

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 19th July, 2019
Pronounced on: 30th July 2019

+ **CS(COMM) 288/2019, I.A. 8023/2019, I.A. 8822/2019 I.A. 8823/2019 & I.A. 8824/2019**

VISTRA ITCL(INDIA) LIMITED & ANR. Plaintiffs

Through: Mr. Sanjeev Puri and Mr. Amit Sibal,
Sr. Advs. with Mr. Krishnendu Dutta,
Mr. Rajender Singh, Mr. Hardeep
Sachdeva, Mr. Rajinder Singh, Mr.
Kamal Shanker, Ms. Priyamvada
Shenoy, Mr. Saket Sikri, Mr. Parag
Maini, Mr. Abhimanyu Chopra, Mr.
Gautam Kumar Bhargava, Ms. Swati
Singh, Mr. Saksham Dhingra,
Ms.Mehak Khurana and Mr. Aman
Sharma, Advs.

versus

LALIT KUMAR JAIN & ORS. Defendants

Through: Mr. Neeraj K. Kaul, Sr. Adv. with
Mr. Sandeep Sethi, Senior Advocates
and Mr. Nikhil Rohtagi, Mr.
Shashank Khurana and
Mr.Raghvanendra M. Bajaj, Advs. for
D- 1 to 3.

CORAM: JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J

1. This order, decides a limited issue as to whether the order dated 28th May 2019, as modified on 9th July 2019, should be further varied pending the final adjudication of the application under Order 39 Rule 1 and 2, CPC.

Proceedings in the Suit

2. This Court while issuing summons in the Suit vide order dated 28th May 2019, granted ad interim injunction, thereby restraining Defendant Nos. 1 to 3 from selling/alienating/transferring/disposing of their movable or immovable assets or diluting the security of the Plaintiff. The relevant portion of the said order reads as under:-

“24. In view of the aforesaid facts, the Court is satisfied that Plaintiffs have made a prima facie case and the balance of convenience also lies in favour of the Plaintiffs and irreparable loss would be caused to them in case injunction is not granted. Huge amount have been expended by the Plaintiffs. Defendants prima facie appear to have defaulted in complying with the terms of agreement. The prayers sought in the plaint are for protection of the securities given under the transaction documents. Defendant Nos. 1 to 3 are signatories to the loan credit documents and are jointly and severally liable for the amount due from Defendant No. 4. Accordingly, till the next date of hearing, protecting the securities which have been pledged and the negative covenant contained in the agreement, Defendant Nos. 1 and 2 the guarantors, along with Defendant 3, are restrained from transferring, alienating, selling, parting with, disposing of, creating third party rights or interests or otherwise encumbering in any manner whatsoever any and all movable and immovable assets, shares, properties or any other assets.

25. Defendant Nos. 1 to 3 and 5 are further restrained from transferring or permitting to transfer or attempting to transfer any pledged shares, being 22,20,000 equity shares held in a dematerialized form, constituting 74% of the share capital of Defendant No. 5 in any manner. Defendant Nos. 1 to 4 are further restrained from or permitting a Transfer or attempting to Transfer any Pledged Shares, being 65,00,000 equity share

constituting 100% of the share capital of Defendant No.4.”

3. Defendants assailed the said order before the Division Bench of this Court. In the said proceedings, the Court declined to interfere and remitted the matter back to this Court with the following directions:

“6. we are of the view that the matter should be decided by the learned Single Judge at an early date taking into consideration all the grounds which have been raised in this appeal and on the basis of the written statements and documents which have been filed by the parties.

7. It is agreed that both the parties will not seek an adjournment before the learned Single Judge when the matter would be listed before the learned Single Judge on Thursday, i.e. 04.07.2019. We have no hesitation in saying that the learned Single Judge would take up the application on the said date and decide the same expeditiously after granting opportunity of hearing to the parties on the basis of the pleadings and documents. We are conscious of the fact that when the matter was listed on the first date of hearing, the learned Single Judge did not have the benefit of the pleadings and documents and neither the appellants had the benefit of the paper book.”

4. The order of the Division Bench, enjoins this Court to expeditiously decide the pending application under Order 39 Rule 1 and 2, CPC 1908 filed by the Plaintiff. The matter was first taken up on 4th July 2019 and thereafter on 9th July 2019, 10th July 2019, 12th July 2019, 15th July 2019, 16th July 2019 and 19th July 2019, the Court heard the counsels for both the parties for several hours on daily basis. Learned Senior Counsels for the Defendants were repeatedly called upon to argue on the injunction application entirely so that the same maybe decided finally, however, the counsels insisted that, at this stage, they are not pressing for vacation of the order and therefore do not intend to argue the application entirely. However,

Learned Counsels strenuously urged that since there are several intricate and complex contentions involving factual and legal issues that are required to be decided for adjudicating the application, arguments on the interim injunction would require detailed hearings that could possibly span several days. They submitted that since the injunction granted by the Court is strangulating Defendant Nos. 1 to 3, who are in the business of Development and Sale of Real Estate, they are only proposing a conditional variation of the order which would not cause any prejudice to the Plaintiffs and would rather safeguard and secure their interest. It was also argued that because the injunction order has disabled Defendant Nos. 1 and 3 to undertake and conduct the business in its usual and ordinary course, there is urgency in the matter. Thus without prejudice to their rights and contentions, they willingly offered security to secure the principal amount and the interest calculated at a reasonable rate amounting to Rs. 250 crores. Defendants urged that the Court may thus modify the order and permit the Defendants to carry out their business transactions for sale of flats/units in the ongoing projects. Mr. Kaul also argued that although vide order dated 28th May 2019, the Court has not specifically restrained Defendants from carrying on its day to day affairs or its business activities, but since the Defendants are in real estate business, the injunction order, has the effect of restraining them from selling any of the flats or units in any of its ongoing projects and hence they need the order to be varied.

5. During the course of the arguments, it was also put to Mr. Kaul, that since the arguments and submissions advanced by him touch upon several highly

disputed factual aspects, even for coming to a decision on the limited prayer made for varying the order, it would be but necessary for the Court to consider, evaluate and determine on a prima facie basis, the contentions raised by the parties. It was suggested that since the first ingredient relating to grant or refusal of an injunction viz “*prima facie case*” would necessarily have to be scrutinized, the better course would be that parties should argue the application finally. Mr. Kaul, however, contended and elucidated that Defendants, at this stage, are not calling upon the Court to deal with any such issue and the arguments are essentially on the principle of demurrer. He submitted that even if the averments made in the plaint are considered to be correct and uncontroverted, the Defendants are still entitled to immediate variation of the order, both on the principles of law as well as on facts. He further submitted that at the first instance Defendants will endeavor to secure the Plaintiff by offering security to the satisfaction of the Court. Mr. Kaul, contended that if in this way, Plaintiff’s interest is safeguarded, the Court should, on the principles of balance of convenience and irreparable loss, vary the order. In the event the prayer is declined, the Court may then hear the application finally.

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6. Mr. Kaul gave several options for securing the Plaintiffs. These proposals are described and referred as Option 1, Option 2 and Option 3 as noted in the order dated 9th July 2019. Defendants outrightly rejected the same on several grounds and reasons, primary one being “non-viability”. Hearings were held to discuss whether the security offered under any of the proposals was worthwhile or not. This led the Court to issue certain directions to obtain

clarity on certain vital and critical aspects such as whether Defendants have requisite clearances and are capable of making good the proposals. Resultantly, both parties filed voluminous material on record which deal with the concepts of FSI (Floor Space Index), EIA clearance and Project Land Clearance. These have been briefly discussed in this order. Thus, while deciding the question of viability of the security offered by the Defendants, I am naturally compelled to give my opinion on several contentions raised by the parties relating to the aforesaid aspects. Besides, there are several ancillary issues which have been evaluated, as the adjudication of prayer for modification of the order, in my view mandatorily requires me to take a prima facie view on certain facts.

7. Before proceeding further, it is pertinent to note certain facts that are relevant for the present order.

Transaction between the parties

8. The case as set out in the plaint is that Plaintiff No. 1-Vistra ITCL (India) Limited, a company incorporated under the provisions of Companies Act, 1956 and Plaintiff No. 2-Ammon Holdings Pte. Ltd., a company incorporated under the laws of Singapore entered into a transaction with Defendant Nos. 1 to 5. Defendant Nos. 1 and 2 (Lalit Kumar Jain and Pranay Lalit Kumar Jain, respectively) are the promoters of Defendant Nos. 3 and 4 companies. Defendant No. 3 - Kumar Urban Development Private Limited, (hereinafter 'KUDPL') is a company incorporated under the provisions of the Companies Act, 1956 and is also one of the promoters and

a majority shareholder of Defendant No. 4, which is also a company incorporated under the provisions of the Companies Act, 1956. Defendant No. 4 - M/s. Sinew Developers Private Limited, proposed to raise funds by way of issuance of Non Convertible Debentures ('hereinafter NCDs') on a private placement basis in two tranches. Pursuant thereto, Defendant Nos. 1 to 4 and the Plaintiff No. 2, entered into two Debenture Subscription Agreements dated 5th December, 2014 ('Series A DSA and Series C DSA'), on the following terms:

- (i) **Series A Secured Loan:** Infusion of Rs. 160,00,00,000/- (Indian Rupees One hundred and Sixty crores) on March 2, 2015 through subscription of Series A, BSE listed, secured, redeemable, interest bearing Series-A, non-convertible debentures ("Series A NCD's") by the Plaintiff No. 2 in Sinew Developers Private Limited ("Defendant No.4") which is governed by Series A Debentures Subscription Agreement dated December 5, 2014 and the Series A Debenture Trust Deed dated December 5, 2014.
- (ii) **Series C Secured Loan:** Infusion of Rs. 30,00,00,000/- (Indian rupees thirty crores only) on January 17, 2018 through subscription of secured, redeemable, interest bearing Series C non-convertible debentures ("Series C NCD's") by the Plaintiff No. 2 in the Defendant No.4, which is governed by Series C Debenture Subscription Agreement dated December 5, 2014 and the Series C Debenture Trust Deed dated December 5, 2014.
- (iii) **Security:** the aforesaid amounts and their redemption/ repayment along with interest, redemption premium, costs, charges, fees, etc., was secured with the following :
 - (a) **SDPL:** Share Pledge Agreement dated February 03, 2015 whereby 100% shareholding of the Defendant No.3 and the Defendant No. 1 in the Defendant No. 4 is pledged to the Plaintiff No. 1;

(b) **KHCPL Share Pledge Agreement** dated February 03, 2015 whereby 74% shareholding of the Defendant No. 3 in the Defendant No. 5 (Kumar Housing Corporation Private Limited, hereinafter 'KHCPL') is pledged to the Plaintiff No.1; and

(c) **Personal guarantees** of the Defendant No.1 and the Defendant No.2 ('hereinafter personal guarantees').

- (iv) **Interest:** The Series A NCD's carry an interest at the rate of 22.95% per annum, compounded quarterly, net of taxes which results in an IRR of 25%. The Series C NCD's carry an interest at the rate of 18.86% per annum, compound quarterly, net of taxes which results in an IRR of 20%.
- (v) **Tenor:** the Series A NCDs have a maximum tenor of 60 months from Deemed Allotment date which is March 2, 2015 i.e. March 2, 2020, or earlier upon occurrence of an event of default, which is not rectified within the stipulated time. The Series C NCDs have a maximum tenor of 37 months from Deemed Allotment date which is January 17, 2018 i.e. February 17, 2021, or earlier upon occurrence of an event of Default, which is not rectified within the stipulated time.
- (vi) **Debenture Trust Deed:** Defendant Nos. 1 to 4 entered into a Debenture Trust Deed (DTD), whereby Defendant No. 4 appointed Plaintiff No. 1 as the trustee for the benefit of the Plaintiff No. 2 and to act as his agent to enforce the provisions/terms of the transaction.

Submissions of the Plaintiff:

9. In brief, Plaintiff contended that Defendant Nos. 1, 2 and 3 are all jointly and severally liable towards the repayment of the loan along with the interest

aggregating to Rs. 448,75,58,347/- (Indian Rupees Four hundred and forty eight crore seventy – five lacs fifty eight thousand three and forty seven only) to Plaintiff No. 2, outstanding as on 20th May, 2019 and such interest continues to accrue until payment is made of the total amount. This is without prejudice to the rights and entitlements of the Plaintiffs to recover the default interest at higher rates, in accordance with the transaction documents. The act of usurping the security pertaining to the shares pledged by Defendant Nos. 1 to 3, is in clear contravention of the Transaction Documents. Plaintiff's security of 74% pledged shares of Defendant No. 5 has been unlawfully/illegally diluted due to the merger of Defendant No. 5 into Defendant No. 3. This critical factor is sufficient to deny Defendant Nos. 1, 2 and 3 any relief.

10. The Plaintiffs also contended that the merger is a clear act of fraud which disentitles the Defendants of any equitable relief. It was argued that this fact was not disclosed by Defendant Nos. 1 to 3 until 26th June 2019, when for the first time it came to the notice of Plaintiff No. 2, that Defendant No. 5 has merged/amalgamated with Defendant No. 3 under an order dated 30th October 2015 passed by the Bombay High Court. Plaintiff contended that the merger is contrary to and in violation of the covenants under the KHCPL Share Pledge Agreement and the order has been obtained by suppression of material facts. Plaintiff's claim that there was a valid Pledge on the shares of the Defendant No. 5 in favour of Plaintiffs and in terms of Clause 4.2 of the Share Pledge Agreement, which provides that *KHCPL and or, the Pledger shall not merge or amalgamate with any entity or liquidate or transfer the Pledged Shares to any other entity unless such entity and the*

Pledger has obtained the approval of the Debenture Trustee for the continuation or creation in favour of the Debenture Trustee, of the pledge over the Pledges Shares to be held by such entity, consequent to the merger, amalgamation or liquidation or asset transfer. Thus it is a clear case of fraud played upon the Court. Some instances of concealment and fraud by the Defendants are mentioned hereunder:

- (i) Defendant No.3 filed an appeal against the order dated 28th May, 2019 of this Court, in which the Defendant No. 5 has been arrayed as a party despite Defendant No. 5 having ceased to exist;
- (ii) Defendants concealed this material fact from Pune Civil Court wherein they have sought reliefs qua release and cancellation of the KHCPL (Defendant No. 5) pledge shares;
- (iii) Defendant No. 3 usurped the shares in the Defendant No. 5 and has taken away the security of Plaintiff No. 2, without taking any permission/release from the Plaintiff No.1;
- (iv) Defendant sent a draft letter to the representatives of the Plaintiffs for the release of pledge of KHCPL Shares on 19th November, 2015, after the amalgamation of Defendant No. 5 with the Defendant No. 3. The draft letter has no mention of amalgamation.

11. Plaintiff No. 1 vide its email dated 28th June, 2019 to Plaintiff No. 2 has confirmed that 22,20,000 equity shares of the Defendant No. 5 are still

pledged with it which clearly shows that, no release were ever granted of the pledge by the Plaintiff No. 1. Accordingly, Defendant Nos. 1 to 3 are not entitled to any just and equitable reliefs, let alone any variations of the order dated 28th May, 2019.

Case of the Defendants

12. Plaintiffs have falsely sought to portray that Series A and Series C Debenture Transactions are standard loan transactions without disclosing the entire commercial understanding between the parties. The Plaintiffs have resorted to suppress several material events / agreements such as Master Agreement, Share Subscription Agreements and Shareholders Agreement executed between the parties and/or Xander and have made a feeble attempt to obfuscate the real issues, disputes and differences between the parties.

13. The instant Suit is based on the default notices dated 5th October 2018, 11th October 2018 and 12th February 2019 issued by Plaintiff No. 2 where under the Plaintiffs have incorrectly and wrongfully invoked the 'Event of Default Clause' of the Debenture Trust Deed and have consequently invoked the Performance Guarantee dated 3rd February 2015 issued by Defendant Nos. 1 and 2, in favor of Plaintiff No. 1, by issuance of the Demand Notices dated 22nd May 2019.

14. Defendants claim to have duly responded to all the alleged Events of Default raised by the Plaintiffs in the Default Notices, vide their response letters dated 14th January 2019 and 27th March 2019 refuting each of the

claims made by the Plaintiffs. The alleged defaults wrongly claimed as the Plaintiffs have failed to take any action in relation to the said defaults from 2015-16 till the date of Series A Default Notice i.e. till October 2018, which evidences that the obligations of Defendant Nos. 1 to 3, if any, have been waived/ acquiesced. Moreover, in light of further investment of a sum of Rs.30 Crore in January 2018, it is evident that there were no events of default.

15. Pertinently, no Events of Default can be attributed to Defendants on account of the circular resolution dated 3rd January 2018 and the Board resolution dated 15th January 2018 of Defendant No. 4, whereby all project and construction related obligations have been taken over by the independent management of Plaintiff No. 2, to the exclusion of Defendant Nos. 1 to 3. The said board resolution specially resolves that Defendant No.1 shall not be liable for any delays in the project. Accordingly, the very premise of the suit is fallacious.

16. In respect of merger of Defendant No. 5 with Defendant No. 3, it is contended that the Plaintiffs conducted due diligence while the merger process was under way. A public notice dated 27th April 2015, disclosing the merger was also issued in Economic Times Newspapers. Moreover, pursuant to a Board resolution dated 29th November 2014, Defendant No. 5 approved the merger and thereafter the merger / amalgamation scheme was filed before the Bombay High Court on 15th March 2015. In any event, this pledge was a pre-term instrument valid only until Defendant Nos. 1 to 3 obtained the EIA clearance (environmental clearance) and Project Land

Clearance for the Project, both of which were done by them, and subsequently, an email was addressed to Plaintiff No. 2 on 3rd October 2015 to release the pledge, to which no reply was received.

17. It is further contended that Plaintiffs have falsely portrayed about attaining knowledge of KHCPL amalgamation pursuant to receipt of copy of the Written Statement filed in the present suit. However, it is a matter of fact that even when the amendments to Series C DSA were being negotiated, Plaintiff No. 2 was categorically informed about Defendant No. 5's merger with Defendant No.3. Thus the conditions precedent for release of pledged shares had been fulfilled.

18. In light of the foregoing facts and taking note of the rival contentions, I now proceed to decide whether the Defendants are entitled to variation/ modification of the order and whether the security offered by them is sufficient or not to protect the interest of the Plaintiffs.

Whether any one of the Option Nos. 1, 2 or 3 is viable?

19. By way of these three options, Defendants are, offering to earmark the flats, in the Towers C1 and C2 which are partly constructed and in Towers C3 and C4 which are yet to be constructed, in the ongoing Nirvana Hills project in Pune, being constructed by Defendant No. 4. In addition, the Defendants are offering a free sale of the FSI component which is alleged to have accrued in lieu of construction of the Slum Rehabilitation Component as per the notification dated 11th September 2014 issued by the Government

of Maharashtra, Urban Development Department. Defendants argued that as per Slum Rehabilitation Authorities Regulations, sale of FSI is permissible and is a saleable/marketable and valuable asset.

20. Mr. Amit Sibal and Mr. Sanjeev Puri, learned Senior Advocates appearing on behalf of the Plaintiffs, have strongly refuted the submissions made by Mr. Kaul. They argued that FSI component is an incentive in lieu of construction of Slum Rehabilitation Component in terms of the Government Notification. The Slum Rehabilitation Authority mandates that the occupation certificate of the free sale buildings is linked with the occupation certificate for the proportionate rehabilitation buildings. Unless the Slum Rehabilitation Buildings are completed and the occupation certificate in respect thereof is issued by the relevant authority, the occupation certificate in respect of any of the towers of the project being/proposed to be constructed by utilizing the FSI generated in lieu thereof cannot be obtained and therefore, the FSI or the flats/units/area in the towers (C1 to C4) of the project, constructed using the FSI, will not be freely saleable/marketable.

21. Additionally, it is argued that the Environment Clearance and the revised Fire NOC for undertaking construction up to the height of 100 meters for all towers i.e. C1 to C4 is required and such Environment Clearance and revised Fire NOC have not yet been obtained. The construction of Towers C1 and C2 have been carried out up to 69 meters and further construction can only be initiated on obtainment of the modification to the Environment Clearance and revised Fire NOC. Lastly they relied upon Clause 13.2.3(vi) to contend

that, Plaintiffs had issued Default Notices dated 5th October 2018, 11th October 2018 and 12th February 2019 despite which the Events of Default have not been rectified within the stipulated period of 7 days as per the Series A Debenture Trust Deed. Hence Plaintiffs are anyway entitled to all rights over the Project Land and the Project.

22. This leads to a contentious issue touching upon the concept of FSI. In order to know the clear stand of the Defendants on this issue, I directed them to file affidavits and also place copies of the Clearances on record. I have perused the said documents and given my thoughtful consideration to the contentions of both the parties. The contents of the affidavit filed by the Defendants, *prima facie* disclose that the Environmental Clearance, filed before this Court is not in terms of KHCPL Share Pledge Agreement. In the affidavit, the Defendants have referred to certain Environment Clearance of 28th February 2011 in respect of 54,993 sq meters and also amended EIA Clearance dated 30th March 2015 which according to the Defendants is for free sale building of 61,740 sq meters. Both the certificates are for an area far lesser than 89,472 sq meters (equivalent to requisite 8,16,281 sq. feet of carpet area), required under the KHCPL Share Pledge Agreement. Further, from the contents of the affidavit, it also appears that the Defendants in paras 34 and 35 of the affidavit admit that further construction can only be initiated upon the obtainment and modification of the Environment Clearance and revised Fire NOC. The relevant averments in the affidavit are as under:-

“34. I say that presently, the latest plans dated 4th May 2017 have

been sanctioned on the basis of the heights of towers C1 to C4 as 100 meters. The High Rise Committee of the Pune Municipal Corporation has permitted the construction on the said towers beyond 70 meters and up to 100 meters and a copy of permission granted by the Pune Municipal Corporation (along with translation thereof) and the plan annexed thereto are filed with the list of documents and marked as Document No. 7. The environment clearance presently available is on the basis of the plans sanctioned by SRA on 4th December 2012 up to the height of 70 meters. Hence, a modification to the available Environment Clearance for construction up to a height of 100 meters is required. A revised Fire NOC in respect of height up to 100 meters is also required.

35. Presently, the construction of towers C1 and C2 has been carried up to nearly 69 meters. Hence, a further construction can be initiated beyond a height of 70 meters upon obtainment of the modification to the Environment Clearance and a revised Fire NOC, which can both be obtained within a time period of 4 moths (approx.).”

23. From the aforesaid averments, it is further revealed that the EIA clearance presently available is on the basis of the sanctioned plan approved by Slum Rehabilitation Authority as on 4th December 2012, for construction up to the height of 70 mts. Hence, a modification is required to the available EIA clearance for a construction of the revised height of 100 mts. Thus, prima facie it appears that the Defendants have failed to obtain the EIA clearance along with other approvals that are required for the purpose of carrying out a construction of 100 mts. Further, Paras 32 and 33 of the affidavit read as under:-

“32. I say that the said architect has issued another Certificate dated 10th July 2019, wherein it has been *inter alia* stated that:-

a. as per the procedure prescribed by the SRA, the rehabilitation component and free sale component can simultaneously be constructed, however, occupation certificates for free sale buildings can be obtained when proportionate occupation certificates for rehabilitation buildings are obtained;

b. for obtaining certificate in respect of Towers C1 and C2 up to the height of 100 meters, the occupation certificate for 339 rehabilitation tenements would be required and which has already been obtained from the SRA;

c. for obtaining the occupation certificates in respect of all 4 towers C1 to C4, the occupation certificate in respect of a total of 741 rehabilitation tenements would be required out of which occupation certificate in respect of 494 rehabilitation tenements is already obtained and a construction of further 201 rehabilitation tenements is already complete on the site and occupation certificates in respect thereof can be obtained in 1 to 2 months; and

d. in respect of the balance 37 tenements, the completion of construction and obtainment of occupation certificates in respect thereof can be undertaken in 4 to 6 months.

A copy of the statement showing the current status of the rehabilitation component as prepared by the architect is filed with the list of documents and marked as **Document No. 6**.

33. I say that as one of the options, Defendant Nos. 1 and 3 have offered to provide Plaintiff No. 2 security to the extent of Rs. 250 crore (approx.) by earmarking 116 flats in Towers C1 and C2. In light of the foregoing paragraphs, it is evident that Defendant No. 4 has sufficient accrued FSI for construction of Towers C1 and C2 and accordingly, balance construction of the said towers can be duly completed and occupation certificate can be obtained without obtaining any occupation certificate in respect of any further rehabilitation tenements.”

(emphasis supplied)

24. The aforesaid contents show that the Defendants have not obtained the occupation certificate in respect of any of the Towers. Defendants have further stated that on account of completion of construction of the rehabilitation component in Wadarwasthi Slum, free sale FSI of 43,732 sq. mts has accrued. It is further stated that in addition FSI of 22,476 sq. mts is also available and an aggregate of the vested FSI and additional FSI would translate to the minimum carpet area of 8,16,281 sq. feet to be utilized for the project. Thus, from the averments made in the affidavit, it appears that it is an admitted position of the Defendants that the free sale FSI of 43,732 sq. mts is available as opposed to 89,472 sq. mts (vested FSI of 66,996 sq. mts plus additional FSI of 22,476 sq. mts) that was required under the transaction documents for completion of construction of the project.

25. Defendants have further stated in their affidavit that the vested FSI of 66,996 sq mts translating into minimum of 5,27,048 sq. feet carpet area under the project was available in favour of the Defendant as on 30th April 2013. After this date, no additional FSI has either been obtained or granted in favour of Defendant No. 4. In view of the above, at this stage, the Court need not engage in deciding the question whether FSI is indeed a saleable and marketable asset. The facts that have emerged from the affidavit filed by Defendants pursuant to the directions of this Court demonstrate that presently the requisite approvals that are mandatory for completion of the project are not in place. As noted in the order dated 15th July 2019, Mr. Kaul had in fact clarified that all the proposals are interrelated with Plaintiffs

giving them an opportunity to complete the project. Mr. Kaul argued that Plaintiff was at the helm of affairs of Defendant No. 4, controlling its board, but owing to certain bilateral disputes between the parties, the project has come to a standstill. He argues that if parties take initiative, they can reshape their relationship and recommence the construction activity and complete the Nirvana Hills project. This will clear the deadlock and both the parties will benefit and Plaintiff would also be able to recoup its investment.

26. The critical issue is whether the options given by the Defendants in offering a security in the nature of earmarking flats in the towers which are yet to be constructed can be considered to be a viable option. The calculations and projections given in the three options are based on the assumption that Defendant No. 3 has the capability and experience to deliver the completed project within the timelines required by RERA. Mr. Kaul repeatedly asserted that Court could devise a mechanism to oversee and monitor Defendant's performance by appointing a Court observer or such other means that the Court deems reasonable and appropriate. To my mind Defendant's potential to complete the construction has little or no relevance in the current scenario where parties are at loggerheads. The Court has to take an objective approach to the issue. The dysfunctional relationship cannot be set right in the present suit. The Court is not in a position to keep a weather eye on the construction. The suit before me is one for recovery of money pursuant to alleged default of the Defendants leading to foreclosure of the loan. There is no foolproof strategy with the Court to actualize the outcome desired by the Defendant Nos. 1 to 3 which may appear to be an optimal course of action. The contesting and diverging claims regarding the

breach and defaults do not give the Court the confidence that is necessary for the Court to give a framework for parties to reconfigure their contractual commitments. Moreover, since at the request of learned counsel for the Defendants this Court is not adjudicating upon Plaintiff's making out a "*prima facie*" case, the Options offered by the Defendants fail to secure the entire amount of Rs. 450 Crores (approx) including the principal amount of Rs. 190 Crore and interest of Rs. 258 Crores. These proposals given by Defendants even if finetuned, may not reliably deliver the results in view of the conflict between the parties that has reached a crescendo resulting in the project being abandoned for many years now. Looking at the long gestation period involved in real estate projects, there is serious risk and possibility that the execution of the proposal may not work out. The Court should studiously stay away from entering into the arena of realty monitor. The proposal of offering security in the project that is the apple of discord is alluring, but not feasible and practicable and I am not satisfied that any of the options would secure the amount in dispute and hence I decline to accept the same.

Merger of Defendant No. 3 with Defendant No. 5 – It's effect on the suit?

27. In view of the above, since the Court does not find the security offered by the Defendant to be viable, the question then arises is whether the Defendants are still entitled to any relief. Before delving into this question, it would be essential to first reflect on the effect of the merger of Defendant No. 5 with Defendant No. 3 which has been highlighted by the Plaintiff as

the most crucial point in the case.

28. It is an admitted position that the merger did take place. The Plaintiffs have alleged fraud and suppression relating to the KHCPL Share Pledge Agreement wherein the Plaintiffs have contended that the Defendants have amalgamated Defendant No. 5 in Defendant No. 3, with a view to obliterate the security without the consent of the Plaintiffs. The Plaintiffs have further contended that the facts pertaining to this amalgamation were suppressed from this Hon'ble Court whilst passing of the ad-interim Order dated 28th May 2019 as well as in the Appeal before the Division Bench of this Court. Clause 8.1 of KHCPL Share Pledge Agreement provided that pledge under the KHCPL Share Pledge Agreement shall be valid until the Promoters obtain (a) the EIA Clearance; (b) the Project Land Clearance in the manner set out in the KHCPL Share Pledge Agreement. Further, in terms of Clause 5.1 of the Share Pledge Agreement *the Security Interest created by or pursuant to this KHCL Share Pledge Agreement shall be a continuing security and shall remain in full force and effect until the Pledge is released fully and finally by the Debenture Trustee, in writing.* Mr. Kaul argued that the said contention is only being made to digress from the issues at hand since the said pledge has not been invoked and is only a preterm arrangement.

29. Clause 8.3 of the KHCPL Share Pledge Agreement reads as under:-

“Notwithstanding anything contained herein, upon the Company obtaining the EIA Clearance and completion of the Project Land Clearance, to the satisfaction of the Debenture Holders, the

Debenture Trustee shall release the Pledge on the Pledged Shares in accordance with the Series A Debenture Trust Deed.”

30. In terms of the aforesaid Clause, KHCPL Pledged Shares could only be released after Defendant No. 4 has obtained EIA Clearance. Further, in terms of Clause 5.1 of the KHCPL Share Pledge Agreement, the KHCPL Share Pledge Agreement shall remain in full force and effect until the pledge is released fully and finally by Plaintiff No. 1 in writing. Perusal of the aforesaid Clause also shows that notwithstanding anything contained in the agreement, Defendant No. 4 upon obtaining the EIA clearance and the project land clearance to the satisfaction of the debenture holder (Plaintiff No. 2), could seek release of the pledge in accordance with the Series A DTD, from the debenture trustee (Plaintiff No. 1) who would release the same in writing. However, there is no document on record which shows that the confirmation of the debenture holders was received, or the debenture trustee released the pledge in writing. As of today the pledge has not been released and the assets of Defendant No. 5 are now under effective possession and control of Defendant No. 3, which is under the control and management of Defendant Nos. 1 and 2. Defendant No. 3 may appropriate assets of Defendant No. 5 in a manner so as to seriously prejudice the rights of Plaintiff No. 2. Thus, prima facie it appears that the merger of Defendant No. 5 with Defendant No. 3, is contrary to and in violation of the covenants under KHCPL Share Pledge Agreement.

Is the order contrary to the Provisions of Order 39 or 38 Rule 5 of Code of Civil procedure, 1908 ?

31. Defendants have sought modification of the order on two accounts-a) on the basis of an offer of securing the Plaintiffs and b) on the legal principle relating to grant of injunction in a suit which is primarily seeking recovery of monies. The first aspect has been dealt with in detail in the foregoing paragraphs and now I proceed to examine whether the Defendants are entitled to any such reliefs on the basis of the second plea.

32. Mr. Sethi very strongly asserted that in money suits, Courts do not have the power to pass an order of injunction. He referred to the provisions of Order 39 and 38, CPC and urged that at the highest, in situations that are covered by provisions of Order 38, the Court can only order furnishing of a security, but certainly under this provision the Court cannot bring the functioning of the company to come to a standstill. On this aspect, Mr. Sethi and Mr. Kaul strongly expressed their views and anguish over the conduct of the Plaintiffs. They have vociferously pitched the case of hardship owing to the order passed by this Court. It was argued that the order is crippling the Company and if it is not vacated, it will be a death knell for the Company. Mr. Kaul argues that the Plaintiffs cannot be allowed to disrupt the day to day business activities of Defendant No. 3 and the injunction order is extremely harsh and deserves to be modified. Mr. Sandeep Sethi argued that the Court could not have passed an order of injunction, which by its import restricts Defendant No. 3-KUDPL, from conducting its business activities and day to day operations. He urged that under Order 38 Rule 5, if the Court is satisfied that the Defendant is about to dispose of the whole or any part of his property or is about to remove the whole or any part of its

property from the local limits of the jurisdiction of the Court, with intent to obstruct or delay the execution of any decree, that may be passed against him, the Court may direct the Defendant to furnish a security. He argued that under the aforesaid provision, the Courts should only order to furnish a security. It was then insisted that regardless, since the Defendants are willing to offer a security that is sufficient to safeguard the case of the Plaintiff, the Defendants are entitled to a modification/variation of the order of injunction forthwith. Retorting to this accusation, Mr. Amit Sibal argues that Defendant No. 3's contention that its functioning has come to a standstill is nothing but a concocted and imaginary ploy to persuade the Court to vacate the ad interim injunction. He repeatedly appealed that Defendant No. 3 should give complete and specific details of the difficulties faced by it.

33. The Court is mindful of the provisions of Order 39 and 38 CPC, 1908. The order of restraint under the aforesaid provisions is not entirely unprecedented. Under Order 39 Rule 1, the Court can grant temporary injunction where Defendant threatens or intends to remove or dispose of his property with a view to defrauding his creditors. Of course, temporary injunction is not to be granted as a matter of course in every case. In addition to a prima facie case the Plaintiff must also show that unless the Defendant is restrained forthwith by a temporary injunction, the Plaintiff would suffer irreparable injury or such injury as would render his eventual success in the suit totally insignificant or infructuous. The remedy provided under Order 38 is for attachment before Judgment. Under Order 38 Rule 5, the Court can order for furnishing of security. The order of attachment under Order 38 Rule 6 follows as the final step that the Court would take in the event the

Defendant fails to show cause as to why he should not furnish surety or fails to furnish the security required within the time fixed by the Court. An Order under the said provisions is indeed a harsh one and it has been repeatedly held in several decisions that judicial discretion should not be exercised until a clear case has been made out. The exercise of power requires caution, deliberation, and sound discretion. The provision no doubt applies where the Defendant is about to dispose of or remove from the local limits of the jurisdiction of the Court, his properties or is about to add to the intent to obstruct or delay the execution of the decree that may be passed against him. However, if the order of attachment is to be passed and made effective and the Court is shown sufficient material of the Defendants intent, the Court ought to act with promptness to make the order effective and relevant. The Supreme Court in *Dalpat Kumar and Anr. v. Prahlad Singh and Ors.*, (1992) 1 SCC 719, held that:

"5. The Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that it is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued. Thus the Court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit.

6. The phrases "prima facie case"; "balance of convenience" and "irreparable loss" are not rhetoric phrases for incantation, but words of width and elasticity, to meet myriad situations presented by man's ingenuity in given facts and

circumstances, but always is hedged with sound exercise of judicial discretion to meet the ends of justice."

34. Further the Supreme Court in *Dorab Cawasji Warden vs. Coomi Sorab Warden*, (1990) 2 SCC 117, observed that the relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining.

35. Significantly, the inherent power of the Court under Section 151 CPC, allows the Court to pass an order of injunction if the situation so warrants. In this way, the Court ensures that the Defendants do not dispose of the property. No doubt such orders are a drastic measure, but in my view the Court can take recourse to such means if the situation so arises and it becomes imperative in view of the factual narrative. On this aspect, it is also worthwhile to note the observations of the Division Bench in FAO (OS) (Comm) 61/2016, decided on 3rd July 2017, titled as *Ajay Singh v. Kal Airways Private Limited*. Though the Court in the said judgment decided the issue relating to the applicability of principles under Order 38 and 39 in the context of Section 9 of the Arbitration and Conciliation Act, 1996, however, certain observations are relevant and need to be noted, the same read as under:-

“24. The first question which the Court addresses is the one adverted to by the appellant, that principles underlying Order 38,

Rule 5 CPC have to be kept in mind, while making an interim order, in a given case, directing security by one party. ***Indian Telephone Industries v Siemens Public Communication*** 2002 (5) SCC 510 is an authority of the Supreme Court, which tells the Courts that though there is no textual basis in the Arbitration Act, linking it with provisions of the CPC, nevertheless, the principles underlying exercise of power by Courts –in the CPC- are to be kept in mind, while making orders under Section 9. In ***Arvind Constructions v Kalinga Mining Corporation*** 2007 (6) SCC 798, the Court held as follows:

“The power under Section 9 is conferred on the District Court. No special procedure is prescribed by the Act in that behalf. It is also clarified that the Court entertaining an application under Section 9 of the Act shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it. Prima facie, it appears that the general rules that governed the Court while considering the grant of an interim injunction at the threshold are attracted even while dealing with an application under Section 9 of the Act. There is also the principle that when a power is conferred under a special statute and it is conferred on an ordinary Court of the land, without laying down any special condition for exercise of that power, the general rules of procedure of that Court would apply. The Act does not prima facie purport to keep out the provisions of the Specific Relief Act from consideration. No doubt, a view that exercise of power under Section 9 of the Act is not controlled by the Specific Relief Act has been taken by the Madhya Pradesh High Court. The power under Section 9 of the Act is not controlled by Order XVIII Rule 5 of the Code of Civil Procedure is a view taken by the High Court of Bombay. But, how far these decisions are correct, requires to be considered in an appropriate case. Suffice it to say that on the basis of the submissions made in this case, we are not inclined to

answer that question finally. But, we may indicate that we are prima facie inclined to the view that exercise of power under Section 9 of the Act must be based on well recognized principles governing the grant of interim injunctions and other orders of interim protection or the appointment of a receiver.”

25. Interestingly, in a previous decision, *Firm Ashok Traders & Anr v Gurumukh Das Saluja & Ors* (2004) SCC 155, the Supreme Court observed that:

“13. ..The Relief sought for in an application under Section 9 of the A&C Act is neither in a suit nor a right arising from a contract. The right arising from the partnership deed or conferred by the Partnership Act is being enforced in the Arbitral Tribunal; the Court under Section 9 is only formulating interim measures so as to protect the right under adjudication before the Arbitral Tribunal from being frustrated.....”

26. Though apparently, there seem to be two divergent strands of thought, in judicial thinking, this Court is of the opinion that the matter is one of the weight to be given to the materials on record, a fact dependent exercise, rather than of principle. That Section 9 grants wide powers to the Courts in fashioning an appropriate interim order, is apparent from its text. Nevertheless, what the authorities stress is that the exercise of such power should be principled, premised on some known guidelines - therefore, the analogy of Orders 38 and 39. Equally, the Court should not find itself unduly bound by the text of those provisions rather it is to follow the underlying principles. In this regard, the observations of Lord Hoffman in *Films Rover International Ltd. v. Cannon Film Sales Ltd.*(1986) 3 All ER 772 are fitting:

“But I think it is important in this area to distinguish between fundamental principles and what are sometimes described as 'guidelines', i.e. useful generalisations about the way to deal with the normal

run of cases falling within a particular category. The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the Court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle.”

27. It was observed later, in the same judgment that:

“The question of substance is whether the granting of the injunction would carry that higher risk of injustice which is normally associated with the grant of a mandatory injunction. The second point is that in cases in which there can be no dispute about the use of the term 'mandatory' to describe the injunction, the same question of substance will determine whether the case is 'normal' and therefore within the guideline or 'exceptional' and therefore requiring special treatment. If it appears to the Court that, exceptionally, the case is one in which withholding a mandatory interlocutory injunction would in fact carry a greater risk of injustice than granting it even though the Court does not feel a 'high degree of assurance' about the plaintiff's chances of establishing his right, there cannot be any rational basis for withholding the injunction.”

36. The Code confer powers to the Court to prevent abuse of power and

secure the ends of justice. Section 151 and 94 of the Code of Civil Procedure, 1908 provide the bandwidth and flexibility so that the Court does not find itself handicapped in granting a relief if it is necessary and expedient. The logic of these provisions is that if the Court notices any shortcomings in the relevant provisions of code, it can resort to its inherent powers. I am cognizant that this power is not all pervading and ought to be used with reference to the outlines and confines given by the specific provisions relating to grant of injunctions. The inherent powers of the Code can be utilized and resorted to for issuing temporary injunctions to meet the ends of justice. However, the Court should be cautious that in the exercise of such power the statutory provisions that are specifically provided are not side-stepped or invalidated. It is pertinent to refer to the Judgment of the Supreme Court in *Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal*, AIR 1962 SC 57, wherein the Court observed that:

"19. There is nothing in Order 39 Rules 1 and 2 which provide specifically that a temporary injunction is not to be issued in cases which are not mentioned in those rules. The rules only provide that in circumstances mentioned in them the Court may grant a temporary injunction.

20. Further, the provisions of Section 151 of the Code make it clear that the inherent powers are not controlled by the provisions of the Code. Section 151 reads:

“Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

21. A similar question about the powers of the Court to issue a commission in the exercise of its powers under Section 151 of the Code in circumstances not covered by Section 75 and Order 26, arose in *Padam Sen v. State of Uttar Pradesh* [(1961) 1 SCR 884] and this Court held that the Court can issue a commission in such circumstances. It observed at p. 887 thus:

“The inherent powers of the Court are in addition to the powers specifically conferred on the Court by the Code. They are complementary to those powers and therefore it must be held that the Court is free to exercise them for the purposes mentioned in Section 151 of the Code when the exercise of those powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the legislature.”

These observations clearly mean that the inherent powers are not in any way controlled by the provisions of the Code as has been specifically stated in Section 151 itself. But those powers are not to be exercised when their exercise may be in conflict with what had been expressly provided in the Code or against the intentions of the legislature. This restriction, for practical purposes, on the exercise of those powers is not because those powers are controlled by the provisions of the Code but because it should be presumed that the procedure specifically provided by the legislature for orders in certain circumstances is dictated by the interests of justice.

23. The section itself says that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make orders necessary for the ends of justice. In the face of such a clear statement, it is not possible to hold that the provisions of the Code control the inherent power by limiting it or otherwise affecting it. The inherent power has not been conferred upon the Court; it is a power inherent in the Court by virtue of its duty to do justice between the parties before it."

(emphasis supplied)

37. Thus, while exercising power under Order 38 and 39, if the Court finds that circumstances necessarily require interim injunction restraining the alienation of properties, it can proceed to do so. This power has to be exercised under rare circumstances and carefully. Further, the restraint order at ad-interim stage under Order 39 is always a temporary arrangement to preserve the status quo, subject to further adjudication, as held by the Supreme Court in *Zenit Mataplast P.Ltd vs State Of Maharashtra, (2009) 10 SCC 388*. This is subject to final adjudication of the Application.

38. Mr. Sethi argued that without prejudice to Defendants' rights, the Court can assume that the conditions for ordering a security are met. Their contention is that even in such a situation, Courts cannot reduce the functioning of the company to a standstill, by way of a restraint order. This submission is premised only on the plea of balance of convenience and hardship faced by Defendants. However, the Defendants seem to forget that, there may be a possibility that, till the time the security being offered is being tested on the anvil of viability, Defendants may liquidate their assets and leave the Court to pass an order of attachment of non-existent assets. As a precursor, the Court would have the power to pass an order restraining the Defendants from alienating/selling/creating third party interest in respect of the property which is sought to be disposed of or removed from the jurisdiction of the Court. There is no doubt that even for passing the restraining order, the Court would have to be mindful of the principles governing the exercise of power under Order 39 and/or Order 38. Thus, I am unable to agree with Mr. Sethi's contention. I strongly feel that the Court

should remain focused on the three well known key features and principles relating to grant of injunction. But whether these elements and conditions have been satisfied in the present case, is not the subject matter of the present order, as the Defendants counsels requested that determination on this aspect be deferred. They have essentially focused on the aspect of the soundness of the security being offered. I am therefore not inclined to vary or vacate the order on the plea advanced by Mr. Sethi.

Whether the Order is causing undue hardship to the Defendants ?

39. Despite directions contained in the order dated 10th July 2019 till the time of writing this judgment, the Court has not been shown the assets of Defendants, apart from a strong statement that Defendant No. 3 has several ongoing projects. At this stage, although the Court is not adjudicating the merits of the case, I cannot ignore the most fundamental aspect that the financial transaction is not disputed. Defendant Nos. 1 to 3 admit receipt of money. The influx of the funds is a matter of record. The funding is thus transparent and admitted. The terms of the contract stipulate rate of interest and on that basis, concededly the outstanding dues aggregate to Rs. 450 crores (approx). Defendants contend that Plaintiff No. 2 is in control of affairs and is responsible for the stalemate on the payments. These questions are all subject matter of trial and I can only take a prima facie view. To me the documents on record exhibit a loan transaction and a default on the part of the Defendants owing to longstanding disputes. In order to allow the creditor to remain competitive, the security for its investment is of paramount importance. Plaintiff No. 2 poured in the money with the intent of reaping commercial benefits from the transaction. Today the security in

the nature of pledged shares has disappeared, leaving Plaintiffs vulnerable to accumulating a bad debt. Whether indeed the structure of the transaction between the parties was that of investment or partnership is not discernible from the documents. The material before me prima facie shows the transaction to be a money lending transaction. Plaintiff also expressed serious doubts about Defendant's credentials because of the concealed merger of Defendant Nos. 5 and 3 which according to them has prejudiced them and has resulted in erosion of this prime security. There are many conflicting zones between the parties that would require adjudication and I am reluctant to get drawn into this controversy at this stage.

40. The preponderant factor that persuades the Court to issue directions, as provided hereinafter is the disappearance of the pledged shares. At the time of the disposal of the suit several intricate topics would require detailed explanation and deeper probe, but it is especially vital that such questions are not rendered irrelevant because of circumstances. The conduct of the Defendants and the admitted infusion of funds, read with clauses providing for the repayment and the interest amount, leads to an inevitable conclusion that Defendants are prima facie in default. This calls for a more comprehensive undertaking to be given by the Defendants. Defendant also made alternate proposals and during the course of arguments, Mr. Kaul agreed that Defendant No. 3 can be ordered to keep 10% of the sale value in a no lien account, subject to further orders in the application and provide the land parcel ad-measuring about 66 acres situated at villages Manjaribudruk, Pune as security.

41. The Court is conscious of the volatility and uncertainty in the real estate markets and the general slowdown in the growth in this sector, as contended by the Defendants. It has been argued that the effect of aforesaid orders is that Defendant Nos. 1 to 3 are unable to function and undertake their business in its usual and ordinary course. It is also submitted that real estate business thrives on the reploughing/reinvestment of receivables. I agree with these submissions. The realtor's portfolio of assets would naturally be the properties that are under construction. By virtue of the order of injunction granted vide order dated 28th May 2019, Defendant Nos. 1 to 3 are prevented from alienating units/properties in their ordinary course of business to generate monies from their purchaser/customers and in the absence of inflow of money into the Company, Defendant Nos. 1 and 3 may not even be able to meet their day to day expenses. It is also crucial for Defendant No. 3 to remain afloat. Sustainability of Defendant No. 3 is necessary even for the Plaintiff. Due to the hardships being faced by Defendant Nos. 1 to 3 and taking note of the serious implications that an injunction order can have in view of the nature of business of Defendants, this Court is persuaded to take an alternate approach to resolve the stalemate and conundrum.

42. Till the application is heard and decided, the Court will also have to ensure that Defendant No. 3 does not fetter away its assets to render the Plaintiff without any effective recourse. Having given my thoughtful consideration on every aspect, I feel that since the security being offered by the Defendants in the nature of Options 1, 2 & 3 cannot be accepted, the alternate proposal of depositing an amount, in a separate no lien account, generated from the sale of each flat or unit from any of Defendant No. 3's

ongoing project or projects proposed to be launched in future, till further orders of this Court, is a more viable and a purposeful approach in the current scenario. Thus, notwithstanding the rejection of the options given by Defendants, till such time the Court takes a final decision on the application, it is necessary that an urgent relief be granted to Defendant Nos. 1 to 3 by way of modification/variance/clarification of the order dated 28th May 2019, so that they can undertake further development of the ongoing projects. Defendant Nos. 1 to 3 have volunteered to deposit 10% of the amount, in a separate no lien account. However, in order to balance the equities and in the interest of justice and having regard to the facts of the case as noted above, it would be appropriate to order Defendant Nos. 1 to 3 to deposit of 25% of the amount generated, in a separate no lien account, from the sale of each flat or unit from any of Defendant No. 3's ongoing project or projects proposed to be launched in future, either independently or under a joint venture or partnership etc. It is further clarified that the amount generated from sale of each flat or unit should be construed to mean and include all amounts received whether, in the form of booking amount, part-payment or final payment, received on or after 31st July 2019. These amounts shall not be utilized for any purpose without the permission of the Court.

43. The above condition shall be strictly adhered to by Defendant Nos. 1 to 3, and they shall submit the amounts in the Court on a fortnightly basis. The above condition shall be implemented subject to the Defendant Nos. 1 to 3 filing an affidavit, giving complete details of the sale transaction that were executed on or after the date of passing of the order dated 28th May 2019 with full particulars as to the details of the property, the amount received

thereunder from the prospective purchaser and the balance amount due, along with the list of its ongoing projects and their stage of construction. Defendant Nos. 1 to 3 must also furnish affidavits for any future project that Defendant No. 3 would undertake in the future, until further orders of this Court. Further, Defendant No. 3 will continue to be restrained from alienating/selling any lands held by the Defendant No. 3 without permission of the Court, as mentioned in their note of submissions.

44. This affidavit shall be filed within a period of one week from the date of the passing of the order.

45. Subject to the above, the order dated 28th May 2019 is modified / clarified to the effect that it does not restrict Defendant No. 3 to carry out its routine/ordinary course of business which includes the construction and development of its projects, undertake sale of flats/units being developed by Defendant No. 3 and to receive sale proceeds therefrom; enter into fresh development agreements, joint ventures agreements and to receive consideration therefrom. However, the sale of flats/Units being developed by Defendant Nos. 1 to 3, is subject to the above-mentioned conditions. Defendants have sought further clarification by way of seeking permission to undertake corporate restructuring in the nature of Mergers and Amalgamations with Defendant No. 3. However it is not within the purview of this Court to expand or dilute the scope of its own order by way of a clarification to its previous order and therefore no clarification is necessary on the above aspect.

46. Needless to say that this order only clarifies the injunction order dated

28th May 2019 as modified on 9th July 2019 and the opinion expressed by the Court is only a prima facie view and contentions of the parties and merits of their case shall be examined uninfluenced by the observations made in this judgment.

SANJEEV NARULA, J.

July 30th, 2019

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