IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

IN ITS COMMERCIAL DIVISION

COMMERCIAL ARBITRATION PETITION (L) NO. 16156 OF 2026

Oil Field Instrumentation India Pvt Ltd ...Petitioner

Versus

Xcalibur Multiphysics Group S.L. & Ors. ...Respondents

Mr. J.P. Sen, Senior Counsel, *a/w Piyush Raheja, Counsel, Pranav Narsaria, Counsel, Vishesh Malviya, Anuja Bhansali, Dev Menghani, i/b M/s. Rashmikant & Partners for the Petitioner.*

Mr. Ninad Deshpande, *a/w Aishwarya Darda, Shreyas Deshpande for Respondent Nos.1 to 3.*

CORAM: SOMASEKHAR SUNDARESAN, J.

DATE: JUNE 8, 2026

JUDGEMENT:

Context and Factual Background:

1. The captioned Petition has been filed under Section 37 of the Arbitration and Conciliation Act, 1996 ("***the Act***") challenging an order dated April 1, 2026 passed by a three-member arbitral tribunal rejecting an application of the Petitioner seeking interlocutory reliefs. The Petitioner, Oil Field Instrumentation (India) Pvt. Ltd. ("***Promoter***"), is the Indian promoter of Respondent No.3, Xcalibur McPhar International Private Limited ("***JV***"), in which Respondent No.1,

Xcalibur Multiphysics Group S.L., a Spanish company ("***Investor***"), is a joint venture partner.

2. The JV was originally a company incorporated by the Promoter to carry on the business of airborne geophysical surveys that would be commissioned by the Government of India. By a Shareholder's Agreement dated October 17, 2022 ("***Agreement***"), the Promoter and the Investor agreed the terms on which the Investor would acquire 51% of the equity shareholding in the JV.

3. The term "***Business***" was defined in the Agreement as the business of providing airborne geophysical surveys for oil and gas exploration, mining exploration, groundwater exploration and environmental and engineering applications. The parties agreed that the Business would be carried out through the JV in the "***Territory***", which was defined as covering India, Sri Lanka, Myanmar, Nepal, Afghanistan, Bangladesh, Bhutan, Maldives, Pakistan, Iran and Iraq. The parties agreed that Iraq would be that part of the Territory where the relationship between the parties would not be exclusive, indicating thereby, that in the rest of the Territory, the relationship between the parties would be exclusive.

4. In other words, the Agreement provided that the 51:49 joint venture between the Investor and the Promoter would be the exclusive vehicle for the parties to carry out the Business in the Territory, except for Iraq, where the business would not be exclusive. This exclusivity arrangement and the non-

compete provision contracted in the Agreement is the foundation of the dispute between the parties.

5. The non-compete and non-solicitation provision is Clause 18.3 of the Agreement. Under Clause 18.3.1, the parties agreed that the provisions of that Clause would jointly and severally bind the "shareholders", namely the Investor and the Promoter so long as they had any shareholding in the JV and for a further period of two years thereafter (i.e. after they cease to hold any shares in the JV). Clause 18.3.2 which is the charging provision relevant for these proceedings is extracted below:-

> *"18.3.2* ***The Shareholders shall not, directly or indirectly, engage in,*** *whether in an individual capacity, through a partnership or as a shareholder, joint venture partner, collaborator, consultant, advisor, principal contractor or sub-contractor, director, trustee, committee member, office bearer or agent or in any other manner whatsoever,* ***whether for profit or otherwise, any business which competes with the whole or any part of the Business*** *(and any other activities carried out by the Company)* ***in the Territory (including but not limited to magnetic survey using drone platform)****. The Company and the Investor* ***shall also sever their existing relationships with all entities; that offer any kind of airborne geophysical surveys in the Territory****."*
>
> ***[Emphasis Supplied]***

6. Clause 18.3.5 represents certain exclusions and limitations to the non-compete provisions. Since that clause further refers to Clause 18.3.6, both these provisions are extracted below:-

> *18.3.5 The Parties agree that* ***the restrictions in this Clause 18.3 shall be limited to the technologies which are offered by the Investor to the Company****. Nothing in this Clause 18.3* ***shall apply to****:*
>
> *(a) any holding of shares by a Shareholder in a publicly listed company where their holding is for investment purposes only and is less than 2 (two) per cent of the paid-up capital of such company; and,*
>
> *(b)* ***any other unique airborne survey technologies or drone-based surveys, subject to 18.3.6 below, which are not offered by the Investor to the Company****.*
>
> *18.3.6* ***The Parties agree and undertake that magnetic survey using drone platform shall only be conducted through the Company using the Promoter's resources.***
>
> ***[Emphasis Supplied]***

7. Clause 18.3.4 of the Agreement explicitly records an acknowledgment from each party that no separate fees would be payable as distinct and separate consideration for the non-compete and non-solicit restrictions and that the parties acknowledge sufficiency of consideration, which are the other reciprocal promises contained in the Agreement.

8. Further, Clause 18.3.7 of the Agreement records the parties' agreement that should a business opportunity be identified by the JV outside the Territory and

be introduced to the Investor or any of its affiliates or any third party identified by the Investor, the parties would engage in good faith discussions and agree on a mechanism to compensate the JV for such referral.

9. Against this backdrop, the issues that lie at the heart of the controversy between the parties may be examined. Upon examining public reports of the Investor, through its Australian affiliate, Respondent No. 2, Xcalibur Aviation (Australia) Pty. Ltd. ("***Australian Affiliate***") having bagged a contract for aerial geophysical survey in the Kingdom of Bhutan ("***Bhutan Contract***"), the Promoter filed a Petition under Section 9 of the Act, seeking an urgent intervention to protect the subject matter of the non-compete clause which is covered by the arbitration agreement between the parties.

10. An *ad interim* order was passed by this Court on *May 9, 2025*, essentially restraining the Investor from negotiating and signing any new contract in respect of the Territory except through the JV for conduct of the Business in the Territory. The said order clarified that the activity contracted in Bhutan would continue but all information about the Bhutan Contract, the nature of the technology deployed in carrying out the activity in Bhutan, the nature of the contract and the supporting documents including the contract shall be communicated to the Promoter and brought on record of this Court in an affidavit to enable an appropriate assessment of whether there has been a breach, and to ascertain the extent of the breach, if any.

11. Pursuant to such order, the Investor filed an affidavit on *June 11, 2025* with its reply and reporting compliance with the disclosures directed by this Court. However, the Bhutan Contract and the supporting documents had not been set out in the affidavit. On *July 24, 2025*, to expedite consideration of the matter, the Section 9 Petition was converted into an Application under Section 17 of the Act, with the *ad interim* protection being continued pending assessment of the Section 17 Application by the Learned Arbitral Tribunal, and the Section 9 Petition was disposed of. Thereafter, the parties filed pleadings before the Learned Arbitral Tribunal, which eventually passed the Impugned Order granting no interim relief to the Promoter, but more importantly, excusing the Investor from even disclosing any material pertaining to the Bhutan Contract on the premise that the counterparty to the contract i.e. the Government of Bhutan had refused to waive the confidentiality obligation contained in the Bhutan Contract.

12. The grievance of the Promoter with the Impugned Order can be broadly classified under two heads:-

A] the complete non-disclosure of any material particulars about the Bhutan Contract, excusing the disclosure on the basis of the confidentiality clause purported to be contained in the Bhutan Contract, which too has not even been examined even by the Learned Arbitral Tribunal;

B] interpretation of the term "offered" used in Clause 18.3.5 of the Agreement, since on that term hinges the exceptions to the non-compete obligations.

13. I have heard Mr. J.P. Sen, Learned Senior Counsel, on behalf of the Promoter and Mr. Ninad Deshpande, Learned Advocate on behalf of the Respondents, and with their assistance I have examined the relevant material on record for purposes of adjudicating this Petition.

Analysis and Findings :-

14. At the threshold, I must state that there are other facets of shareholder disputes between the parties which form subject matter of Section 9 Petition and thereby the Section 17 proceedings. None of these are agitated in the course of this Petition. The Impugned Order itself deals with the aforesaid two issues alone. Therefore, this judgment is restricted to the two facets identified above, covered by the Impugned Order, and agitated before me.

15. The two facets (non-disclosure and whether the technology covered by the Bhutan Contract was offered to the JV) are analysed below. The approach of the Learned Arbitral Tribunal in arriving at its decision is set out; the underlying material is examined for returning the findings under each issue; and my conclusions based on the same follow thereafter, under each head.

Complete non-disclosure of the Bhutan contract:

16. The Agreement is a typical joint venture agreement among shareholders. It is apparent that the parties have chosen the JV to be the parties' exclusive vehicle for carrying on the Business throughout the Territory, except in Iraq. Bhutan evidently forms an integral and operative part of the Territory. It is common ground that the Investor, through the Australian Affiliate, contracted Business with the Government of Bhutan. The dispute is whether that technology deployed in Bhutan had been offered to, and was rejected by the JV, or whether its deployment through the JV remained under active pursuit.

17. Towards this end, it was alleged that the activity in Bhutan being the business of airborne geophysical survey, fell within the meaning of the term Business and was being carried out in breach of the exclusive relationship within a market forming part of the Territory.

18. The Learned Tribunal held that the Promoter bore the initial burden of showing, based on material before it, a *prima facie* breach of Clause 18.3, including that the Bhutan Contract used technology which was earlier offered to the JV[1]. The Learned Arbitral Tribunal then held that the burden would shift to the Investor only after the Promoter first established such a case on the basis of the material already "*available before the tribunal*". Only then would the onus shift to the

1 Paragraph 12 of the Impugned Order

Investor to show "*if necessary*", with the use of material "*in its exclusive possession*" that the technology deployed in Bhutan is covered by the exception under Clause 18.3.5 of the Agreement. Therefore, it was held that no adverse inference could be drawn from the non-disclosure by the Investor since it would lead to expecting the Investor to help bridge the gaps in the Promoter's case. As regards the directions issued by this Court in the *ad interim* order, to make the disclosure, the Learned Arbitral Tribunal was convinced that compliance with it could be excused since no disclosure of the Bhutan Contract could have been made without the consent of the Government of Bhutan - such consent had been sought and refused. Towards this end, the Learned Arbitral Tribunal held that upon examination of "*related correspondence in this behalf*", the non-disclosure stood explained, and it was not a deliberate refusal to justify drawing an adverse inference.

19. Three judgements relied upon by the Promoter before the Learned Arbitral Tribunal, namely, ***Paul Deepak***[2], ***Kripalu Shankar***[3] and ***Interactive Avenues***[4] have been distinguished by the Learned Arbitral Tribunal. Distinguishing ***Paul Deepak***, it was stated that the defaulting party in that case had initially denied the very existence of an Agreement, but later reversed its position, admitting to signatures on it. Therefore, the Learned Arbitral Tribunal held that evasive conduct

2 Paul Deepak Rajaratnam v. Surgeport Logistics Pvt. Ltd. – 2025 SCC OnLine Del 5062
3 State of Bihar v. Kripalu Shankar – 1987 3 SCC 34
4 Interactive Avenues (P) Ltd. v. Tikona Digital Network (P) Ltd. – 2018 SCC OnLine Bom 4725

was treated by the High Court as lack of candour and therefore, those facts are distinguishable from the instant case where the Investor "*claims to be bound*" by a non-disclosure clause with the government of a country which is its counterparty, and also produces material to show that the Investor indeed applied for permission of the counterparty, which request was declined.

20. As regards the judgment in ***Interactive Avenues***, the Learned Arbitral Tribunal held that the facts are distinguishable because the party which objected to a document was itself relying on it to support its case and that document formed an intrinsic part of the contest including the very joinder of the party which was based on the document in question. Holding that the Court was considering whether to order the production of the document and not the effect of its non-production, the Learned Arbitral Tribunal held that the Investor had offered a *prima facie* justification for non-production of the document which in any case "*is not relied upon by it, as of now, in the trial*".

21. As regards ***Kripalu Shankar***, the Learned Arbitral Tribunal noticed that the decision supports the power to direct production of even confidential documents in any case for the Court to see, but held that in the instant case, the question was not about ordering the production of a document but about considering the effect of non-production. Reiterating that the Investor had made

out a *prima facie* justification for non-production of the document, the Learned Arbitral Tribunal held that no case for an adverse inference was made out.

22. With the aforesaid articulation, the Learned Arbitral Tribunal held that in a matter involving restraint on trade, Courts and Tribunals, should be slow to issue directions imposing such restraint unless a very high bar is met.

23. With the deepest respect to the Learned Arbitral Tribunal, for the reasons set out in this judgement, I have to disagree. Exclusivity obligations in joint venture agreements entail precious and vital commercial elements that sophisticated parties negotiate and contract with careful attention to detail. The need for strict construction of a non-compete obligation cannot justify withholding the material relevant to adjudicate whether such obligation has been breached.

24. From a reading of the Impugned Order and the material on record, with the greatest respect to the Learned Arbitral Tribunal, I find it difficult to accept that it is reasonable to allow a litigant to claim that it will not part with relevant underlying material directed to be produced by a Court on the ground that it has a contractual obligation in another commercial contract not to produce it. Commercial parties are always aware of such potential conflicts and it is really conventional to provide in the confidentiality clauses how to handle such conflicts and minimize the disclosure of the elements not essential to the dispute in hand and otherwise justifiably commercial sensitive information. In the matter in hand,

the outcome is not even a consideration of whether there are elements in the Bhutan Contract that need to be masked and redacted. There is not even a consideration of how the parties faced with a disclosure directed by a Court engaged on dealing with the disclosure. Two disjointed letters have been presented to the Learned Arbitral Tribunal indicating that this is the "correspondence" that should lead to an inexorable conclusion that a direction to disclose cannot be complied with.

25. If the approach when adjudicating an alleged breach of a non-compete provision is to simply excuse the production of the very document that is vital to adjudicate the dispute, any alleged breach of such non-compete obligation would become immune from scrutiny merely by claiming that a confidentiality clause is contained in the very allegedly offensive agreement by which the non-compete obligation is said to have been breached.

26. In the instant case, the Investor has gotten away without disclosing even the purported confidentiality clause said to be contained in the Bhutan Contract. The need to see the confidentiality clause is not a matter of distrusting Learned Advocates who would have made the submissions on its existence, on instructions, to the Learned Arbitral Tribunal but to underline the need to deal with its contents and examine how the parties to the Bhutan Contract were meant to put the confidentiality clause into operation.

27. Commercial contracts are bound to have confidentiality provisions. Typically, such confidentiality provisions would entail any party faced with the prospect of a disclosure, having to intimate such obligation to the counterparty. The parties then are typically meant to engage with each other to study the scope of the disclosure faced with, examine the means of minimizing disclosure to the bare and specific minimum necessary for compliance with the disclosure obligation, and then agree upon how to make the disclosure.

28. Confidentiality clauses often bump up against legal obligations to disclose. For example, a party to a contract which has a confidentiality clause may have to disclose that contract to a regulatory agency in the course of an investigation – for example, an investigation in a civil proceedings by the Competition Commission of India investigating anti-trust allegations; or in criminal proceedings by the Directorate of Enforcement when investigating, say anti-money laundering laws. Another example would be a disclosure of a contract to the securities market regulator which may want to examine the terms of a contract based on news reports on that contract in order to assess whether the public markets at large have been accurately informed about a material contract a listed company has executed. Even in securities offerings documents, material contracts between a listed company and other privately held companies would have to be disclosed if the contract were material. Likewise, even in contracts executed by companies which may not have any listing of securities on a stock exchange, it

may become necessary to make disclosures to other statutory agencies or to courts as a matter of statutory obligation. In my view, a disclosure obligation of this nature, and indeed an obligation imposed by a Court of law would be a statutory obligation and cannot be simplistically negated by reliance upon a contractual clause of confidentiality.

29. An approach that has the result of holding that a statutory or regulatory or even a legal obligation to make a disclosure would stand obliterated by a privately contracted confidentiality clause, in my respectful opinion, the finding would be perverse for being contrary to first principles of which obligation would give way and which obligation would cede ground. Typically, the very confidentiality clauses in private agreements provide for the private law obligation in the contract ceding ground to public law obligations to make disclosures, with the parties engaging on the terms of the disclosure but ensuring that they are compliant with the law.

30. A clear pointer to the nature of such conventional confidentiality clauses can be seen from the very confidentiality clause contained in the Agreement that contains the arbitration clause. Clause 18.4 (Page 133 of the Petition) is extracted below purely for indicative value:

18.4 Confidentiality

*18.4.1 **Each Party shall keep all information relating to this Agreement and the transactions contemplated hereunder (collectively referred to as the "Information") confidential**. **None of the Parties shall issue any public release or public announcement or otherwise make any disclosure** concerning this Agreement and/or this Agreement and the transactions contemplated herein, **without the prior approval of the other Parties**.*

*18.4.2 **Nothing in Clause 18.4.1 above shall restrict the Parties from disclosing information for the following purposes**:*

(a) to the extent that such Information is in the public domain other than by breach of this Agreement;

*(b) **to the extent that such Information is required to be disclosed by any Applicable Law** or **required to be disclosed to any governmental entity to whose jurisdiction the Parties are subject** or **with whose instructions it is customary to comply**, provided that **any such disclosure shall be made after due consultation and discussions with the other parties**;*

(c) in so far as it is disclosed to the employees, Directors or professional advisors of Parties, as the case may be, provided that each party shall ensure that such Persons treat such Information as confidential on the same terms as set out under this Clause 18.4;

(d) to the extent that any of such Information was previously known or already in the lawful possession of any of the Parties, prior to disclosure by any other Party hereto; and

(e) to the extent that any Information, materially similar to the Information, shall have been independently developed by any of the Parties without reference to any Information furnished by any other Party hereto.

[Emphasis Supplied]

31. The aforesaid clause is illustrative of a customary and conventional confidentiality clause that most multinational business corporations would contract. Sub-clause (b) above is a pointer – where information is required to be disclosed by any "applicable law" or is required to be disclosed to any "government entity" to whose jurisdiction the parties are subject, the disclosure must be made but after due consultation and discussions between the parties. The term "applicable laws" is defined in Clause 1.1 (Page 109 of the Petition) to include *any direction having the force of law issued by any Court,* and of course, government, statutory authority, tribunal or board having jurisdiction over a party. \Had there been a direction from a Court to disclose anything relating to the Agreement, a requirement to comply with applicable law would have arisen, and the framework of the confidentiality clause could never be to enable the parties to not comply with what a Court believed it should see. They can at best engage on the terms of making the disclosure, seeking redaction of portions of it to hide any commercially sensitive information and comply with the applicable law. It can never be held that the applicable law would cease to apply and the Court's direction to make a disclosure would get excused on the ground of a private confidentiality clause.

32. I must hasten to reiterate that the extraction and analysis of Clause 18.4 is not at all to indicate or speculate that the confidentiality clause in the Bhutan Contract was identically drafted or was formulated in the same terms. What the

confidentiality clause in the Bhutan Contract contains is simply not known to any one and has not been sought. I have extracted the clause above only to show that at the least, the confidentiality clause ought to have been called for to examine the veracity of the Investor seeking to rely upon it.

33. It is also remarkable that it is the Investor who has sought to rely on the confidentiality clause in the very Bhutan Contract that is sought not to be disclosed. This undermines the basis of differentiation of the judgement in ***Interactive Avenues*** by the Learned Arbitral Tribunal, which held that the party that sought to hide a contract also relied on the same contract in that case. This is precisely what the Investor has done too.

34. To excuse compliance with the binding *ad interim* order dated May 9, 2025, the Learned Arbitral Tribunal ought to have seen more. To be clear, the Learned Arbitral Tribunal was entitled to revisit the *ad interim* order. However, what is up for review in this challenge is whether the Impugned Order excusing the disclosure is a plausible decision that is in consonance with law. In my respectful opinion, the basis on which the disclosure has been excused is quite weak. The Impugned Order is a ringing endorsement of the contention that the Bhutan Contract could not be disclosed because the counterparty of the contract, the Government of Bhutan, refused permission to disclose it.

35. It does appear that the counterparty to the Bhutan Contract being a sovereign government appears to have had some weightage in the minds of the Learned Arbitrators. The very nature of the Business i.e. the subject matter of non-compete protection for the JV, within the Territory, is one where the clients of the JV or the Investor or indeed the Promoter, would necessarily be sovereign governments. Indeed, in the territory of the Republic of India, the client of the JV is always a government agency. In all such geological surveys that are conducted, before further tapping or exploitation of natural resources, such surveys would necessarily be carried out by a sovereign government. It would be a state agency that would examine and identify potential for tapping such resources, after which, bids could be invited for the private sector to tap the resources, which are indicated as being available, pursuant to such surveys. Until then, the clientele for such work would mostly be governments. Yet, the contract with a private party such as the JV or the Australian Affiliate would be a commercial contract for purposes of the activity entailed.

36. A party that is bound by non-compete obligations would need to ensure that its participation in such a commercial contract is not in conflict with the legal obligations owed by it to other counterparties in other contracts. This too is a standard representation that is usually contained in commercial contracts – that the contract terms do not conflict with legal obligations contained in other existing contracts and provisions of law to which the party is subject. What has transpired

in the instant case is that a summary view has been taken that all that the Investor needed to do was deliver a letter from the Government of Bhutan refusing to make a disclosure. Even that correspondence in the instant case has gaps that have not been reconciled, as would become evident from a plain reading of the "correspondence" sought to be relied upon by the Investor.

37. The "*related correspondence in this behalf*" referred to in the Impugned Order comprises two letters – a letter dated *June 9, 2025* purportedly issued by the Managing Director of the Australian Affiliate and heavily redacted to mask the contract number and the identity of the person to whom the letter was addressed. That letter indicates that this Court had passed an order to provide a copy of the Bhutan Contract to the Court. This letter from the Managing Director of the Australian Affiliate highlights that there is a confidentiality obligation under the Bhutan Contract, under which prior permission of the Department of Geology and Mines in Bhutan is required and therefore, permission was being sought. Evidently, this is a letter written one month after the *ad interim* order dated May 9, 2025 issued by this Court.

38. The only other document that forms part of the "*related correspondence in this behalf*" is a letter dated *June 23, 2025* from a person whose name and designation is redacted and is addressed to the Managing Director of the Australian Affiliate. What is significant is that this letter from the Government of Bhutan is a

reply, not to the letter dated June 9, 2025 but to another letter dated June 18, 2025. This letter purports to record Bhutan's refusal of permission to make a disclosure as directed by this Court. Learned Advocates for the parties confirm that the letter dated June 18, 2025 is not part of the record and was not shown to the Learned Arbitral Tribunal. What correspondence the parties engaged in pursuant to the *ad interim* order dated May 9, 2025 is totally unknown to the arbitral record.

39. There is nothing on record to show the stream of correspondence linking the chain of letters from June 9, 2025 from the Australian Affiliate to the letter dated June 23, 2025 from the Government of Bhutan has been called for and seen. One is left none the wiser as to how the Government of Bhutan replied to the original letter dated June 9, 2025 and whether any terms of redacting or seeking confidentiality waivers were even discussed between the parties. Whether concerns over disclosure were discussed between the parties to lead to the further letter from the Australian Affiliate dated June 18, 2025 (contents of which are also in the dark) to which Bhutan replied by its letter dated June 23, 2025, is also unknown. It appears that for no better reason than there being a letter of June 23, 2025 from a sovereign government's official (one does not even know the rank of the officials with whom such correspondence was had and what escalation of the issue took place and was pursued), the Learned Arbitral Tribunal was persuaded by the Investor to take a view that the unseen confidentiality clause in the unseen Bhutan Contract had run its course and permission had been duly sought and was duly

refused, and therefore, nothing further need be seen by the Learned Arbitral Tribunal. Therefore, the two disjointed letters – one dated June 9, 2025 and another dated June 23, 2025, which are all that constitute the correspondence brought on record before the Learned Arbitral Tribunal, without any insight into who the Investor communicated with through the Australian Affiliate, were deemed sufficient to conclude that no disclosures could be made.

40. I am unable to accept such an approach as being a reasonable and non-arbitrary approach. By this approach, no non-compete clause ever contracted by either the Investor or the Promoter would ever come to trial, and can be written off as unenforceable since all that a breaching party needs to do is to insert a confidentiality clause in its contracts that would negate the non-compete clause. All that one would have to do then is to state that nothing contained in the allegedly violative contract can ever be called for in any proceedings, citing the contractual confidentiality obligation owed.

41. I must remark that even in contracts with governments, an element of transparency is involved, which is what potentially led to the issuance of the press release that led to the Promoter getting to know about the alleged breach of exclusivity within the Territory. Despite the admitted position of airborne geophysical surveys being carried out in Bhutan and that too from publicly stated information published by the Investor and Bhutan indeed forming part of the

Territory under coverage of exclusivity, the dispute in question, for all practical purposes would now have to be adjudicated without any relevant material to see if the Investor has violated Clause 18.3 of the Agreement. This is the reasoning that compels me to interfere with the Impugned Order.

42. Multiple avenues were available for the proceedings to be conducted, addressing the concerns that may have arisen about the disclosure. *First*, the purported confidentiality clause could have been called for. *Second*, concerns about the contents that would cause concerns to Bhutan could have been addressed by appropriate redacting and blanking of clauses containing sensitive information. *Third*, a closed confidentiality ring could have been put in place to ensure that specific identified individuals alone would have access even to the redacted material and such individuals would be bound by the obligation to maintain confidentiality over such information. None of these have been meaningfully explored when returning a decision to excuse disclosure of the core transactions that would need to be adjudicated.

43. Such provision and arrangements are fairly conventional in commercial and regulatory litigation and would indeed be expected to be adopted in relation to clauses in contracts of this nature. This is sorely missing. It is not for this Court or for the Learned Arbitral Tribunal to speculate about what the contents of the confidentiality obligations or for that matter the Bhutan Contract, would be, in

order to adjudicate if there has been a breach and if so, what damages would be appropriate. As a part of the due process to adopt before excusing a party to an arbitration proceedings from disclosure obligations already imposed by a Court, in my opinion, a far higher standard of review ought to have been deployed, which is missing in the instant case.

44. The Promoter has made out a *prima facie* case of the Bhutan Contract having been signed, which, *prima facie* is similar to the Business as defined in the Agreement, by bringing to bear, publicly known information. The *ad interim* order of May 9, 2025 directs the disclosure of the Bhutan Contract. In the words of the Impugned Order, it was necessary for the Investor to show what technology is deployed in Bhutan and how it is exempt from exclusivity, on the terms contracted within Clause 18.3 of the Agreement. An unseen clause in the unseen Bhutan Contract, coupled with two disjointed letters ought not to excuse performance of the *ad interim* direction issued by the Court.

45. Before parting with this segment of the judgement, to avoid prolixity, I am not reproducing from the judgements cited at bar. Suffice it to say, the general principle laid down by the Supreme Court in ***Kripalu Shankar*** in Paragraph 25 of that judgement clearly sets the tone of the declaration of the law. The Supreme Court held that even State documents can be asked to be produced by the Court if it is relevant for the litigation in question. The case at hand is a commercial contract

with the State and subject to protections, it ought to have been produced. Likewise, Paragraph 7 of ***Interactive Avenues*** summarises the law and arrangements such as redacting quite well and commends itself for deployment in the facts of this case too.

'Offer' of the Technology to the JV:

46. The core issue for the second facet of this judgement is the scope of the term "offered" for purposes of Clause 18.3.5 of the Agreement, which has been extracted above. This is important because under Clause 18.3.5, the restrictions in Clause 18.3 i.e. the obligation to ensure an exclusive relationship to conduct Business in the Territory only with each other, would apply only to technologies which are offered by the Investor to the JV. Nothing in Clause 18.3 would apply to any unique airborne survey technologies, which are not offered to the JV. Drone-based surveys too would not be covered by the exclusivity, unless any utilisation of that is done by the JV but using the resources of the Promoter.

47. Both Mr. Deshpande and Mr. Sen confirm that it is common ground that the technology branded as "iCORUS-X" is what has been deployed for the geophysical survey being conducted in Bhutan. Mr. Deshpande would allude to the material on record to canvas the proposition that this was indeed offered to the JV. The Investor claims that the "iCORUS & MAG/GARD System" although offered to

the JV was not acted upon by the JV, and that once offered and rejected, the Investor ought not be precluded from utilising the technology so offered elsewhere. Mr. Sen would contend that the technology was indeed offered to the JV. He would submit that the offer was not rejected and on the contrary, the JV even wrote to its existing client i.e. the Government of India to consider using such technology and this exercise is in progress. Yet, the Investor has, he would contend, blatantly violated Clause 18.3 by deploying this in Bhutan outside the exclusive relationship of the parties, thereby breaching the obligations under Clause 18.3 of the Agreement.

48. The aforesaid core element of Clause 18.3.5, which limits the applicability of the non-compete obligation contained in Clause 18.3.2, having been noticed, how this has been dealt with by the Learned Arbitral Tribunal falls for consideration. The Learned Arbitral Tribunal held that the term "offer" should be interpreted as an accepted offer i.e. purchase, without which the Investor would *prima facie*, be free to deploy it elsewhere. The following observations of the Learned Arbitral Tribunal are noteworthy:

> *"20. Learned Counsel for the Claimant, however, submits that above material, at any rate, shows that this technology, though not actually made available, or used by, Respondent No. 3, was clearly offered to it by Respondent No. 1 and the decision to actually avail of it or use it could always have been taken by Respondent 3 as need arose in future. Learned Counsel laid emphasis on the word "offered" in connection with the expression 'technology' in the Non-Compete clause. We are afraid the term*

> *'offer' in this context cannot be taken in the sense of an offer in the matter of formation of a contract; something which the counterparty may or may not accept; something which, when accepted, gives rise to a binding contract. The word "offered" here, in our view, implies something which is actually made available to Respondent No. 3 by Respondent No. 1, which is what the parties could have intended. A mere 'offer' of making available a technology which may or may not be accepted by the counterparty would not make any business sense in the context of the present Non-Compete clause. Such interpretation would then imply that the promotee company (Respondent No. 3), without accepting and paying for a technology, bind the investor (Respondent No. 1) not to use that technology anywhere in the territory. The interpretation does not commend itself to us, at the prima facie stage.*
>
> ***[Emphasis Supplied]***

49. Mr. Sen would assail the aforesaid finding on the ground that the Learned Arbitral Tribunal has completely re-written the contract by purporting to give the provision business efficacy. When sophisticated commercial parties have used the term "*offered*" in their contract, it was not for the Learned Arbitral Tribunal to extrapolate it and substitute it with the word "*purchased*", he would contend. Thereby, he would contend, the Learned Arbitral Tribunal has committee a grave error demonstrating patent illegality in rewriting the contract between the parties.

50. I have examined the record in this regard. The record shows that the technology admittedly deployed in Bhutan was admittedly offered to the JV in 2023, as pointed out by Mr. Deshpande. An email dated August 24, 2023 would

show that iCORUS-X had indeed been offered to the JV and that too by the Australian Affiliate (Pages 185 and 186 of the Petition).

51. An email dated November 5, 2023 from Mr. David Cox, who is the CEO of the JV, records that he spoke with the Geological Survey of India about iCORUS-X, the new gravity device, and that he planned to bring it in November and run a pilot project for the Government of India, which was keen but advised that approval of the Director General of Civil Aviation ("***DGCA***") would be necessary.

52. A reply of the same date (Page 188 of Petition) to that email indicates that this was indeed feasible to deploy in India. Another piece of the material on record is that Mr. David Cox, the JV's CEO actually wrote to the Deputy Director General, Remote Sensing and Aerial Survey of the Geological Survey of India, as recently as January 15, 2025, specifically submitting that the technology that was sought to be tailored and deployed in this regard would include the iCORUS scalar gravity meter which can be integrated with MAG/GRAD surveys for enhanced geophysical exploration.

53. Minutes of Meeting of a Board Meeting of the JV held on March 12, 2024, record that the purchase of the technology namely, iCORUS and MAG/GRAD system was discussed. The Minutes of Meeting record that the JV could purchase the technology as and when requirements demand.

54. On a review of the foregoing, I find it difficult to agree with Mr. Deshpande that offer of the system by the Investor to the JV had been rejected. Mr. Deshpande's contention that the JV did not accept the offer by reason of lack of financial support by the Promoter, resulting in the opportunity being lost by the JV, is certainly not borne out by the record that he would rely upon.

55. Evidently, there are disputes between the parties about capital infusion into the JV. In such joint venture disputes, invariably the element of capital infusion and the resultant dilution of the party that does not believe capital infusion is necessary, comes up for consideration. However, in this case that is not really relevant for the issue at hand. The aforesaid material indicates that the technology now deployed in Bhutan was offered to the JV but the JV has not rejected the technology, and certainly not at the instance of the Promoter. The availability of the technology was pursued with the Government of India, and indeed as recently as January 2025 there is every indication that the same technology is being pursued for deployment in India.

56. However, I am also of the considered view that whether or not the technology is already deployed in India would have no bearing on the question of whether the rest of the Territory is free for independent use outside the JV. To my mind, whether the technology got deployed in India, necessitating a purchase of the technology by the JV from the Investor for a specific deployment would again

seriously undermine an important element of the near-equal joint venture. Evidently, the dispute on hand is a classic joint venture dispute, and the merits of such dispute would be dealt with by the Learned Arbitral Tribunal on examination of all the other material produced by the parties before it. The core question for consideration by this Court, sitting in appeal over the Impugned Order is to see if the interpretation that "offer" should mean "purchase" or "deployed" is a plausible view.

57. Again, with the deepest respect for the Learned Arbitral Tribunal, I am simply not persuaded to agree. The Learned Arbitral Tribunal has indeed taken a view that non-compete provisions should be strictly construed since while they are permissible agreements, they are agreements in restraint of trade. Even adopting this approach, one cannot efface the non-compete provision or read them down in a manner that renders the explicit stated non-compete provisions meaningless. What is apparent is that an actual act of purchase of a technology by the JV from the Investor has been held by the Learned Arbitral Tribunal to be the benchmark for Clause 18.3 to operate. This would mean that only such technology as actually purchased would be covered by Clause 18.3. If that were so, commercially sophisticated parties such as the Investor and the Promoter would have used these substituted words instead of using the word "offered".

58. To my mind, at this *prima facie* stage, one reading of the provision, without substituting any words would be that once a technology has been offered and such offer has been rejected, it would not be open to the Promoter to be a 'dog in the manger' and hold up deployment of the technology in any other part of the Territory. However, equally, another reading of the provision would be that an offer rejected in one instance for deployment in one market within the Territory would not mean that the JV would cease to be the exclusive vehicle for deployment of the same technology through the JV in another market within the Territory. The latter view appears plausible while the former view appears implausible because to get out of the exclusivity, all that the Investor would need to do is to offer a technology to the JV in respect of a market where there is no realistic prospect of deployment of the technology. The inability to deploy it would lead to the commercial irrelevance of purchasing it. The technology would then become free for deployment by the Investor in any and every other part of the Territory. The interpretation, although *prima facie*, adopted by the Learned Arbitral Tribunal would lead to this inexorable consequence.

59. On other hand, it is apparent that the Business and the technology deployed for it is not akin to some over-the-counter product covered by the joint venture. For the JV to actually carry on Business, it would need to win a bid or end up with a successfully negotiated contract with the government of one of the markets constituting the Territory. Unless a contract is bagged, it would not make

any commercial sense for the JV to purchase the technology without an actual deployment being anywhere in sight. In the instant case, as far as the business in India is concerned, the technology was offered by the Australian Affiliate to the JV for deployment in India. It is apparent from the record that the JV has in fact clearly been in engagement with the Government of India for deployment of the technology in India. Therefore, even the thesis that the technology was offered and rejected is not borne out from the record.

60. The Minutes of Meeting of March 12, 2024 do not lead to a reasonable inference of a deemed rejection. The decision that the technology would be purchased as and when appropriate would only mean that the technology would be purchased when the existing clientele enables a framework for deployment. Once there is a framework for deployment, the steps towards purchasing would take place. It would have been another matter if there had been an explicit and outright rejection of the technology. That is not the case here. The Investor seeks to infer from the postponement of a purchase, a deemed rejection. If that were the case, the CEO of the JV would not have continued to engage on the subject much later in January 2025 for deployment of the same technology.

61. Therefore, the *prima facie* reading canvassed by Mr. Sen, namely, that the technology would be purchased when there is a prospect of deployment and indeed the prospect of deployment was being actively pursued, it would not be

feasible to conclude that the offer had been rejected, is truly a plausible reading. In sharp contrast, the contention of Mr. Deshpande that the postponement of a decision on purchase, despite the active pursuit of creating potential for deployment in the existing market, should be read as a deemed rejection, to my mind is utterly implausible.

62. The Learned Arbitral Tribunal took a view that the term "offer" in the contract should not be read as an "offer" as understood in contract law, does not lend itself to acceptance. Indeed, Mr. Sen has a point when he contends that should actual purchase have been the metric to undermine the exclusivity clause, the parties would have agreed so. It should also be remembered that while the *genus* of the rights in Clause 18.3 may be regarded as a non-compete provision, the *specie* is actually one of a commitment to a marriage reduced to writing in the JV. Therefore, Clause 18.3 is not a simple restraint on trade but a commitment to positively trade in collaboration with one another. This is where, in my opinion, the Learned Arbitral Tribunal has fallen in error in discerning two competing potential reading of Clause 18.3 – one, the plain letter of the provision; and the other, the inferred reading on the footing that the provision poses an ambiguity, which it need not. When a *prima facie* reading is effected, and that too in the jurisdiction for preservation of the subject matter of the arbitration agreement, the former cannot be lightly overridden by the latter.

63. On this issue too, based on the limited material available with the Learned Arbitral Tribunal, it is evident that correspondence between the parties had to be analysed to return a *prima facie* conclusion that the technology deployed in the Bhutan is not covered by Clause 18.3 of the Agreement. The survey carried out in Bhutan, was noted as being a gravity survey while no gravity survey is conducted in the Indian market. The Learned Arbitral Tribunal has examined an email of May 22, 2023, indicating a proposal to acquire and process the iCORUS-X gravity technology, and a reply from the JV that the JV would have to make sure that the Government of India changes the tender documents to include gravity survey as an option in the tender of these blocks. It was stated by the JV that in the absence of such material being mentioned in the tender, it would be very difficult to charge for gravity related services.

64. The Learned Arbitral Tribunal has also examined the email dated August 24, 2023 from the Australian Affiliate to the CEO of the JV, on the subject of prices for the India business plan, indicating that the estimated price for iCORUS-X was Euro 250,000 per unit. The Learned Arbitral Tribunal held that the evidence clearly showed that iCORUS-X was not agreed to be purchased by the JV and it was referred to as a new gravity device calling for running of a pilot gravity project for India. The Learned Arbitral Tribunal held that India was keen but had advised that there would be a need for approval from the DGCA. The Learned Arbitral Tribunal found that it is nobody's case that India, at any time, sought to include the use of

the technology now deployed in Bhutan. The Learned Arbitral Tribunal extracted from the email correspondence in this regard to indicate that the geophysical equipment required for the project was not available with the JV and the Learned Arbitral Tribunal agreed with the contention of the Investor that the Bhutan project could not have been undertaken by the JV because the JV did not have the financial or the physical resources to execute such a project much less outside India.

65. I have already set out my reasons for why actual deployment in one market, is not the basis of the exclusivity coming to an end with respect to other parts of the Territory. If the parties had desired to have that arrangement, Clause 18.3.5 would have simply said so. When sophisticated multinationals with a footprint in various markets around the globe choose language in a contract, it should be presumed that they meant what they wrote, at least at the *prima facie* stage, rather than hold that they meant an actual purchase with or without any prospect of deployment; or that they meant the exclusivity would not apply in any market in the Territory even if there was an active pursuit of potential deployment in the Indian market. Therefore, I am constrained to disagree with the Learned Arbitral Tribunal's reading of Clause 18.3.5 and equating "offer" with "being accepted and paid for".

66. One cannot at all quarrel about the decision of the Learned Arbitral Tribunal not to stay the operation of the Bhutan Contract. Despite the prima facie

case, if grave and irreparable harm would be caused by grant of such an injunction, it would not be appropriate to interfere with the performance of the Bhutan Contract. This is another reason why appropriate relief in the instant case would not impair the interests of Bhutan. When the Government of Bhutan got into an agreement with the Australian Affiliate, the Investor essentially chose a different vehicle for the transaction outside the JV. There is nothing to show that the Bhutan prospect was even tabled before the JV, and that the JV had rejected the proposition. Even at this stage, there may be little sense in stopping the Bhutan Contract but indeed, if the JV was meant to be the chosen exclusive vehicle, a case for damages would clearly be made out. for that, one would need to know the value of the opportunity that was meant to come to the JV and was lost to it by the alleged breach of the exclusivity. This is the subject matter of the arbitration agreement that required preservation.

67. Therefore, with no interference with the decision not to impose any stay on the conduct of the Bhutan Contract, there is indeed a clear case for holding that the Bhutan Contract was *prima facie* meant to be subject to the exclusive pursuit through the JV. Indeed, the Learned Arbitral Tribunal has clearly held that the Agreement is valid and subsisting and there is no question of the Investor undertaking any contract in the Territory, whether by itself or through any Affiliate in breach of Clause 18.3. Should such an event arise, the Learned Arbitral Tribunal has given the Promoter liberty to come back to it with the facts of such breach.

Conclusions and Directions:

68. In these circumstances, I am satisfied that a case has been made out to set aside the Impugned Order by way of remand. However, considering the nuances involved in the sheer divergence of views between the Impugned Order and this judgement, on the approach to the issues involved, it would be necessary to summarise the findings and issue certain directions to enable the re-consideration upon remand:

A] *Prima facie*, Clause 18.3 is valid and binding as indeed held by the Learned Arbitral Tribunal in its final conclusion;

B] Clause 18.3 is not a simple case of a restraint on trade but a provision for conduct of trade in an exclusive relationship between the Promoter and the Investor. The subject matter of preservation and protection is the exclusivity in the marriage between the Investor and the Promoter in the form of the JV, for pursuit of the Business in any of the markets comprising the Territory. Only in Iraq, the parties were not meant to have an exclusive relationship;

C] *Prima facie*, there is nothing to indicate that there has been a rejection of the technology deployed independently by the Investor in Bhutan, by the JV for the Indian market. On the contrary, it would be impossible to hold a

view that there was a deemed rejection of the technology in India when the JV is seen to be actively pursuing the deployment of the technology in India;

D] The conflation of the word "*offered*" with the phrase "*accepted and paid for*" by the Learned Arbitral Tribunal constitutes re-writing the contract and is untenable, necessitating this finding to be quashed and set aside. The business efficacy test cannot be lightly deployed by any forum in the absence of ambiguity being writ large in a contract, more so, at a *prima facie* stage when all that the Learned Arbitral Tribunal has to examine is to see what measure would best protect and preserve the subject matter of the arbitration agreement. In this case, the subject matter of the arbitration agreement is the exclusivity of relationship for conducting the 'Business' in the 'Territory', only through the JV;

E] Therefore, the issue to be considered is what would best preserve the subject matter of the arbitration agreement for purposes of Section 17 of the Act. This may take the form of not injuncting the Bhutan Contract but would still require all material information about the Bhutan Contract being made available to the Learned Arbitral Tribunal for assessment of the scale of injury that could be suffered by the JV, before deciding on what protective measure is appropriate;

F] In the *ad-interim* order dated May 9, 2025, this Court had already directed production of such information to enable the Learned Arbitral Tribunal to take a view in the matter. The Learned Arbitral Tribunal has excused the Investor from provision of such information, which it is entitled to do on merits. However, the decision to excuse compliance with production of the Bhutan Contract and material information about it is being interfered with because it is a decision taken solely on the basis of two disjointed letters constituting correspondence to hold that Bhutan had refused permission to waive a contractual right to confidentiality. The finding that a confidentiality clause in a commercial contract with Bhutan can trump an Indian Court's order is quashed and set aside. The finding of the Learned Arbitral Tribunal that the Investor has to be excused from disclosing the Bhutan Contract is quashed and set aside;

G] The Investor is indeed relying on a clause in the very same Bhutan Contract that the Investor is desirous of holding back from the Learned Arbitral Tribunal. Reliance on the very document that is being withheld from the Learned Arbitral Tribunal is perverse, necessitating the interference with the Impugned Order. That apart, the basis of the differentiation by the Learned Arbitral Tribunal, with the judgement in ***Interactive Avenues*** stands undermined;

H] The various operational measures discussed in the body of the judgement are available to protect any concerns on sensitivity and confidentiality of contents that may be expressed by Bhutan. However, in the instant case, the Learned Arbitral Tribunal did not even have the purported confidentiality clause of the Bhutan Contract, on the strength of which, provision of information has been excused. This portion of the Impugned Order clearly calls for being quashed and set aside – the first issue framed in this judgement is held in favour of the Promoter and against the Investor;

I] The Investor is directed to disclose the Bhutan Contract to the Learned Arbitral Tribunal, without redacting the confidentiality clause or any facet of the Bhutan Contract that would have a bearing on assessment of appropriate interim relief. The Investor is also directed to truthfully disclose to the Learned Arbitral Tribunal, the entire set of correspondence with the Government of Bhutan, without redacting the designation and identity of the officials that the Australian Affiliate was engaging with, when purporting to seek approval for disclosure of the Bhutan Contract in compliance with this Court's order. The Notices Clause, if any in the Bhutan Contract shall also not be redacted. The efforts taken by the Investor and the Australian Affiliate on the methodology of working out compliance with this Court's order in accordance with the confidentiality clause that the Investor claims to have

committed to in the Bhutan Contract, shall be demonstrated to the Learned Arbitral Tribunal;

J] A full copy of the Bhutan Contract, without redacting anything should be exclusively made available to the Learned Arbitral Tribunal, which can then direct which portion of the Bhutan Contract may be redacted when making it part of the record. The Learned Arbitral Tribunal shall have the liberty to direct confidential treatment to the Bhutan Contract and issue directions and put the Promoter to terms on maintenance of confidentiality including the creation of confidentiality rings and execution of appropriate non-disclosure agreements. I am conscious that I could have called for the Bhutan Contract to this Court to conduct this exercise, but the approach of this Court in arbitration matters is to enable the Learned Arbitral Tribunal, which is the master of the evidence, to apply its own mind on what may be redacted and what should not. While the jurisdiction of the Section 37 Court in my view entails a light-touch approach, it is in the facts of this case that I find it necessary to interfere in the manner that has been done in this judgement;

K] After the Investor complies with the foregoing, the Learned Arbitral Tribunal shall issue directions to the parties for re-hearing the Section 17 Application afresh in consonance with the declarations made in this

judgement, in order to consider appropriate protective measures to preserve and protect the subject matter of the arbitration agreement, within the jurisdiction of Section 17 of the Act.

69. In the aforesaid terms and with the directions and conclusions issued above, the Petition is ***allowed*** by way of remand. The parties shall present themselves before the Learned Arbitral Tribunal within a period of four weeks from the upload of this judgement and seek directions on how to proceed further.

70. Being a commercial arbitration, costs ought to follow the event. The Learned Arbitral Tribunal is requested to factor in the element of costs in the interim round of these proceedings when it disposes of the matter on remand.

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

[SOMASEKHAR SUNDARESAN, J.]