

**IN THE HIGH COURT OF DELHI AT NEW DELHI**  
**(Reportable)**  
**O.M.P. 577 of 2012 & I.A. Nos. 12593 and 15657 of 2012**

CPI INDIA I LTD

..... Petitioner

Through: Mr. Rajiv Nayar, Senior Advocate  
with Ms. Bindi Dave, Mr. Amit  
Sethi, Mr. Sameer Pandit and  
Mr. Aman Raj Gandhi, Advocates.

Versus

BPTP LTD AND ORS.

..... Respondents

Through: Mr. Dushyant Dave and Mr. Sandeep  
Sethi, Senior Advocates with  
Mr. Hardeep Sachdeva,  
Mr. Rudreshwar Singh, Mr. Kamal  
Shankar, Mr. R. Poddar and  
Mr. Ravi Bhasin, Advocates.

**CORAM: JUSTICE S. MURALIDHAR**

**ORDER**  
**03.10.2012**

1. By this petition under Section 9 of the Arbitration and Conciliation Act, 1996 ('Act'), CPI India I Limited ('CPI'), a company organized under the laws of Mauritius and having its registered office address at Ebene in Mauritius, has sought interim reliefs against BPTP Ltd. ('BPTP') (Respondent No. 1), an Indian company, and twenty-four other Respondents in relation to the disputes that have arisen between CPI and the Respondents from the Share Subscription Agreement ('SSA') dated 10<sup>th</sup> August 2007; Shareholders' Agreement ('SHA') dated 10<sup>th</sup> August 2007 as further amended by the Amendment Agreement dated 9<sup>th</sup> July 2008 ('Agreement') and a Memorandum of Understanding ('MoU') dated 19<sup>th</sup> December 2009 entered into between CPI and the Respondents.

2. The background to the present petition is that the Respondents 2 and 3 are the Promoters of BPTP, Respondent No. 1. An SSA was entered into between CPI, Respondents 2 and 3 (referred to as 'Promoters'), BPTP (referred to as the "Company") as well as other existing shareholders of BPTP whose names were listed out in Schedule-I to the Agreement (and who are arrayed as Respondents 4 to 25 in this petition). In the SSA, CPI was described as "a property investor desirous of making investments in the Indian real estate sector." The recitals to the SSA stated that the Promoters who are engaged in the business of real estate construction and development, along with the other existing shareholders, collectively held 100% of the issued share capital of BPTP, "a real estate development company engaged in residential and commercial real estate development projects". The current real estate projects of BPTP were set out in Schedule-II of the SSA.

3. The SSA stated that the Promoters as well as BPTP represented to CPI that BPTP would make its best efforts to complete the listing of its shares under qualified and initial public offer ('QIPO') within twenty-four months of the Closing Date as defined in Clause 5.1 of the SSA, i.e., 18<sup>th</sup> August 2007. CPI subscribed to 13,551,971 Equity Shares for the sum of Rs. 300 crores and 22,500,000 Preference Shares for a total amount of Rs. 22.50 crores.

4. In terms of Clause 4.2 of the SHA executed on the same date, it was agreed that the proceeds of CPI's subscription of shares would be utilized by BPTP only for foreign direct investment ('FDI') compliant real estate projects, hotels, hospitals and special economic zones, and to fund capital expenditures and/or land acquisitions for the purpose of expanding the business of BPTP in relation to such FDI compliant real estate projects etc. Under Clause 4.8 of the SHA, the parties acknowledged their intent

to pursue a QIPO to be closed within twenty four months after the Closing Date.

5. Clause 4.10 of the SHA provided for “Swap Option”. *Inter alia*, it was stated that in the event BPTP failed to achieve a QIPO within twenty-four months following the Closing Date, CPI, shall within six months from the expiry of the said twenty four months period, have the option (the ‘Swap Option’) to require upon demand that:

“(i) the Company (or the Promoters) establish one or more special purpose project companies (each, a **“Project Company”** and, collectively, the **“Project Companies”**) as set out in Clauses 4.10.4 and 4.10.5 below,

(ii) the Project Company(s) issue to the Investor a number of Shares in the Project Company(ies) as per the shareholding set out in Clause 4.10.4,

(iii) the Company transfer assets to the Project Company(s) in accordance with Clause 4.10.4, with any cost of such transfers (including stamp duty, if any) to be borne solely by the Project Company(s) (provided that the Company shall be responsible for capital gains taxes, if any, involved in connection with such transfer of assets) and

(iv) the Company or the Promoter (or a Promoter SPV) shall buy back the Investor Shares in the Company pursuant to Clause 4.10.7. Notwithstanding the forgoing, the Investor shall be entitled to exercise the Swap Option at any time prior to the expiry of twenty four (24) months under the provisions of Clause 11.3.5 and Clause 11.4.2.”

6. The manner of issuing Swap Option was set out in Clause 4.10.3 of the SHA. CPI was entitled to select the projects under the Swap Option within thirty days from receipt of the Company Fair Market Value from the Auditor by giving a written notice to BPTP and the Promoters. A separate Project Company was to be formed in respect of each of the projects. CPI and BPTP were to hold shares in each of the Project

Company(s) in the ratio of 49.99:50.01. Under Clause 4.10.5, CPI was to infuse fresh funds and subscribe/purchase such shares of the Project Company(s) for the acquisition of 49.99% shareholding in such projects.

7. 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 the Promoters then CPI “shall have the right to require (on a joint and several basis against the Promoters), at any time upon demand, that the Promoters purchase the Investor Shares in accordance with the mechanics set forth in Clause 11.3”. In the event that the failure to implement the Swap Option was attributable directly to the failure of CPI to use its reasonable efforts to complete such Swap Option, including but not limited to infusion of fresh funds, then CPI would not be entitled to require the Promoters to purchase CPI’s shares. The said Clause further provided as under:

“In the event the Swap Option is not implemented within six (6) months of the date of receipt of the Swap Option Notice for any reason, the Investor shall have the right to require the Company to sell the Project(s) selected by it under the Swap Option, in accordance with Clause 4.10.16. This right shall be valid for a period of thirty (30) days from the expiry of the said six (6) month period in the preceding sentence.”

8. Under Clause 8.15 of the SHA, no major decision could be taken in connection with BPTP by a Resolution or at any meeting with respect to the matters listed out thereunder “without the affirmative vote of the Investor Director”, i.e., CPI. The matters listed out included:

- “(a) Amendments to the articles of association or any constitutional documents, except as may be required for the QIPO;
- (f) Incurrence of indebtedness over Rs.100 crores, not specifically approved in the annual AOP;

- (h) Deviations from the AOP in terms of new project site acquisitions where the land cost is greater than Rs.150 crores, financings beyond Rs.100 crores, major capital expenditures beyond Rs.50 crores, selection of construction contractors (other than listed names in the AOP for value exceeding Rs.50 crores) and branding of projects other than under the “BPTP” brand;
- (i) Entering into any new line of business;
- (j) Sale, lease, license, mortgage or otherwise subject to lien or dispose of substantially all of the properties or assets of the Company”

9. In terms of Clause 4.10 SHA read with Clause 3 of Amendment Agreement No. 1 dated 9<sup>th</sup> July 2008, CPI initiated its Swap Option right by a notice dated 9<sup>th</sup> July 2008. Subsequently on 9<sup>th</sup> January 2009, CPI delivered the Swap Option Notice to BPTP as well as the Promoters’ Group. With the six months’ period provided in Clause 4.10.13 having expired on 8<sup>th</sup> July 2009, CPI by its Notice dated 6<sup>th</sup> August 2009 exercised the Sale Right in terms of the said Clause. At this stage, the parties held further negotiations and an MoU was entered into on 19<sup>th</sup> December 2009 in terms of which, as set out in Preamble Clause (D), it was agreed as under:

“(D) Without prejudice to the exercise of the Sale Right by the Investor, the Parties have agreed, subject to the terms of this MoU, to postpone/ suspend the implementation of the Sale Right for a period of time up to the IPO Deadline (as hereinafter defined) in order to give the Company time to complete a QIPO. If on or prior to the IPO Deadline, the Company has completed the QIPO and the shares of the Company are listed on the Exchange, then the Sale Right shall not be implemented by the Investor and this MoU shall stand terminated. To facilitate the Sale Right, the Parties have agreed upon a mechanism which shall maximize the revenues generated upon the sale of the Selected Projects (as hereinafter defined).”

10. The selected projects referred to hereinabove were set out in Schedule

A as under:

“SCHEDULE A  
SELECTED PROJECTS”

| Sr. No. | Name of Project         | City      | Type          | Sector | Area    | Average In Valuation | CPI Share | CPI's Avg. Valuation | BPTP Share | BPTP's Avg. Valuation |
|---------|-------------------------|-----------|---------------|--------|---------|----------------------|-----------|----------------------|------------|-----------------------|
|         |                         |           |               |        | (acres) | INR m                | (%)       |                      | (%)        |                       |
| 1       | Project P (Resort)      | Faridabad | Group Housing | 75     | 18.506  | 831.80               | 57.99%    | 482.36               | 42.01%     | 349.44                |
| 2       | Project A               | Faridabad | Group Housing | 83     | 17.669  | 708.61               | 55.99%    | 396.75               | 44.01%     | 311.86                |
| 3       | Project G               | Faridabad | Group Housing | 83     | 18.013  | 722.15               | 50.00%    | 361.08               | 50.00%     | 361.08                |
| 4       | Project H               | Faridabad | Group Housing | 83     | 7.013   | 288.02               | 50.00%    | 144.01               | 50.00%     | 144.01                |
| 5       | Project M               | Faridabad | Group Housing | 80     | 10.630  | 441.08               | 55.99%    | 246.96               | 44.01%     | 194.12                |
| 6       | Project G               | Gurgaon   | Group Housing | 106    | 21.956  | 1035.33              | 50.00%    | 517.67               | 50.00%     | 517.67                |
| 7       | Project A (Park Serene) | Gurgaon   | Group Housing | 37D    | 13.000  | 674.49               | 58.00%    | 391.20               | 42.00%     | 283.29                |
| 8       | Project Y               | Gurgaon   | Group Housing | 102    | 27.431  | 2,552.44             | 50.00%    | 1,276.22             | 50.00%     | 1,276.22              |
|         | Total                   |           |               |        | 134.217 | 7,253.92             |           | 3,816.25             |            | 3,437.67”             |

11. The ‘absolute trigger events’ were set out in Clause 4.4 of the MoU. One of this was BPTP having failed to successfully implement the QIPO by the IPO Deadline. Clause 10 of the MoU provided for distribution of sale proceeds. The proceeds from the sale/transfer of each of the selected projects were to be deposited directly into an Escrow Account which was to be in the name of BPTP and was to be operated upon by the escrow agent thereunder 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., 19<sup>th</sup> December 2009 from the pre-sales by BPTP or any units located on any of the selected projects was to be deposited into the escrow account. Further “after the Effective Date, any construction or pre-sales of any units on any of the Selected Projects shall be made subject to and in accordance with the mutual agreement in

writing between the Company and the Investor”.

12. Under Clause 10.3(a) of the MoU, the sale proceeds were to be distributed to CPI and BPTP in the ownership percentage ratio set forth in Schedule A. Under Clause 10.3(b) of the MoU, CPI’s portion had to be paid to it “by way of immediate buy back of the Investor Shares by the Company upon the sale of each Selected Project and shall be completed within ten (10) Business Days from the time that the Sale Proceeds for each Selected Project are deposited into the Escrow Account”. Under Clause 10.3(c) of the MoU, it was provided that in the event that the Reserve Bank of India (‘RBI’) or any governmental authority determines the buy-back price of the shares of CPI at a price lower than that arrived at under Clause 10.3(b) then BPTP and the Promoter Group would still be obligated to pay CPI the difference in CPI Portion through a suitable tax effective mechanism.

13. Clause 12 of the MoU set out the ‘representations and warranties’. Under Clause 12.2(d), it was represented by BPTP that “other than the Selected Projects mentioned in Schedule H, the necessary development licenses have been obtained for all other Selected Projects....”.

14. Admittedly, the QIPO was not achieved as was agreed under the MoU. According to CPI, BPTP immediately became liable to implement the sale of Selected Projects and CPI was entitled to have its share of the proceeds distributed to it in accordance with the MoU. CPI stated that BPTP and the Promoters had “without any just cause intentionally and in breach of the MoU and the SHA failed to take further steps to implement the sale of the Selected Projects till date”.

15. The present petition in para 7.4(f)(ii) lists out the alleged breaches

and defaults committed by the Respondents. This includes unauthorised raising of the debts by the Respondents without the Investor Director's approval. In particular, it is pointed out that a meeting of the Board of Directors of BPTP was held on 29<sup>th</sup> June 2012 and the Respondents proceeded to approve incurrence of the following debts, without CPI's Directors approval:

- “(i) Term loan from Syndicate Bank for Rs.90 crores,
- (ii) Corporate loan of Rs.125 crores from IFCI Limited; and
- (iii) raising fresh debt of upto Rs.730 crores.”

16. It was further averred by CPI that on 9<sup>th</sup> November 2011, i.e., five days after receiving the default notice from CPI, the Respondents unilaterally addressed a letter to RBI requesting for an opinion on the validity of certain provisions of the Agreements without disclosing the full information pertaining to CPI's investments in BPTP. RBI had by a letter dated 12<sup>th</sup> December 2011 given a brief response advising BPTP to be guided by its Instructions dated 24<sup>th</sup> October 2011 as was advised to it in a similar case earlier.

17. By letters dated 25<sup>th</sup> April 2012 and 8<sup>th</sup> June 2012, BPTP had taken the stand that the rights and remedies available to CPI under the Agreements were not enforceable in law. CPI alleges that these letters were attempts at avoiding BPTP's obligations towards CPI and to illegally extinguish its remedies. The other grievances include creation of encumbrances on the Selected Projects, the unauthorised passing of resolutions and unauthorised use of proceeds from the sale of development rights.

18. In the above circumstances, the present petition was filed and on 4<sup>th</sup> July 2012 the following order was passed by this Court in the presence of

counsel for the Respondents:

“1. Notice. Mr. Kamal Shankar, learned counsel accepts notice on behalf of the Respondents.

2. During the course of the arguments it has been agreed by learned Senior counsel for the Respondents, on instructions, that within the next week, a meeting will be held between the representatives of Respondent No. 1 BPTP Limited and the Petitioner CPI India Limited to examine what alternative options can be explored including reworking the shareholders agreement which is the subject matter of the present petition. Respondent No. 1 will disclose to the Petitioner the exact amounts of statutory and government dues which are to be paid by Respondent No. 1. The Petitioner will also be informed as to which unencumbered properties/assets of Respondent No. 1 company will be earmarked to secure the investment made by the Petitioner thus far. It is made clear that this would be without prejudice to rights and contentions of either party.

3. List on 26<sup>th</sup> July 2012.

4. Till the next date of hearing, Respondent No. 1 will not give effect to the Resolution passed by the Board of Directors of Respondent No. 1 at the meeting held on 29<sup>th</sup> June 2012. It is clarified that none of the ‘Selected Projects’ the list of which is at page 138 of the documents volume, shall be sold, alienated or otherwise encumbered by Respondent No. 1 till the next date.

5. Order be given dasti under signature of the Court Master.”

19. BPTP filed I.A. No. 12593 of 2012 for modification of the aforementioned order dated 4<sup>th</sup> July 2012. On 17<sup>th</sup> July 2012, the following order was passed in the said application:

“1. Issue notice.

2. Mr. Amit Sethi, Advocate accepts notice on behalf of the Petitioner.

3. It is stated by Mr. Mukul Rohtagi, learned senior counsel for the Petitioner (*sic* BPTP) that without prejudice to the rights and contentions of the Respondents, the Respondents are prepared to offer as security to the Petitioner two of its unencumbered

properties, the valuation report in respect of which has been enclosed with the application. He further states that the Petitioner can carry out inspection of the title documents of both the properties on a mutually convenient date and time. The Respondents are also prepared to answer any other queries that the Petitioners may have in respect of the said two properties.

4. It is directed that the Petitioners will be permitted to inspect the title documents of the properties offered on 18<sup>th</sup> July 2012 at 3.00 p.m. at the office of the Respondents.

5. The original title deeds in respect of these two unencumbered properties shall be produced by the Respondents on the next date of hearing.

6. List on 23<sup>rd</sup> July 2012.”

20. Thereafter on 25<sup>th</sup> July 2012 after hearing the submissions of the counsel for the parties, the following order was passed:

“1. Mr. Harish Salve, learned senior counsel appearing for the Respondents states that a further affidavit will be filed within two days with copies to the other side explaining the circumstances under which the Respondents are pressing for being permitted to avail of the loan of Rs.125 crores from the IFCI. He states that the affidavit will also indicate the current status of the eight properties listed in Schedule A to the Memorandum of Understanding (‘MoU’) dated 19<sup>th</sup> December 2009.

2. Mr. Rajiv Nayyar, learned senior counsel for the Petitioner states that the Petitioner will file a reply to the said affidavit before the next date of hearing.

3. List on 29<sup>th</sup> August 2012.

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4. The parties are agreed that the eight properties listed in Schedule-A to the MoU can be evaluated by Cushman & Wakefield (India) Pvt. Ltd., registered office at B-6/8, Commercial Complex, Opp. Deer Park, Safdarjung Enclave, New Delhi-110029 and also at 14<sup>th</sup> Floor/II, Block-C, Building No.8, DLF Cyber City, Gurgaon-122022. A request will be made to the said valuers today itself jointly by both the parties. The fees of the valuer will be shared equally by both the parties. The Court requests the valuers

to submit their report not later than four weeks from today. The Respondents will provide complete details of the eight properties to the valuers to enable them to properly assess their present value.

5. The next date of 26<sup>th</sup> July 2012 is cancelled.

6. List on 29<sup>th</sup> August 2012.

7. Interim orders to continue.

8. Copy of this order be given Dasti.”

21. On 1<sup>st</sup> August 2012, the following order was passed in I.A. No. 13887 of 2012, an application filed by the Respondents, for directions:

“1. Learned Senior counsel for the parties have been heard.

2. Without prejudice to the rights and contentions of the Petitioner, the four projects/properties of Respondent No.1-Company, viz., Project M, Project H, Project Q and Project D listed in Annexure ‘A’ to this application will, in addition to the properties asked to be evaluated in the earlier order dated 25<sup>th</sup> July 2012, also be evaluated by the same firm, i.e. Cushman and Wakefield (India) Pvt. Ltd in terms of the order passed by this Court on 25<sup>th</sup> July 2012.

3. The application stands disposed of in the above terms.”

22. Subsequent to the above orders, M/s Cushman & Wakefield (India) Pvt. Ltd. [‘Cushman & Wakefield’], have filed their Report dated 22<sup>nd</sup> August 2012 as further revised on 28<sup>th</sup> August 2012. They have also submitted a valuation report in respect of the four further land parcels which were permitted to be evaluated by the order dated 1<sup>st</sup> August 2012 passed by the Court.

23. One other subsequent development is that a three-Member arbitral Tribunal (‘arbitral Tribunal’) has been constituted for adjudicating the disputes between the parties. It is stated that the said arbitral Tribunal

has already held its first sitting on 29<sup>th</sup> September 2012.

24. This Court has heard the submissions of Mr. Rajiv Nayar, learned Senior counsel appearing for CPI and Mr. Dushyant Dave and Mr. Sandeep Sethi, learned Senior counsel appearing for the Respondents.

25. At the outset, it requires to be noted that the parameters governing grant of interim reliefs in an application under Section 9 of the Act are more or less the same as those governing an application for interim injunction under Order XXXIX of the Code of Civil Procedure, 1908 ('CPC'). The three basic parameters that require to be considered are the existence of a *prima facie* case; the balance of convenience and the irreparable hardship that might result from the grant or refusal of the interim relief as prayed for in the petition.

26. In ***Wander Ltd. v. Antox India (P) Ltd.*** 1990 (2) Arb.LR 399 (SC), the Supreme Court observed as under (Arb.LR @ p.401):

“5. Usually, the prayer for grant of an interlocutory injunction is at a stage when the existence of the legal right asserted by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. The court, at this stage, acts on certain well settled principles of administration of this form of interlocutory remedy which is both temporary and discretionary. The object of the interlocutory injunction, it is stated is to protect the plaintiff against injury by violation of his rights for which he could not adequately be compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the "balance of convenience lies". The interlocutory remedy is intended to preserve in *status quo*, the rights of parties which may appear on a *prima facie*. The court also, in restraining a defendant from

exercising what he considers his legal right but what the plaintiff would like to be prevented, puts into the scales, as a relevant consideration whether the defendant has yet to commence his enterprise or whether he has already been doing so in which latter case considerations somewhat different from those that apply to a case where the defendant is yet to commence his enterprise, are attracted.”

27. In ***Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd. (1999) 7 SCC 1***, it was held as under (SCC @ p.13-14):

“24. We, however, think it fit to note herein below certain specific considerations in the matter of grant of interlocutory injunction, the basic being-non-expression of opinion as to the merits of the matter by the Court, since the issue of grant of injunction usually, is at the earliest possible stage so far as the time frame is concerned. The other considerations which ought to weigh with the Court hearing the application or petition for the grant of injunctions are as below:

- (i) Extent of damages being an adequate remedy;
- (ii) Protect the plaintiffs interest for violation of his rights though however having regard to the injury that may be suffered by the defendants by reason therefor;
- (iii) The court while dealing with the matter ought not to ignore the factum of strength of one party's case being stronger than the other's;
- (iv) No fixed rules or notions ought to be had in the matter of grant of injunction but on the facts and circumstances of each case - the relief being kept flexible;
- (v) The issue is to be looked from the point of view as to whether on refusal of the injunction the plaintiff would suffer irreparable loss and injury keeping in view the strength of the parties' case;
- (vi) Balance of convenience or inconvenience ought to be considered as an important requirement even if there is a serious question or prima facie case in support of the grant;

(vii) Whether the grant of refusal of injunction will adversely affect the interest of general public which can or cannot be compensated otherwise.”

28. The issue that requires to be first addressed is whether CPI has made out a *prima facie* case for continuation of the interim order passed by this Court on 4<sup>th</sup> July 2012 till such time the arbitral Tribunal passes an order on any application that may be filed by either party under Section 17 of the Act. What is not in dispute is that CPI has over five years ago invested over Rs. 322.5 crores in the shares of BPTP. Till date it has had no return on the said investment. CPI's investment was not a simpliciter subscription of shares of BPTP. It was governed by elaborate conditions in the SSA, the SHA (as amended) and later the MoU. While BPTP may now want to contend that the SSA, the SHA and the MoU may be void and therefore unenforceable the fact remains that BPTP has not rescinded any of the said agreements or the MoU. Further, it has had the benefit of FDI under those agreements and the MoU. The clauses of the documents referred to hereinbefore demonstrated that there was an expectation that BPTP would be able to roll out a QIPO within an assured time frame, failing which CPI could exercise the Swap Option and thereafter bring the Selected Projects to sale. Although extensive arguments were advanced on behalf of the Respondents as to who should be held liable for the QIPO not taking place, that is a question that should be properly raised before and addressed by the arbitral Tribunal. At this stage, it is sufficient for the Court to note the factual position that such QIPO has in fact not taken place. The MoU spells out the consequences of the QIPO not taking place. The MoU does state that the Selected Projects would be available to be brought to sale at the instance of CPI as per its choice and the sale proceeds would be placed in an escrow account to be operated under the joint instructions of CPI and BPTP.

29. The exercise of having the Selected Projects evaluated by Cushman & Wakefield was basically to ascertain what the current market value of those assets might be. The executive summary produced by Cushman and Wakefield in relation to those Selected Projects indicates that their present market values are at an aggregate of around Rs.387 crores subject of course to qualifying statements regarding the unlicensed projects, , which are expected to fetch much less than licensed projects. Likewise the valuation report in relation to the four additional Projects states that their aggregate market value is around Rs. 390 crores. This is again subject to the caveat regarding the unlicensed projects.

30. In response to a query from the Court whether in the market value indicated in the above executive summaries in the reports prepared by Cushman and Wakefield are reflective of the possibility of the said properties fetching the stated prices if immediately brought to sale, the response of learned Senior counsel for Respondents was that the current market scenario in the real estate sector was not encouraging. It was unlikely that there might be many buyers forthcoming to pay the aforementioned market value if the properties were put up for sale.

31. From the reports of Cushman and Wakefield it is apparent that in relation to two of the Selected Projects, i.e., Project A (Park Serene) and Project M (Park Arena), BPTP has not only raised constructions, but has also been selling the units to individual flat buyers. It is pointed out by learned Senior counsel appearing for CPI that the amounts collected so far from the purchasers by BPTP in relation to both Project M and Project A are approximately Rs. 213 crores. CPI has filed I.A. No. 15657 of 2012 insisting that BPTP should be asked to deposit the said sum of Rs. 213 crores in an escrow account. CPI alleges that sale of units in both the Projects A and M have been undertaken by BPTP without the consent

of CPI as mandated in the MoU. BPTP states that it did inform CPI that it was going ahead with the sale of units in both those Projects and there was an implied consent.

32. At this stage, it is not possible for the Court to come to a definite conclusion on the above submissions regarding Projects A and M. However, in the absence of a specific letter of consent from CPI, it does *prima facie* appear that BPTP was in breach of its obligation to obtain the consent of CPI to the sale of units in Projects A and M.

33. All the above facts when collectively assessed do indicate that CPI has made out a *prima facie* case for continuation of the interim order in its favour till such time the arbitral Tribunal passed an order on an application that may be filed by either party under Section 17 of the Act.

34. It was earnestly pleaded on behalf of BPTP that the balance of convenience was in favour of the modification of at least the first part of the interim order dated 4<sup>th</sup> July 2012 which stayed the implementation of the decisions taken at the Board Meeting held on 29<sup>th</sup> June 2012. It was submitted that BPTP has sixty ongoing projects, has an annual turnover of over Rs. 1500 crores and nearly 700 employees. Further, BPTP was facing a liquidity crunch and the interim order was starving BPTP of the possible borrowings from financial institutions. In particular, a reference is made to a loan of Rs. 125 crores sanctioned by IFICI which BPTP says has not been able to be availed of by it because of the interim order passed by the Court. BPTP submits that in lieu of the vacation of the first part of the interim order dated 4<sup>th</sup> July 2012 it is willing to place four additional properties, which have also been evaluated by Cushman & Wakefield, as unencumbered security with CPI so as to meet any possible claims that CPI might have against it. It is submitted that the collective

value of the six of the Selected Projects (minus Project A and Project M) together with the four additional projects would be more than sufficient to meet CPI's entire claims which in any event have not yet been formally made before the arbitral Tribunal.

35. Learned Senior counsel appearing for CPI, on instructions, stated that CPI would not be willing to accept four additional properties three of which in any event are unlicensed. It is stated that even among the Selected Projects it now transpires that the warranties given by BPTP in its MoU were false. The report of Cushman & Wakefield reveals that among the Selected Projects, Projects G and H in Sector 83 are unlicensed, and only five acres in Project Y in Sector 102 and 14.79 acres in Project G in Sector 106 are licensed. In respect of four additional projects being offered, three are unlicensed. It is pointed out that with the real estate market admittedly not encouraging, the furnishing of further properties as security would hardly be sufficient to meet CPI's claims. CPI, a foreign investor, after investing over Rs. 300 crores in BPTP and waiting for over five years is faced with a situation where there is neither a QIPO nor the prospect of any of the Selected Projects being brought immediately to sale.

36. As regards the prayer that BPTP should be asked to deposit Rs. 213 crores that it has collected through sale of units in Projects A and M in an escrow account, it appears to the Court from the submissions made by learned Senior counsel for BPTP that the amounts so collected have already been utilized in construction activity in Projects A and M themselves. BPTP says that it would not be able to deposit any sum, leave alone Rs. 213 crore, even in a separate account that will be subject to the interim or final Award that the arbitral Tribunal might pass. It was stated by learned Senior counsel for BPTP that it might not be prepared

even to sell one parcel of those properties rightaway to generate some cash which could be placed in a separate account.

37. The Court would like to observe that BPTP's contention regarding the legality of the SSA, the SHA and the MoU in light of the Foreign Exchange Management Act, 1999 and RBI's circulars can be raised before and be addressed by the arbitral Tribunal. At this stage, the prayer of CPI that the sale proceeds of the projects should be deposited in an escrow account does not *per se* violate any requirement of the RBI. However, in the light of BPTP's expression of its inability to deposit any sum in an escrow account, the only order that the Court is prepared to pass at this stage is to require BPTP to keep a complete account of all the monies collected by it thus far through sale of units in Projects A and M and furnish such accounts, including the appropriation of the monies so collected, to CPI within a period of two weeks from today. Subject to further orders that may be passed by the arbitral Tribunal, BPTP will cease further activities as regards Projects A and M and maintain status quo in relation to the Selected Projects. It is clarified that it would be open to BPTP to place before the arbitral Tribunal any further proposal in support of its plea for modification or variation of this order. Such proposal would be then considered on its merits by the arbitral Tribunal.

38. In the circumstances, and particularly in light of the repeated submissions made by counsel for both parties that the real estate market is not very encouraging at the present stage, it does appear that the balance of convenience in continuing the interim orders passed by this Court on 4<sup>th</sup> July 2012 at this stage is in favour of CPI and not BPTP.

39. On the aspect of irreversible hardship, the Court at this stage is satisfied that if the interim order passed by it on 4<sup>th</sup> July 2012 is not

continued in the manner indicated hereinafter, CPI would be subjected to irreversible hardship which hardship outweighs the possible hardship that BPTP will be subjected to in the facts and circumstances of the case.

40. It is clarified that the observations in this order are tentative and not intended to influence any order that may be passed by the arbitral Tribunal.

41. In conclusion, it is directed as under:

- (i) The interim order passed by this Court on 4<sup>th</sup> July 2012 is directed to continue till such time the arbitral Tribunal passes an order, including by way of modification or variation of this order, in accordance with law in an application that may be filed by either party under Section 17 of the Act.
- (ii) BPTP will furnish to CPI, within two weeks from today, the accounts of the monies collected by it by sale of units in Projects A and M, including the manner of disbursing of such monies collected by it. Till further orders that may be passed by the arbitral Tribunal, BPTP will cease further activity in relation to Projects A and M and maintain status quo in relation to the Selected Projects.
- (iii) It will be open to the parties to rely on the pleadings, documents and reports forming part of the record of the present petition in the arbitral proceedings.

42. The petition and all pending applications are disposed of in the above terms but with no order as to costs.

**S. MURALIDHAR, J**

**OCTOBER 3, 2012 /akg**