

Bombay High Court

Kishor N Shah And 2 Ors vs Urban Infrastructure Trustees ... on 14 December, 2020

Bench: G.S. Patel

Kishor N Shah & Ors v Urban Infrastructure Trustees Ltd & Ors
1-CARBP-1435-2019-J.docx

Shephali

REPORTABLE

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
INTERIM APPLICATION (L) NO. 6647 OF 2020
IN
COMM ARBITRATION PETITION NO. 1435 OF 2019

1. Kishor Shah,
having his residential address at
Samruddhi (Residence Gate), Plot No.
157, 18th Road, Near Ambedkar Garden,
Chembur (E), Mumbai 400 071
2. Vimal K Shah,
having his residential address at
Samruddhi (Residence Gate), Plot No.
157, 18th Road, Near Ambedkar Garden,
Chembur (E), Mumbai 400 071
3. Nainesh K Shah,
having his residential address at
Samruddhi (Residence Gate), Plot No.
157, 18th Road, Near Ambedkar Garden,
Chembur (E), Mumbai 400 071 ...Petitioners

~ versus ~

Shephali
Mormare
Digitally signed
by Shephali

1. Urban Infrastructure

Trustees Ltd,

Mormare

Date:

2020.12.14

11:08:13 +0530

a company incorporated under the
[Companies Act](#), 1956, and having its

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registered office at 46-47, Maker
Chambers VI, Nariman Point, Mumbai
400 021

2. Urban Infrastructure

Venture Capital Fund,
a Trust registered as a Venture Capital
Fund, under the SEBI (Venture Capital
Funds) Regulations, 1996, having its
registered office at 46-47, Maker
Chambers VI, Nariman Point, Mumbai
400 021

3. Joyce Realtors Pvt Ltd,

a company incorporated under the
[Companies Act](#), 1956, and having its
registered office at Meeting Room, Godrej
Coliseum, 1301, A wing, 13th Floor,
Behind Everard Nagar, Off Eastern
Express Highway, Sion (E), Mumbai 400
022 ...Respondents

appearances

For the Applicants /

Petitioners

"the Shahs"

Mr Aspi Chinoy,

For the 1st & 2nd

Respondents

"Urban"

Mr Zal Andhyarujina,

Senior Advocate
with Ayushi Anandpara,
Rohan Dakshini and Vishesh
Malviya,
i/b Rashmikanth And Partners

Senior Advocate,
With Mr Sharan Jagtiani,
Senior Advocate,
and Mr Aditya Mehta,
i/b Dastur Kalambi &
Associates

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CORAM : G.S.Patel, J.
JUDGMENT RESERVED ON : 7th December 2020
JUDGMENT PRONOUNCED ON : 14th December 2020
JUDGMENT:

1. The three Applicants ("the Shahs") suffered an arbitral Award dated 19th May 2019 (corrected on 13th August 2019) rendered unanimously by a three-member arbitral tribunal. The Shahs' challenge petition under [Section 34](#) of the Arbitration & [Conciliation Act](#), 1996 -- Commercial Arbitration Petition No. 1435 of 2019 -- is pending admission. The present Interim Application is under [Section 36](#) of the Arbitration Act. The Shahs seek a stay on the execution, implementation and enforcement of the Award.

2. The IA is delayed, but I am going to let that pass. Mr Chinoy for the Shahs has something of an explanation for the delay, to which Mr Andhyarujina for the contesting Respondents Nos. 1 and 2 ("Urban") may have an equally arguable response, but I see no value in addressing this question. Matters such as these cannot, I believe, always be decided simply on the ground of delay.

3. Mr Chinoy's submission is that the Award is so utterly and egregiously perverse, and so riddled with patent illegality, that the Shahs are entitled to an unconditional stay. Now this positions the matter perhaps slightly differently from most. For Mr Chinoy says a 14th December 2020 Kishor N Shah & Ors v Urban Infrastructure Trustees Ltd & Ors

1-CARBP-1435-2019-J.docx refusal of stay would result in colossal injustice and inequity, especially given the facial perversity of the Award.

4. This submission needs to be correctly positioned in law. I am not, after all, hearing the [Section 34](#) petition either for admission or final disposal. A consequence that must immediately follow is that all observations and findings on facts in this order are restricted to the Section 36 Interim Application. They are not to be read as binding on the court that takes up the Section 34 Petition, whether for admission or final disposal; my observations in this order are entirely prima facie. I have, of necessity, had to take a view -- that is unavoidable -- but, in fairness, I must on my own limit the reach of my view on facts.

5. The question of law is about the correct or appropriate approach of a [Section 36](#) court. Is a stay always to be conditional, requiring a deposit or security, most especially when there is a money Award? In what situation could a [Section 36](#) court grant an unconditional stay? What must an applicant in [Section 36](#) achieve to obtain an unconditional stay (especially of a money Award)?

6. The general principle seems to be that courts should not readily -- or at least too easily -- deny to a successful litigant in arbitration the 'fruits of the arbitral award'. See, albeit in the context of [Section 9](#): *Nimbus Communications Ltd v Board of Control for Cricket in India*.¹ From this, it must follow that unconditional stays of arbitral awards cannot be the norm. [Section 36\(3\)](#) of the Arbitration Act provides guidance. It begins by saying that, on an application 1 2012 (5) Bom CR 114 : 2013 (1) Mah LJ 39.

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1-CARBP-1435-2019-J.docx under [Section 36\(2\)](#), a Court may, subject to such conditions as it deems fit, stay the operation of the award. Reasons are necessary. Then the proviso says that while considering the application for stay in the case of an arbitral award for payment of money, the Court must have 'due regard' to the provisions under the Code of Civil Procedure, 1908 ("CPC") for stay of a money decree.

7. The Award is for specific performance of a particular clause of a Shareholders' Agreement. The Shahs have been ordered to pay Rs.106.61 crores and interest at 12% per annum from 28th March 2012 as the purchase price to purchase certain securities that Urban holds. This is, therefore, a money award.

8. Order 41 Rule 5(3) of the CPC says there can be no appellate stay of a money decree unless the court staying the decree is satisfied

(a) that the applicant may be put to substantial loss if stay is refused;

(b) there is no delay in making the application; and (c) that the stay- applicant has furnished sufficient security to satisfy any ultimate decree. Order 41 Rule 5(5) contains a non obstante clause and says that where the appellant fails to make the deposit (or furnish security), the Court 'shall not make an order staying' the execution of the decree.

9. However mandatory the wording of Order 41 Rule 5 of the CPC, [Section 36\(3\)](#) clearly says that the court considering a stay of an arbitral award for money must have 'due regard to' the provisions of the CPC. Mr Chinoy points out, and I think completely correctly, that the CPC provisions are a guidance, and that they are to be taken into 14th December 2020 Kishor N Shah & Ors v Urban Infrastructure Trustees Ltd & Ors 1-CARBP-1435-2019-J.docx consideration; not that the [Section 36](#) Court lacks all discretion to grant an unconditional stay if the circumstances otherwise so warrant.² Even in a case purely under Order 41 Rule 5, i.e. for stay of a decree rather than an award, if an exceptional case has been made for staying execution of a pure money decree, the judicial discretion to do justice is not eliminated. True, a strong and exceptional case must be made for an unconditional stay -- and this is as true of an award for money as it is for a decree -- but there is no blanket prohibition on an appellate court unconditionally staying a money award or a money decree.³ The consequence, he says, is plain: a [Section 36](#) court is not to merely look at the operative part of the arbitral award under challenge, see that it is for money, and automatically order a deposit or security. The Court must look to all the circumstances; and if it be shown that the Award is entirely vulnerable, within the frame of permissible challenges under [Section 34](#), then in a given case a court may legitimately grant an unconditional stay.

10. This case, he submits, is one such case, for the arbitral award is so entirely perverse, irrational, and patently illegal that it cannot but be stayed without conditions.

11. I believe Mr Chinoy's submissions on the legal position are entirely accurate. I do not think for a moment that in every single case the Court is bound to order a deposit, or that it cannot, in a fit case, for good reason, order an unconditional stay. It can, and it may. But 2 Pam Developments Pvt Ltd v State of WB, (2019) 8 SCC 112; Ecopack India Paper Cup Pvt Ltd v Sphere International, 2018 SCC OnLine Bom 540. 3 Malwa Strips Pvt Ltd v Jyoti Ltd, (2009) 2 SCC 426.

14th December 2020 Kishor N Shah & Ors v Urban Infrastructure Trustees Ltd & Ors 1-CARBP-1435-2019-J.docx whether or not this case fits the bill is a separate question. All that Mr Chinoy submits at this stage is that the [Section 36](#) Court is not forbidden from looking, at least prima facie, at the award itself. How else, he asks, would any party be able to make out the necessary exceptional case and circumstances? That is entirely logical and true.

12. Mr Andhyarujina in fairness does not dispute the legal position, that is to say he does not canvas an argument that I am not entitled to look into the Award. What he does maintain is that the overarching principle of minimal judicial interference, coupled with the statutory intent of reaping to the successful litigant the fruits of his litigation labours, cannot too easily be jettisoned. The pattern or trend, he says, pointing to some orders of the Supreme Court, is to demand a full deposit of the amount awarded and nothing less. After all, it should not be that if the [Section 34](#) challenge fails, the award- holder is back to running from one judicial pillar to another judicial post seeking recovery. On the other hand, if the challenge succeeds, the petitioner will get his money back with interest. Viewed, therefore, from any perspective, outside a case that is utterly egregious and outlandish, justice and equity demand a full deposit. Merely showing this or that alleged vulnerability will not do.

13. The position therefore is that Mr Chinoy must make out a strong, exceptional and overwhelmingly compelling case for an unconditional stay of this Award. To do this, he must make reference to at least some part of the factual matrix, to provide context for his submissions on the Award. If Mr Chinoy cannot meet the necessary standard -- bearing in mind that this is a money Award -- a conditional order will follow.

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14. It is against this backdrop that I proceed to a brief narrative of the facts.

15. The Shahs are property developers. They operate through a clutch of entities. For our purposes, these entities, in turn, have development or ownership rights (or both) in nine real estate development projects. Some of these properties have tenants and occupants. There are also the interests of the original land owners to be considered. The various development projects therefore required the Shahs to clear encumbrances, settle with the land owners and acquire marketable land titles. The one thing that any such endeavour demands is, of course, money -- vast amounts of it. The Shahs went to Urban for finance for the 'joint development' of these nine projects. The attraction, as usual, was that the successful completion of these projects would yield even greater monetary dividends. The parties agreed to continue and complete this development jointly through a Special Purpose Vehicle called Joyce Realtors Pvt Ltd ("Joyce"), Respondent No. 3. This was to be Joyce's only business activity. Joyce's shareholding was to be held equally by the two sides.

16. These negotiations led to a Share Subscription Agreement or SSA of 26th October 2007. Urban took up equity of Rs.1 crore and debentures of Rs.53 crores. Urban committed to a further investment of Rs.80 crores, when intimated of Joyce's requirement, and this was to fund the settlements with tenants, occupants and land owners towards acquiring marketable

title. Urban also agreed to invest another Rs.36 crores to purchase additional Transferrable Development Rights or TDR.

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17. I note this as part of a historical narrative. The 2007 SSA is not, apparently, the governing contract, as we shall shortly see.

18. Mr Chinoy would have it that between October 2007 and April 2008, Urban invested only an additional Rs. 5 crores net (putting in Rs. 10 crores in February 2008 and accepting a refund of Rs. 5 crores in March 2008). This is really where the controversy apparently begins. For it seems that between December 2007 and June 2008, Urban funded Joyce in the amount of Rs.60 crores in two tranches of Rs.40 crores and Rs.20 crores. These were under two Inter Corporate Deposit Agreements ("ICDs") of 7th December 2007 and 17th April 2008. Mr Chinoy's short point is that whatever may have been the purpose or purposed utilization of these amounts under the two ICDs, they were not under the 2007 SSA and therefore Urban was already in breach, and the two ICD payments were a 'separate transaction, not in fulfilment of' Urban's obligations under the 2007 SSA. But in more than one place, the Shahs themselves have said that the amount under the two ICDs during this period was indeed 'further funding' by Urban. That statement, in paragraph 16 of the [Section 34](#) petition, references the ICDs and the dates in question. I will need to return to the rival contentions in this regard a little later.

19. On 24th April 2008, the Shahs and Urban entered into a second Share Subscription Agreement. There was also a separate Shareholders' Agreement or SHA of the same date. The 2008 SSA accepted that Urban had put in Rs. 52 crores, and reiterated Urban's commitment to invest another Rs. 80 crores and Rs.36 crores. The 2008 SSA provided that if the Shahs (described as 'Promoters') did not fulfil their obligation, then Joyce would have to return the entire 14th December 2020 Kishor N Shah & Ors v Urban Infrastructure Trustees Ltd & Ors 1-CARBP-1435-2019-J.docx debenture subscription amounts with 12% annual interest from the date of payment; and the Shahs would have to purchase Urban's equity by paying for it with interest at 12% per annum. Evidently, this is the Award Urban finally received. The 2008 SSA seems to cap the maximum investment by Urban at Rs.168 crores. This is the 'investment amount' defined in the 2008 SSA. That definition says that Rs.168 crores is the amount invested or to be invested by Urban (called the 'Investor' in the documentation) by way of equity subscription, debentures ("optionally fully convertible debentures" or "OFCDs") or by any other securities issued by Joyce, or by way of providing loan or funding to" Joyce.⁴

20. There is apparently another controversy about when Urban was to bring the additional amounts of Rs.80 crores and Rs.36 crores. Though Mr Chinoy's written chronology says this was to be done 'forthwith', that appears prima facie to be incorrect. There are clauses in the 2008 SSA that say the additional amount of Rs 80 crores was on an as-needed basis, upon Joyce providing Urban with proof of requirement of funds by those of the Shahs' entities that were actually handling the development work for title clearance.

21. The Rs.36 crores funding by Urban was, similarly, contingent upon Joyce needing the infusion to fund purchase of additional TDR by the Shahs' entities. These entities are referred to everywhere as 'PGEs' -- Promoter Group Entities.

4 Vol 03, pp. 123-124.

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22. From this, it would follow that the 2008 SSA and SHA were structured so that Urban's funding was routed through Joyce to these PGEs for on-site per-project deployment for (a) title clearance and (b) additional TDR acquisition. Joyce was, therefore, clearly conceived as the funding reservoir. Individual spigots of funding would be opened as needed.

23. Factually, it appears that the projects never reached TDR- purchase stage. In one project, Urbania, the title was already clear. In the others, the title issues were never cleared. No development seems to have commenced.

24. The 2008 SHA says in clause 1.5 that it is the 'entire agreement' between the parties. Prima facie, I do not see how it is possible to refer to the 2007 Agreement in view of this (other than, of course, the 2008 SSA).

25. On their own, the 2008 SSA and SHA could not possibly allow for any 'joint development', since the development rights lay with six separate PGEs. Therefore, on the same date, 24th April 2008, Joyce entered into six separate Joint Development Agreements or JDAs with the six PGEs for the joint development of each of six different projects. Each JDA provisioned for a refundable 6% pa interest- bearing security deposit that Joyce would place with the PGEs. On 23rd May 2008, there was a seventh JDA with another PGE with

similar terms. There is no dispute that these security deposits were indeed placed. Those security deposits came from, and only from, 14th December 2020 Kishor N Shah & Ors v Urban Infrastructure Trustees Ltd & Ors 1-CARBP-1435-2019-J.docx Joyce; and the funds in Joyce to make the deposits, all came from Urban.

26. Between April and December 2008, Urban brought in another Rs. 12 crores. Mr Chinoy says the total funding was woefully short, no more than Rs.17.5 crores. The ICD amounts could not be treated as 'funding'. Mr Andhyarujina would have it otherwise. The total Urban brought in to Joyce by May 2008, he says, whatever the description or moniker applied to the inflow, was Rs.129 crores. From this, Joyce placed security deposits with the PGEs, all controlled by the Shahs. The Shahs claimed to be entitled to Rs.102 crores, all from the security deposits, as something called 'take out money'. I do not pretend to understand what, if anything, this is supposed to mean. The Arbitral Tribunal was forced to consider it, and I will come to that presently, but at the broadest level, it seems to be only this. That, according to the Shahs, they were entitled from the funds Urban 'brought in' to 'take out' this (and possibly further) sums to keep for themselves.

27. Mr Chinoy says the projects failed for want of funding. Mr Andhyarujina maintains that the Shahs and their PGEs did nothing to achieve Stage 1 compliance, i.e. clearance of encumbrances, and never furnished Joyce with proof of funding requirements for this purpose. This is purely a question of evidence and of fact.

28. In August 2008, Urban gave Joyce another Rs 8. crores. The Shahs say this was not funding under any SSA or SHA; Urban says it was; and the Shahs have admitted as much even in the [Section 34](#) 14th December 2020 Kishor N Shah & Ors v Urban Infrastructure Trustees Ltd & Ors 1-CARBP-1435-2019-J.docx petition (apart from never contending before the Arbitral Tribunal that this was not funding). I did not, at the hearing before me, receive a clear answer to my question: that if this was not funding, then what was it? I was only told that this amount, like the previous amounts under ICDs, were not project funding. They were just loans that had to be returned. This assertion was never reconciled in the arguments (or in the brief chronology that contains comments and submissions) with the provisions of the 2008 documents that define 'investment amount'.

29. Then there was one intervening event regarding payment of interest to Axis Bank to stave off a threatened SARFAESI action. This is not determinative and need not delay us.

30. In February 2012, Urban filed three summary suits in this court against Joyce to recover the amounts under the three ICDs.

31. On 28th March 2012, Urban gave notice to the Shahs, claiming that the Shahs were in breach (including not clearing titles, among other things) and demanded that the Shahs buy out Urban's equity holding in Joyce and, too, the OFCDs with 12% interest.

32. On 31st October 2012, the Shahs terminated the JDAs between Joyce and the Shahs-controlled PGEs. The notice of termination also said that the interest-bearing refundable security deposits placed by Joyce were being appropriated as 'damages'. This includes the entire amount of Rs.40 crores under the ICDs.

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33. On 25th April 2013, this Court referred all disputes to arbitration.

34. Almost exactly a year later, Gupte J of this court heard the 2013 Notice of Motion or Notices of Motion filed by Joyce -- evidently driven by the Shahs -- to refer the disputes in the summary suits to arbitration under [Section 8](#) of the Arbitration Act. Now this is absolutely pivotal to the issue at hand today. Here, the Shahs contended that the amounts under the ICDs were in fact part of the funding under the 2008 SSA and SHA and were covered by the arbitration clause. I need to extract portions of this order.

2 The facts of the case may be briefly stated thus: The Plaintiffs have filed the present Summary Suit for recovery of a debt of Rs. 32,37,73,257/-, which arises under a Deposit Agreement dated 17 April 2008. Under this agreement, the Defendant borrowed from the Plaintiffs a sum of Rs.20,00,00,000/- as a short term Inter Corporate Deposit. The Defendant undertook to repay the entire principal amount together with interest on or before 16 May 2008. The repayment period was extended upto 30 September 2008 by a Deposit Agreement dated 12 May 2008 between the parties. The Defendant defaulted in repayment and as a result the present Summary Suit has been instituted by the Plaintiffs.

3 It is contended by the Defendant that the Plaintiffs themselves claim to have invested a sum of Rs. 110.39 crores in the Defendant company in pursuance of two agreements - a Share Holders Agreement and a Share Subscription Agreement, both dated 24 April 2008 (the Agreements contain an arbitration clause.) It is the case of the Defendant that the suit claim is included in that 14th December 2020 Kishor N Shah & Ors v Urban Infrastructure Trustees Ltd & Ors 1-CARBP-1435-2019-J.docx investment and as such, is covered by the two agreements. The Defendant contends that the disputes between the parties under the two agreements have already been referred to arbitration, and the suit claim, also being one arising under the two agreements and being covered thereunder, ought to be referred and made part of the arbitral reference. This is the basis of the Defendant's Notice of Motion.

4 In reply to the Notice of Motion, it is submitted by the Plaintiffs that the Inter Corporate Deposit is an independent transaction, which is the subject matter of a separate Deposit Agreement between the parties, and is not covered by the Share Holders Agreement or the Share Subscription Agreement. It is submitted that the dispute in the suit cannot be referred to arbitration in pursuance of the arbitration agreement contained in either of the two agreements.

.....

6 It is clear from the reading of two agreements and particularly the arbitration agreement contained therein that the parties to the arbitration agreement are the Promoters (listed in Schedule I to the Agreement) and the Investors (the Plaintiffs), and it is only disputes and differences between these two parties in respect of or concerning or connected with the implementation of the project or performance of obligations by the parties, etc. that shall be referred to the arbitration of an arbitral tribunal. Such arbitral tribunal shall be constituted by the Promoters and the Investors nominating one arbitrator each and the two nominated arbitrators selecting a third arbitrator.

7 As for the suit claim for refund of the Inter Corporate Deposit of Rs. 20 crores by the Defendant company, the same clearly arises out of a separate 14th December 2020 Kishor N Shah & Ors v Urban Infrastructure Trustees Ltd & Ors 1-CARBP-1435-2019-J.docx agreement between the Plaintiffs and the Defendant. The agreement i.e. Deposit Agreement of 17 April 2008, was an independent agreement executed prior to the two agreements between the Promoters and the Investors. A separate board resolution was passed by the Defendant Company for acceptance of the Inter Corporate Deposit. The rights and liabilities of the parties, i.e. the Plaintiffs and the Defendant, are governed entirely by the Deposit Agreement (as modified by a later agreement of 12 May 2008) and not governed by any of the terms and conditions of the Share Subscription Agreement or the Share Holders Agreement. The dispute concerning non- refund of the short term loan is a dispute between the Plaintiffs and the Defendant Company and there is no arbitration agreement between the two to refer such dispute to arbitration.

8 Merely because in the legal notices issued by the Plaintiffs, the amount is shown as part of a fund made available by the Plaintiffs to the Defendant Company, termed as investment, the Defendant cannot claim the deposit of Rs.20 crores as being part of the obligations of the Plaintiffs under the Share Subscription Agreement or the Share Holders Agreement. Non-refund of that deposit by the Defendant is neither a breach of any of the two agreements nor a dispute between the Promoters and the Plaintiffs. The subject matter of the present suit is, thus, not covered by any arbitration agreement between the parties, i.e. the Plaintiffs and the Defendant, and there is no question of referring the parties to arbitration.

(Emphasis added)

35. Mr Chinoy contends that with this finding, the Arbitral Tribunal could not have taken into account any part of the claim 14th December 2020 Kishor N Shah & Ors v Urban Infrastructure Trustees Ltd & Ors 1-CARBP-1435-2019-J.docx covered by the Summary Suits on the ICDs for any purpose at all. The Arbitral Tribunal, however, accepted that the amount of the ICDs, Rs 40 crores, was part of the 'funding' under the 2008 SSA and SHA, and indeed used this amount to compute the interest liability.

36. This submission is severely problematic. First, in the Summary Suit, it was the Shahs who claimed or contended that the Rs 40 crores under the ICDs was part of the funding. I do not see how it can be heard now to say that it is the Shah's case that the Rs 40 crores due under the ICDs was not part of the funding and that, therefore, Urban was in breach of its funding obligations. The order of Gupte J does not, in fact, and correctly read, say that it was not part of the project funding. It only says that the recovery of this part of the funding was covered by a separate, stand-alone agreement without an arbitration clause and could not be swept into the arbitration of disputes under the SSA and SHA. This is a perfectly possible and plausible scenario. Funding may have come from different directions, at different points in time. The question would be how much of that funding is recoverable as a repayment obligation under the 2008 SSA and SHA in arbitration and how is recoverable outside arbitration. The funding and its recovery, in whole or in part, are two distinct aspects. I do not see how it was ever possible for the Shahs to conflate these two. Notably, in the arbitration, Urban made no claim at all for the recovery of the Rs 40 crores covered by the ICDs. Whether or not an interest component could include the Rs 40 crores is a separate issue. On its own, this will not make the order so patently illegal or perverse as to warrant the order of unconditional stay Mr Chinoy seeks.

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37. The second issue is with what is not just an inconsistency but a fatal and irreconcilable mutually destructive contradiction in the Shahs' stand. Yesterday, they claimed that the Rs. 40 crores was part of the funding and should be arbitrated. Today, they say it was never part of the funding and could not have entered any part of the discussion by the arbitral tribunal.

38. This contrariness carries through into the Section 34 Petition itself. In paragraph 29, the Shahs say that Urban's Summary Suits proceeded on the "false and incorrect premise that the amounts advanced under the ICDs were independent of and separate from the funding obligations of Respondents Nos. 1 and 2 under the 2008 SSA and SHA. In its Affidavit in Reply to the Summonses of Judgement filed in the said Summary Suits, JRL contended that

the aggregate amount of Rs. 40 crores advanced by such ICDs were also towards fulfilment of the funding obligations of Respondent Nos. 1 and 2 under the terms of the 2008 SSA and SHA. JRPL made an application under [Section 8](#) of the Arbitration and [Conciliation Act](#), 1996, ("the Act") for reference of the claims made in the Summary Suits, to arbitration."

39. I do not see how the Shahs can turn this entire issue on its head and, as it were, make a virtue of their own failure. It was the Shahs who said that ICDs were part of the funding. It was the Shahs who maintained this throughout -- and the [Section 34](#) petition will certainly need closer examination if that is indeed what is being said even now (I believe there is some amendment application pending as well). In any case, the Shahs case today seems to me to proceed on an 14th December 2020 Kishor N Shah & Ors v Urban Infrastructure Trustees Ltd & Ors 1-CARBP-1435-2019-J.docx entirely inaccurate reading of Gupte J's order. He was not asked to pronounce on whether or not the ICDs were part of the funding. He was only asked to decide whether the claims under the ICDs were arbitrable and had to be compelled into arbitration.

40. Was there a corresponding inconsistency or contradiction in what Urban said and now says? It would appear not, despite the interpretation the Shahs seek to put on it. In Arbitration, Urban said (and this is noted in paragraph 9.17 of the Award):

"The ICD Agreements (and Extension Agreements) do not contain any arbitration clause. The relief of refund of the outstanding loan amounts under the ICDs claimed against Joyce in the Summary Suits could not have been made the subject matter of the arbitration proceedings. The relief of the purchase of equity shares and debentures and damages could not have been the subject matter of the Summary Suits in view of the arbitration agreement, between the parties as incorporated in SSA and SHA ... "

41. Urban's stand is thus consistent: the amounts of the ICDs could not be recovered in arbitration. The claim in arbitration isolated the purchase of equity shares and debentures, and the claim for damages from the claim under the ICDs.

42. As I noted, the fact that a party has to take distinct steps for recovery of distinct claims does not alter the nature, character or purpose of the payment. There may be a single transaction yielding multiple causes of action -- the law clearly recognizes this. What the Shahs seek to do is to conflate the single transaction (the funding) with the distinct causes of action (the arbitration and the Summary 14th December 2020 Kishor N Shah & Ors v Urban Infrastructure Trustees Ltd & Ors 1-CARBP-1435-2019-J.docx Suits). It is settled law that one transaction can yield multiple, distinct causes of action.⁵

43. Indeed, I see no quarrel with this well-established proposition. What Mr Chinoy seeks to canvas is a question of evidence and fact, i.e. whether the Rs. 40 crores under the ICDs was part of the funding under the 2008 SSA and SHA. Gupte J did not -- and could not -- have said it was not part of the funding. The Shahs saying it was did not make it so; nor did Urban's notice. As paragraphs 7 and 8 of his order show (and, which incidentally, the arbitral tribunal considered and extracted verbatim), Gupte J only held that the dispute as to recovery of the amount under the ICDs was not arbitrable and was not covered by the arbitration provisions of the 2008 SSA and SHA. Apart, therefore, from the inherent contradiction in the Shahs case, the position that emerges from Gupte J's order is entirely consistent with the legal position, viz., that a single transaction may well give rise to multiple causes of action.⁶

44. The Shahs and Urban had only a single, solitary relationship

-- funding by Urban through Joyce to the PGEs for the development/re-development projects. There was nothing else. Before me, today too, no other relationship is shown or established; for instance, that there were regular relations of lending and repayment for purposes unrelated to these re-development projects. Joyce was incorporated for a solitary purpose, viz., these re- development projects. It had no other objective and the Shahs and 5 See: MSEB v National Transport Company, (1992) Mah LJ 1505.

6 The Shahs SLP to the Supreme Court failed.

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Kishor N Shah & Ors v Urban Infrastructure Trustees Ltd & Ors
1-CARBP-1435-2019-J.docx Urban had no other truck with each other. It is in this context that one must see the absence of a cogent response to my question that if the ICD amount was not funding, then what was it?

45. Finally, there is this: the allegations the Shahs make now of a failure by Urban to fund Joyce and the re-development projects simply do not stand to reason. Consider the following, in the Shahs' list of dates, through which Mr Chinoy took me. This is part of item 8 of that chronology:

After having created a situation where the encumbrances could not be cleared and the Projects could not be proceeded with largely due to their failure to bring

in the agreed finances/ funding, the Respondents addressed a Notice dated 28.03.12 ...

(Emphasis added) Why would Urban create this 'situation'? What could it possibly gain by undermining the entire enterprise? Clearly, Urban's ultimate payback was not in a wearying and uncertain litigation, but in successful completion of the projects. It gained nothing at all by scuttling the entire proposal, but was potentially at very considerable monetary risk if it did so.

46. This is actually the whole of the case for an unconditional stay

-- the question of this amount of Rs. 40 crores under the ICDs. Mr Chinoy and Mr Andhyarujina took me through various parts of the Award. I do not believe I need to examine each such paragraph today (or ever, actually; that is hardly within the remit of a [Section 34](#) court, long held not to be a first appellate jurisdiction).

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47. In arbitration, Urban said its total funding to Joyce was:⁷

(a) Rs. 1 crore for equity;

(b) Rs. 68 crores for the OFCDs, plus additional amounts as debenture application money aggregating to Rs.70.3875 crores.

(c) Rs. 40 crores covered by the ICDs for which separate suits were pending in this court.

The total funding is Rs.110.39 crores.

48. It is not necessary to examine the nature of the breaches alleged by Urban against the Shahs.

49. On the question of the ICDs, paragraph 4.19 of the Award puts it like this:

4.19 There are two notable points which are of significance:- First, as noted earlier also, the Claimants are claiming relief only against Respondents No. 1 to 3, the Promoters; the Claimants have not sought for any relief being allowed to them against the Company, Respondent No. 4 although it has been joined as party to the proceedings.

Secondly, vide para 74, the Claimants have specifically stated that amount of ICDs (Inter Corporate Deposits) was not being claimed in these proceedings. They have stated -- 'The Claimants are not claiming herein the amounts of the ICDs under the ICD Agreements. The said claims are pending before the Hon'ble Court in Summary Suit Nos. 2680 of 2011, 558 of 2012 and 560 of 2012. The Claimants reserve their right to claim in these proceedings the loss, if any that the 7 Paragraph 4.4 of the Award, Vol 3, pp. 15-16.

14th December 2020 Kishor N Shah & Ors v Urban Infrastructure Trustees Ltd & Ors 1-CARBP-1435-2019-J.docx Claimant may suffer in the event of the Claimant being ultimately unable to recover the said ICD amounts from the Company. The Promoters would be liable to pay the said loss as and by way of damages in that event'.

(Emphasis in bold added)

50. The Shahs' case in arbitration was summarized like this:

5.7 The Claimants defaulted. They did not meet with their funding obligations. The sum of Rs. 218 crores was not financed. Instead, after initial financing of Rs. 100 crores the Claimants started raising disputes on the expenses incurred by the Promoters. Due to lack of funds, the Claimants paid an amount of Rs. 40 crores on 07.12.2007 to Respondent No. 4 on behalf of another FDI Real Estate Fund. This amount was on account of Vengas Realtors Pvt. Ltd. (VRPL), another Joint Venture Company. The Respondents submit that on the Claimants own admission, the Claimants have committed default in investment to the extent of Rs. 98 crores. This resulted in erupting of the disputes between the parties.

(Emphasis added)

51. The Arbitral Tribunal was confronted with Gupte J's order. It considered it at some length, and rendered a reasoned view. In doing so, it considered the law, including Order II Rule 2 of the CPC, and held that law does not require that where several causes of action arise from one transaction, a plaintiff should sue for all of them in one suit. The law only forbids splitting up of a unitary cause of action into parts so as to bring separate suits in respect of those parts. This is faultless, and it exposes a fatal flaw in the Shahs' case. The funding was a single 14th December 2020 Kishor N Shah & Ors v Urban Infrastructure Trustees Ltd & Ors 1-CARBP-1435-2019-J.docx transaction, but from it arose distinct causes of action: one set in arbitration and another in a civil summary action.

52. Then the arbitral tribunal ruled on the Shahs' preliminary objection:

9.14 The Claimants' consistent case is, and has been, that the ICD amounts are part of the Claimants' investments in Joyce as per the Umbrella Agreement (the SSA/SHA). The loans are under separate ICD Agreements, the terms of repayment of which are governed by the separate ICD Agreements. This is also the finding of the Bombay High Court in the Order dated 23 April 2014. This is not inconsistent with the investment being under the overall Umbrella Agreement (the SSA and the SHA). The Promoters' contention that there has been a sifting change in Claimants' case is incorrect.

9.15 The case as above is clearly pleaded in the Statement of Claim itself in the present arbitration proceedings. Even before the filing of the SoD, the Claimants have made a clean breast of necessary basic facts, also set out how the causes of action are different. Para 17.1 and 17.2 of the Statement of Claim, read as under:

"17.1. The Claimants performed and fulfilled their obligations to bring money, under the Agreement. (Note viz. the 2008 SSA/SHA) The Claimants invested in the Company a total amount of about Rs. 143.39 crores by way of

(i)equity subscription, (ii)Optionally Fully Convertible Debentures/Optionally Fully Convertible Debenture Application monies and (iii) Intercompany Deposits for short-

term funding. From the aforesaid amount of 14th December 2020 Kishor N Shah & Ors v Urban Infrastructure Trustees Ltd & Ors 1-CARBP-1435-2019-J.docx Rs.143 crores, an amount of approximately Rs.

33 crores was repaid to the Claimants from time to time.

17.2 The Claimants' present investment in the Company is Rs.110.39 crores in the following manner:

(i) Rs.1,00,00,000/ (Rupees One Crore only) towards subscription for allotment of 10 Lakhs equity shares (of the face value of Rs.10/- each);

(ii) Rs.68,00,00,000/-(Rupees Sixty Eight Crores only) for 68 lakh Optionally Fully Convertible Debentures "OFCD" (of the face value of Rs.100/- each) and Rs.1,38,75,000/- as debenture application money, aggregating to Rs.69,38,75,000/-

(Rupee Sixty Nine Crores Thirty Eight Lakhs Seventy Five Thousand only).

The Claimants' equity shares, Optionally Fully Convertible Debentures and the debenture application money as above are hereinafter referred to as "the Securities" or "the Claimants' Securities". The aggregate investment by the Claimants in the Securities is Rs.70,38,75,000/. No dividend has been paid on the equity shares and the Debentures do not carry any interest and are redeemable at

par. A more particular description of the Claimants' 14th December 2020 Kishor N Shah & Ors v Urban Infrastructure Trustees Ltd & Ors 1-CARBP-1435-2019-J.docx Securities is set out in Exhibit "D"

hereto;

(iii) Rs.40,00,00,000/- (Rupees Forty Crores only) as separate interest bearing inter- corporate deposits with the Company under separate inter- corporate deposit agreements between the Claimants and the Company.

Separate proceedings by way of summary suits, have been filed in the Hon'ble High Court at Bombay by the Claimants against the Company for recovery of these amounts along with interest, due under the said separate inter-corporate deposit agreements.

9.16 In the affidavit of Mr. Parag Parekh (CW-1), vide para 24 & 33 it has been stated that outstanding amounts due under the ICDs are not the subject matter of arbitral proceedings and as to ICDs three summary suits have been filed in Bombay High Court.

9.17 The submissions on behalf of the Claimants have proceeded as noted hereinafter. Clause 5.2 (ii) of the SHA under which the claim in the arbitration proceedings has been made [prayer (a)] does not provide for repayment of the loan amounts under the ICDs consequent upon the breach of the SSA/SHA terms by the Promoters. The ICD Agreements (and Extension Agreements) do not contain any arbitration clause. The relief of refund of the outstanding loan amounts under the ICDs claimed against Joyce in the Summary Suits could not have been made the subject matter of the arbitration proceedings. The relief of the purchase of equity shares and debentures and damages could not 14th December 2020 Kishor N Shah & Ors v Urban Infrastructure Trustees Ltd & Ors 1-CARBP-1435-2019-J.docx have been the subject matter of the Summary Suits in view of the arbitration agreement, between the parties as incorporated in SSA and SHA. In the present proceedings, the Claimants are relying upon the facts relating to payments made by them under the ICDs only to establish fulfilment of their obligations under the SSA/SHA, and also to establish defaults on the part of the Promoters under the SSA/SHA, as specifically pleaded in the SOC.

9.18 Thus, the fact is that no reliefs are claimed or could be claimed against Joyce in the present arbitration proceedings for recovery of those amounts, in view of the arbitration clause. The fact that the defences raised by Joyce to the Claimants' claim in the summary suits may have common features with the defences raised by the three individuals (Promoters) in the present arbitration proceedings cannot alter the distinct nature of the two causes of action in the two proceedings.

9.19 In our opinion, what has been noted hereinabove, especially in para 9.16 & 9.17 above, is enough to overrule the plea of bar based on Order II Rule 2 of the CPC as urged by the Promoter-Respondents.

9.20 In addition, it must be noted that the Promoters opposed the application filed by the Claimants under [Section 11](#) (6) of the [Arbitration Act](#) seeking appointment of an Arbitrator on behalf of the Promoters in regard to the present arbitration proceedings. In the Affidavit in Reply dated 6 March 2013, (after filing of the Summary Suits) the Promoters took up a specific plea in the following words:-

"6. I say and submit as the Applicants [Note: Claimants here] have ,filed suits in this Hon'ble Court for recovery of part of the amount invested by them pursuant to the said 14th December 2020 Kishor N Shah & Ors v Urban Infrastructure Trustees Ltd & Ors 1-CARBP-1435-2019-J.docx Share Subscription Agreement and Shareholders' Agreement they have abandoned and/or have deemed to be abandoned the Arbitration Agreements contained under the Share Subscription Agreement and Shareholders' Agreement and in view thereof the above application filed by the Applicant is liable to be dismissed with compensatory costs."

The Respondents No. 1-2-3 cannot be allowed to approbate and reprobate.

9.21 The Tribunal is clearly of the opinion that the civil suits have been filed by the Claimants against the Company (Respondent No. 4) for enforcing the obligations arising out of ICDs wherein there is no clause for arbitration. So far as the present arbitral proceedings are concerned the Claimants have filed proceedings against the promoters for enforcing their personal obligations based on the cause of action arising out of SSA and SHA wherein there is a clause for arbitration. The cause of action whereon the claims is based in civil suits and the cause of action on which are based the claims in the present proceedings are different, though the transaction may be one.

9.22 The order of the High Court of Bombay dt.

25.04.2013 in Arb. Appli. No. 230/2012 which was made on the Claimant's application u/s 11(6) of A&C Act is significant. For the purpose of present arbitral proceedings, the Claimants having nominated their arbitrator moved the application seeking appointment of arbitrator for the Respondents. On 25.04.2013 the Respondent NO. 1 to 3 nominated their arbitrator without any reservation and made a statement to that effect before the Court. The Respondent 14th December 2020 Kishor N Shah & Ors v Urban Infrastructure Trustees Ltd

& Ors 1-CARBP-1435-2019-J.docx No. 4 stated that it did not propose to appoint any arbitrator. The Court directed: -

- (i) That the arbitrators nominated by the Claimants and Respondents No. 1 to 3 shall nominate the presiding arbitrator;
- (ii) That there would be only one arbitration reference between the parties under both the agreements (SSA and SHA).
- (iii) That the question which had arisen before the Court as to whether Respondent No. 4 company can be represented by Respondents No. 1 to 3 or not is kept open.

9.23 In view of the above said facts, the Tribunal is of the opinion that the present arbitral proceedings are competent.

(Emphasis added)

53. The arbitral tribunal returned these final findings on one of the Points for Determination:

16.1 The Claimants were to invest a maximum aggregate of Rs. 168 crores under the said agreements. The Claimants invested the sum of Rs. 52 crores on execution as agreed. The balance amounts upto Rs 116 crores were payable from time to time, on the terms set out in the agreement viz in installments on a need basis at the time Joyce required funds for providing finance to the PGEs for settlement and to obtain a clear and marketable title and after notice from Joyce and upon Joyce providing proof of requirements. Similar terms applied to the payment of the amounts upto Rs 36 Crores under clause 3.5.3 (ii).

14th December 2020 Kishor N Shah & Ors v Urban Infrastructure Trustees Ltd & Ors 1-CARBP-1435-2019-J.docx 16.2 The SPV Joyce was to raise funds through bank borrowings, etc. under clause 2.2.10 (d) of the 2008 SSA in installments from time to time on satisfaction of the conditions by the PGEs and Joyce set out in that clause. The occasion for payment of any amounts towards Rs. 36 crores never arose. No TDR was required to be acquired. The raising of finances through bank borrowings etc. did not arise, as the conditions had not been fulfilled.

16.3 Mr. Devitre submitted that in the above circumstances it has to be held that the Claimants fulfilled their obligations. They made available to Joyce huge amounts to enable Joyce to pay these amounts to the PGEs for settlements and as Security Deposits/Additional Security deposits/Advances. In addition to the Rs. 52 crores paid in October 2007, the Claimants paid further amounts of Rs. 91.39 crores (gross) [Rs. 58.39 crores net, after return of the amounts to the Claimants].

16.4 In the opinion of the Tribunal, the Claimants have fulfilled their part of the obligations. The Promoters, however, did not do so. They did not clear the encumbrances on project lands and did not arrive at settlements, etc. so as to make the properties available for joint development under the Agreements.

54. On the question of Urban's alleged failure to fund, the arbitral tribunal said:

18.5 The defence of the Promoter-Respondents is that the Claimants did not fund Joyce for providing finance to the PGEs for the settlement expenses (of Rs. 80 crores). On behalf of the Claimants it is submitted that the Claimants had admittedly made available funds to the extent of about Rs. 143.39 crores (gross) and Rs. 110.39 crores (net - after 14th December 2020 Kishor N Shah & Ors v Urban Infrastructure Trustees Ltd & Ors 1-CARBP-1435-2019-J.docx repayment of amounts to the Claimants by Joyce). These huge funds were available for utilization by the PGEs for settlement expenses for obtaining clear and marketable titles. The Promoters did not utilize these amounts for that purpose. The Promoters have attempted to justify their refusal to utilize the amounts for project expenses by claiming that the amount of Rs. 102 crores from the amounts paid to Joyce was their alleged 'Take Out', which according to them was not to be accounted for or used for project purposes. This plea of Take Out has already been considered in this award and rejected. The defense is not available to Promoter-Respondents. On behalf of the Claimants it is submitted that once the theory of 'take out' has been discarded, the Claimants have fulfilled their obligation to make the investment and in any case a substantial amount thereof was made available and the Promoter-Respondents have utterly failed in showing that the amount made available by the Claimants was utilized for fulfilling their obligations which they had undertaken.

(Emphasis added)

55. The arbitral tribunal took the figure of funding at Rs. 110.39. Following the discussion above, this was not forbidden nor patently illegal or perverse. On this, it computed interest.

56. I return to this argument of 'take-out money'. Put simply, it seems to be a figure to which the Shahs claimed they were entitled, free and clear, with no requirement of an explanation or accounting. It was theirs to keep. The amount was not small: Rs. 102 crores.

57. The arbitral tribunal too considered this 'take-out money' plea. The Shahs relied on some Term Sheet that pre-dated the 2008 SSA 14th December 2020 Kishor N Shah & Ors v Urban Infrastructure Trustees Ltd & Ors 1-CARBP-1435-2019-J.docx and SHA. The arbitral tribunal rightly rejected the validity or continuance of any such term sheet provision after the

2008 Agreements (with their 'entire agreement' clause) came into play.⁸ It also rejected the argument that the 'real' agreement was in the Term Sheet -- and of this, perhaps the less said the better, in view, among other things, of the [Evidence Act](#). This is how the arbitral tribunal dealt with the take-out money submission:

5.8 The Respondents have urged (vide para viii, at page 11 of SoD) that the Claimants had included clause 2.2.10 (d) in the draft of the Subscription Agreement despite full knowledge that sums had already been paid over towards take out moneys in the period between October 2007 to July 2008. Respondent No.4 had paid the same over to the Promoter Group Entities as per the Term Sheet and the Agreements executed in October 2007 pursuant to the agreed structure between the parties. The Claimants requested for clause 2.2.10(d) and similar terms citing internal accounting reasons and legal and tax advice. The said clause and other similar clauses contained in the SSA and SHA are clearly inoperative and void as the stipulations therein seek to deal with takeout moneys of Rs.102 crores which had already been paid by the Claimants pursuant to earlier structure and documents and utilized for the agreed end i.e. as take out moneys'.

[(Comment by the Tribunal):-There are two terms used by the Promoter Respondents which are 'tax effective planning' and 'take out monies'. These two terms are not explained in the pleadings of the Respondents, not even in evidence. Till the end of the hearing, these terms, especially 8 Paragraph 14.12, Vol 03, p. 58.

14th December 2020 Kishor N Shah & Ors v Urban Infrastructure Trustees Ltd & Ors 1-CARBP-1435-2019-J.docx 'take out money' have remained shrouded in mystery. This will be discussed more at an appropriate place].

58. There follows, in paragraph 15 a detailed discussion of the take- out money theory. I do not see the point in extracting the whole of that discussion. It covers the pleadings, the evidence, and the rival submissions. Perhaps all that is needed is to extract the utterly delightful heading to this section of the Award.

'Take Out Money'; a mystery! Sometimes, a mere caption says it all.

59. Urban put Rs. 110.39 into the project. Of this, the record shows, about Rs.8.8 crores went into project expenses. What of the rest? This, it seems, is the mysterious 'take out money'. Now the Shahs say the Award is perverse because it takes the amount of Rs. 110.39 to compute interest, although this was not -- according to the Shahs, and never mind that they said exactly the opposite on oath -- 'funding' under the 2008 SHA and SSA.

60. This is hardly the kind of exceptional, unique and compelling case required for an unconditional stay of a money award or decree. It could not be further from it. To meet that standard, the impugned award or decree must be shown without any great convolutions to be facially perverse and untenable. It is not enough to show that this or that finding presents discomfort to the losing party.

61. One of the statutory components in assessing such a case for an unconditional stay of a money decree or award is the question of 14th December 2020 Kishor N Shah & Ors v Urban Infrastructure Trustees Ltd & Ors 1-CARBP-1435-2019-J.docx delay. As I said at the head of this judgment, I am not addressing that question at all. I do not reject the application for an unconditional stay on that ground. Mr Chinoy has argued that certain events in parallel led the Shahs to believe that Urban would not move in enforcement. That may or may not be correct. There is certainly no requirement of expedition in enforcement, although a delay may well be a factor in grant of a particular relief in execution. It is, however, true that Urban moved in execution only relatively recently, in the last few months. Second, I have never believed that an application of this kind should ever be defeated only on the ground of delay, unless it is utterly gross and wholly unexplained. A court cannot be hamstrung in its discretion by counting days. The delay, therefore, and if any, has played no part at all in my decision.

62. The application for an unconditional stay is rejected.

63. This presents a problem of its own. The prayer in the Interim Application is only this:

(a) Pending the hearing and final disposal of this petition this Hon'ble Court be pleased to stay the effect, implementation, execution and enforcement of Impugned Award dated 19th May, 2019, as corrected/ modified by the Order dated 13th August, 2020;

There is no mention here of the stay being 'on such terms and conditions as this Hon'ble Court may deem fit'. This means that, absolutely technically, the Interim Application would have to be dismissed.

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64. But I believe it would be a failure on my part not to give the Shahs an option by means of a conditional stay. After all, their [Section 34](#) petition is as yet pending admission. Mr Chinoy did submit that a conditional order in the full amount would be oppressive and put his clients to extreme hardship. But that is not the only mandate of Order 41 Rule 5, though it is

certainly one of the factors. That aspect is, however, entirely eclipsed once I am invited into the factual and evidentiary matrix and I read, among other things, that the Shahs have appropriated to themselves this amount of Rs.102 crores. That is surely not something to be ignored.

65. Consequently:

(a) The impugned award will be stayed upon, and only upon, the Applicants depositing with the Prothonotary & Senior Master no later than by 29th January 2021

(i) the entire amount of Rs.106.61 crores with interest calculated as per the Award up to the date of deposit;

(ii) The entire amount of Rs.16.56 crores with interest as per the Award up to the date of deposit;

(iii) The entire amount of Rs. 7,04,90,666/- with interest as per the Award up to the date of deposit.

(b) It is clarified that interest 'as per the Award' will mean the enhanced rate in paragraph 27(iv) of the Award;

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(c) Upon deposit, the Prothonotary & Senior Master will invest the amounts separately in a nationalized bank at an optimal rate of interest initially for a period of six months, and then to renew each deposit for one year thereafter until further orders of the Court.

(d) Optionally, the Shahs shall be at liberty to furnish a single unconditional bank guarantee for all the amounts mentioned above and interest accrued, as also future interest, such bank guarantee to be to the satisfaction of the Prothonotary & Senior Master and to be issued by a nationalised bank; OR separate bank guarantees for one or more of the amounts mentioned above on like terms.

(e) If deposits are made as directed above, Respondents Nos. 1 and 2 shall be entitled to withdraw the whole or part of the amounts deposited upon furnishing a similar unconditional bank guarantee of a nationalized bank to the satisfaction of the Prothonotary & Senior Master covering the amounts withdrawn and further interest;

(f) This order will continue pending the final disposal of the [Section 34](#) petition.

66. There remains the question of costs since this is a matter in the Commercial Division, and, under the provisions of the CPC as amended by the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, costs must follow

the event, and the losing party must be required to pay costs. If costs are not awarded, reasons must be given. I can think of no reason to decline costs. I will make no order of costs today. Instead, 14th December 2020 Kishor N Shah & Ors v Urban Infrastructure Trustees Ltd & Ors 1-CARBP-1435-2019-J.docx the costs of this application will be included in the order on costs, if any, at the final disposal of the [Section 34](#) petition.

67. All observations and findings are not only prima facie but are limited to this application. All contentions in execution and in the [Section 34](#) petition are kept open.

68. This order and judgment will be digitally signed by the Private Secretary of this Court. All concerned will act on production of a digitally signed copy of this order.

(G.S. PATEL, J.) 14th December 2020