

(2015) 07 DEL CK 0020

In the Delhi High Court

Case No : Arb. A. 8/2015, IA No. 3496/2015 and O.M.P. 79 of 2015

BPTP Limited and Others

APPELLANT

Vs

CPI India I Limited and Others

RESPONDENT

Date of Decision : 03-07-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 17, 37, 9

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5

Specific Relief Act, 1963 — Section 14(1)(a), 14(1)(b), 14(1)(c), 14(1)(d), 41 (c)

Citation : (2015) 6 AD 701 : (2015) 4 ARBLR 410 : (2015) 234 DLT 180 :
(2015) 152 DRJ 292

Hon'ble Judges : S. Muralidhar, J

Bench : Single Bench

Advocate : Ciccu Mukhopadhyaya, Senior Advocate and Kaushik Poddar, for the Appellant; Rajiv Nayar, Bindi Dave and Aman Gandhi, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Dr. S. Muralidhar, J.—Arbitration Appeal No. 8 of 2015 by BPTP Ltd. ("BPTP") is directed against an order dated 5th January 2015 passed by the Appellate Tribunal ("AT") in an application filed by CPI India I Ltd. ("CPI") under Section 17 of the Arbitration and Conciliation Act, 1996 ("Act"). By the said interim order the AT directed BPTP to deposit a sum of Rs. 251.2 crores in an escrow account.

2. OMP No. 79 of 2015 is a petition filed by CPI under Section 9 of the Act seeking interim reliefs against BPTP and 24 others.

3. Since both the appeal and the petition arise out of a common set of facts, they are being disposed of by this common judgment.

4. At the outset it requires to be noted that there have already been several rounds of litigation between the parties prior to and during the course of the arbitration proceedings involving them and which is still in progress.

Background facts

5. The background facts are that CPI is a company incorporated under the laws of Mauritius. It invested a sum of Rs. 322.5 crores in BPTP by subscribing to 5.67% of its paid up equity capital. BPTP is a real estate development company engaged, inter alia, in constructing residential and commercial real estate projects. Kabul Chawla and Anjali Chawla (Proforma Respondents 2 and 3 in Arbitration Appeal No. 8 of 2015 and Respondents 2 and 3 in OMP No. 79 of 2015) are the promoters of BPTP. Respondents 2 to 12 (in Arbitration Appeal No. 8 of 2015) together form the promoter group. Kabul Chawla is the promoter group representative. Proforma Respondents 13 to 25 are affiliates of BPTP, who according to CPI hold title development rights and/or development licences for the "selected projects" that form the subject matter of the agreements between the parties.

6. On 10th August 2007, two agreements were entered into between CPI on one hand and BPTP together with its promoter group on the other. The first was a share subscription agreement ("SSA") and the second was the shareholders agreement ("SHA"). While the SSA concerns the investment by CPI of a sum of Rs. 322.50 crores in BPTP by purchase of equity shares constituting 5.67% of its equity paid up share capital, the SHA sets out the rights of CPI including its right to receive dividend and to an affirmative vote on all major decisions of BPTP. It is stated that as of date CPI holds 1,45,68,368 equity shares in BPTP. It is also stated that the investment was in full compliance with the regulations regarding foreign direct investment ("FDI") issued by the Reserve Bank of India ("RBI").

7. Schedule 2 to the SSA listed out all the current real estate projects of BPTP. According to CPI, it was represented by BPTP as well as its promoters that they would make best efforts to complete the listing of BPTP's shares under a qualified and initial public offer ("QIPO") within 24 months of 18th August 2007 which was defined as the "closing date" under Clause 5.1 of the SSA. Under Clause 4.2 of the SHA which was executed on the same date, it was agreed that the proceeds from the shares subscribed by CPI would be utilised by BPTP only for FDI compliant real estate projects, hotels and special economic zones and to fund the capital expansion and/or land acquisition for expanding the business of BPTP in relation to such FDI compliant real estate projects.

8. Under Clause 4.10 of the SHA it was provided that in the event BPTP failed to achieve QIPO within 24 months following the closing date, CPI shall, within six months from the expiry of the said 24 months, have a swap option. Inter alia this involved an obligation on BPTP or the promoter special purpose vehicle ("SPV") companies to buy back the investor's share in BPTP. The manner of issuing the swap option was set out in Clause 4.10.3 of the SHA. Under these swap option, CPI was entitled to select the projects within 30 days from the receipt of the "Company Fair Market Value from the Auditor" by giving a written notice to BPTP and the promoters. Separate companies were to be incorporated for each such project. CPI and BPTP were to hold shares in each of the companies in the ratio

of 49.99:50.01. Under Clause 4.10.5 of the SHA, CPI had to infuse fresh funds and subscribe/purchase such shares of the project company(s) for the acquisition of 49.99% shareholding in such projects.

9. Clause 4.10.13 of the SHA provided that in the event that the failure to implement the swap option was attributable to BPTP or its promoters then CPI would have the right to require that the promoters be made to purchase the investor shares in accordance with the mechanics set forth in Clause 11.3. In the event that CPI failed to complete the swap option, it would not be entitled to require the promoters to purchase its shares. Clause 4.10.13 further provided that in the event the swap option was not implemented within six months of receipt of the swap option notice for any reason, CPI would have the right to require BPTP to sell the project selected by it under the swap option in accordance with Clause 4.10.16. That right was to be valid for a period of 30 days from the expiry of 6 months period during which the swap option was to be completed.

10. Clause 8.15 of the SHA listed out those matters in connection with which no major decision could be taken by BPTP without the affirmative vote of CPI. Inter alia this included deviations from the AOP in terms of the new project site acquisition where the land cost was greater than Rs. 150 crores, financing beyond Rs. 100 crores, major capital expenditures beyond Rs. 50 crores, entering into any new line of business and "sale, lease, license, mortgage or otherwise subject to lien or dispose of substantially all of the properties or assets" of BPTP.

11. Under the SHA read with SSA CPI had broadly the following rights:

"(i) Right to a dividend on the shares held by it;

(ii) The right to ultimately redeem the investment through the following mechanisms: (a) A QIPO (b) Swap option (c) sale rights (d) put option.

(iii) Affirmative voting right under Clause 8.5.1 of the SHA on certain key/major decisions of BPTP by the nominee Director of CPI as long as it continued to hold shares."

12. It must be noted at this stage that on 9th July 2008, an amendment agreement was entered into between the parties in connection with the swap option available to CPI. The idea was to accelerate the swap option and to provide that CPI would also be entitled to initiate the swap option at any time within one month of the said agreement. It provided for certain Claw Back Rights if the BPTP pursued a QIPO within a period of 19 months from the date of the said amendment agreement i.e. the Claw Back. CPI was to have the right to choose any of the assets/projects set out in the swap option notice. The swap option amount was also provided.

13. CPI acknowledged and agreed that BPTP would be issuing shares to another investor namely Harbour Victoria Investment Holdings Limited: a wholly owned

member of the JP Morgan Chase and Company group ("JPM"). On the same date i.e. 9th July 2008 the swap option notice was issued by CPI to BPTP and the promoters group. However, the QIPO not having materialised within 6 months thereafter, CPI by a notice dated 6th August 2009 exercised the sale right in terms of Clause 4.10.13 of the SHA.

The MOU

14. This led the parties to enter into negotiations and a memorandum of understanding ("MoU") was entered into between them on 19th December 2009. Interestingly, the parties to the MoU were CPI (first part), Kabul Chawla and Anjali Chawla i.e. the promoters (second part), BPTP (third part), persons listed in Schedule I to the MoU (fourth part) and affiliates of BPTP (fifth part).

15. The preamble clauses to the MoU acknowledge that CPI had issued the swap option notice which had not been intimated for a period of 6 months, which expired on 8th July 2009 as a result of which CPI had exercised the sale right.

16. Preamble Clause (D) of the MoU stated that without prejudice to CPI's rights to exercise the sale right, the parties had agreed to postpone/suspend the implementation of the sale right for a period of time up to the IPO deadline in the MoU in order to give BPTP time to complete a QIPO. It was agreed that if on or prior to the IPO deadline BPTP completed the QIPO and shares were listed in the Exchange then the sale right shall not be implemented by the CPI and the MoU would stand terminated. The MoU also recorded that in order to facilitate the sale right the parties had agreed upon a mechanism which would maximise the revenues generated upon the sale of the selected projects. Preamble Clause (F) clearly stated that BPTP affiliates which held title to and/or the development rights/licenses in the selected projects were executing the MoU to confirm, acknowledge and agree that they were bound by the terms of the MoU.

17. The selected projects were set out in Schedule A to the MoU. Projects A and M in Faridabad listed at Serial Nos. 2 and 5 were group housing projects. Apart from the above two, listed at Serial Nos. 1, 3, 4, 6, 7, 8 were the other projects.

18. Clause 4.4 of the MoU described what would be understood as the "Absolute Trigger Events". One of these was failure by BPTP to successfully implement the QIPO by the IPO deadline. Clause 10 of the MoU provided for distribution of the sale proceeds of the selected projects. Those proceeds were to be deposited directly into an escrow account which was to be in the name of BPTP and was to be operated by the escrow agent only upon receipt of joint written instructions from BPTP and CPI. Under Clause 10.2 of the MoU, all proceeds generated after the effective date i.e. 19th December 2009 from pre-sales by the BPTP of any units located on any of the selected projects were to be deposited into the escrow account. After the effective date any construction/marketing of any such selected project shall be made subject to and in accordance with the mutual agreement in writing between CPI and BPTP.

19. The sale proceeds were to be distributed between CPI and BPTP in the ownership percentage ratio in respect of each of the selected projects. CPI "s portion in terms of Clause 10.3(b) of the MoU was to be paid to it by way of immediate buy back of the investor shares by BPTP and was to be completed within 10 business days from the time the sale proceeds for each selected project were deposited into the escrow account. In the event that the RBI or any governmental authority determined the buy-back price of the shares of CPI to be lower than that arrived at under Clause 10.3(b) then BPTP and the other promoter group would still be obligated to pay CPI the difference in CPI's portion through "a suitable tax effective mechanism."

20. It is not in dispute that the QIPO was not achieved as envisaged under the MoU and that CPI insisted upon the sale of the selected projects and distribution of the proceeds to it.

The first round of litigation

21. CPI then filed OMP No. 577 of 2012 in this Court. At the hearing on 4th July 2012 the parties agreed to hold a meeting to examine what alternative options could be explored including re-working the shares agreement. The Court directed BPTP to disclose to CPI the exact amount of statutory and government dues which were to be paid by BPTP. CPI was also to be informed as to each of the unencumbered properties/assets of BPTP earmarked to secure the investment made by the Petitioner thus far. Till the next date of hearing i.e. 26th July 2012, BPTP was not to give effect to the resolution passed by its Board of Directors ("BoD") at the meeting held on 29th June 2012. It was further clarified that none of the selected projects would be sold, alienated or otherwise encumbered by BPTP till the next date.

22. What led to the filing of the above petition was the stand taken by BPTP in letters dated 25th April and 8th June 2012 that the rights and remedies available to CPI under the SSA, SHA and MoUs were not enforceable in law. CPI also alleged unauthorised passing of resolutions by BPTP, creation of encumbrances on selected projects and unauthorised use of proceeds for sale of development rights. Also at the meeting of the BoD on 29th June 2012, BPTP and affiliates proceeded to approve incurrence of further debts without approval of CPI's Directors.

23. At the hearing of the above petition on 17th July 2012 a statement was made on behalf of BPTP that without prejudice to its rights and contentions it is prepared to offer as security to CPI two of its unencumbered properties, the valuation of which was enclosed with the application. CPI was then permitted to inspect the title documents of the said properties. On 25th July 2012, BPTP stated that it would file a further affidavit explaining the circumstances under which BPTP was seeking permission to avail of a loan of Rs. 125 crores from IFCI. The affidavit was also to indicate the current status of 8 properties listed out in Schedule A to the MoU.

24. The Court also noted that there was agreement between the parties to have the 8 properties listed in Schedule A to be evaluated by Cushman and Wakefield. The Court directed the valuation report to be submitted by the said agency within four weeks. On 1st August 2012, on an application filed by the BPTP, the Court permitted 4 other projects of BPTP i.e. Project M, Project H, Project Q and Project D also to be evaluated by the same agents. Cushman and Wakefield filed their valuation reports in respect of the aforementioned projects and properties. The Court was also informed that in the meanwhile a three-Member Arbitral Tribunal ("AT") had been constituted and had already held its first sitting on 29th September 2012.

The order of the Single Judge

25. By a detailed order dated 3rd October 2012, this Court (Single Judge) held that CPI had made out a prima facie case for continuation of the interim order already passed in its favour and that prima facie BPTP appeared to be in breach of its obligation to obtain the consent of CPI to the sale of units in Project A (Park Serene) and Project M (Park Arena) in which, from the report of Cushman and Wakefield it was apparent that BPTP had not only been raising constructions but also selling units to individual flat buyers. It was informed to the Court that the amount collected till then by BPTP from flat purchasers in relation to both Projects A and M was approximately Rs. 213 crores.

26. The Single Judge also noted that CPI had already filed IA No. 15657 of 2012 insisting that BPTP should be asked to deposit the said sum of Rs. 213 crores in an escrow account since the sale of units in both the projects was undertaken without its consent as mandated in the MoU. Even at that stage it was argued on behalf of BPTP that it was facing a financial crunch and the interim order passed by the Court was starving it from possible borrowings from financial institutions and probably preventing it from availing of a loan of Rs. 125 crores from IFCI. BPTP offered that in view of vacation of the first part of the order dated 4th July 2012, it was willing to place 4 additional properties also evaluated by Cushman and Wakefield as unencumbered security with CPI so as to meet any possible claims that CPI might have against it. BPTP claimed that the value of the 6 selected projects (minus Projects A and M) together with the 4 additional projects was more than sufficient to meet CPI's entire claim which at that stage had not been made before the AT.

27. CPI, however, was not willing to accept the 4 additional properties of which 3 in any event were unlicensed. It also pointed out that even some of the selected projects included in Schedule A to the MoU were not licensed. The Court (Single Judge) noted that from the submissions of learned Senior counsel for BPTP it appeared that the sum collected through sale of units in Projects A and M had already been utilised in construction activities in Projects A and M. It noted that BPTP had stated that it would not be able to deposit any sum "leave alone Rs. 213 crores even in a separate account which will be subject to the interim or final Award that the Arbitral Tribunal might pass."

28. In the above circumstances, the Court (Single Judge) directed that BPTP would furnish the accounts of the monies collected by it till then through sale of units in Projects A and M to CPI within two weeks. It was further directed that subject to further orders that might be passed by the AT, BPTP would cease further activities as regards Projects A and M and maintain status quo in relation to the selected projects. It was, however, clarified that it would be open to BPTP to place before the AT any further proposal in support of its plea for modification or variation of this order.

The first order of the Division Bench

29. The above order dated 3rd October 2012 was challenged both by CPI (in FAO (OS) No. 538/2012) and BPTP in (FAO (OS) No. 507/2012). The Promoters filed FAO (OS) No. 508/2012.

30. The Single Judge had in the order dated 3rd October 2012 observed that the legality of the conditions of the swap option and also the conditions in MoU creating interest in the selected projects in terms of the Foreign Exchange Management Act, 1999 ("FEMA") could be raised before and decided by the AT the appropriate stage. This plea was again urged before the Division Bench ("DB") apart from the plea that BPTP should be permitted to continue with the projects particularly Projects A and M and also raise a loan of Rs. 125 crores from IFCI.

31. The DB which heard the above appeals noted that the AT had fixed a schedule for pleadings to be completed so that the hearing could commence in April 2013. In para 15 of its order dated 9th November 2012 the DB posed the question: "The only problem would be what to do till April 2013. In other words what should be the ad interim order?" It also noted that the blanket restraint order issued by the Single Judge that BPTP would cease its further activities relating to Projects A and M and maintain status quo in relation to the certain projects had adversely affected the rights of third parties. It was noted that nearly 50% of the flats in one project and 70% of the flats in the other project had been booked. Third parties had made payments to the tune of Rs. 213 crores. It was settled law that interim orders affecting third party rights should normally not be passed. The balance of convenience required that interim orders of a kind which did not affect third parties be passed. The DB was of the view that the interim order passed by the Single Judge was "likely to stop vital oxygen supply to BPTP Ltd. and if the company dies it would be prejudicial to the interest of CPI India Ltd."

32. Accordingly, the appeal was disposed of by the DB by the aforementioned order of 9th November 2012 by permitting BPTP to raise a loan of Rs. 125 crores from IFCI without altering the shareholding of BPTP; that BPTP would use the said loan to pay the government dues; that BPTP would continue with the ongoing projects i.e. Projects A and M which would entitle BPTP to enlist further flat buyers for the remaining towers proposed to be constructed in the two

projects; BPTP would be permitted to receive money from the existing flat buyers and further enrol flat buyers but would open an escrow account within a week, details of which would be furnished to the AT and the amounts realised would be deposited in the said account, utilisation whereof would be as per the interim orders of the AT. BPTP was not to take any further decisions pertaining to obtaining any loans or encumbering any of its assets. It was to provide to the AT by affidavit the details of the existing flat buyers who had booked flats in Projects A and M together with the amount paid by them and to show how the amount was utilised. BPTP was not to commence any booking of flats in any of these projects enlisted in the Schedule to the MoU.

The second order of the DB

33. The AT could not immediately proceed in the matters leading BPTP to file three miscellaneous applications in the appeals seeking modification of the order dated 9th November 2012. The main grievance in the applications was that BPTP should be permitted to encumber its assets and raise loans not exceeding Rs. 1160 crores failing which the licences issued by the Haryana Urban Development Authority ("HUDA") and the Director, Town and Country Planning, State of Haryana would lapse thereby diminishing the value of the lands owned by BPTP and its affiliates.

34. Dealing with the said applications by its order dated 8th May 2013, the DB observed that "ordinarily we would not have entertained the application and would have dismissed the same as not maintainable for the reason it would be doubtful whether upon constitution of an Arbitral Tribunal and an application filed under Section 17 of the Arbitration and Conciliation Act, 1996 before the Tribunal parallel remedy could be availed under Section 9 of the Arbitration and Conciliation Act, 1996 before a Court." However, at the same time since the AT could not assemble and the urgency of the matter was such that not even a day's delay could be brooked, the Court "may have to step in to fill the time gap."

35. The DB, however, felt that the days by which the licenses could have lapsed would have already been crossed, therefore "the damages have already been done." Consequently, the DB was not satisfied that the doctrine of necessity stood attracted. However the DB observed:

"keeping in view the fact that the applicants are under a restraint order passed by this Court, the competent authority issuing the licenses may consider further grant of time till the Arbitral Tribunal takes a decision on the matter. We may also observe that if the applicant finds itself in a situation where delay cannot be brooked in obtaining some interim directions, upon an application filed before the Arbitral Tribunal, upon said extreme and critical urgency being shown, the Arbitral Tribunal would find a way out to solve the problem and for which written submission could be considered and the three Arbitrators could be in sync through video conferencing."

36. Consequently, the DB declined to modify the order dated 9th November 2012.

The third order of the DB

37. Nonetheless within a period of 5 months, two more applications came to be filed before the DB seeking clarification/modification of the same order since the AT was still unable to meet in order to decide the applications. In one application it was stated that in view of the delaying tactics adopted by CPI before the AT, BPTP was left in a state of limbo. The AT had deferred further hearing of the application to 14th and 15th October 2013.

38. However, the DB was not impressed that any case had been made out in one of the applications, i.e., CM No. 10417/2013 whereby BPTP sought further clarification of the interim order dated 9th November 2012. The said application was accordingly dismissed by the order dated 9th October 2013.

39. By the same order, the DB also dealt with CM No. 10419/2013 which prayed for modification of the order dated 9th November 2012 pointing out that in relation to Project M a loan of Rs. 50 crores had been availed from Allahabad Bank and an escrow account had already been opened with the said bank and that the bank had a lien on the said account as well as the mortgage of the project. It was pleaded that the said fact was already within the knowledge of the CPI but "inadvertently was not made known to the Court." Now permission was sought to open an escrow account with PNB so that monies could be kept in "an escrow account" and not "an escrow account".

40. The DB felt that these were facts upon which AT could form an opinion and, therefore, there was no occasion to clarify the order dated 9th November 2012 even in this regard. Consequently, even the said application was dismissed.

The affidavit of Kabul Chawla

41. On 7th December 2012, Kabul Chawla filed an affidavit furnishing the list of flat buyers who had booked flats in Projects A and M as well as indicating the amount received from them in Annexure A. The manner of utilisation of the amount so collected was set out in Annexure B. It appears from the said Annexure B that as far as the Faridabad Project i.e. Project M was concerned a sum of Rs. 73.9 crores was collected from the customers and the project expenditure was shown as 50.9 crores. Indirect expenses were shown as 8.3 crores. The cash used for the business of the company was shown as 42.5 crores.

42. As far as Project A was concerned, the collection from customers was Rs. 177.3 crores. The project expenditure was shown as Rs. 66.9 crores, indirect expenses Rs. 18.5 crores and cash used from the business as Rs. 36.9 crores.

CPI's application before the AT

43. Of immediate relevance to the present matters is the application filed by CPI before the AT on 24th December 2012. In the said application it was noted that as part of the sale process under the MoU, the parties had constituted a

Monitoring Committee chaired by a former Judge of the Supreme Court of India who had since resigned as Chairman. It was pointed out that despite CPI not agreeing to the request of BPTP to develop and sell Projects A and M, it transpired from the information supplied by the BPTP to Cushman and Wakefield that BPTP had gone ahead and sold a substantial number of units in both those projects. 637 out of 712 units had been sold in Project A and 258 out of 616 units in Project M. This according to CPI amounted to a material breach of Clauses 9.1(a) and 10.2 of the MoU and the ongoing development of the project amounted to a continuing breach of the MoU.

44. It was averred by CPI that the assurances and representations made by BPTP to CPI in respect of the status of the projects were not only false but were made with a malafide intent of defrauding the claimant (CPI) and appropriating sale proceeds of the projects without CPI's knowledge. It was further averred that apart from depriving CPI of its share of proceeds from the sale of Projects A and M, BPTP was "unjustly gaining from the unauthorised use of the sum of Rs. 251.20 crores during the pendency of these arbitration proceedings by conveniently appropriating these proceeds for their own purposes instead of depositing it into the escrow account in breach of the MoU." It was also pointed out that under Clause 10.4(a) of the MoU the EDC/IDC payments made by BPTP for any specific project could be recovered only from the sale proceeds of the selected projects and not from the proceeds of any other projects.

45. Similarly, under Clause 10.2 of the MoU any costs of development/construction/marketing of any selected projects, if agreed to in writing by the CPI, could be deducted only from the pre-sale receipts of that particular project. The object of these provisions was to segregate the costs and revenues of each project so that there was no diversion of funds or malafide intermingling of profits from the Projects with other activities of BPTP. The affidavit filed by BPTP on 7th December 2012 revealed that BPTP was misusing the sale proceeds of Projects A and M to fund its other projects and this was in breach of Clauses 10.2 and 10.4 of the MoU.

46. It was pointed out by CPI that pursuant to the order of the DB dated 9th November 2012, BPTP had opened two accounts: one with the Punjab National Bank, Connaught Place for deposit of proceeds of Project A and another with Allahabad Bank for deposit of all proceeds of Project M. However, both these escrow accounts had been opened without appointing any escrow agent. Consequently, BPTP was in control of the said escrow accounts which could therefore not be actually termed as such. An apprehension was expressed by CPI that BPTP and its promoters would clandestinely withdraw amounts from the escrow accounts. Accordingly, it was prayed that an escrow agent ought to be appointed.

47. CPI also pointed out that the submission made by BPTP before the High Court as recorded in the order dated 3rd October 2012 that "all the amounts collected in respect of Projects A and M had already been utilised in the

construction of those Projects", was false. BPTP's letter dated 17th October 2012 revealed that it was left with a surplus of Rs. 111.30 crores after meeting all expenses relating to Projects A and M. The affidavit dated 7th December 2012 showed that the collections on Projects A and M had increased to Rs. 251.20 crores and had been misappropriated for BPTP's own purposes under the garb of "cash used for business". Therefore, it was prayed that in addition to a direction to BPTP to deposit all past and future proceeds of sale of Projects A and M into the escrow account, BPTP must also provide weekly reports of the amount collected so that there is no further diversion or misappropriation of funds.

48. CPI also pointed out that through continuous acts of mismanagement, BPTP was now in a financially precarious position and was not able to discharge even its monthly loan repayment obligations. A majority of its assets were already encumbered. Therefore, it was submitted that it would not be possible for CPI to enforce any final Award that may be made in its favour.

49. On the basis of the above averments, CPI prayed before the AT, inter alia, for the appointment of an escrow agent in respect of the escrow accounts; the escrow agent to operate the said accounts only in accordance with the directions of the AT or joint written instructions of CPI and BPTP; a direction to BPTP to disclose on affidavit all sales/allotments that have taken place and any MoUs/agreements entered into by BPTP and its affiliates for selling any of the flats/shops in Projects A and M along with the schedule of payment for each such flat/shop. Another prayer was for a direction to BPTP to deposit the full amount of the sale/receipts from the sale of units of Projects A and M including Rs. 251.20 crores received up to 31st October 2012 and also submit weekly statements.

BPTP's reply

50. In reply to the said application it was urged by BPTP that various options in the transaction documents had not been given effect to as they were inconsistent with the FDI Policy. It referred to all the transaction documents as "now severed". According to BPTP under Clause 10.2 of the MoU, CPI would be entitled to only its percentage of the proceeds generated after deduction of the cost of development/construction/marketing of the selected projects and the proceeds generated would be distributed to CPI after conveyance of the relevant units made by BPTP to the end buyers. Further under Clause 10.4 of the MoU the amount to be distributed would have to be after deducting the EDC/IDC payments and the interest paid to the Directorate of Town and Country Planning, Haryana and after recovering of taxes, surcharges.

51. It was further claimed by BPTP that the exchange of correspondence with CPI would show that Projects A and M had been launched only after informing CPI. Clause 8 of the MoU also mentioned the various encumbrances on the selected projects. It was submitted that pre sales of the units in both Projects A and M were carried out only with the knowledge and consent of CPI. The allegation of misappropriation of sale proceeds was ultimately denied. According to BPTP, the

total payment receivable by CPI after conveyance of the relevant units in both the Projects A and M was to the tune of Rs. 54.1 crores. It was maintained that the receipts of Projects A and M were to be deposited in the respective escrow accounts and had not been withdrawn. BPTP had moved a separate application under Section 17 of the Act seeking leave to withdraw the amounts and the said application was pending. Statements of both escrow accounts were annexed with the reply.

52. Inter alia it was pointed out that BPTP was fully capable of satisfying any Award; that CPI had been secured with assets of BPTP worth Rs. 984.5 crores based on the valuation of Cushman and Wakefield; even if Projects A and M were excluded, CPI would be secured with assets of Rs. 786.7 crores. The utilisation of funds of one project for another project was explained by BPTP as under:

"It is reiterated that the business model of the Respondent Company as accepted by the Claimant has been that it deposits all the collections in one pool and then distributes the same. The need to do this arises as there is a timing gap between the amount collected by the Respondent Company from its customers towards a project and the expense and payment of other liabilities of that project by the Respondent Company. It is to bridge this time gap that the Respondent Company pools in all the collection and takes loans for the differential amount. All the money collected are utilised for the purposes of the Respondent Company and nothing else."

53. It was pointed out that an escrow agent would shortly be appointed for both escrow accounts.

CPI's Rejoinder

54. In its rejoinder to the above reply, CPI referred to the orders dated 29th January and 13th May 2013 passed by the High Court in Contempt Petition No. 69 of 2013.

55. It may be noticed at this stage that in the order dated 13th May 2013, the Court recorded the statement made on behalf of BPTP that it would approach PNB and appoint the escrow agent in line with the directions already issued by the DB on 9th November 2012. Further an undertaking was given by BPTP about the deposit in the escrow account with Allahabad Bank. Both these orders showed that BPTP had failed to comply till that time with the order dated 9th November 2012. The amounts received from the projects were being deposited into the loan accounts with Allahabad Bank for which the bank had first charge. Therefore, even as regards the Rs. 11.35 crores collected from Project M, the entire amount stood charged in favour of Allahabad Bank and did not secure CPI in any way.

56. The statement of account filed by BPTP showed that only Rs. 17.62 crores had been deposited in the escrow account since 9th November 2012 although BPTP had informed the DB, as recorded in the order dated 9th November 2012,

that approximately Rs. 213 crores collected from Projects A and M would be deposited into the escrow account. It also appeared that BPTP had hastily withdrawn large sums from Allahabad Bank shortly before the order dated 9th November 2012. It was admitted by BPTP that the proceeds of Project M had already been deposited with Allahabad Bank even prior to the order dated 9th November 2012. Although Rs. 73.90 crores had been collected from Project M, the withdrawals from Allahabad bank had left only Rs. 2995.06 in the said account as on 31st October 2012.

Proceedings before the AT

57. At the 8th sitting held on 16th October 2013, learned counsel for the parties had agreed that 8 selected projects listed at Schedule A in the MoU would be valued by Cushman and Wakefield.

58. On 21st October 2013, the three applications filed by BPTP and one filed by CPI under Section 17 of the Act were considered by the AT. In modification of the directions contained in para 30 (4) of the order dated 9th November 2012 of the DB, the AT permitted BPTP to raise a loan not exceeding Rs. 100 crores or the security of the projects other than the selected projects. It was further directed that the loan so raised shall be used only for the purpose of making payment of EDC/IPC payments and other dues of the Government of Haryana in respect of the licences obtained by BPTP and its affiliates. BPTP was further to give due intimation to CPI about the raising of the loan and also furnish proof of payment of EDC/IPC to CPI. The payments to the Government of Haryana of the EDC/IPC was to be made through demand drafts by the banks holding the amounts directly.

59. Cushman and Wakefield submitted a report on 30th January 2014. At the 9th and 14th sitting of the AT held between 3rd and 5th February 2014 a detailed order was passed by the AT in which it summarised what had transpired till then. On 5th February 2014 an agreement was filed by the parties concerning the sale of the selected projects. It was agreed that the selected projects would be sold on "as is where is basis" in accordance with Schedule F to the MoU; sale would be monitored by the Monitoring Committee. The Monitoring Committee would comprise of one representative of CPI and BPTP each and would be headed by a Chairman. Cushman and Wakefield would be the International Property Consultant ("IPC") to implement the sale process. The buyers of the selected projects would deposit the sale proceeds into the escrow account maintained with PNB; the IPC would directly report to the Chairman of the Monitoring Committee; monthly reports were to be provided to the AT by the Chairman of the Monitoring Committee.

60. By the order passed on 10th February 2014, the AT appointed Justice Mukul Mudgal as the Chairman of the Monitoring Committee. The AT directed that in modification of the directions in para 30 (iv) of the order dated 9th November 2012 of the DB, BPTP may draw a loan of Rs. 200 crores out of the sanctioned

amount of Rs. 600 crores by encumbering/mortgaging the six projects mentioned in para 10 of the order. It permitted 11 properties mentioned in para 12 of its order to be sold on an "as is where is" basis on the same terms as applicable to the 8 selected projects. The sale process was to be monitored by the Monitoring Committee. The terms contained in the joint agreement dated 5th February 2014 were to govern the sale/transfer of the 11 projects as well. The sale proceeds from sale transfer of the 11 projects besides the selected projects were to be deposited by the IPC into the escrow account.

61. At this stage it must be noticed that the Monitoring Committee chaired by Justice Mukul Mudgal was independently holding its sittings. At the 9th sitting the Committee noted that "the present process of sale followed by the Committee is not fetching a very positive response." The 10th meeting was scheduled for 29th January 2015. One factor to be noted was that the real estate market was facing a downward trend and, therefore, there were no ready buyers willing to offer an acceptable sum for any of the projects which were to be put on sale.

Fresh application by CPI

62. On 19th July 2014 CPI filed an application before the AT seeking recall/vacation of the AT's orders dated 21st October 2013 and 10th February 2014. Inter alia, it was stated that BPTP had deliberately made false submissions in order to obtain the aforementioned two orders. Although the AT had been told by BPTP at the hearing on 5th February 2014 that loans to the tune of approximately Rs. 600 crores had been sanctioned and BPTP should be permitted to raise loans of at least half of the said amount i.e. Rs. 300 crores, it now transpired that admittedly no loan had been sanctioned in favour of BPTP at the time of passing of the above order.

63. CPI pointed out that a letter was addressed by BPTP on 30th June 2014 referred to a "sanctioning letter" from IDBI Bank for a loan of Rs. 30 crores. In an application filed by BPTP on 10th July 2014 seeking modification of the February 10 order it had attempted to portray this as a routine change to the list of loans and corresponding security. It transpired that the original list of loans provided to the AT was totally fictitious. By a letter dated 11th July 2014, BPTP admitted to CPI that the primarily sanctioned loan and corresponding securities did not actually exist.

64. CPI further pointed out that BPTP did not raise any loan almost for 9 months and did not suffer any cancellation of licences. The properties for which BPTP was purporting to pay government dues were different from those mentioned before the AT earlier recorded in its order dated 21st October 2013. Thirdly, what had been mortgaged as a security for the IFCI loan were a different set of properties and not those mentioned in the sanction letter dated 20th June 2012 of IFCI. It was, therefore, stated that BPTP had deliberately suppressed material information with a view to deceiving CPI and to have the AT pass the aforementioned interim order.

BPTP's fresh application

65. On 6th September 2014 BPTP filed an application before the AT seeking to amend its statement of defence which was only to incorporate pleadings relating to the RBI's circulars. It was inter alia contended that the sale right in the transaction documents had to be FDI compliant and would have to comply with the July Notification of the RBI i.e. Notification with effect from 8th July 2014.

The impugned order of the AT

66. By the impugned order dated 5th January 2015, the AT disposed of CPI's application dated 24th December 2012 under Section 17 of the Act wherein it had inter alia prayed for the following reliefs:

"(a) to appoint an escrow agent in respect of the escrow accounts.

(b) direction to BPTP to disclose on affidavit all sale of units that took place in Projects A and M.

(c) directing BPTP to deposit Rs. 251.20 crores being the amount received from sale of units in Projects A and M, and

(d) directing BPTP to procure that all amounts receivable from purchasers of units under Projects A and M are directly deposited by the respective purchasers into the escrow account."

67. The AT noted at the outset that the agreement between the parties dated 5th February 2014 before the AT had already taken care of prayer (a) of the application.

68. As regards prayer (b) it noted that the particulars of the agreement/ understanding in respect of the sale of units at Projects A and M along with unit-wise payment schedule had already been filed before the High Court based on which the High Court had passed certain orders. Therefore, prayer (b) also had been substantially granted and no longer survived.

69. The AT then took up for consideration the remaining two prayers (c) and (d). The AT dealt with contentions raised on behalf of BPTP that relief (c) as prayed for in the application by CPI was not even prayed for in the statement of claims and, therefore, could not be granted. The AT noted that the final relief was for a direction to BPTP to pay CPI the investor's portion of the profits in the proportion set forth in Schedule A of the MoU and in the manner prescribed in the MoU. The AT noted that "This is a final relief, but in order to arrive at this final relief, the modus prescribed under the MoU vide Clause 10 was to deposit in the escrow account, thereafter take account of expenses agreed to by the parties and thereafter distribute the investor's portion in the proportion prescribed therein." Therefore, the relief sought was "merely an interim measure in aid of the final relief to ensure that the final relief does not become imaginary because of flittering away of the monies collected."

70. The AT then dealt with the submission of BPTP that in terms of Section 14(1) (a) and 41(c) of the Specific Relief Act, 1963 ("SRA") since the main prayer in the statement of claim was a money claim, the relief sought by way of interim application could not be granted. The AT noted that in the statement of claims, two prayers had been made. One was for specific performance of the terms of the MoU and second for an amount of Rs. 917,73,80,000 as compensation for losses suffered by CPI on account of BPTP. Therefore, the AT rejected the contention that the prayer in the main statement of claim was only one for damages. The AT concluded that there was a strong prima facie case in favour of CPI; that irreparable loss would be caused to CPI if no interim measures were directed and finally the balance of convenience was also in favour of CPI for granting interim measures of complying with the terms of the MoU read in the light of the judgment dated 9th November 2012.

71. The AT rejected the contention that the relief sought was one in the nature of attachment before judgment or seeking security before judgment. The AT characterised it as merely "an interim measure to comply with the terms of the MoU on which there is no dispute in the background of the order of the Division Bench of the Delhi High Court dated 9th November 2012."

72. Consequently, the AT allowed the application and directed BPTP to deposit in the escrow account with the PNB a sum of Rs. 251.20 crores received by it upto 31st October 2012 and continue to deposit all amounts received thereafter in the escrow account from the sale of units in Projects A and M (if not already deposited).

Submissions of counsel

73. This Court has heard the submissions of Mr. Ciccu Mukhopadhyaya, learned Senior counsel appearing for BPTP in Arbitration Appeal No. 8 of 2015, Mr. Amit Sibal, learned Senior counsel appearing for BPTP in OMP No. 79 of 2015 and Mr. Rajiv Nayar, learned Senior counsel appearing for CPI.

74. Mr. Mukhopadhyaya, learned Senior counsel for BPTP submitted that the impugned order of the AT was beyond its jurisdiction since it amounted to ordering specific performance of a contract by way of an interim order when such specific performance could not have been granted as a final relief in view of the bar under Section 14(1)(a) to (d) SRA read with Section 41 (c) thereof. It is submitted that the impugned order is more severe than providing security for even an admitted claim when in the present case there is no pecuniary liability whatsoever owed by BPTP to CPI. The impugned order would tantamount to directing BPTP to remedy an alleged breach at an interim stage without a determination on whether BPTP was in breach at all and which determination could be made only in the final Award.

75. Mr. Mukhopadhyaya submitted that by repeatedly referring to calling upon BPTP to comply with Clause 10 of the MoU, what the AT was doing was in fact granting specific performance of the MoU. He submitted that this was impermissible in law

and in support of the said proposition he relied upon the decisions in Intertoll ICS Cecons O and M Co. Pvt. Ltd. v. National Highways Authority of India (2013) 197 DLT 473 (hereinafter Intertoll), Ministry of Road Transport and Highways Government of India v. DSC Venture Pvt. Ltd. (2015) 219 DLT 596 and Gatx India Pvt. Ltd. v. Arshiya Rail Infrastructure Ltd. (2015) 216 DLT 20.

76. In reply it was submitted by Mr. Rajiv Nayar, learned Senior counsel appearing for CPI, that in the instant case the proceedings before the AT were virtually a continuation of the proceedings that had been initiated in the High Court by CPI under Section 9 of the Act. He submitted that the proceedings being in continuation of the orders passed by the Single Judge and the Division Bench and which orders have become final, were duly taken note of by the AT and the said orders were taken to their logical conclusion by the AT.

77. Mr. Nayar pointed out that the MoU was not sought to be resiled from by either of the parties. In fact both of them were arguing for implementation of the MoU. He submitted that it was not open to BPTP to wriggle out of its obligations under the MoU and out of the agreement recorded even before the AT as far as sale of the properties and the deposit of money in the escrow account was concerned. It is pointed out by Mr. Nayar that in para 5 of its application, BPTP itself had admitted that the MoU had to be complied with. He also referred to BPTP's statement of defence. He submitted that the submission regarding compliance with the RBI's circulars was a red herring as that stage had not yet been reached. The AT would deal with it at the appropriate stage.

78. Mr. Nayar submitted that the repeated orders by the AT as regards the sale of the secured projects had not materialised and even three years after the sale right had been exercised by CPI, no money whatsoever was forthcoming. He denied that the only prayer in the statement of claims was for money. He pointed out that in terms of the MoU between the parties there was an obligation to pay into the escrow account the monies received from the sale of the selected projects and it was definitely one of the reliefs sought for in the statement of claims. The claim for compensation was in addition to the above claim and the claim for damages was an alternative prayer. Mr. Nayar, distinguished the facts in Intertoll (supra) as well as Gatx India Pvt. Ltd.(supra)

Discussion and Reasons

79. At the outset it must be noted that in the present case there are a few unique features which were not present in any of the cases cited by Mr. Mukhopadhyaya. In particular:

"(i) The acknowledgement in the orders of the Single Judge and impliedly by the DB that there is a need to preserve the proceeds from the sale of Projects A and M that have been collected by BPTP and the requirement for BPTP to account for the monies collected.

(ii) Although the DB permitted BPTP to raise a loan of Rs. 125 crores from IFCI

and permitted it to continue accepting bookings in Projects A and M, it did so on the express condition that the proceeds will be deposited in an escrow account to be managed by an escrow agent and that BPTP would account for all such monies.

(iii) The DB declined to modify its order dated 9th November 2012 save and except variation or modification by the AT. Even the AT's subsequent orders preserved the crux of the DB's order as far as Projects A and M were concerned.

(iv) Even before the AT, BPTP only sought variation/modification of the order dated 9th November 2012 and not its complete vacation. Even if it did, the AT did not grant BPTP that relief. The AT only modified it to a limited extent of permitting sales of Projects other than Projects A and M; permitting BPTP to raise further loans on other projects; requiring BPTP to deposit the monies in the escrow accounts; requiring BPTP to account fully for all monies received by it."

80. None of the above reliefs granted by either this Court or the AT have been objected to by BPTP as amounting to grant of a relief of specific performance. In that sense, the impugned order dated 5th January 2015 insofar as it requires BPTP to account for the monies already collected by it and to keep depositing them into the escrow account is in continuation of the above order. The requirement to deposit Rs. 251.20 crores is also based only upon the orders of the Single Judge and the DB and is not independent of those orders. Read in the context of those orders, it cannot be said that this is a grant of the relief of specific performance. It must be remembered that the selected projects included Projects A and M as well whereas what is asked to be deposited is only the money collected from the units sold in Projects A and M.

81. The facts in *Intertoll* (supra) were that the Tribunal there was dealing with an application under Section 17 of the Act praying that the Respondent, against whom there was a money claim, should furnish as an interim measure security for the amount claimed and to disclose the source from where it was arranging finances for the litigation. The only claim was in relation to the amount in dispute. The Court drew a distinction between "subject matter of the dispute" and "amount in dispute". It was held that Section 17 should be understood as referring only to a tenable subject matter of dispute which was different from "amount in dispute". It was in the above context held that even for the purposes of Order XXXVIII Rule 5 CPC unless the Petitioner was able to show that the Respondent was about to dispose of or remove any part of its property from the local limits, the Court could not be satisfied that the Respondent was impecunious and, therefore, be required to furnish security for the monetary claim.

82. The proposition of law laid down in the above case is unexceptionable. Indeed a blanket interim relief directing furnishing security for the amount claimed might be impermissible within the ambit of Section 17 of the Act. However, here what is sought to be prayed for is actually pursuant to an MoU

between the parties under which the parties have bound themselves to certain conduct and are not seeking to resile from it. At various points of the litigation both before the Single Judge, the Division Bench, and the AT, BPTP itself constantly referred to the obligations under the MoU. The word "severed" is used by BPTP in relation to the MoU only in its amended statement of defence before the AT. This appears to be an afterthought and in any way will be examined by the AT at the appropriate stage. Suffice to note that the nature of the interim relief sought by CPI was not merely security for its monetary claim. As rightly noted by the AT, the interim relief prayed for was traceable to Clause 10 of the MoU which required a certain obligation to be performed by BPTP. The orders of this Court and the AT requiring BPTP to account for money collected by it for Projects A and M have been repeatedly frustrated by it.

83. To reiterate, in the present case, neither party has yet resiled from the MoU. In fact even before the AT they had agreed upon the modalities for the disposal of the selected projects in furtherance of the MoU. In para 149 of its written submissions, BPTP states that "BPTP is not denying the MoU to be binding in respect of past actions but going forward as it clearly clarifies that it can only be performed in the context of developments that had already been taken place as extracted in paragraph [145] above." It seeks in para 146 to suggest that the "MoU should be performed as per its terms" till the MoU is retracted or cancelled or resiled from what is to be carried out to its logical conclusion. The phrase "as is where is basis" does not constitute a novation of the MoU. This certainly reflects an agreement between the parties as to the method of carrying forth the MoU. This is clear from the many orders passed by the AT including the one passed on 10th February 2014 which was challenged by BPTP. Given these peculiar facts of the present case, the decision in *Gatx India Pvt. Ltd.* is also distinguishable and does not advance the case of BPTP.

84. The protection granted by the DB to CPI was to require BPTP to account for the sales of the units in Projects A and M. The disclosure made by BPTP showed that what it has been stating before the Single Judge and the DB was different from what has actually happened. It does appear now that the entire money collected from the booking of flats in both Projects was not utilised totally for those two projects. From the affidavit filed it is plain that, as pointed out by CPI, a substantial amount of money has been deviated either to other projects or unaccounted for as far as utilisation is concerned. The basis on which the modification of the order of the Single Judge was made by the DB on 9th November 2012 has been belied by the subsequent facts which have emerged in the affidavit filed by BPTP. Clearly, therefore, BPTP was keeping back vital facts from the Court.

85. The orders passed in the contempt petition by the Single Judge which have also attained finality do reveal that BPTP did not comply with the directions issued by DB on 9th November 2012 in letter and spirit. The conduct of BPTP made out a case for grant of an additional interim protection measure in favour

of CPI by the AT.

86. The already long history of the litigation and the fact that till date nothing has been able to be realised by CPI and even the interim protection measures thus far have proved to be futile, are the, selves sufficient for a conclusion that a prima facie case has been made out by CPI for grant of interim relief.

87. The main prayer in CPI's statement of claim was not only for money. When critically analysed there are a combination of prayers for specific performance coupled with compensation. Prayer (b) started with the words "without prejudice and in the alternative to prayer (a)" and prays for a direction to the promoters to purchase the investor's share at the fair market value. Therefore while prayer (a) seeks to enforce the sale rights as well as seeks compensation for the losses suffered, prayer (b) seeks a direction for realisation of the put option and is in addition to the prayer for compensation and damages. The Court, therefore, negatives the plea of BPTP that the relief granted by the AT by the impugned order was beyond the scope of its jurisdiction.

88. The submission with reference to Order XXXVIII Rule 5 CPC is also misconceived. On its own showing, BPTP has been unable to satisfy either the Court or the AT of its ability to meet its monetary claims. Despite various orders, the entire money collected under Projects A and M has not been deposited into the escrow account as was anticipated by the DB when it passed the order dated 9th November 2012. The decisions in *Tulsi Castings and Machining Limited v. India Venture Trust* (2014) SCC Online Bombay 1283, *Airport Authority of India v. Dilbagh Singh* 1997 (40) DRJ 518 , *Percept D'Mark (India) Pvt. Ltd. Vs. Zaheer Khan and Another*, AIR 2006 SC 3426 : (2006) 2 ARBLR 34 : (2006) 5 CompLJ 224 : (2006) 1 CTLJ 100 : (2006) 11 JT 596 : (2006) 3 SCALE 324 : (2006) 4 SCC 227 : (2006) AIRSCW 1751 : (2006) 3 Supreme 186 and *Best Sellers Retail (India) Pvt. Ltd. Vs. Aditya Birla Nuvo Ltd. and Others*, AIR 2012 SC 2448 : (2012) 4 RCR(Civil) 857 : (2012) 5 SCALE 437 : (2012) 6 SCC 792 : (2012) AIRSCW 3200 turned on their own facts, distinct from the present case, and are therefore of no assistance to BPTP.

89. The AT has prima facie found that BPTP has not complied with the requirements of the MoU or even the SSA and SHA. In exercise of its Appellate jurisdiction this Court is not persuaded to hold that the said determination is perverse or contrary to the record.

90. It is submitted by Mr. Mukhopadhyaya that the contention of the CPI that because the swap option value is identified as Rs. 381.62 crores it is owed that amount is misconceived. He pointed out that after accounting for interest, ED/ID charges etc. the total amount would work out to approximately Rs. 500 crores, 50% of which would only be Rs. 250 crores. It is accordingly submitted that it is inconceivable that CPI would be entitled to Rs. 381.62 crores.

91. The AT has only required BPTP to abide by the basic premise of the DB's order dated 9th November 2012 concerning the amounts collected for the sale of

units in Projects A and M. The amount of Rs. 250.51 crores is a figure that has emanated from what has been submitted by BPTP itself. Repeatedly, BPTP has admitted that Rs. 111 crores was surplus from the sale of units in Projects A and M (after accounting for the deductions), of which a sum of Rs. 52.3 crores was used for other projects. This was clearly prohibited by the MoU and contrary to the directions of the DB. In the event the AT was fully justified in requiring BPTP to deposit the entire sum collected by it from the sale of the units in Projects A and M.

92. The last submission is regarding the ability of BPTP to comply with the impugned order passed by the AT. It is sought to be contended that the cash and bank balance of BPTP in 2014 is Rs. 98.10 crores out of which Rs. 94.34 crore is in the escrow account. In 2013 it was Rs. 59.53 crores out of which Rs. 41.11 crore was in the escrow account. The net available cash and bank balances for the two financial years of 2012-13 and 2013-14 is stated to be Rs. 3.76 crores and Rs. 18.42 crores respectively.

93. The above submission does not impress the Court as far as the validity of the impugned order of the AT is concerned. The mere fact that BPTP may not be in a position to comply with the order, is not a reason to set it aside. The Court is also not satisfied with the submission that the damages would be an adequate remedy in the present case. The expectation of the CPI in making the FDI in BPTP was that the commitments under the SSA, SHA and later the MoU would be honoured. That expectation has been belied for various reasons some of which certainly are attributable to BPTP.

94. For all of the aforementioned reasons, the Court is not satisfied that the impugned order dated 5th January 2015 passed by the AT suffers from any illegality calling for interference by the Court. The appeal is accordingly dismissed with costs of Rs. 50,000 which shall be paid by BPTP to CPI in four weeks. I.A. No. 3496 of 2015 is disposed of.

O.M.P. No. 79 of 2015

95. Turning now to CPI's application under Section 9 of the Act, a preliminary objection is raised by BPTP to its maintainability. It is submitted that what in effect the Section 9 application seeks is an enforcement of the order passed by the AT under Section 17 of the Act which is impermissible in law.

96. Mr. Amit Sibal, learned Senior counsel for BPTP submitted that there is no mechanism for enforcement of an order of the AT and the prayers in the Section 9 application belie the true nature of the said application which is nothing but seeking an execution of the order of the AT. Reliance is placed on the decision in V.B. Prasad Vs. Manager, P.M.D.U.P. School and Others, AIR 2007 SC 2053 : (2007) 113 FLR 835 : (2007) 5 JT 378 : (2007) 5 SCALE 543 : (2007) 10 SCC 269 : (2008) 1 SCC(L&S) 500 : (2007) 4 SCR 1077 : (2007) AIRSCW 3138 : (2007) 3 Supreme 534 . It is submitted that the very same reliefs prayed for in the petition under Section 9 have been already prayed for before the AT under

Section 17 of the Act. Mr. Sibal submitted that if this Court sought to differ from the view taken by a coordinate Bench in *Sri Krishan v. Anand* 2009 (112) DRJ 657 the petition must be referred to a larger Bench. Reliance was also placed on the decision in *M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd.*, AIR 1999 SC 565 : (1999) 1 ARBLR 305 : (1999) 3 CompLJ 205 : (1999) 1 JT 49 : (1999) 123 PLR 685 : (1999) 1 SCALE 40 : (1999) 2 SCC 479 : (1999) 1 SCR 89 : (1999) 1 UJ 613 : (1999) AIRSCW 225 : (1999) 1 Supreme 126 .

97. On merits, it was submitted by Mr. Sibal that CPI is already satisfactorily protected by the interim orders that have been passed and in any event BPTP has been restrained from making bookings in selected projects. 8 selected projects have already been directed to be sold. Further BPTP has offered another 11 projects valued at more than Rs. 1100 crores to CPI. Further CPI continues to hold 5.67% shares of BPTP and has been exercising the right of sale. Since CPI is already sufficiently secured, there is no warrant at all to pass any further interim orders.

98. It was submitted by Mr. Sibal that the Respondents were not jointly and severally liable for the amounts collected by BPTP. Further, it was submitted that CPI could opt for one of the four exit mechanisms and not two of them - viz., the sale right and the put option - at the same time.

99. The Court posed a specific query to Mr. Sibal whether as a result of the dismissal of BPTP's appeal under Section 37 of the Act against the interim order of the Tribunal dated 5th January 2015 the said order of the AT under Section 17 of the Act would be deemed to have merged with the order of the Court dismissing the appeal. The response was that there would be no such merger. It is submitted that the petition under Section 9 of the Act in any event would not be maintainable if the appeal of BPTP was dismissed. It is submitted that allowing the Section 9 petition and dismissing the appeal of BPTP would result in two orders being passed on the same issue. Further the challenge to the dismissal of the appeal would be to the Supreme Court whereas the challenge to the order allowing the Section 9 application would be before the DB. This would cause confusion.

100. The Court is not impressed with any of these submissions. It is plain that the scheme of Section 37 of the Act is that an order denying or granting relief under Section 17 of the Act could be challenged by way of an appeal. While Section 17 itself may not result in an order enforceable by a Court, once that order is tested and is affirmed in an appeal under Section 37 of the Act, the order of the appellate Court should prevail. Such interpretation would ensure that the exercise of getting the AT to pass interim orders under Section 17 is not rendered futile. The statutory remedy under Section 17 cannot be allowed to be frustrated if the alternate dispute resolution mechanism of arbitration has to be effective and efficacious. In *Sri Krishan v. Anand* (supra) a submission to the said effect was noted but not examined and considered by the Court. In any event it is seen that in *Sri Krishan* the Court was not considering a challenge to an order

passed by the AT under Section 17 of the Act simultaneous with an application under Section 9 of the Act.

101. Consequently, this Court is satisfied that as a result of the dismissal of the appeal filed by BPTP, the order passed by the AT on 5th January 2015 has merged with the order passed by the Court in appeal and the order passed in appeal is enforceable. It will be open for CPI to take appropriate steps in accordance with law for its enforcement.

102. There is nothing in the wording of Section 9 of the Act that precludes a party from seeking interim reliefs before the Court at any stage of the proceedings, i.e. even during arbitration. However, if an application seeking identical reliefs has already been preferred before the AT under Section 17 of the Act, the Court will normally not entertain such application under Section 9 of the Act.

103. In the present case, the petition under Section 9 of the Act, to the extent it seeks reliefs not sought in the application filed under Section 17 of the Act before the AT, would be maintainable. However, on merits the Court is of the view that the order dated 5th January 2015 of the AT, affirmed by this Court in appeal, adequately protects CPI's interests at this stage. Consequently, the Court does not consider it necessary to grant any of the further interim reliefs prayed for in the Section 9 petition by CPI i.e. for appointment of a Receiver for the other projects of BPTP in respect of which in any event the same orders have been passed by the AT.

104. For all of the aforementioned reasons, the petition under Section 9 of the Act is dismissed. It will, however, be open to the parties to approach the AT for further interim reliefs in accordance with law, if the circumstances so warrant.