disregards the separate identity of Kadam. It is nobody's case that the corporate façade of Kadam has to be disregarded. On the contrary, the relevant agreements (whether it be a Loan Agreement or Share Sale Purchase Agreement) are premised on the basis that Kadam is validly constituted as a separate entity.

53. Undisputedly, the Sale Property was mortgaged to Indiabulls to secure the loans extended by it to the Borrowers. It is also not disputed that in the event of default, Indiabulls would be well within its rights to

enforce its security interest in respect of the Sale Property. It is also important to note that Kadam is not one of the Borrowers. Concededly, Indiabulls had not advanced any sums to Kadam. It had advanced loans to other companies of the Shipra Group including SEL, which is the holding company of Kadam. It is against those loans that Kadam had offered its asset – the Sale Property – to Indiabulls as a collateral. It is at once clear that in the event of Indiabulls enforcing its security interest in respect of the Sale Property by liquidating the said asset and appropriating the proceeds thereof; Kadam would be entitled to recover the value of the Sale Property from the Borrowers as it would then step into the shoes of Indiabulls as a creditor to the Borrowers.

54. Invoking the pledge of the Pledged Shares (all the issued equity shares of Kadam) would result in the acquirer of the Pledged Shares, acquiring control of the affairs of Kadam and consequently, the indirect control of Kadam's assets. However, that would not result in the acquirer becoming the owner of the assets of Kadam because, as noted above, Kadam is an independent and distinct entity. Whereas, the Pledged Shares are assets of SEL; the Sale Property is an asset of Kadam. Whilst its shareholder may control the affairs of Kadam, they do not acquire ownership of its assets. This distinction has been authoritatively explained by the Constitution Bench of the Supreme Court in ***Bacha F. Guzdarv. The Commissioner of Income Tax: AIR 1955 SC 740*** *albeit,* in the context of the nature of income of a company that is derived by the shareholders by virtue of their shareholding in that company.

55. Since the equity shares of Kadam constitute a separate asset, which was pledged to Indiabulls, it would be well within its rights, in the event of a default, to invoke the pledge in accordance with law. Invoking of the pledge would not automatically release its security interest in the Sale Property. In the event, the value of the Sale Shares does not satisfy the outstanding debt, Indiabulls could proceed to enforce its security interest in the Sale Property. As stated above, in such an event, Kadam would step in as a creditor to the Borrowers. It is also clear that in such an event, the Pledged Shares (shares of Kadam) do not become valueless, as their value would depend on the realizable value of Kadam's assets being the receivables from the Borrowers amongst other intangibles, if any.

56. In the aforesaid view, this Court is unable to accept that the action regarding invocation of pledge of Kadam's shares by Indiabulls ought to be viewed as interlinked to DLF's claim for specific performance of the ATS. The question whether DLF is entitled to any interim relief in respect of the ATS must be examined independent of the action of Indiabulls invoking and selling the Pledged Shares or the *inter se* dispute between the Borrowers/Kadam and Indiabulls, which do not arise in connection with or relate to the ATS.

Specific Enforcement of ATS after the Long Stop Date

57. The next question to be examined is whether, *prima facie*, DLF is entitled to specifically enforce the ATS. DLF contended that it is and was always ready and willing to perform its obligations under the ATS. In fact, during the course of the proceedings, it was submitted that DLF is ready

and willing to consummate the transaction and to make the payment immediately. However, Mr. Pinaki Mishra subsequently clarified, after seeking instructions, that DLF was ready and willing to perform its obligations and to make the payment on registration of the Sale Deed in respect of the sale property in its favour as agreed under the ATS. He had also handed over a document indicating that DLF had already secured a substantial line of credit from a financial institution/bank (HDFC) for the aforesaid purpose. In any event, Indiabulls has not seriously argued that DLF was at any time reluctant to perform its obligations as agreed under the ATS. On the contrary, Indiabulls has relied on DLF's letter dated 19.06.2021 addressed to the Sellers (SEL, Kadam and Mr. Mohit Singh) objecting to their seeking two weeks' time from YEIDA for complying with its conditions for grant of permission for transfer of the Sale Property. The Sellers (respondent nos.1 to 3) have also supported DLF's petition.

58. The controversy between the parties is, essentially, between the Sellers and Indiabulls with each accusing the other for not performing their obligations under the ATS. DLF claims that both Indiabulls and the Sellers (Kadam, SEL and Mohit Singh) have failed and neglected to perform their obligations under the ATS.

59. According to Indiabulls, it had provided a conditional NOC in terms of its letter dated 26.05.2021 and thus, was not obliged to take any further steps under the ATS till the conditions as stipulated were satisfied, that is, a sum of ₹900 crores was deposited in its account within a period of fifteen days of entering into the ATS. DLF and the Sellers (respondent nos. 1 to 3) contend to the contrary. According to DLF, Indiabulls had

undertaken specific obligations to ensure that the Conditions Precedent for closing of the transaction were duly satisfied. According to respondent nos. 1 to 3, Indiabulls was also required to settle the disputes and release the Borrowers of their liability.

60. The said controversy requires to be addressed with reference to the terms of the ATS. Indiabulls by its letter dated 26.05.2021 had accorded it's no objection for Kadam and SEL to enter into the ATS for the Sale Property, subject to deposit of ₹900 crores directly in its account within a period of fifteen days. It had also specified that, in the event the amount was not deposited, it's no objection would stand terminated/withdrawn automatically without any notice. Indiabulls case rests on the express wordings of this NOC and as noticed above, it contends that it was not required to take any further steps. However, it is important to note that after issuing the NOC Indiabulls had proceeded to enter into the ATS. It is, thus, bound by the terms of the ATS.

61. Sub-clause (iii) of Clause 1.2 of the ATS expressly provides that "*the recitals hereinabove stated shall be deemed to form a part of the operative portion of this Agreement*". The parties had agreed that the recitals would form an operative part of the ATS. Recitals 'C', 'D' and 'E' of the ATS clearly indicate that DLF had entered into the ATS based on the assurances as held out by Kadam (referred to as the Seller), Mr. Mohit Singh (referred to as the Promoter) and Indiabulls (referred to as IHFL). Recitals 'C', 'D' and 'E' of the ATS are set out below:

> "C. The Seller, the Promoter and IHFL, further represent and warrant to the Purchaser that there are certain ongoing

litigations and arbitrations, *inter alia*, between the Promoter, IHFL and the Seller in relation to the said Loan Facilities, and enforcement of securities (**"Litigations"**). The details of the Litigations are as set out in the **Schedule 3** of this Agreement.

D. The Seller, the Promoter and IHFL have amicably and collectively agreed to fully, finally and absolutely settle / withdraw all the Litigations. The Seller and the Promoter have further agreed to sell the Sale Property for which IHFL has granted in-principal No Objection Certificate (**"IHFL NOC"**); and

E. The Seller, the Promoter have approached the Purchaser with a proposal to absolutely and irrevocably sell, transfer, convey, grant, assign and deliver the Sale Property to the Purchaser, and relying on the representations, warranties, acknowledgement, guarantees, covenants, undertakings, assurances and the indemnities of the Seller, the Promoter and IHFL as set out in this Agreement, the Purchaser has agreed to purchase the Sale Property from the Seller free from all Encumbrances, on the terms and conditions and in the manner set out in this Agreement."

62. In terms of recital 'C', Kadam and the Promoter (Mr Mohit Singh) had agreed to fully and finally settle/withdraw all litigations. The litigations were set out in Schedule 3 to the ATS. Kadam and Mr. Mohit Singh had agreed to sell the Sale Property and Indiabulls had granted its in-principle no objection (referred to as the '**IHFL NOC'**). Clause 2.2 of the ATS also records that Mr. Mohit Singh had acknowledged and affirmed the proposed sale of the Sale Property in favour of DLF and, Indiabulls had granted its in-principle NOC for the said sale. In terms of Clause 2.3 of the ATS, Indiabulls had agreed and undertaken to relinquish all rights, claims, charge and interest in the Sale Property subject to the

fulfillment of the conditions as set out in the IHFL NOC. Clause 2.3 of the ATS is set out below:

> "2.3. Subject to fulfillment of conditions under IHFL NOC, IHFL hereby agrees and undertakes to relinquish all rights, claim, charge and interest it has in the Sale Property in accordance with the terms and conditions as well as within the timelines specified in Clause 4 and shall not seek any consideration, payment or compensation of any kind from the Purchaser, other than the payment as specified in Clause 3 below."

63. Clause 3 of the ATS sets out the consideration. There is no dispute that DLF had paid a sum of ₹1 crore as advance and had agreed to pay ₹899 crores upon execution of the Sale Deed. It had also agreed to pay stamp duty plus registration charges (₹1.07 crores); transfer charges payable to YEIDA quantified at ₹86.06 crores; enhanced compensation charges quantified at ₹20 crores and, in addition, to allot certain property in the form of Plots, Built-up Floors, Group Housing Units, Institutional Units, Commercial Units or FAR worth ₹350 crores within fifteen days of receipt of the Registration Certificate from Uttar Pradesh Real Estate Regulatory Authority. Indiabulls had agreed that the payment of sale consideration in the manner as set out in Clause 3.2 of the ATS would constitute a valid discharge of all obligations of DLF.

64. Clause 4 of the ATS sets out the Conditions Precedent for closing the transaction. The relevant sub-clauses of Clause 4 of the ATS are set out below:

> "**4. CONDITIONS PRECEDENT.**

4.1 Notwithstanding anything contained in this Agreement, the Purchaser shall not be obligated to purchase/acquire the Sale Property and make payment of the Purchase Consideration for the Sale Property, until the each of the following conditions precedent have been fulfilled by the Seller, the Promoter and / or IHFL, as the case may be, with respect to the Sale Property, to the complete satisfaction of the Purchaser prior to the Long Stop Date as specified herein below:

*** *** ***

4.1.3 Lender Consent: The Seller shall have obtained and IHFL shall have issued approval / consent / no-objection for the sale, transfer, conveyance, grant and assignment of the Sale Property to the Purchaser and all other transactions contemplated under this Agreement and for the release of the mortgage, charge and Encumbrance created on the Sale Property. Subject to fulfillment of conditions of IHFL NOC, IHFL shall execute and register the release deed / deed of reconveyance of mortgage by itself and / or by any trustee appointed for the benefit of IHFL in this regard at its own costs and expense;

*** *** ***

4.1.5 Fencing and Boundary of the Sale Property: The Sale Property shall have been completely fenced and bounded by the Seller;

*** *** ***

4.1.7 Litigations– The Seller and Promoter shall ensure that all the Litigations should have been fully and completely settled with no adverse orders on the sale of the Sale Property to the Purchaser and handing over of the vacant and peaceful possession of the Sale Property to the Purchaser and allowing sale and transfer of the Sale Property in favour of the Purchaser.

4.1.8 Deposit of the records and the title deeds. The Seller, SEL and the Promoter agree that IHFL shall handover to the Purchaser all the record and the title deeds of the Sale Property at the time of execution of release deed as contemplated herein and such handover shall be adequate discharge of IHFL's obligations under the Loan Facilities.

*** *** ***

4.3 The Seller, Promoter and IHFL agree that the Purchaser may in its sole discretion stipulate additional conditions precedent / conditions subsequent in relation to the Sale Property, including such conditions precedent / conditions subsequent pursuant to the due diligence exercise. Such conditions precedent / conditions subsequent shall be fulfilled by the Seller, Promoter and IHFL within the timelines provided by the Purchaser. The Purchaser shall by way of a written notice inform the Seller, Promoter and IHFL such conditions precedent / conditions subsequent and timelines within which such conditions precedent / conditions subsequent should be fulfilled by the Seller, Promoter and IHFL. Each such written intimation shall form integral part of this Agreement.

4.4 The Seller, Promoter and / or IHFL as the case may be, shall satisfy the Conditions Precedent set out in the Clause 4.1 as soon as possible after the Execution Date but prior to the Long Stop Date. It is clarified that the obligations of satisfaction of all the Conditions Precedent is of the Seller, Promoter and / or IHFL as the case may be, irrespective of the fact that the documents with respect to satisfaction of certain Conditions Precedent have to be obtained in the name of the Seller.

4.5 The Seller, Promoter and / or IHFL as the case may be, shall promptly give notice to the Purchaser, in writing of the satisfaction of each of the Conditions Precedent provided for at the Clause 4.1, immediately upon

becoming aware of the same, in the form and manner as provided for at **Schedule 6** (**"Conditions Precedent Satisfaction Notice"**). Along with the Conditions Precedent Satisfaction Notice, the Seller, Promoter and / or IHFL as the case may be, shall provide documents evidencing the fulfillment of the Conditions Precedent."

65. Clause 5 of the ATS contains the agreement between the concerned parties regarding execution and registration of the Sale Deed in favour of DLF. Sub-clause 5.1 of Clause 5 of the ATS is set out below:

> 5.1 Upon the completion of the Conditions Precedent as set out in the Clause 4 above, the Seller and the Purchaser shall mutually discuss and agree on the date which is no later than 15 (fifteen) days from the completion of the Conditions Precedent in a manner as set out in the Clause 4 above (**"Sale Date"**) on which the Seller shall execute and register the Sale Deed in the favour of the Purchaser."

66. The ATS also contains certain representations and warranties held out by the parties. The representations held out by Indiabulls, recorded in Clause 6.2 of the ATS, are set out below:

> 6.2 IHFL hereby represents and warrants to the Purchaser as follows:
>
> (i) Other than the charge / mortgage created in favour of IHFL or for the benefit of IHFL in terms of the mortgage deed dated January 25, 2018, IHFL neither has any other charge, lien, right, benefit and claim over the Sale Property nor has created any Encumbrance thereon in any manner whatsoever. Upon execution of the release deed / deed of reconveyance of such mortgage, all rights, title, interest, charge, lien, right, benefit or claim IHFL over the Sale Property shall stand discharged.

(ii) The original title deeds listed in **Schedule 4**hereto are the only title deeds available with IHFL in respect to the Sale Property and the same are with and in actual possession of IHFL.

(iii) All approvals, consents and corporate authorizations required by it to place to enter into this Agreement and to comply with its obligations under this Agreement have been obtained and are in full force and effect.

(iv) Other than as disclosed herein, there are no orders, judgments, claims, proceedings, *lis pendens*, litigations, disputes, arbitration etc., which prohibits the execution of this Agreement."

67. As noted above, one of the stumbling blocks for consummation of the sale transaction in terms of the ATS was the necessary permission from YEIDA for transfer of the Sale Property. YEIDA, by its letter dated 17.06.2021, had *inter alia*, pointed out the requirement of an NOC from Indiabulls in favour of YEIDA and a clear NOC in favour of YEIDA in respect of the mortgage approval issued in favour of Beacon Trusteeship Ltd. (the Security Trustee appointed by Indiabulls). Paragraphs 4 and 5 of the said letter are set out below:

"4. A clear No Objection Certificate is not enclosed in the favour of the authority relative to the mortgage approval issued by Authority in the favour of Indiabulls Housing Finance Ltd. relative to the said plot.

5. The approval of security transfer has been provided in favour of M/s Beacon Trusteeship Ltd. (Security Trustee) relative to the mortgage approval issued by the authority in the favour of Indiabulls Housing Finance Ltd., in reference of whose, a clear no objection certificate in favour of authority relative to the mortgage approval

issued in the favour of M/s Beacon Trusteeship Ltd. is not enclosed."

68. *Prima facie*, the obligations to provide the said documents was that of Indiabulls. No other entity could have furnished the same. In terms of Clause 4.1.3 of the ATS, Indiabulls was required to issue its approval, consent, no-objection for the sale, transfer, conveyance, grant and assignment of the Sale Property to DLF and all other transactions as contemplated under the ATS.

69. A plain reading of Clause 4.1.3 of the ATS as set out above indicates that it is in two parts. The first limb of Clause 4.1.3 of the ATS requires the Seller (Kadam) to '*obtain*' and Indiabulls to '*issue the necessary consents for sale, transfer, conveyance, grant and assignment of the Sale Property*' to DLF and all other transactions necessary to complete the sale. The second limb of Clause 4.1.3 of the ATS relates to the execution of the Release Deed/Deed of Conveyance of the mortgage by itself or by any trustee appointed for its benefit. *Prima facie*, insofar as the registration or execution of a Release Deed is concerned, the same was contingent upon fulfillment of the conditions of the 'IHFL NOC'. Further, Clause 4.1.5 of the ATS also made it obligatory for Indiabulls to fulfill and complete all other Conditions Precedent stipulated by DLF after entering into the ATS.

70. Thus, the premise that Indiabulls was not required to take any steps for the sale of the Sale Property to DLF except to give its in principle conditional NOC – which according to Indiabulls, it had – is difficult to accept. The ATS does contemplate a proactive role on the part of

Indiabulls. The contention that the ATS has expired by efflux of time as the Long Stop Date has passed, is also unpersuasive. It was agreed that in terms of Clause 4.1 of the ATS, DLF would not be obligated to purchase or acquire the Sale Property if the Conditions Precedent were not complied with before the Long Stop Date. It does not in any manner absolve Kadam or Indiabulls from complying with the conditions and their obligations prior to the Long Stop Date.

71. Clause 9 of the ATS also referred to the Long Stop Date provides that "*Notwithstanding anything else contained herein, the Seller, Promoter and IHFL shall have no right to terminate this Agreement until the Long Stop Date*." It was contended on behalf of Indiabulls that this clause must be read to mean that any party could terminate the ATS after the Long Stop Date. This Court is not persuaded to accept that interpretation. The language of Clause 9 of the ATS is in the negative. It proscribes the parties from terminating the ATS until the Long Stop Date, that is, within a period of fifteen days of entering the agreement. However, that does not mean that all parties thereafter, would be free to terminate the ATS or would be absolved from performing their obligations. Surely a party which has defaulted in performing its obligations under the ATS prior to the Long Stop Date, cannot claim that it is entitled to now terminate the ATS on expiry of the Long Stop Date and is no longer required to perform its obligation, notwithstanding that the other parties are ready and willing to perform their obligations under the ATS. A reading of Clause 9 of the ATS in the manner as suggested by Indiabulls would render the clause without any meaning as any party

could delay its obligations beyond the period of two weeks and terminate the agreement after expiry of the said period.

72. The aforesaid view also finds support in Clause 10 of the ATS, which entitles DLF to claim specific performance of the ATS. Clause 10 of the ATS is set out below:

> "**10. SPECIFIC PERFORMANCE**
>
> The Parties agree that in the event of any breach or threatened breach by the Seller, and, or, Promoter and, or, IHFL of any covenant, obligation or other provision set forth in this Agreement, the Purchaser shall be entitled, in addition to any other remedy that may be available to it, to seek; (i) any decree or order of specific performance to enforce the observance and performance of any covenant, obligation or other provisions of this Agreement by the Seller, and, or, Promoter and, or, IHFL; and, or, (ii) any injunction restraining such breach or threatened breach by the Seller, and, or, Promoter and, or, IHFL. The Parties agree that the Sale Property is a special property and in the event of any breach or default of any terms of this Agreement by the Seller, and/or, Promoter and/or IHFL monetary relief shall not be sufficient and the Purchaser is entitled to seek mandatory or any other injunctions at an interim stage."

73. It was contended on behalf of Indiabulls that the NOC dated 26.05.2021 is the NOC as contemplated under Clause 4.1.3 of the ATS. As stated above, the said clause is in two parts. The "*approval/consent/no objection*" for the sale, transfer, conveyance, grant and assignment of the Sale Property to the purchaser as mentioned in the first sentence of Clause 4.1.3 of the ATS cannot be read to mean that the no objection, which is mentioned in the latter part of the said clause as 'IHFL NOC'. The term

'IHFL NOC' has not been defined in the definition clause of the ATS. However, recital 'D' mentions the same as an "in-principle No Objection Certificate", granted by Indiabulls.

74. Indiabulls, by its letter dated 26.05.2021, merely granted a no objection for entering into the ATS. It did not issue any specific or clear no objection for YEIDA to grant permission for transfer of the Sale Property, which it was obliged to in terms of the first sentence of Clause 4.1.3 of the ATS. Even if the NOC dated 26.05.2021 is considered as the in-principle approval, referred to as the 'IHFL NOC' in recital 'D' of the ATS, the same did not absolve Indiabulls to issue such other consents or no objections as required for completing the transaction under the ATS.

75. This is also clear because in terms of the ATS, Indiabulls would directly receive the consideration for the Sale Property on compliance of certain Conditions Precedent. It is clearly not open for Indiabulls to contend that it is not required to meet the conditions precedent till the sum of ₹900 crores is deposited with it. The import of the said contention is, that the terms of the NOC would be in direct conflict with the terms of the ATS because DLF was not required to make any payment until the conditions precedent as mentioned in Clause 4 of the ATS were met and Indiabulls had agreed to the same subsequent to issuance of the NOC dated 26.04.2021.

76. Indiabulls could terminate the ATS on account of lapse of time provided it was not in default of its obligations under the ATS. And, as is apparent from the above, the question whether Indiabulls has defaulted in

its obligation under the ATS is a contentious one which is required to be addressed by the Arbitral Tribunal.

Whether the ATS is by its nature determinable

77. The explanation to Section 10 of the Specific Relief Act, 1963, prior to its substitution by virtue of the Specific Relief (Amendment) Act, 2018 provided for a statutory assumption that a breach of contract to transfer immovable property cannot be adequately relieved by compensation in money. This is based on the traditional common law assumption that no two pieces of land are alike.

78. Section 14 of the Specific Relief Act, 1963 sets out certain classes of contracts that are not specifically enforceable. One such class of contracts comprises of contracts, which are in their nature determinable. Clause (d) of Section 21 of the Specific Relief Act, 1877 expressly provided that contracts which are in their nature 'revocable' are unenforceable. The said statute was repealed and replaced by the Specific Relief Act, 1963. Clause (c) of Section 14(1) of the Specific Relief Act, 1963, as was in force prior to Specific Relief Act, 1877, expressly provided that contracts, which are in the nature determinable, were not specifically enforceable. The word 'revocable' as used in Clause (d) of Section 21 of the Specific Relief Act, 1877 was replaced by the word 'determinable'. The rationale for excluding such contracts, which are in their nature determinable, from the ambit of those contracts which may be specifically enforced, is apparent. There would be little purpose in granting the relief of specific performance of a contract,

which the parties were entitled to terminate or otherwise determine. The relief of specific performance is an equitable relief. It is founded on the principle that the parties to a contract must be entitled to the benefits from the contracts entered into by them. However, if the terms or the nature of that contract entitles the parties to terminate the contract, there would be little purpose in directing specific performance of that contract. Plainly, no such relief can be granted in equity.

79. Viewed in the aforesaid perspective, it is at once apparent that the contract is in its nature determinable if the same can be terminated or its specific performance can be avoided by the parties. Thus, contracts that can be terminated by the parties at will or are in respect of relationships, which either party can terminate; would be contracts that in their nature are determinable. If a party can repudiate the contract at its will, it is obvious that the same cannot be enforced against the said party.

80. However, if a party cannot terminate the contract as long as the other party is willing to perform its obligations, the contract cannot be considered as determinable and it would, in equity, be liable to be enforced against a party that fails to perform the same. Almost all contracts can be terminated by a party if the other party fails to perform its obligations. Such a contract cannot be stated to be determinable solely because it can be terminated by a party if the other party is in breach of its obligations. The party who is not in default would, in equity, be entitled to seek performance of that contract. In such cases, it cannot be an answer to the non-defaulting party's claim that the other

party could avoid the contract of the party seeking specific performance, had breached the contract; therefore, the same is not specifically enforceable. Thus, the question whether a contract is in its nature determinable, must be answered by ascertaining whether the party against whom it is sought to be enforced would otherwise have the right to terminate or determine the contract even though the other party are ready and willing to perform the contract and are not in default.

81. The contention advanced on behalf of Indiabulls that the ATS is in its nature determinable as Indiabulls could terminate it on failure of the other parties to perform their obligations is, plainly, unmerited. This contention is premised on the basis that Indiabulls is correct in its assumption that the other parties had breached the terms of their obligation. Concededly, if the other parties were ready and willing to fully perform their obligations, Indiabulls would not have any recourse to the termination clause. Such recourse is contingent on the failure of the other parties to perform the contract. It cannot be stated that the contract by its very nature is not specifically enforceable because it entitles a party to terminate the contract if the other parties have failed to perform their obligations.

82. There are other contracts, specific performance of which can be avoided by either party as the said contracts set up relationships such as agency or partnerships, the performance of which, subject to exceptions, cannot be compelled. These contracts are also by their nature determinable.

83. In the case of ***T.O Abraham v. Jose Thomas and Ors: (2018) 1 KLJ 128***, the Kerala High Court held as under:

> "**18.** The question thus before us is whether this contract is determinable. Before we answer this, we deem it necessary to understand clearly what is meant by determinable contracts. In the now repealed Specific Performance Act, 1877, section 21(d) stipulated that a contract, which in its nature is revokable, cannot be enforced to unenforceable contracts. The provision of the old Act corresponds to section 14(1)(c) of the Specific Relief Act, 1963 (which will, hereinafter be referred to as the "Act" for convenience), the only difference between the two being that the word 'revokable' has been substituted with the word 'determinable'. This was done because the word 'revokable' was inaccurate and it was felt that a more accurate word for it be substituted. Therefore, it is indubitable that a contract which in its nature is revokable or determinable, as described in the provisions of the sections afore referred, is definitely not enforceable through specific performance. For a contract to become determinable, it has to be first shown by the defendant that its clauses and terms are such that it would become possible for either of the parties to determine and terminate it without assigning any reason. The words used in section 14(1)(c) is "inherently determinable". The effect of the use of the word "inherently" in the section is to make it unambiguously clear that a contract which can be terminated by either of the parties on their own will without any further reason and without having to show any cause, would ones are inherently determinable. However, if an agreement is shown to be determinable at the happening of an event or on the occurance of a certain exigency, then it is ineluctable that on such event or exigency happening or occurring alone that the contract would stand determined. In order to see if a particular contract is inherently determinable or otherwise, we have to first see whether the parties to the said contract have the

right to determine it or to terminate it on their own without the junction of any other party and without assigning any reason. This is akin to a partnership at will, where one of the partners can notify the others of his intention not to continue in the said firm and the partnership itself then dissolves. The analogy we think is appropriate because a contract, to be inherently determinable, will have to specifically provide competence to the parties to it to terminate it without assigning any reason and merely by indicating that he does not intend to comply with the same.

**** **** ****

20. It is obvious from a reading of clause 13 of the agreement that the vendors namely the appellant and respondents 2 to 5 herein have agreed that if, for any reason, which is not expected in the normal course, the agreement cannot be completed due to reasons of breach or default on their side, they will repay the advance amount of Rs. 1,50,00,000/- with 12% interest, less the value of the rubber trees sold by the first respondent herein.

21. Can we say, we asked ourselves whether this would be in the nature of a determinable contract. It is obvious from a reading of the clause that this does not give any of the parties a right to determine the contract on their own without assigning reasons. On the contrary, the clause is worded in such a manner that if there is any breach on the side of the vendors, then alone the contract will stand determined and too on them making payment of the advance amount with 12% interest."

84. In ***Narendra Hirawat and Co. v. Sholay Media Entertainment Pvt. Ltd: (2020) 5 Mah LJ 173***, the Maharashtra High Court held as under:

"**8.** The question now is whether the plaintiff deserves any interim protection pending such trial. Dr. Saraf, for defendant No. 1, submits, and he is joined in this by Mr.

Andhyarujina, who appears for defendant No. 2, that the suit agreements being in the nature of a licence, and accordingly, by their very nature being determinable, their specific performance cannot prima facie be granted. Learned Counsel rely on the provisions of section 14(d) of the amended Specific Relief Act. (Amended section 14(b) is in *parimateria* with old section 14(1)(c) of the un-amended Specific Relief Act.) The word "licence" used in the suit agreements is not some special term of art so as to give rise to any particular consequence, as a matter of law, so far as revocability or determinability of the agreements is concerned; the consequence would rather depend on the agreements read as a whole. Apropos the agreements and having regard to the particular term of determination thereunder, Dr. Saraf and Mr. Andhyarujina argue that the contract is clearly determinable and if that is so, no specific performance is permissible. Learned Counsel rely on the cases of *Indian Oil Corporation Ltd.* v. *Amritsar Gas Service*, (1991) 1 SCC 533, *Jindal Steel and Power Limited* v. *SAP India Pvt. Ltd.*, (2015) 221 DLT 708 and *Spice Digital Ltd.* v. *Vistass Digital Media Pvt. Ltd.*, 2012 MhLJ Online 105 : (2012) 114 Bom LR 3696. Relying on these cases, it is submitted that since the subject agreements contain a termination clause, they must be treated, as, by their very nature, determinable and accordingly, no specific performance should be granted. Learned Counsel are not right there. When the relevant provision [section 14(d) of the Specific Relief Act] uses the words "a contract which is in its nature determinable", what it means is that the contract is determinable at the sweet will of a party to it, that is to say, without reference to the other party or without reference to any breach committed by the other party or without reference to any eventuality or circumstance. In other words, it contemplates a unilateral right in a party to a contract to determine the contract without assigning any reason or, for that matter, without having any reason. The contract in the present case is not so determinable; it is determinable only

in the event of the other party to the contract committing a breach of the agreement. In other words, its determination depends on an eventuality, which may or may not occur, and if that is so, the contract clearly is not "in its nature determinable".

9. The cases cited by learned Counsel for the defendants are clearly distinguishable on facts. In *Indian Oil Corporation* (supra), the contract (clause-28 of the distributorship agreement) gave right to either party to determine the agreement by giving 30 days' notice and the only relief that was permissible in such a case was award of a compensation for the period of notice, that is to say, 30 days. It is in the context of this clause that the Supreme Court held that the respondent before it (original plaintiff) was not entitled to restoration of its distributorship terminated by the appellant (original defendant), but only entitled to compensation for loss of earning for the notice period of 30 days, since such notice was not given by the defendant to the plaintiff. Likewise, in *Jindal Steel and Power Ltd.* (supra), the relevant clause of the contract gave right to the respondent before the Court (original defendant) to terminate the licence after giving 30 days' notice to the petitioner (original plaintiff). In pursuance of this clause, a learned Single Judge of Delhi High Court held that the contract was determinable by its very nature. In *Spice Digital Ltd.* (supra), the relevant contract (clause 6.2 of the agreement before the Court) gave right to either party to the contract to terminate the agreement upon a 30 days' prior written notice to the other party without assigning any reason for such termination. Once again, it is in the context of such unilateral right of termination that the Court came to a conclusion that the contract was, by its very nature, determinable and no specific performance could be claimed. All these cases are clearly distinguishable and do not support the defendants' case here."

[Emphasis Supplied]

85. In ***Tarun Sawhney v. Uma Lal: 2011 (125) DRJ 527***, this Court held as under:

> "4. Section 14(1) of Specific Relief Act deals with the contracts which cannot be specifically enforced and such contracts include a contract which by its nature is determinable. Therefore, the question which comes up for consideration is as to whether the agreements dated 16.09.2009 can be said to be determinable by nature within the meaning of Section 14(1)(c) of Specific Relief Act. In my view, Section 14(1)(c) of Specific Relief Act deals with the contracts which a party to the contracting is entitled to determine, during the subsistence of the contract. This clause, in my view, does not refer to a contract which would stand determined on account of non-performance of his obligation by a party to the agreement. Defendant No. 5 states that Clause 20 of the first agreement and Clause 17 of the second agreement, which are identical clauses, provide for termination of the contract in the event of its not being implemented within the time frame fixed in the agreement and not by an action of a party to the agreement. Even if the interpretation being given by Defendants No. 3 and 5 is accepted, a clause providing for automatic termination of the contract on account of its not being implemented within a given time frame would not make the contract terminable in nature, within the meaning of Section 14(1)(c) of Specific Relief Act, which I feel only to such contracts which provide for its termination by a party to the agreement, during the subsistence of the agreement. Section 14(1)(c) refers to agreements, which, either from their special character or from special stipulations, are determinable at the option or pleasure of the party against whom the relief is sought."
>
> [Emphasis Supplied]

86. The Madras High Court in its decision of ***A.Murugan and Ors. v. Rainbow Foundation Ltd: (2020) 3 MLJ 47***, has held as under:

"16. On examining the judgments on Section 21(d) of SRA 1877 and Section 14(c) of the Specific Relief Act, as applicable to this case, i.e. before Act 18 of 2018, I am of the view that Section 14(c) does not mandate that all contracts that could be terminated are not specifically enforceable. If so, no commercial contract would be specifically enforceable. Instead, Section 14(c) applies to contracts that are by nature determinable and not to all contracts that may be determined. If one were to classify contracts by placing them in categories on the basis of ease of determinability, about five broad categories can be envisaged, which are not necessarily exhaustive. Out of these, undoubtedly, two categories of contract would be considered as determinable by nature and, consequently, not specifically enforceable : (i) contracts that are unilaterally and inherently revocable or capable of being dissolved such as licences and partnerships at will; and (ii) contracts that are terminable unilaterally on "without cause" or "no fault" basis. Contracts that are terminable forthwith for cause or that cease to subsist "for cause" without provision for remedying the breach would constitute a third category. In my view, although the **Indian Oil case** referred to clause 27 thereof, which provided for termination forthwith "for cause", the decision turned on clause 28 thereof, which provided for "no fault" termination, as discussed earlier. Thus, the third category of contract is not determinable by nature; nonetheless, the relative ease of determinability may be a relevant factor in deciding whether to grant specific performance as regards this category. The fourth category would be of contracts that are terminable for cause subject to a breach notice and an opportunity to cure the breach and the fifth category would be contracts without a termination clause, which could be terminated for breach of a condition but not a warranty as per applicable common law principles. The said fourth and fifth categories of contract would, certainly, not be determinable in nature although they could be terminated under specific

> circumstances. Needless to say, the rationale for Section 14(c) is that the grant of specific performance of contracts that are by nature determinable would be an empty formality and the effectiveness of the order could be nullified by subsequent termination."

87. The aforesaid view was also followed by the Madras High Court in its subsequent decision of ***Jumbo World Holdings Ltd v. Embassy Property Developments Pvt Ltd: 2020 SCC OnLine Mad 61***.

88. The reliance placed by Indiabulls on the decision of the Supreme Court in ***Indian Oil Corporation Ltd. v. Amritsar Gas Service and Ors.: (1991) 1 SCC 533***, is misplaced. The controversy in the case arose in respect of an arbitral award rendered in respect of disputes between the parties. The appellant (IOCL) had terminated the LPG Distributorship Agreement with the respondent, *inter alia*, alleging that the respondent had released unauthorised connections by tampering with the waiting list registration record. Aggrieved by the action of IOCL in terminating the Distributorship Agreement, respondent no.1 (Amritsar Gas Service) filed a suit before the Court of Special Judge, First Class, Amritsar, *inter alia*, seeking a declaration that the termination of Distributorship Agreement was illegal and void and, that the said Agreement should continue notwithstanding, the termination by IOCL. IOCL had filed an application for staying the suit, which was rejected. The appeal and revisions preferred by IOCL were also rejected. IOCL carried the matter to the Supreme Court and the Supreme Court granted leave and had referred the disputes to

arbitration. The said proceedings culminated with the arbitral tribunal delivering the award.

89. The award was the subject matter of controversy before the Supreme Court. The arbitral tribunal held that the termination was wrongful and invalid. It further directed IOCL to remedy the breach by restoring the Distributorship Agreement as it existed on 14.03.1983, that is, before its termination and to return all articles, goods and records which IOCL had taken into possession pursuant to the termination. The counter-claims made by IOCL were rejected. The Arbitral Tribunal had also found that the Distributorship Agreement was determinable and, had observed that it would not fetter the right of IOCL to terminate the Distributorship Agreement in accordance with the terms of the Agreement. IOCL had terminated the Distributorship Agreement under Clause 27 of the said Agreement, which listed out certain events on occurrence of which IOCL could terminate the agreement at "*its entire discretion*". The Supreme Court noticed that in terms of another clause, that is, Clause 28 of the Distributorship Agreement, the said Agreement was revocable by either party by giving thirty-days' notice. In the aforesaid context, the Supreme Court observed as under:

> 12…. The finding in the award being that the Distributorship Agreement was revokable and the same being admittedly for rendering personal service, the relevant provisions of the Specific Relief Act were automatically attracted. Sub-section (1) of Section 14 of the Specific Relief Act specifies the contracts which cannot be specifically enforced, one of which is 'a contract which is in its nature determinable'. In the present case, it

> is not necessary to refer to the other clauses of sub-section (1) of Section 14, which also may be attracted in the present case since clause (*c*) clearly applies on the finding read with reasons given in the award itself that the contract by its nature is determinable. This being so granting the relief of restoration of the distributorship even on the finding that the breach was committed by the appellant-Corporation is contrary to the mandate in Section 14(1) of the Specific Relief Act and there is an error of law apparent on the face of the award which is stated to be made according to 'the law governing such cases'. The grant of this relief in the award cannot, therefore, be sustained….
>
> xxxx xxxxx xxxx
>
> 14. ….In such a situation, the agreement being revokable by either party in accordance with clause 28 by giving 30 days' notice, the only relief which could be granted was the award of compensation for the period of notice, that is, 30 days. The plaintiff-respondent 1 is, therefore, entitled to compensation being the loss of earnings for the notice period of 30 days instead of restoration of the distributorship…."

90. The decision in ***Indian Oil Corporation Ltd. v. Amritsar Gas Service and Ors.*** (*supra*) essentially, rested on two grounds. First, the conclusion of the arbitral tribunal that the contract in question was determinable. In view of this finding, it was clearly not open for the arbitral tribunal to have directed specific performance of the contract. Second and more important, the fact that the contract in question (Distributorship Agreement) could otherwise be terminated by either party by giving thirty days' notice. Clearly, if the terms of a contract entitles either of the parties to terminate the same in its absolute discretion, it would be inequitable to denude the parties of their right to

otherwise terminate the same. Enforcing specific performance of a contract of its nature would clearly be a futile exercise. Plainly, such contracts, which can be determined by either parties at will in their absolute discretion, are contracts which in their nature are determinable and therefore, the parties to such contracts cannot in equity seek specific performance against a party, by completely ignoring its right to terminate the same at will.

91. The decision in the case of ***Rajasthan Breweries Ltd. v. The Stroh Brewery Company*** (*supra*) is not strictly applicable to the facts of the present case. In that case, the appellant had sought a temporary injunction seeking stay of the notices of termination issued by the respondent. In that case, the Technical Knowhow Agreement as well as the Technical Assistance Agreement executed between the parties were terminated. In terms of the contracts, the appellant had agreed to render services and also provide the knowhow. The respondent terminated these agreements alleging that the appellant had failed to meet the requisite quality and standards. In a contract of this nature, the purchaser could not be compelled to accept technical assistance and knowhow, which according to it were not up to the standards. On the other hand, the appellant's claim could be satisfied by the amount payable under the said contracts if it was found that the termination was illegal. It is important to note that the court concluded that *"even in absence of a specific clause authorizing and enabling either party to terminate the agreement in the event of happening of events specified therein the same could be terminated even without assigning any reason by serving a*

reasonable notice". It is obvious that the court found that the contract in question was *"in its nature determinable"*

92. In ***Orissa Manganses and Minerals (Pvt.) Ltd. vs Adhunnik Steel Ltd: AIR 2005 Ori 113***, the Orissa High Court considered a contract which entitled either party to terminate the contract if after issuing ninety-days' notice to remedy the breach, the same was not cured. The court did not accept the agreement in question was in its nature determinable and not specifically enforceable. It held that since *"only in the event either party fails to remedy the breach, the agreement can be terminated. Therefore, it cannot be said that the agreement is determinable at the instance of either party"*. This decision was carried in appeal before the Supreme Court. The Supreme Court did not upset the aforesaid view; it modified the order and restrained the appellant from creating any third-party rights in respect of the mine in question and also restrained the appellant from contracting with any third party to carry on the mining operations. [***Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd.:(2007) 7 SCC 125***].

93. In ***Intercontinental Hotels Group India Pvt. Ltd. Vs. Shiva Satya Hotels Pvt. Ltd.: 2013 SCC OnLine Guj 8678***, the Gujarat High Court considered the question whether the contract in that case was determinable. The Court held that the expression determinable could be considered as synonymous to revocable. The Court noted that in ***Rajasthan Breweries Ltd. v. The Stroh Brewery Company*** (*supra*), this Court had given one test and in ***Adhunik Steel Ltd.*** (*supra)*, the Orissa High Court had taken a somewhat different view. After considering the

meaning of the expression 'in its nature determinable' as used in Section 14(1)(c) [renumbered as clause (d) of Section 14(1) as substituted by Act 18 of 2018 with effect from 1.10.2018] of the Specific Relief Act, 1963, the Court held that the question, whether an agreement is in its nature determinable, would require one to address the question whether it is possible to issue an order of specific performance and enforce that order. The relevant extract of the decision is set out below:

> "47. What is meant by determinable? Its dictionary meaning as per *Oxford English Dictionary* is, (I) Fixed definable (ii) Able to be authoritatively decided, definitely fixed or definitely ascertained and (iii) Liable to come to an end, terminable. In the earlier Act i.e. Specific Relief Act, 1877-Clause (d) of Section 21 had used the word 'revocable'. The Law Commission had suggested that 'revocable' is not the proper expression. Following the recommendation of Law Commission, the word 'determinable' is introduced. So, word 'determinable' can be considered as a synonyms of word 'revocable'. Further, when term in question in the agreement is not incomplete, or not lacking in clarity or it is not uncertain and such term or terms of the agreement is breached and question arose for determination whether the agreement is determinable or not, then answer most likely than 'not', in all cases would be in negative i.e. not determinable. How to consider that agreement is determinable in nature or not? In *Rajasthan Breweries Ltd.'s case* (supra) gives one test, viz., all voidable agreements are revocable and such agreements are determinable. In *Adhunik Steel's case* (supra), the Orissa High Court took the view that provision of closing the breach i.e. calling upon the other side to remedy the breach within 90 days makes the agreement not determinable at the instance of either party. In *Mariott International Inc.'s case* the Court found that agreement is not specifically enforceable on account of

> Section 14(1)(a) and 14(1)(b). Clause- (c) does not appear to have been specifically considered by the Court. One way of looking at it, is to ask the question whether it is possible to issue order of specific performance and possible to enforce that order? In other words, the Court would not issue idle or formal order or the direction. The Court would not issue futile direction. Obviously, the facts and circumstances of the case-mainly the terms of the agreement-would decide whether it is just, proper and legal to enforce the agreement or not. Determinability of the agreement may be determined by applying the test of 'propriety."
>
> [Emphasis Provided]

94. The question whether the contract by its very nature is determinable is required to be answered by ascertaining the nature of the contract. Contracts of agency, partnerships, contracts to provide service, employment contracts, contracts of personal service, contracts where the standards of performance are subjective, contracts that require a high degree of supervision to enforce, and contracts in perpetuity are, subject to exceptions, in their nature determinable. These contracts can be terminated by either party by a reasonable notice.

95. In addition, it is also necessary to ascertain the intention of the parties. It is important to address the question, whether the parties intended the contract to be determinable and thereby, not specifically enforceable. Plainly, if in terms of the express language of the contract, the parties have agreed that their contract will be specifically enforceable; the courts would have to assume to the said effect. This is not to say that the courts are bound to issue an injunction or specifically enforce the contract; but it would certainly require to give due

consideration to the intention of the parties.

96. As noted above, Clause 10 of the ATS expressly states in unambiguous terms that DLF would be entitled to specific performance of the ATS as the Sale Property is a special one and a similar property is otherwise not easily available. Once the parties have expressly agreed that the contract is required to be specifically enforceable, it is clearly not open for any party to contend to the contrary.

Re: Scope of Section 9 of the A&C Act

97. Indiabulls contends that the relief sought by DLF is beyond the scope of Section 9 of the A&C Act as it had terminated the ATS.

98. Section 9(1)(ii) of the A&C Act is relevant and is set out below:

> "**9. Interim measures, etc. by Court-** [(1)] A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a Court:—
>
> **** **** ****
>
> (*ii*) for an interim measure of protection in respect of any of the following matters, namely:—
>
> (*a*) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
>
> (*b*) securing the amount in dispute in the arbitration;
>
> (*c*) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may

> arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;
>
> (*d*) interim injunction or the appointment of a receiver;
>
> (*e*) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it."

99. It is apparent from the plain language of Section 9(1)(ii) of the A&C Act that the court has wide powers for granting interim measures of protection including for preservation of property that is a subject matter of dispute.

100. In ***Arvind Constructions Co. (P.) Ltd. v. Kalinga Mining Corporation and Ors.: (2007) 6 SCC 798***, the Supreme Court observed as under:

> "15. …. The power under Section 9 is conferred on the District Court. No special procedure is prescribed by the Act in that behalf. It is also clarified that the Court entertaining an application under Section 9 of the Act shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it. Prima facie, it appears that the general rules that governed the court while considering the grant of an interim injunction at the threshold are attracted even while dealing with an application under Section 9 of the Act.

101. In ***Modi Rubber Ltd. vs. Guardian International Corp.: (2007) 141 DLT 822,*** this Court had observed as under:

> "287.It is also necessary to examine the parameters within which the Court shall exercise such power. The manner and limits of exercise of such discretion have fallen for consideration in several judicial pronouncements and the principles laid down can be usefully called out thus:
>
> (i) ….
> (ii) The scope of Section 9 of the Arbitration and Conciliation Act, 1996 is in *pari meteria* with the provisions of Order 39 of the Code of Civil Procedure,1908. The power vested in the court by virtue of Section 9 must be exercised in consonance with equity which tampers the grant of discretionary relief as the relief of interim injunction is wholly equitable in nature. [Ref. (1995) 5 SCC 545, *Gujrat Bottling Co. Ltd. v. Coca Cola; 2004 (8) AD (Delhi) 361, Reliance Infocomm Ltd. v. Bharat Sanchar Nigam Ltd.*]"

102. In ***M/s Value Source Mercantile Ltd. v. M/s Span Mechnotronix Ltd.: 2014 SCC OnLine Del 3313***, the Division Bench of this Court had examined the scope of Section 9 of the A&C Act. The said decision was rendered in an appeal preferred under Section 37 of the A&C Act against an order passed by the learned Single Judge of this Court under Section 9 of the A&C Act, directing the appellant to pay arrears of rent/damages at the rate at which it was last paid and to continue to pay the same in the future in respect of the premises leased by the appellant. The appellant had during the course of the proceedings vacated the leased premises and had appealed against the order, *inter alia*, contending that the directions issued by the Court were beyond the

scope of Section 9 of the A&C Act. In this context, the Division Bench observed as under:

> "12. As far as the contention of the counsel for the appellant of a direction as issued by the learned Single Judge being beyond the domain of a proceeding under Section 9 of the Arbitration Act is concerned, Section 9 is titled as "Interim measures, etc. by Court" and provides for an application to the Court for an interim measure of protection for preservation, interim custody or sale of any goods which are subject matter of Arbitration Agreement or for securing the amount in dispute in the arbitration or for detention, preservation or inspection of any property or thing which is the subject matter of dispute in arbitration or for interim injunction or appointment of a receiver or "such other interim measure of protection as may appear to the Court to be just and convenient".
>
> 13. Section 9 of the Arbitration Act uses the expression "interim measure of protection" as distinct from the expression "temporary injunction" used in Order XXXIX Rules 1&2 of the CPC. Rather, "interim injunction" in Section 9(ii)(d) is only one of the matters prescribed in Section 9(ii)(a) to (e) qua which a party to an Arbitration Agreement is entitled to apply for "interim measure of protection". Section 9(ii)(e) is a residuary power empowering the Court to issue/direct other interim measures of protection as may appear to the Court to be just & convenient. Section 9 further clarifies that the Court, when its jurisdiction is invoked thereunder "shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it"."

103. In ***Films Rover International Ltd. v. Cannon Film Sales Ltd.: (1986) 3 All ER 772***, Lord Hoffman had observed as under:

> "But I think it is important in this area to distinguish between fundamental principles and what are sometimes described as 'guidelines', i.e useful generalisations about the way to deal with the normal run of cases falling within a particular category. The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle."
>
> [Emphasis Supplied]

104. The aforesaid passage was also referred to by the Division Bench of this Court in ***Ajay Singh v. Kal Airways Private Limited: 2017 SCC OnLine Del 8934*** while examining the scope of Section 9 of the A&C Act. In that decision, the Court held as under:

> "27. Though apparently, there seem to be two divergent strands of thought, in judicial thinking, this court is of the opinion that the matter is one of the weight to be given to the materials on record, a fact dependent exercise, rather than of principle. That Section 9 grants wide powers to the courts in fashioning an appropriate interim order, is apparent from its text. Nevertheless, what the authorities stress is that the exercise of such power should be principled, premised on some known guidelines - therefore, the analogy of Orders 38 and 39.

> Equally, the court should not find itself unduly bound by the text of those provisions rather it is to follow the underlying principles."

105. It is also relevant to refer to the decision of the Supreme Court in ***Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd.:*** (*supra*), whereby the Court had explained that the normal rules that govern the court in the grant of interim orders would also be relevant for the purpose of Section 9 of the A&C Act. The Court further held that an injunction is a form of specific relief and the provisions of the Specific Relief Act, 1963 cannot be kept out of consideration. The relevant extract of the said decision is set out below:

> "11. It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject-matter of the arbitration agreement and such interim measure of protection as may appear to the court to be just and convenient. The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well-known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was dehors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the section itself brings in the concept of "just and convenient" while speaking of passing any interim measure of protection. The concluding words of the section, "and the court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it" also suggest that the normal rules that govern the court in the grant of interim orders is not sought to be jettisoned by the provision. Moreover, when a party is given a right to approach an ordinary court of the country without providing a special

procedure or a special set of rules in that behalf, the ordinary rules followed by that court would govern the exercise of power conferred by the Act. On that basis also, it is not possible to keep out the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim measures under Section 9 of the Act.

12. The power and jurisdiction of courts in arbitral matters has been the subject of much discussion. The relationship between courts and Arbitral Tribunals have been said to swing between forced cohabitation and true partnership. The process of arbitration is dependent on the underlying support of the courts who alone have the power to rescue the system when one party seeks to sabotage it. The position was stated by Lord Mustill in *Coppee Lavalin N.V.* v. *Ken-Ren Chemicals & Fertilizers Ltd.* [(1995) 1 AC 38 : (1994) 2 WLR 631 : (1994) 2 All ER 449 : (1994) 2 Lloyd's Rep 109 (HL)] Lloyd's Rep at p. 116 : (All ER pp. 459*j*-460*a*)

> "[T]here is plainly a tension here. On the one hand the concept of arbitration as a consensual process, reinforced by the ideal of transnationalism leans always against the involvement of the mechanisms of State through the medium of a municipal court. On the other side there is the plain fact, palatable or not, that it is only a court possessing coercive powers which can rescue the arbitration if it is in danger of foundering,…"

13. In *Conservatory and Provisional Measures in International Arbitration*, 9th Joint Colloquium, Lord Mustill in "*Comments and Conclusions*" described the relationship further:

> "Ideally, the handling of arbitral disputes should resemble a relay race. In the initial stages, before the arbitrators are seized of the dispute, the baton is in the grasp of the court; for at that stage there is no other organisation which could take steps to prevent the

> arbitration agreement from being ineffectual. When the arbitrators take charge they take over the baton and retain it until they have made an award. At this point, having no longer a function to fulfil, the arbitrators hand back the baton so that the court can in case of need lend its coercive powers to the enforcement of the award."

It is in the above background that one has to consider the power of the court approached under the Arbitration Act for interim relief or interim protection.

14. Professor Lew in his *Commentary on Interim and Conservatory Measures in ICC Arbitration Cases*, has indicated:

> "The demonstration of irreparable or perhaps substantial harm is also necessary for the grant of a measure. This is because it is not appropriate to grant a measure where no irreparable or substantial harm comes to the movant in the event the measure is not granted. The final award offers the means of remedying any harm, reparable or otherwise, once determined."

15. The question was considered in *Channel Tunnel Group Ltd.* v. *Balfour Beatty Construction Ltd.* [1993 AC 334 : (1993) 2 WLR 262 : (1993) 1 All ER 664 (HL)] The trial Judge in that case took the view that he had the power to grant an interim mandatory injunction directing the continuance of the working of the contract pending the arbitration. The Court of Appeal thought that it was an appropriate case for an injunction but that it had no power to grant injunction because of the arbitration. In further appeal, the House of Lords held that it did have the power to grant injunction but on facts thought it inappropriate to grant one. In formulating its view, the House of Lords highlighted the problem to which an application for interim relief like the one made in that case may give rise. The House of Lords stated at AC p. 367 : (All ER p. 690*g-h*)

> "It is true that mandatory interlocutory relief may be granted even where it substantially overlaps the final relief claimed in the action; and I also accept that it is possible for the court at the pre-trial stage of a dispute arising under a construction contract to order the defendant to continue with a performance of the works. But the court should approach the making of such an order with the utmost caution, and should be prepared to act only when the balance of advantage plainly favours the grant of relief. In the combination of circumstances which we find in the present case I would have hesitated long before proposing that such an order should be made, even if the action had been destined to remain in the High Court."

16. Injunction is a form of specific relief. It is an order of a court requiring a party either to do a specific act or acts or to refrain from doing a specific act or acts either for a limited period or without limit of time. In relation to a breach of contract, the proper remedy against a defendant who acts in breach of his obligations under a contract, is either damages or specific relief. The two principal varieties of specific relief are, decree of specific performance and the injunction (See *David Bean on Injunctions*). The Specific Relief Act, 1963 was intended to be "an Act to define and amend the law relating to certain kinds of specific reliefs". Specific relief is relief in specie. It is a remedy which aims at the exact fulfilment of an obligation. According to Dr. Banerjee in his *Tagore Law Lectures on Specific Relief*, the remedy for the non-performance of a duty are (*1*) compensatory, (*2*) specific. In the former, the court awards damages for breach of the obligation. In the latter, it directs the party in default to do or forbear from doing the very thing, which he is bound to do or forbear from doing. The law of specific relief is said to be, in its essence, a part of the law of procedure, for, specific relief is a form of judicial redress. Thus, the Specific Relief Act, 1963 purports to define and amend the law relating to certain kinds of specific reliefs obtainable

in civil courts. It does not deal with the remedies connected with compensatory reliefs except as incidental and to a limited extent. The right to relief of injunctions is contained in Part III of the Specific Relief Act. Section 36 provides that preventive relief may be granted at the discretion of the court by injunction, temporary or perpetual. Section 38 indicates when perpetual injunctions are granted and Section 39 indicates when mandatory injunctions are granted. Section 40 provides that damages may be awarded either in lieu of or in addition to injunctions. Section 41 provides for contingencies when an injunction cannot be granted. Section 42 enables, notwithstanding anything contained in Section 41, particularly Clause (*e*) providing that no injunction can be granted to prevent the breach of a contract the performance of which would not be specifically enforced, the granting of an injunction to perform a negative covenant. Thus, the power to grant injunctions by way of specific relief is covered by the Specific Relief Act, 1963.

17. In *Nepa Ltd.* v. *Manoj Kumar Agrawal* [AIR 1999 MP 57] a learned Judge of the Madhya Pradesh High Court has suggested that when moved under Section 9 of the Act for interim protection, the provisions of the Specific Relief Act cannot be made applicable since in taking interim measures under Section 9 of the Act, the court does not decide on the merits of the case or the rights of parties and considers only the question of existence of an arbitration clause and the necessity of taking interim measures for issuing necessary directions or orders. When the grant of relief by way of injunction is, in general, governed by the Specific Relief Act, and Section 9 of the Act provides for an approach to the court for an interim injunction, we wonder how the relevant provisions of the Specific Relief Act can be kept out of consideration. For, the grant of that interim injunction has necessarily to be based on the principles governing its grant emanating out of the relevant provisions of the Specific Relief Act and the law bearing on the subject. Under Section 28 of the Act of

> 1996, even the Arbitral Tribunal is enjoined to decide the dispute submitted to it, in accordance with the substantive law for the time being in force in India, if it is not an international commercial arbitration. So, it cannot certainly be inferred that Section 9 keeps out the substantive law relating to interim reliefs."

106. In ***Nimbus Communications Limited v. Board of Control for Cricket in India & Anr.: (2013) 1 MahLJ 39***, the Bombay High Court referred to the decision in ***Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd.*** (*supra*) and held as under:

> "24. A close reading of the judgment of the Supreme Court in Adhunik Steels would indicate that while the Court held that the basic principles governing the grant of interim injunction would stand attracted to a petition under Section 9, the Court was of the view that the power under Section 9 is not totally independent of those principles. In other words, the power which is exercised by the Court under Section 9 is guided by the underlying principles which govern the exercise of an analogous power in the Code of Civil Procedure 1908. The exercise of the power under Section 9 cannot be totally independent of those principles. At the same time, the Court when it decides a petition under Section 9 must have due regard to the underlying purpose of the conferment of the power upon the Court which is to promote the efficacy of arbitration as a form of dispute resolution. Just as on the one hand the exercise of the power under Section 9 cannot be carried out in an uncharted territory ignoring the basic principles of procedural law contained in the Code of Civil Procedure 1908, the rigors of every procedural provision in the Code of Civil Procedure 1908 cannot be put into place to defeat the grant of relief which would subserve the paramount interests of justice. A balance has to be drawn between the two considerations in the facts of each case. The principles laid down in the Code of Civil Procedure 1908 for the

> grant of interlocutory remedies must furnish a guide to the Court when it determines an application under Section 9 of the Arbitration and Conciliation Act, 1996. The underlying basis of Order 38Rule 5 therefore has to be borne in mind while deciding an application under Section 9(ii)(b)."
>
> [Emphasis Supplied]

107. A Coordinate Bench of this Court in ***West Haryana Highways Projects Private Limited v. NHAI: OMP (I)(COMM.) 144/2020 and OMP (I) (COMM) 263/2020, decided on 07.10.2020*** had referred to the aforesaid decisions and had observed as under:

> "36. Thus, it is evident that while the well-settled principles governing grant of injunctions, as laid out under the provisions of the Specific Relief Act and Code of Civil Procedure, are to guide this Court while exercising its powers under Section 9, they do not strictly bind the course of the decision. Ultimately, the Court, after examining the facts of the case, has a duty to assess and decide which would be the most just and convenient route to take as also to prevent the ends of justice from being defeated."

108. The decision of the Division Bench of this Court in ***M/s Bharat Catering Corporation v. Indian Railway Catering and Tourism Corporation Limited (IRCTC) & Anr.*** (*supra*) is not dispositive of the controversy in this case. The observations made by the Court that the scope and ambit of Section 9 of the A&C Act do not envisage the restoration of a contract which has been terminated were made in the context of the facts of the said case. In that case, the respondent had terminated a catering contract with the appellant. The appellant had filed an application under Section 9 of the A&C Act praying for an *ex-*

parte order injuncting the operation of the letter of termination and further, restraining the respondent from giving effect to the same. In other words, the appellant (M/s Bharat Catering Corporation) sought an order to enable it to continue with the contract, which was terminated on the ground that there were disputes between its constituent partners and, the structure of the appellant firm had been changed in breach of the conditions of the contract. The Single Judge had declined the relief as sought for and the appellant had preferred an intra-court appeal under Section 37 of the A&C Act. The Division Bench of this Court had examined the controversies and observed as under:

> "14 ….We are unable to agree as, in our view, prima facie the respondents were entitled to take action for revoking the agreement entered into with the appellant in view of the fact that the tender conditions stipulated that the respondents at their discretion could revoke the said agreement if the appellant firm changed its structure and the appellant firm had admittedly changed its structure."

109. It is also relevant to note that the aforesaid decision did not notice the decision of the Supreme Court in ***Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd.*** (*supra*), whereby the Court had clearly held that in terms of the residuary clause, a court would have the same power under Section 9 of the A&C Act for making an order as it has for the purpose and in relation to any proceedings before it.

110. ATS is an agreement for sale of an immovable property and such contracts are specifically enforceable unless there are circumstances which indicate otherwise. Explanation to Section 10 of the Specific

Relief Act, 1963 as it existed prior to the Specific Relief (Amendment) Act, 2018 coming into force, specifically provided that unless and until the contrary is proved, the court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money. In the present case, the ATS expressly records the agreement between the parties that the sale property is a 'special property' and monetary relief shall not be sufficient.

111. In ***Avantha Holdings Limited v. Vistra ITCL India Limited*** (*supra*), a Coordinate Bench of this Court had noted the principles applicable while considering a relief under Section 9 of the A&C Act. The Court had also elaborately dealt with the facts in that case and held that the factum of default in payment of the outstanding amounts were acknowledged and admitted by the petitioner and thus, events of default as contemplated under the Debenture Trust Deeds had occurred. After observing the same, the Court had observed that "*No occasion, therefore, arises for this Court to interdict the invocation and sale, if any, of the pledged BILT shares. Any such direction, by this Court, would amount to a proscription, on the respondents exercising the rights, conferred and vested in them by the covenants of the Debenture Trust Deeds. This, on the face of it, is impermissible; in any case, no such relief can be granted, in a proceeding under Section 9 of the 1996 Act*."

This case has no applicability to DLF's claim for seeking an order for pursuing the subject matter of dispute (the Sale Property) in aid of its claim for specific performance of the ATS.

112. As noted above, contracts pertaining to sale of land are, subject to certain exceptions, specifically enforceable. The scope of Section 9 of the A&C Act is wide and is intended to preserve the subject matter of disputes so that a party may effectively avail its remedies in arbitration. There is some controversy, whether the width of Section 9 of the A&C Act is wider than the scope of relief that can be granted under the Code of Civil Procedure, 1908 (hereinafter the 'CPC'). However, there can be no cavil that if on the anvil of the principles as applicable to Order XXXIX Rule 1 and 2 of the CPC, interim injunction is required to be issued, the court can do so in exercise of its powers under Section 9 of the A&C Act. It is certainly not disputed that in given cases relating to agreements for sale of immovable property, it is not uncommon for the courts to issue injunction for preserving the rights in relation to the immovable property, which is the subject matter of the transaction.

113. In the case of ***N. Srinivasa v. Kuttukaran Machine Tools Ltd.: (2009) 5 SCC 182***, the Supreme Court considered an appeal against an order passed by the High Court setting aside the order passed by the Ld. Addl. City Civil Judge, Bangalore, issuing an order directing maintenance of *status quo* in respect of the subject immovable property. The parties had entered into an agreement for sale in respect of an immovable property on 21.12.2005. The appellant had also paid part consideration and the balance was payable at the time of registration of the sale deed, which was to be registered within a period of sixty days. The respondent (Kuttukaran Machine Toold Ltd.) cancelled the

agreement for sale on grounds that time was the essence of the said agreement and the appellant (N. Srinvasa) had failed to perform its obligations under the said agreement. Accordingly, the appellant filed a petition under Section 9 of the A&C Act before the Addl. City Civil Judge, Bangalore, *inter alia,* praying that the respondent be restrained form creating any third-party interest in respect of the property. The Addl. City Civil Judge, Bangalore held that *prima facie*, the respondent was likely to sell the property in dispute and if it was sold, it would render the arbitral award that may be passed infructuous. In such a case, the appellant would suffer irreparable loss and injury.

114. Whilst the Addl. City Civil Judge, Bangalore allowed the petition, the said decision was reversed on appeal before the High Court. The said decision was appealed to the Supreme Court. The Supreme Court set aside the decision of the High Court and restored the *status quo* order passed by the Ld. Addl. City Civil Judge, *albeit*, on certain conditions. The relevant extract of the said decision is set out below:

> "21. … The only ground taken by the respondent is that since time was the essence of the contract and the appellant had failed to perform his part of the contract within the time specified in the said agreement for sale, the question of grant of injunction from transferring, alienating or creating any third-party interest in respect of the property in dispute would not arise at all.
>
> 22. At the same time, it must be kept in mind that it would be open to the respondent to transfer, alienate or create any third-party interest in respect of the property in dispute before passing of the award by the sole arbitrator in which

one of the main issues would be whether time was the essence of the contract or not.

23. It is evident from the impugned order of the High Court that by vacating the order of status quo granted by the trial court, practically the High Court had limited the scope of the arbitration to the extent that the right of the appellant to receive back the amount with or without compensation would be taken away, if ultimately his allegations are found to be true.

24. Though the appellant has been denied the benefit of injunction but since the application was under Section 9 of the Act for interim measure, to secure the interest of the appellant in the event of his succeeding to an award before the arbitrator it would be in the interest of justice to put the appellant on terms.

25. It is also evident from the impugned order that the High Court has made it clear that the observations in the same shall not be understood to have limited the power of the arbitrator to consider the disputes on all its aspects including grant of specific performance of the contract, but by vacating the interim relief to the appellant, the High Court had made the entire arbitration proceeding infructuous and by dint of vacation of the interim order of the trial court, the respondent shall be in a position to transfer, alienate the property in dispute to a third party by which a third-party right shall be created and the appellant shall suffer enormous injury.

26. Furthermore, if at this stage the respondent is permitted to transfer, alienate or create any third-party interest in respect of the property in dispute, then the award, if passed in favour of the appellant by the arbitrator, would become nugatory and it would be difficult for the appellant to ask the respondent to execute the sale deed when a third-party interest has already been created by sale of the property in dispute and by possession delivered to the third party.

27. In a contract for sale of immovable property, normally it is presumed that time is not the essence of the contract. Even if there is an express stipulation to that effect, the said presumption can be rebutted. It is well settled that to find out whether time was the essence of the contract, it is better to refer to the terms and conditions of the contract itself.

28. Furthermore, the High Court, in our view, has failed to appreciate that by the impugned order they have also limited the scope of arbitration if ultimately the allegations made by the appellant are found to be true. That is to say, if an order restraining the respondent from creating any third-party interest or from transferring the property in dispute is not granted till an award is passed, the appellant shall suffer irreparable loss and injury and the entire award if passed in his favour, would become totally negated.

29. In this connection, it is imperative to refer to a judgment of this Court in *Maharwal Khewaji Trust (Regd.)* v. *Baldev Dass* [(2004) 8 SCC 488 : AIR 2005 SC 105] which observed as follows: (SCC p. 490, para 10)

> "*10*. … unless and until a case of irreparable loss or damage is made out by a party to the suit, the court should not permit the nature of the property being changed which also includes alienation or transfer of the property which may lead to loss or damage being caused to the party who may ultimately succeed and may further lead to multiplicity of proceedings. In the instant case no such case of irreparable loss is made out except contending that the legal proceedings are likely to take a long time, therefore, the respondent should be permitted to put the scheduled property to better use. We do not think in the facts and circumstances of this case, the lower appellate court and the High Court were justified in permitting the respondent to change the nature of the property by putting up construction as also by

permitting the alienation of the property, whatever may be the conditions on which the same is done."

Going by the ratio of the abovementioned decision, it is clear that the VIth Additional City Civil Judge, Bangalore, was justified in directing the parties to maintain status quo in the matter of transferring, alienating or creating any third-party interest as prima facie it has been proved that the respondent was trying to sell the property in dispute to a third party thus alienating the rights of the property in dispute, which would have caused irreparable damage to the appellant.

30. From a bare perusal of the findings of the High Court reversing the order of the trial court and rejecting the application for injunction, it would be evident that the appellant had failed to make out a prima facie case for grant of an order of injunction in his favour. But in view of our discussions made hereinabove, we are of the view that the Additional City Civil Judge, Bangalore was fully justified in directing the parties to maintain status quo as to the nature and character of the property in dispute till the award is passed by the sole arbitrator as we have already held that if the order of status quo is not granted and the respondent is permitted to sell the property in dispute to a third party, complications will arise and the third-party interest will be created, for which the award if any, passed in favour of the appellant ultimately, would become nugatory.

31. As noted hereinearlier, one of the main issues for the purpose of deciding the application for injunction was whether time was the essence of the contract or not. By the impugned order, the High Court had failed to appreciate that in the contract relating to immovable property, time cannot [Ed.: The complete legal position as to time being of the essence in contracts for sale of immovable property is stated in para 27.] be the essence of the contract. In any event even in such a case the arbitration clause would survive and the dispute would be required to be resolved.

That being the position, pending disposal of the arbitration proceeding, interim measure to safeguard the interest was required to be taken.

32. The High Court also, in our view, had failed to appreciate the material on record as the agreement and the correspondences produced by the parties to the effect that since the appellant was required to furnish the nil encumbrance certificate till the date of transaction to show that there was no charge over the property and further since the property was to be kept vacant at the time of the execution of the sale deed, time cannot be held to be the essence of the contract in the facts and circumstances of the case and accordingly, the interim measure was necessary to prevent irreparable loss and injury.

33. However, the question whether time was of the essence of the contract or not is to be decided by the arbitrator in the arbitration proceeding and for that reason only, the High Court had also left open such an issue to be decided by the learned arbitrator and in this connection, the High Court observed as follows:

> "As such the contentions with regard to survivability of the arbitration clause and the dispute as to whether time is the essence of the contract are issues which are within the realm of the arbitrator and accordingly, we do not wish to pronounce on the same and therefore, we do not see reason to refer to the arguments and case law referred in this regard."

Since the High Court had not at all gone into the question regarding whether time was the essence of the contract or not, it is not necessary for us to go into the question as the same shall be decided by the arbitrator while passing the award.

34. As noted hereinearlier, the respondent while opposing the application for grant of injunction, pleaded that the

prayer of the appellant for grant of injunction in respect of the property in dispute should be refused because admittedly, the time to execute the deed by the appellant had expired in the meantime.

35. As we have already held that one of the main issues to be decided by the arbitrator is whether time was the essence of the contract or not, which was not decided by the High Court while reversing the order of the Additional City Civil Judge, Bangalore, and in view of the fact that there is no dispute that a sum of Rs 2,00,00,250 (Two crores and two hundred fifty) has been paid by the appellant to the respondent at the time of execution of the agreement for sale and in view of the fact that there is no dispute that the parties had entered into an agreement for sale on certain terms and conditions, out of which one of the conditions was whether time was the essence of the contract or not which shall be decided by the sole arbitrator, we do not find any ground as to why the order directing the status quo in the matter of transferring, alienating or creating any third-party interest passed by the Additional City Civil Judge, Bangalore shall not be maintained till the award is passed by the arbitrator.

36. That apart, the survivability of the arbitration clause in the agreement was also questioned by the respondent in their objection to the application for injunction but since that question has also been kept open for the decision of the arbitrator by the High Court as well, we have no hesitation in our mind to hold that since the said question shall also be decided by the arbitrator while deciding the disputes between the parties, there is no ground why the order of status quo granted by the trial court shall not be maintained till the award is passed by the arbitrator.

37. It is well settled that even if an agreement ceases to exist, the arbitration clause remains in force and any dispute pertaining to the agreement ought to be resolved according to the conditions mentioned in the arbitration clause. Therefore, in our view, the High Court was not

> justified in setting aside the order of the trial court directing the parties to maintain status quo in the matter of transferring, alienating or creating any third-party interest in the same till the award is passed by the sole arbitrator."

115. The aforesaid decision in ***N. Srinivasa v. Kuttukaran Machine Tools Ltd.*** (*supra*) underscores the principle that parties must be relegated to arbitration for adjudication of their disputes but in the meanwhile, the subject matter of the disputes must be preserved so as to not curtail the claim or the remedy available to the parties. In the present case, DLF's claim for specific performance of the ATS is not insubstantial. All disputes raised in this context are required to be decided by the Arbitral Tribunal, however, in the meanwhile, it is essential to ensure that third party rights are not created in the Sale Property as that would frustrate DLF's final relief.

116. In the facts of the present case, this Court is of the view that the balance of convenience lies in favour of DLF. DLF is a developer and intends to develop the Sale Property. The entire transaction between the parties as recorded in the ATS is premised on the basis that DLF would use the Sale Property for development of its real estate project. Insofar as Indiabulls is concerned, concededly, it is a money lender and its interest is essentially to recover the loans along with interest as claimed by it. Thus, as far as Indiabulls is concerned, it can always be compensated in terms of money. There is no dispute that Kadam is a part of the Shipra Group of entities and admittedly, had mortgaged the Sale Property with Indiabulls to secure the repayment obligations of the Borrowers. The Borrowers claim that Indiabulls had agreed to accept

the consideration payable by DLF under the ATS as full and final settlement of its claims. Plainly, if Kadam and the Borrowers prevail in their case that the dues owed to Indiabulls were fully settled, they would stand discharged of their liability on Indiabulls receiving the consideration as provided under the ATS. However, if they fail in this case, the Borrowers would continue to be liable to discharge their dues. Insofar as Kadam is concerned, Kadam is not one of the Borrowers and its liability is limited to the collateral provided by it for securing the debts owed to Indiabulls, that is, the Sale Property.

117. As noted above, in terms of Clause 10 of the ATS, the parties had agreed that the Sale Property is a 'special property' and damages would not be an adequate remedy. Thus, if DLF prevails in its case that it is entitled to specific performance of the ATS, the damages it would suffer in the event the Sale Property is alienated, cannot be compensated in monetary terms. This Court is of the view that in these facts, the balance of convenience is, plainly, in favour of grant of an interim injunction restraining the parties from creating any third party rights.

118. In view of the above, this Court considers it apposite to direct that *status quo* as to the title and possession be maintained in respect of the Sale Property till the conclusion of the arbitral proceedings. It is so directed.

119. The parties are at liberty to approach the Arbitral Tribunal as and when the Arbitral Tribunal enters reference, to seek any variation,

modification or vacation of the aforesaid order and/or seek any further relief as advised.

120. It is further clarified that all rights and contentions of the parties are reserved and nothing stated in this order shall be construed as a final expression of opinion on the merits of the disputes. The findings and observations made in this order are solely for the purposes of the present application and would not preclude the parties from advancing their respective contentions as may be advised, before the Arbitral Tribunal.

121. The petition is disposed in the aforesaid terms. The pending application is also disposed of.

VIBHU BAKHRU, J

NOVEMBER 8, 2021
gsr/RK