

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

% *Judgment pronounced on: March 10, 2015*

+ **O.M.P. 1123/2012**

SOLITAIRE VENTURES PVT LTD & ORS Petitioners
Through Mr.Neeraj Kishan Kaul, Sr. Adv.
along with Mr.Arvind Kumar,
Mr.C.S.Chauhan, Ms.Shivi
Agarwal, Ms.Henna George and
Mr.Gurmehar S.Sistani, Adv.

versus

VIPUL SEZ DEVELOPERS PVT LTD & OTHERS
..... Respondents
Through Mr.Sandeep Sethi, Sr.Adv. with
Ms.Rashmi Virmani & Ms.Mukta
Dutta, Advs. for R-2 & 5 to 7.
Mr.Amit Singh Chadha, Sr.Adv.
with Mr.Abhishek Sharma &
Mr.Aakash Bajaj, Advs. for R-3.
Mr.H.S.Chandhoke, Adv. with
Ms.Charu Rawat, Advs. for R-4.

+ **O.M.P. 551/2014 & I.A. No.15117/2014**

M/S SILVERSTONE DEVELOPERS PVT LTD Petitioner
Through Mr.Amit Singh Chadha, Sr.Adv.
with Mr.Akash Bajaj &
Mr.Abhishek Sharma, Advs.

versus

M/S VIPUL SEZ DEVELOPERS PVT LTD & ORS
..... Respondents

Through Mr.Sandeep Sethi, Sr.Adv. with
Ms.Rashmi Virmani & Ms.Mukta
Dutta, Adv. for R-2 & 6 to 8.
Mr.Gurmehar S.Sistani, Adv.for
R-3 & R-4.
Mr.H.S.Chandhoke, Adv. with
Ms.Charu Rawat, Adv. for R-5.

+ **O.M.P. 624/2014, I.A. Nos.10790/2014 & 15112/2014**

SOLITAIRE VENTURES PTE LTD & OTHERS Petitioners
Through Mr.Neeraj Kishan Kaul, Sr. Adv.
with Mr.Arvind Kumar, Adv.
Mr.C.S.Chauhan, Ms.Shivi
Agarwal, Ms.Henna George and
Mr.Gurmehar S.Sistani, Adv.

versus

VIPUL SEZ DEVELOPERS PVT LTD & OTHERS
..... Respondents
Through Mr.Sandeep Sethi, Sr.Adv. with
Ms.Rashmi Virmani & Ms.Mukta
Dutta, Adv. for R-2 & 5 to 7.
Mr.Amit Singh Chadha, Sr.Adv.
with Mr.Abhishek Sharma &
Mr.Aakash Bajaj, Adv. for R-3.
Mr.H.S.Chandhoke, Adv. with
Ms.Charu Rawat, Adv. for R-4.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioner No.1 in OMP No.1123/2012 is M/s. Solitaire Ventures Pte. Ltd., a Private Limited Company Registered under the

Singapore Companies Act. The petitioner No.2 is M/s. Solitaire Capital India, a Trust established under the laws of India, having its Registered Office at S-38, Greater Kailash-II, New Delhi-110048. It is a Venture Capital Fund registered with SEBI. The petitioner No.1 is one of three investors of the suit project.

2. In the present petition, i.e. OMP No.1123/2012 filed under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the “Act”), the petitioners, i.e. Solitaire Ventures (hereinafter referred as “the Petitioners”) have sought the following interim reliefs:

“(a) Pass an order restraining the Respondents, their directors, their nominees, officers, employees, representatives, servants and agents, from alienating or creating third party rights or interests in the assets (immovable and movable), land, liabilities, licenses and receivables of Respondent No.1 JVC and Respondent No.5 to 10;

(b) Pass an order restraining the Respondents, their directors, their nominees, officers, employees, representatives, servants and agents, from taking any steps to prejudice or impede the capitalization of investment by the Petitioners into equity share capital of the Respondent No.1 JVC by any action including refund of investment or cancellation of JDCA dated 29.08.2006 and/or cancellation of MOU dated 13.09.2008;

(c) Pass an order of status quo on the assets (immovable and movable), land, licenses and receivables of Respondent No.1 JVC and respondents No.5 to 10;

(d) Pass an order of status quo on the shareholding and directorship of Respondent No.1 JVC and Respondents No.5 to 10;

(e) Pass ex-parte interim or ex-parte ad interim orders in terms of the prayers above; and

(f) Pass any other or further order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case."

3. The respondent No.1 Vipul SEZ Developers Pvt. Ltd. (hereinafter referred as Joint Venture Company or JVC) was originally formed by respondent No.2 Vipul Ltd. as a Special Purpose Vehicle (SPV) for the purpose of execution of SEZ project in Gurgaon, Haryana. Originally, the respondent No.1 was incorporated on 8th February, 2006 as Indica Estates Pvt. Ltd. and the name was subsequently changed to Vipul SEZ Developers Pvt. Ltd. on 27th June, 2006.

4. The respondent No.2 is M/s Vipul Limited. The respondent No.3 is M/s. Silverstone Developers Pvt. Ltd. who is second investor. Similarly, the respondent No.4 is M/s. Karamchand Realtech Pvt. Ltd, is the third investor.

5. The respondent No.5 is M/s. Ritwiz Builders and Developers Pvt. Ltd. The respondent No.6 is Entrepreneurs (Calcutta) Pvt. Ltd. The respondent No.7 is URR Housing Corporation Ltd. The respondent No.8 is KST Buildwell Pvt. Ltd. The respondent No.9 is PKBK Buildwell Pvt. Ltd. The respondent No.10 is PKB Buildcon Pvt.

Ltd. The respondents No.2 to 10 are the Private Limited Companies registered under the Companies Act, 1956.

The case of the petitioners.

6. The petitioners entered into the Joint Development and Collaboration Agreement ("JDCA") dated 29th August, 2006 for development of SEZ Project ("Project") over an area of approx. 150 acres (hereinafter called "Project Land") with respondent No.1 JVC & respondent No.2 wherein respondent No.2 owns 50.04% shares in respondent No.1 JVC, petitioners own 18.20% and other investors being respondent No. 3 and respondent No. 4 own 16.76% and 15% shares respectively in the said respondent No.1 JVC.

7. The petitioners invested Rs.58.85 Crores during 2006-07 in respondent No.1 JVC.

8. The respondent No.2 is the majority shareholder in respondent No.1 JVC and is in control of day-to-day affairs of respondent No.1 JVC. Respondents No.5 to 7 are subsidiaries of respondent No.2. It is the case of all the three investors that in effect, respondents No.1, 5 to 10 are subsidiaries of respondent No.2. Respondents No.1, 2 and 5 to 10 are hereinafter called as "Vipul Group" unless contrary to context.

9. When the petition being OMP No.1123/2012 was listed first time before Court, the following interim order was passed on 3rd December, 2012 The extract of the same are reproduced below:

"Till the next date of hearing status quo be maintained as regards the assets (immovable and movable), land, licenses, receivables and shareholding and directorship of

Respondent No.1 Vipul SEZ Developers Pvt. Ltd and
Respondent No.5 to 10”.

10. By an order dated 27th September, 2013, the order passed on 3rd December, 2012 was modified whereby Vipul Group was directed to maintain status-quo as regards the assets (immovable and moveable), land, licenses, receivables, shareholding and directorship of the said respondents. The said order dated 3rd December, 2012 was only partially varied qua the respondents No.5 to 7 on the ground that certain statutory liabilities have be to be paid by the respondents No.5 to 7.

11. The following agreements were entered into between the parties pertaining to the said SEZ project in Gurgaon:

- i. JDCA dated 23rd March, 2006 between Silverstone Developers Private Ltd. and Vipul Ltd.
- ii. Memorandum of Understanding dated 5th April, 2006 between Solitaire Buildmart Private Limited (SBPL) and Vipul Limited;
- iii. Memorandum of Understanding dated 18th April, 2006 between SBPL and Vipul Limited;
- iv. JDCA dated 5th May, 2006 between Karamchand Realtech Private Ltd., Vipul SEZ Developers Pvt. Ltd. and Vipul Ltd.;
- v. Addendum dated 29th August, 2006 to aforementioned JDCA between Silverstone Developers Pvt. Ltd. and Vipul Ltd.;
- vi. JDCA dated 29th August, 2006 amongst (i) Solitaire Ventures Pvt. Limited; (ii) Solitaire Capital; (iii) SBPL; (iv) Vipul Limited and (v) Vipul SEZ Developers Private Limited.;

- vii. Memorandum of Understanding dated 13th September, 2008 between the parties herein.
12. Clause 3.5.4.3 of the JDCA acknowledged that the investment made by the petitioners was against the value of land acquired by the respondent No.1 JVC at the rate of Rs.1.75 Crores per acre.
13. The petitioners claim that they have substantive rights in the respondent No.1 JVC some of which are described as under:
- (i) As per Clause 3.5.4.1 of JDCA, the respondent No.1 JVC shall maintain the shareholding pattern as described in Clause 3.5.2 of the JDCA i.e. to say that the petitioners will hold 18.20% shares.
 - (ii) The investment of the petitioners will be treated as subscription money for the allotment of shares in respondent No.1 JVC as per Clause 3.5.6.2 of the JDCA.
 - (iii) The respondents shall not do any act that will derogate the interest and rights of the petitioners in the Project/Project Land in any manner as per Clause 4 (b) of the JDCA.
 - (iv) The petitioners will have representation on the Board of Directors in proportion to their shares as per Clause 4 (c) of the JDCA.
 - (v) The Bank Accounts of the Company will be operated jointly by representatives of the petitioners and respondent No.2 as per Clause 4.2 of the JDCA, but however, the Authorized Representative of the petitioners has not been made the Joint Signatory to the Bank Account of the respondent No.1 Company.
 - (vi) Any sale of the land shall be done jointly by representatives of the petitioners and respondent No.2 as per Clause 4.3 of the JDCA.

- (vii) The petitioners also have right of inspection, tag along rights, put option, call option as per Clauses 4.4, 4.5, 4.6 and 4.7 of the JDCA.
- (viii) The petitioners have affirmative rights on various aspects of the functioning of respondent No.1 JVC, including without limitation of any sale, lease, exchange or otherwise disposal of the project land as per Clause 4.9 of the JDCA read with Schedule “J” thereto.
- (ix) It is specifically provided in Clause 21 of JDCA that the parties agree and acknowledge that money damages may not be adequate remedy for any breach of the provisions of this agreement and parties will have a right to apply to any Court of law or appropriate forum for specific performance and injunctive relief in order to enforce or prevent any violation of the provisions of this agreement.
- (x) The affirmative vote of the petitioners is required on various matters in relation to the Project as per the Schedule “J” of the JDCA dated 29th August, 2006. It is submitted that for the Appointment of Auditors, Architects, Project Managers/Consultants/Contractors, the affirmative vote of the petitioners is mandatory but however, the aforesaid appointments were made inspite of objections raised by the petitioners.

14. Clause 6.1 of the JDCA also imposed the obligation on respondent No.2 for development of the project on the Project Land, including obtaining and maintaining all licenses and project approvals from appropriate Authorities, completion and execution of the project

as per maximum permissible FSI norms within the specified time lines from the date of receipt of requisite approvals and permissions.

15. Clause 3.5.9.2 of the JDCA also required that the parties thereto shall keep the Project adequately financed at all times to meet the Project Cost (which includes government fees, levies and charges) in accordance with their respective share.

16. The petitioners made payment in terms of the aforesaid JDCA dated 29th August, 2006 and also on the basis that the land held by JVC would be approx. 150 Acres.

17. Investments made by the Investor Group were used for purposes of purchase of the lands (including development rights in relation to those lands in the name of Vipul Group/affiliate companies). Initially, the project land comprised approximately 150 acres. The total value of the Project land worked out to Rs.262.5 crores representing the value of 150 acres @ Rs.1.75 crores per acre.

18. The Vipul Group proposed to acquire additional 15 acres of land and called for contribution vide their email dated 21st July, 2006 and subsequent correspondences, the petitioners also paid its share which was required to be deposited for the purchase of additional 15 acres of land. However, no details were given about the location of additional 15 acres of land which was proposed to be acquired, for which the contribution of the earnest money has been made by the petitioners.

19. Respondent No.2 had entered into an Addendum Agreement with respondent No.3 dated 29th August, 2006 regarding the

acquisition of additional 15 acres of land. (As per recital D & E1 of the Addendum dated 29th August, 2006, respondent No 2 had confirmed the purchase of 15 acres of additional land and increase of Project Land from 150 acres to 165 acres).

20. The petitioners had made a total contribution of Rs.58.847 Crores in respondent No.1-JVC from time to time in the year 2006-07 and have owned interest and are entitled to 165 acres of land. The break-up of Rs.58.847 Crores invested is as follows:-

- (i) Payment for appropriate shares in 150 acres of land = Rs.47.80 Crores.
- (ii) Payment for additional 15 acres of land = Rs.1.365 Crores.
- (iii) Payment for Estimated Project Expenses in 165 acres of land = Rs.9.682 Crores.

21. The three investors being the petitioners, respondent No.3 and respondent No.4 made a total investment of Rs.58.847 crores, Rs.54.170 crores & Rs.48.475 crores respectively i.e. Rs.161.492 crores in the Project Land in terms of their respective JDCA. The respondent No.2 has made an investment of Rs.50.060 crores in the Project.

22. Subsequent to the said investment, the petitioners learnt that out of the total Project Land which had already been sold to (belong to) JVC as aforesaid and for which contributions had been collected from petitioners, respondent No.2 had offered to sell an area of 28.156 acres falling in Commercial Zone to a Joint Venture between respondents No.4 & 2 ("Vipul Karamchand JV") for a commercial project in gross breach of trust in order to cheat the petitioners.

23. Sometime in November 2007, keeping in view the Draft Master Plan, Gurgaon-Manesar, 2021 it was mutually agreed and decided by all the parties to abandon the SEZ project and to change the nature of the project to group housing, commercial complex, residential township, in which 100% Foreign Direct Investment under the automatic route was permitted.

24. All the parties i.e. the petitioners and the respondents entered into a MOU dated 13th September, 2008. The said MOU specifically provided that the terms of the respective JDCAs would stand amended only to the extent as agreed by the parties in accordance with the terms and conditions of the MOU and other terms and conditions of the respective JDCAs shall remain unaltered and shall be binding on the respective parties.

25. The MOU defines the Project Land and the rights, title and interest of each party with regard to the Project Land which was reduced from 150 acres to 138.568 acres with the unqualified consent of all the parties herein, detail and break up of which was provided in Schedule-A to the MOU to avoid long drawn dispute subject to refund of excess amount received by respondent No.2 for which they had to provide statement of account within 15 days from the date of MOU.

26. The relevant clauses of the MOU are excerpted herein below for ready reference:

"4. The Parties further agree that Investor Group had already contributed towards the value of Revised Project Land which were mentioned in respective JDCAs and contribution towards the Project Expenses in accordance

with the terms and conditions set out in their respective JDCAs. Parties hereby agree that the account of each party shall be prepared jointly by the parties on the basis of Revised Project Land area and other project expenses agreed by all the parties.

a. In case amount contributed by party is in excess than the required amount as per Revised Project Land area plus share of agreed project expenses shall be paid back to the respective party by Vipul or shall be utilized towards respective party's share of project expenses in future.

b. In case amount contributed by party is in short than the required amount as per revised Project Land area plus share of agree project expenses the respective party has to deposit the same within 7 (seven) days to Vipul.

Further, the Parties agree that the balance amount whether in excess or in short would also attract an interest @18% p.a. from the due dates in terms of the respective Agreement (JDAs) till the date the excess or short amount is paid back or deposited by/to Vipul or utilized for Project Expenses in future.

Further, the statement of Project account as referred above would be prepared upto the date of MOU within 15 working days from the date of execution of this MOU and all the parties will provide full co-operation for the same.

11. The terms of the JDCA shall stand amended to the extent as agreed by the Parties in accordance with the terms and conditions of this MOU and other terms and conditions of the respective agreements shall remain unaltered and shall be binding on the respective Parties.

12. The Parties confirm and acknowledge that this MOU and their respective JDCAs shall constitute the entire agreement and understanding between them up to date and shall supersede all previous communications, either oral or written between the Parties with respect to the subject matter of this MOU and no agreement or understanding varying or extending the same shall be binding on the Parties unless arising out of the specific provisions of this MOU. No amendment, modification or addition to this MOU shall be effective or binding on either of the party unless set forth in writing and executed by them to through their duty authorized representatives and subject to obtaining requisite approvals, if any, following such execution."

27. The Revised Project Land is owned by Vipul Group, who agreed to transfer their rights, title and interest in their respective land along with their permissions and licenses, etc., if any, granted by the Competent Authority, to Vipul SEZ (Clause 1) (Pending formal transfer of parcels of land, the entire revised Project Land is in the possession of the respondent No.1).

The MOU divided the parties into two groups: respondent No.1, Respondent No.2 and respondent Nos.5 to 10 were together called 'Vipul Group' and petitioners, respondent Nos.3 and 4 were together described as 'Investor Group'.

The details of 138.568 acres are:

Company Name	GH	Commercial	Plotted	Green/Open	Institutional	Total
Indica Estates Pvt. Ltd.	31.872		23.285	15.646	6.000	76.803
Entrepreneurs (Calcutta)Pvt. Ltd.	-	-	12.969	-	-	12.969

KST Buildwell Pvt Ltd	1.313	-	-	-	-	1.313
P.K.B BuildconPvt. Ltd	-	-	1.756	1.686	-	3.442
URR Housing Construction Pvt. Ltd.	-	-	-	6.238	-	6.238
Vipul Limited	-	-	6.481	1.863	-	8.344
Ritwiz Builders & Developers Pvt Ltd	-	-	7.806	-	-	7.806
P.K.B.K BuildwelPvt. Ltd	2.143	4.000	12.150	3.359	-	21.652
Grand Total	35.328	4.000	64.447	28.792	6.000	138.567

28. The details of 28 acres of commercial land are:

Company	Area in Acres
Indica Estates Pvt. Ltd.	7.000
Vipul Ltd	5.850
Ritwiz Builders & Developers Pvt Ltd	15.306
Ritwiz Builders & Developers Pvt Ltd	7.144
Total Land Under Commercial Project	28.156

29. It appears from Clause 4 of the MOU that the Vipul Group had to make payment to the petitioners in consideration for the said reduction of Project Land to Revised Project Land. The said MOU required the parties to arrive at a “Statement of Project Account” within 15 days of execution of MOU for determining the aforesaid amount. The MOU also provided that the monies found to be due from Vipul to the investors pursuant to the Statement of Project Account shall be paid back to the respective party by Vipul or shall be utilized towards respective party’s share of project expenses in the

future. The parties also agreed that upon the execution of MOU dated 13th September, 2008, all conditions precedent have been fulfilled/waived off in the Board of Directors meeting dated 10th February, 2009 wherein the nominees of all the parties were present.

The statement of Project Account wherein respondent No.2 acknowledged its liability to pay an amount of Rs.12.91 Crores to petitioners was finally executed on 22nd October, 2012, after a delay of more than 4 years. As per the said statement of Project Account, Vipul Group also acknowledged the fact that it had to make a payment of Rs.10.64 Crores to respondent No. 4 and a payment of Rs.11.78 Crores to respondent No 3.

30. An escrow agreement was executed between the parties as far back as on 13th September, 2008 but it was never acted upon by either of the parties. The said Escrow Agreement was overridden by the Statement of Account dated 22nd October, 2012.

Respondent No.1 had obtained the following licenses for development of the Revised Project Land.

License No.	Date	Area for Development	Purpose of Development
7 of 2010	15.01.2010	12.8281 Acres	Group housing
9 of 2010	23.01.2010	22.50 Acres	Group housing

31. The petitioners submit that the said statement was also executed by Vipul Group only after the investors discovered that Vipul Group had also misappropriated and diverted substantial funds to the tune of Rs.6.188 Crores belonging to JVC for their own project in Faridabad in the year 2007.

It is submitted by the petitioners that a sum of Rs.6,18,80,000/- was deposited by respondent No.1 with Directorate of Town & Country Planning (DTCP) on 18th September, 2006 for licence of commercial component. The application was later withdrawn on 2nd February, 2008 but respondents No.1 & 2 did not take any step to get the amount refunded from DTCP. Instead, as per petitioners, respondent No.2 diverted these deposits with DTCP for its own projects in Faridabad. Such misappropriation was also reflected by making entries in the financials of respondent No.1 by which Rs.1,96,07,087 was reflected as receivable from respondent No.2 and the balance amount of Rs.4,22,72,889/- was reflected receivable from DTCP and the petitioners became aware of the misappropriation at a much later date and confronted the nominee Directors of respondent No.2.

32. It is the case of all the three investors that at present, around Rs.100 crores have been paid for the licence fees and another Rs.150 crores have to be paid for the renewal of licence fees; the licences on 138 acres of land. It is also alleged by the investors that it is a matter of public knowledge that the land value increases from 5 to 10 times after getting a licence and without a licence, the land value crashes by 80 to 90 per cent. Further, only a limited number of licences are released in a given area and if a licence is cancelled finally then it is allotted to some other party and cannot be re-obtained.

33. The petitioners submit that in view of increase in the value of land after 8 years of the investment, the Vipul Group tried to

fraudulently refund a portion of the investment at par and misappropriate the gains. The same was sought to be done on the false pretext that requisite Foreign Inward Remittance Certificates (FIRCs) have not been issued by the Authorized Dealer/Remitting Banks. Actually, copies of such FIRCs have already been submitted to Reserve Bank of India (RBI) and are also available with respondent No.1.

It is alleged by the petitioners that the petitioners were making all efforts for progress of the Project but nominee of Vipul Group along with some of the respondents, threatened the petitioners that they would unilaterally return. Even unauthorized and illegal measures have been taken in furtherance of such threats, including the unauthorized letter dated 29th October, 2012 written by Mr.Rakesh Sharma, employee of respondent No.2 and a nominee Director of respondent No.2 on the Board of respondent No.1 JVC to RBI to seek permission for refund of investment by petitioners. The whole purpose was to dilute the equity stake of the petitioners and dispose off the land/rights held by respondent No.1 JVC. The allegations are that respondent No.2 Vipul Group has not only misappropriated money from the Project but have also disputed and denied the signed Statement of Project Account vide their contemporaneous letters dated 27th September, 2013 and 1st February, 2014 as admitted amount which was to be paid by the Vipul Group as far back as in 2008 and would have been utilized for the payment of EDC and IDC for the Project is now being denied as per Clause 6 of the aforesaid JDCA, the responsibility of Project

Development and obtaining and maintaining the licenses are on the Vipul Group.

34. Further allegations are made that the Project interests were overlooked by Vipul Group though they were entrusted with the responsibility of Project management as per the JDCA and MOU. It is a fact that Group Housing Licenses over 35.33 acres of land and the commercial licence/s are in jeopardy due to non deposit of EDC/IDC and also due to the above mentioned misconduct of Vipul Group. The notices dated 26th March, 2014 have been issued by the DTCP for cancellation of the aforesaid licenses on account of non-payment of such EDC/IDC to respondent No.2. A notice was also issued regarding dues outstanding for commercial license admeasuring 4 acres by DTCP on 25th March, 2014.

35. It is alleged by the petitioners that without the compliance of terms and conditions of MOU by respondent No.2, the respondent No.4 is claiming its claim over land which was offered to be released under MOU without any payment from Vipul Group. Respondent No.4 had earlier extended their support to the demand made by petitioners for payment of amount as per Statement of Project Account. Due to such disputes raised by Vipul Group, petitioners were constrained to reject the request of respondent No 4 to exercise any separate right over any part of Project Land/Suit Land, as no payment has been made by them or received by JVC for the said land.

It is submitted that even in respect of the Revised Project Land under the MOU, 6 acres of land was recently sold by Vipul Group to M/s. Sarvpriya Securities Pvt. Ltd. Consent for such sale was

obtained from petitioners on misrepresentation by Vipul Group in their capacity as Project Managers that the land could only be used for Institutional purposes. It is alleged that the petitioners have now come to know that such land was actually suitable for Residential Group Housing. The said fact is evident from an email dated 27th December, 2013 whereby M/s. Sarvpriya Securities Pvt. Ltd had requested for change of land use from school to Group Housing. Vipul Group had withheld the information about the rezoning of land. The sale of land is at substantially low value and has caused a huge loss which is estimated more than Rs.200 Crores to the Project and the petitioners has a right to exercise and retain its right over the whole of 165 acres of land. Vipul Group is liable to compensate the petitioners for the loss that has been occasioned or that may be occasioned by non deposit of EDC and IDC charges, for which funds were required to be provided by Vipul Limited pursuant to the Statement of Project Account. The Project interests were overlooked by Vipul Group though they were entrusted with the responsibility of Project management as per the aforesaid agreements. It is a fact that Group Housing licenses over 35.33 acres of land and commercial licences are in jeopardy due to non deposit of EDC/IDC by the Vipul Group.

36. It is stated by the petitioners that an Escrow agreement was executed on 13th September, 2008 at which point entire land was unlicensed therefore it relied on simple formula of 50% being kept for protection of entire Investor Groups. But subsequently now 35.33 acres of Group Housing is licensed and 4 acres of Commercial is about to be licensed. The respondent No.1 is unable to make

payment of dues on account of breach of trust by respondent No.2. Therefore, earlier Escrow arrangement was inadequate to cover the losses which may arise from cancellation of licenses.

37. In failure of Vipul Group to deposit the EDC and IDC charges and mis-utilization of the aforesaid amounts & consequent expiry of Group Housing Licenses by DTCP, Haryana is likely to cause a huge loss. The market capitalization of Vipul Group as on 17th April, 2014 is mere 66 Crores (as per BSE website). It is evident from the above that Vipul Group is not in a position to compensate petitioners for the losses suffered by it only through the land defined in the MOU as it has also come to the knowledge of the petitioners that a Winding-Up Petition had been filed against the Vipul Group being CO.PET. No.643/2013. An interim order dated 10th December, 2013 had been granted against the Vipul Group restraining it from transferring, selling or otherwise disposing of its immoveable assets or creating any third party interest therein till the next date of hearing. Though the winding up relates to a sum of about Rs.62 lac, Vipul has now settled the matter by issuing 12 post-dated cheques of approximately 5 lacs each. It shows that Vipul is presently not in a position to even meet liabilities of Rs.62 lac.

The respondent No.2 has not disclosed any information about the assets, liabilities, business, land bank, financial statements etc. of respondents No.1, 2, 5 to 10 who have no business activity and are holding land and licences. The majority of assets held by Vipul group are under mortgage. Various assets of respondent No 2 are mortgaged to DMI Finance as admitted by respondent No.2 in their

applications filed in OMP No.1123/2012. From published Government Records, it appears that charges on the assets held by Respondent No.2 have been created by other Financial Institutions and Banks including Aditya Birla Finance Limited, LIC Housing Finance Limited, Punjab National Bank, Axis Bank and Indian Overseas Bank.

38. Under these circumstances, the petitioners have reserved their right for specific performance of the JDCA and MOU and also to seek compensation for losses through sale of Non Project Assets and non-suit land assets held by respondent No.2 which includes respondent Nos.1 & 5 to 10 in the present petition as respondent No.2, who is in control of the affairs of the respondent No.1 JVC are trying to sell, transfer and alienate the Project Land/ Suit Land owned by the respondent No.1 JVC and its Subsidiary/Associate Companies, without obtaining the mandatory consent of the petitioners as required under the JDCA.

39. The petitioners submit that in view of change of circumstances, they are left with no option but to file another fresh petition under Section 9 of the Act being OMP No.624/2014 by seeking the following additional prayers:

- I. Pass an order restraining the Respondents, their directors, their nominees, officers, employees, representatives, servants and agents, from alienating or creating third party rights or interests in the assets (immovable and movable), land, licenses and receivables of Respondent No. 1 JVC, Respondent No. 2 and Respondents No. 5 to 10;
- II. Pass an order restraining the Respondents, their directors, their nominees, officers, employees,

representatives, servants and agents, from taking any steps to prejudice or impede the capitalization of investment by the Petitioners into equity share capital of Respondent No. 1 JVC by any action including refund of investment or cancellation of JDA dated 29.08.2006 and/or cancellation of MOU dated 13.09.2008.

- III. Pass an order of status quo on the assets (immovable and movable), land, licenses and receivables of Respondent No.1 JVC, Respondent No. 2 and Respondents No. 5 to 10;
- IV. Pass an order of status quo on the shareholding and directorship of Respondent No. 1 JVC, Respondent No. 2 and Respondents No. 5 to 10;
- V. Appoint a receiver on Respondent No. 1 JVC, Respondent No. 2 and Respondents No. 5 to 10 to manage their affairs in a manner that the Group Housing and Commercial Licences on the suit land are preserved and protected by payment of any statutory dues as also to manage the day-to-day affairs and bank accounts of the said Respondents;
- VI. This Hon'ble Court may empower the receiver appointed on Respondent No.1,2,5 to 10 to sell any portion of assets of Respondent No. 1,2,5 to 10 or suit land in issue to generate resources for payment of statutory dues, government dues, licence fees, etc. in a manner that would protect the interest of the Petitioners;
- VII. Direct Respondent No. 1,2.5 to 10 to provide all details of their assets, liabilities, land bank, licences etc. on affidavit within a period of one week;
- VIII. And or to pass orders in terms para 102 as suggested hereinabove;

- IX. Pass ex-parte interim or ex-parte ad-interim orders in term of the prayers above, and
- X. To grant costs of the present petition in favour of the petitioners and against the Respondents No. 1,2,4 to 10,
- XI. Pass any other or further order (s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case.

The case of respondent no.2

40. Vipul Group i.e. respondent No.2 also filed its response to the petition, who stated that the ex-parte status quo order dated 3rd December, 2012 is a blanket stay order and covers all assets (immovable /movable), land, license, receivables of respondents No.5 to 7. It is further alleged that assuming without admitting, that the case set up by the petitioners is correct no restraint or status quo with respect to any asset of the respondent No.5 to 7 or any land or license of respondents No.5 to 7 can be passed as the same is not part of Schedule A to the MOU dated 13th September, 2008. By way of applications being I.A. No.631/2013 and I.A. No.14699/2013 filed, Vipul Group has made a prayer to modify/clarify that the ex-parte interim order dated 3rd December, 2012 should confine the same to immovable properties set up in Schedule-A of MOU dated 13th September, 2008. Similarly, the status quo in respect to immovable assets and lands (other than the land mentioned in Schedule A to MOU dated 13th September, 2008) and license, receivable, shareholding and directorship of respondents No.5 to 7 is required to

be vacated. Respondent No.2 has denied all the arguments of the investors/ petitioners as addressed by them. Mr.Sandeep Sethi, learned Senior counsel appearing on behalf of respondent No.2 has argued that the interests of all the three investors are protected under the Project Land of 132 acres irrespective of the fact that the licences are obtained at this stage or not. Learned Senior counsel has made his submission that all the issues raised by the investors are to be considered by the Arbitral Tribunal which should not be decided on merits in the present petitions filed by the investors. In any case, respondent No.2 undertakes not to dispose of the Project Land of 132 acres in any manner and the interim order granted be restricted to the said land by modifying the remaining interim order in view of the MOU executed between the parties whereby the Project Land is reduced to 132 acres. Learned Senior counsel for the respondent No. 2 has referred the clauses of Escrow agreement where the interests of the investors are protected. He states that in case of any claim(s) or counter-claim(s) by any party to the Project or the MOU, the same is to be raised before the Arbitral Tribunal.

41. The main submissions on merit of respondents No.2 and 5 to 7 are that once the parties have mutually and unequivocally agreed to restrict the project land to 132.568 acres, they cannot go beyond the contract entered into between the parties and seek a restraint order in the form of interim measures under Section 9 of the Act contrary to the terms of the MOU. The ex-parte interim order dated 3rd December, 2012 travels beyond the purview of the contract entered into between the parties in as much as it, inter-alia:

- (i) operates over land not forming part of the project land;
- (ii) the respondents 5 to 10 did not undertake any obligation under JDCA. They only undertook to provide certain identified portions of land under the MOU. To place any restrictions on the licenses other than those obtained with respect to the Revised Project Land, receivables, shareholding or directorship of respondents No.5 to 7 would amount to travelling beyond the contract between the parties.
- (iii) the parties expressly agreed that the Vipul Group and respondent No.4 would have exclusive rights to deal with the land not forming part of the Revised Project land.

42. It is stated by the respondents that both, i.e. petitioners and respondents No.3 and 4 have 49.96% interest in the Revised Project Land. The Vipul Group has 50.04% interest in the same. It is submitted that the value of 132.568 acres, (138.568 – 6 acres already sold with the consent of all the parties) is sufficient to secure the interest of the Investor Group in the project. No evidence has been lead or document produced to support the petitioners' allegation that the value of 132.568 acres is not enough to secure the interest of the Investor Group.

43. It is argued on their behalf that the parties had themselves agreed that the value of only 50% of the Revised Project Land was enough to secure the Investor Group: Parties had entered into an *Escrow Agreement* dated 13th September, 2008 whereby they agreed that Vipul Group would deposit title deeds of project land aggregating to approx. 70 acres representing approx. 50% of the project land in

an escrow account so as to secure the payment of the commitment deposits made by the Investor Group.

44. The respondents No.1, 2 and 5 to 7 are ready and willing to give an undertaking even beyond the Escrow Agreement that they will not sell, alienate etc not only 50% but the entire Revised Project Land comprising of 132.568 acres as on date. Parties had clearly and unequivocally agreed that Vipul Group and respondent No.4 would have exclusive rights to deal with land other than Revised Project Land: Clause 1 of the MOU clearly states that the Vipul Group and respondent No.4 have the right to deal with any land owned by Vipul Group but not forming part of Revised Project Land. It is submitted that the parties had clearly decided that rights of the Investor Group were limited to the Revised Project land. They cannot today claim any right over any land beyond the Revised Project Land.

45. It is argued on their behalf that there is a provision for Liquidated Damages already made by the parties in JDCA in case of breach: Without prejudice, the parties have specifically provided for 'Liquidated Damages' in case of breach of JDCA (Clause 4.10 of the JDCA). Once the parties have agreed upon and stipulated an amount as penalty in case of breach of contract, the parties are bound by the same and none of the parties can claim any amount or relief beyond the penalty already stipulated in the contract as per Section 74 of the Indian Contract Act, 1872.

46. The Licenses with respect to the Revised Project Land have not been renewed on account of the deliberate non-cooperation of the Investor Group itself in working the project. That in the four years

since the said licenses were granted, the parties have not been able to launch the project as the Investor Group has failed to arrive at a consensus on key issues. Further, renewal of licenses in the circumstances when the parties cannot agree on working together in future would be of no avail and only result in mounting of losses.

47. It is submitted by respondent No.2 and respondents No.3 to 7 that the petitioners' allegation that they have made 'excess contribution' and therefore have subsisting interest over the entire original project land, is misplaced for the following reasons:

- (i) Clause 1 of the MOU clearly stipulates that the parties had agreed to modify the Project Land to 138.568 acres. At the same time, the parties further agreed to give exclusive rights to Vipul group and respondent No. 4 to deal with remaining land.
- (ii) Clause 4 of the MOU nowhere stipulates that any alleged 'excess contribution' would entitle the Investor Group to the remainder of the initial Project land. Clause 4(a) explicitly states that in case of an excess contribution the same would either be paid back or utilised towards respective party's share of future project expenses.
- (iii) Any alleged breach of terms of the MOU is a subject matter of arbitration.
- (iv) The alleged statement of Project Account filed by the petitioners to support their allegation of 'excess contribution' is denied, outdated and of the vintage of 2012.

- (v) The petitioners have failed to make out a prima facie case that they are entitled to their respective share in any land beyond the revised project land.
- (vi) Without prejudice, the revised project land is enough to secure the 49.96% interest of the Investor Group in the project. No documents have been shown to the contrary.

48. It is submitted that the arguments on behalf of petitioners as well as on behalf of respondents No.3 and 4 that a receiver should be appointed in the circumstances to deal with the project land have no force and is misconceived. There is no danger of the Revised Project Land being wasted or damaged. The petitioners have not been able to set up a prima facie case. The petitioners have also not been able to show that the subject matter of the dispute is in such grave danger that imminent and immediate reliefs are necessary. There is a greater danger of the property being frittered away and mounting of losses in case a Receiver is appointed and vested with the powers as sought. *Reliance is placed on **Shin Satellite Public Company Ltd. Vs. Jain Studios Ltd.**, 153 (2008) DLT 604 (para 37, 38).*

49. The respondent Nos.2 and 5 to 7 are seeking the following directions from the Court while disposing all petitions:-

- (i) vacation of ex-parte interim order dated 3rd December, 2012 and dismissal of the abovementioned OMPs; or, in the alternative;
- (ii) modification of ex-parte interim order dated 3rd December, 2012 so as to,
 - (a) restrict order of status quo with respect to **132.568 acres**, (138.568 – 6 acres already sold with the consent of all the

parties) i.e., the Revised Project Land as per the Memorandum of Agreement (“MOU”) dated 13th September, 2008 and as described in Schedule A to the MOU dated 13th September, 2008;

- (b) vacate order of status quo in respect of (i) moveable assets, (ii) immoveable assets and lands other than Revised Project Land, (iii) licenses, (iv) receivables, (v) shareholding, and (vi) directorship of respondents No.5 to 7;
- (iii) direction to Bank of India, Overseas Branch, Citibank NA, and the petitioners to produce and place before the Arbitral Tribunal the records as set out in para 6 of application being I.A. No.3361 of 2013 filed by the respondent No.2.

Response of Respondent No.4

50. The respondent No.4 in response to subsequent petitions being OMP No.551 of 2014 & 624 of 2014 have filed its replies dated 7th November, 2014 reiterating its stand taken earlier in the pleadings filed. In further support relied on the documents filed along with the aforesaid replies, more particularly and annexed to the Supplementary Affidavit dated 19th April, 2014: (i) Annexure A- JDCA dated 28th September, 2006, (ii) Annexure B “Colly” – Email Correspondences in relation and exchanged prior to the execution of MOU dated 13th September, 2008 (“Pre-MOU Correspondences”) and (iii) Annexure C “Colly” – letters dated 7th March, 2014, 12th March, 2014 and 22nd March, 2014. Respondent No.4 Karamchand in response to IA. Nos.631/2013 and I.A.No.14699/2013 have filed a

Supplementary Affidavit dated 19th April, 2014 as well as replies dated 1st April, 2014 to the said two applications.

51. The case of respondent No.4 vis-a-vis of the petitioners is that initially all allegations of illegality committed and wrongdoing including the issuance of the letter dated 29th October, 2012 (to RBI) for return of investments and other follow up correspondences dated 21st November, 2012 and 1st December, 2012 were asserted against the Vipul Group/ its nominee director Mr.Rakesh Sharma and who with 50.04 % shareholding are in control and management of Vipul SEZ against Karamchand - only bare allegations and this too were made. It was also alleged that Vipul Group in its endeavour to frustrate the rights of Solitaire are being supported, aided and abetted by other respondents on Board of Vipul SEZ. It was also alleged that certain lands/assets had been sold without the authorization of the Board.

52. However, subsequently and during the pendency of proceedings as well as after the passing of the stay order dated 3rd December, 2012, Solitaire and Silverstone (investor group) have joined hands and started asserting and that too by adopting a line of arguments albeit contrary to contract and the settled position between parties and claimed rights in 165 acres of Project lands without even identifying or delineating the same. Solitaire along with Silverstone has also claimed that the payment of excess contribution to Investor Group was a condition precedent for revision and/or release of lands. Since the excess contribution due to Investors Group was never paid, the remaining balance lands were never released from the Project. They therefore pray that the blanket stay order dated 3rd December,

2012 *inter alia* covering the remaining balance lands (released from the Project and permitted to be dealt with by Vipul Group and Karamchand under a separate project at their discretion including by transfer to third party) should be confirmed. By way of the subsequent petitions and at the time of arguments, Solitaire and Silverstone have prayed that this severed/remaining balance should be sold to pay of DTCP dues.

53. The respondent No.4 denies and opposes all allegations made in the original as well as subsequent petitions. It is submitted that all allegations of collusion, conspiracy, aiding and abetting as ex-facie vague, indefinite, unsubstantiated, insufficient and deficient in material particulars, hence rendering it as incapable of response. Even otherwise, the allegations raised by way of the original petition and submissions advanced in the subsequent petitions hold no credibility and the same should be dismissed as the same have been filed in order to defeat inviolable rights created in favour of the Karamchand at its expense. The respondent No.4 also opposes the attempts by the Solitaire and Silverstone to mis-interpret the JDCA's and later superseded by MOU dated 13th September, 2008 with intent to frustrate inviolable legal rights accruing in its favour qua the remaining balance lands.

54. The respondent has disputed the case of the petitioner by taking the following position in the pleadings:

- a) **In relation to refund of Solitaire's investments** – it is clarified that by way of letter dated 5th November, 2011 Solitaire had requested for refund on investments. However, Solitaire

subsequently by way of a letter dated 19th January, 2012 withdrew its earlier request for refund. This was duly taken note of in the Minutes of Meeting dated 5th November, 2011 of Vipul SEZ. The authority to Mr. Rakesh Sharma passed by way of Board Resolution dated 5th November, 2011 to approach RBI, was also withdrawn. However and with a view to frustrate the rights of the Solitaire and acting contrary to the aforesaid position, Vipul Ltd. re-agitated the issue with the RBI and issued the letter dated 29th October, 2012. Since the same was contrary to the recorded position, it was opposed by Karamchand and Silverstone by way of email/letter dated 18th December, 2012. Demonstrably this amply establishes the bonafides of Karamchand. It further establishes that it is not a party to any collusion, aiding and abetting in the attempts made to refund. Most pertinently, the counsel for Vipul Group during the course of arguments have conceded and agreed to the fact that they will not be pursuing and/or taking any steps in furtherance of the letter dated 29th October, 2012 addressed to RBI for refund of Solitaire's investments. In this view of the matter, the allegation of refund does not survive.

- b) **In relation to the remaining balance land and the MOU dated 13th September, 2008** – Solitaire and Silverstone have wrongly, illegally and incorrectly sought to mis-interpret the MOU dated 13th September, 2008 by placing thereon and reading into it a condition precedent that plainly does not exist. This wrong

interpretation is the premise to their claims and is opposed on the following grounds:

- i. JDCA's as well as MOU dated 13th September, 2008 executed in favour of the Investor Group are valid, effective, subsisting and rights created therein are specifically enforceable in law;
- ii. MOU dated 13th September, 2008 and rights created therein are not contingent upon the fulfilment of any conditions precedent as falsely alleged. On the contrary, the MOU dated 13th September, 2008 is a binding agreement and records and reflects the intent of the parties and the factum of restriction of rights of the parties to Revised Project lands being 138.568 acres.
- iii. By way of Clauses 1 and 4 of the MOU, it is further explicitly agreed and recorded that Investor Group shall only have rights in relation to the Revised Project Land alone. Remaining balance land is specifically allocated and falls to the share of the Vipul Group and Karamchand who have rights to deal with it at their discretion under a separate project as well as transfer the same to a third party. Necessarily inviolable rights stand created in favour of Karamchand and the Vipul Group. In this regards, Karamchand has also obtained necessary licenses and approvals in relation to the remaining balance lands. All this is in the knowledge of Solitaire and Silverstone.

- iv. It is submitted that Karamchand paid not only its entire share of the land under the earlier JDCA's, but also for its share under the JDCA dated 28th September, 2006. The factum of remaining land being covered under the JDCA's as well as JDCA dated 28th September, 2006 was never disclosed to it by Vipul Group. On the contrary all the parties (including Solitaire and Silverstone) were aware of the commercial project/ JDCA dated 28th September, 2006 and the fact that Karamchand had paid twice for the same land. This is established from a reading of the pre- MOU Correspondence exchanged between the parties and annexure annexed as Annexure B "Colly" to the Supplementary Affidavit dated 19th April, 2014. This correspondence also establishes that an offer was made to the Investor Group to undertake the commercial project. Not only did they expressly refuse, but also agreed to forgo any or all rights they may have had upon and by way of execution of the MOU dated 13th September, 2008.
- v. During the course of arguments advanced by Solitaire, no response and/or denial, either written or oral was given to the claims raised by Karamchand in relation to the pre-MOU correspondence, which is in fact the very reason for project lands being revised. Hitherto, in view of no specific denial or even addressal of the claim raised by it, the claim is deemed to be admitted by Solitaire and Silverstone.

- vi. As regards the interpretation of documents: the intent of parties has to be ascertained from a plain reading of the documents itself. The intent of the parties in this case is clear and adequately reflected in the clauses of MOU dated 13th September, 2008 and which neither expressly nor impliedly attach any pre-conditions qua dealing or severance of remaining balance from the project. On the contrary, it recognizes the rights of Karamchand and Vipul Group to deal with the said land at its sole discretion including by transfer to a third party. It also does not make the exercise of such right contingent upon any refund of first the excess contribution. Had there been any intention to the contrary, same would have been expressly incorporated and engrafted in the MOU dated 13th September, 2008.
- vii. With regard to excess contributions, the Investor Group is entitled to excess amounts paid by it. To this end Karamchand is in agreement with the Solitaire and Silverstone that Vipul needs to pay the excess amounts to Investor Group or adjust the same as project expenses. However, mere non-payment does not entitle Solitaire and Silverstone to claims rights, title and interest in the remaining balance land which as per MOU dated 13th September, 2008 is no longer a part of the Revised Project Land and stands specifically excluded. As such these fall to the share of Vipul and Karamchand. On reading of Clause 4 of the MOU dated 13th September, 2008, it is further clear that any delay in

payment and/or adjustment attracts only interest. Rate of interest is also specifically provided for. Necessarily, the only remedy is for refund/recovery of this excess share paid with interest and which does not extend to include any rights in land which had ceased to form part of the Project.

- viii. The petitioners and respondent No.3, i.e. Solitaire and Silverstone were not only privy but voluntarily and knowingly consented to and participated in the creation of inviolable rights in favour of Karamchand and Vipul qua the remaining balance land and which fact is established by (a) the pre-MoU Correspondence and (b) MOU dated 13th September, 2008. It is for this very reason that the claims in the original petition were correctly restricted to 138.568 acres and no claims/reliefs were sought in relation to the remaining balance lands.
- ix. It is stated by respondent No.4 that the false claims in relation to remaining balance lands were raised for the first time in 2014 by way of letter dated 7th March, 2014 and subsequently vide letter dated 12th March, 2014. This establishes collusion and connivance between Solitaire and Silverstone. Therefore, the claims now raised are an after-thought and made by Solitaire and Silverstone with the sole intent to unduly harass Karamchand and defeat rights created in its favour, while at the same time illegally gain therefrom. Thus, the claims of petitioners and respondent No.3 are therefore barred by principle of estoppel from

raising such claims in relation to the remaining balance lands. Even otherwise, these claims are contrary to the intent of parties as adequately reflected and recorded in the MOU dated 13th September, 2008. Such malafide attempts in denial of inviolable rights created in favour of Karamchand therefore are opposed and disputed. As such also the disputes cannot be enlarged and stay sustained in relation to the matters beyond the *lis* and clearly not forming part of the subject matter of the dispute and in relation where to no legal rights exists. Hitherto, the extension of stay sought by subsequent petitions (and that too by Solitaire without first amending its earlier petition) is incorrect, unsustainable and does not lie and ought to be dismissed on that count alone.

55. The respondent No.4 alleges that there is no merit in the submission of Vipul Limited that respondents No.5 to 10 have no relation with the present dispute. It is submitted that respondents No.5 to 10 are parties to the MOU and also hold portion of 166.724 acres of land as is evident from the distribution of land.

56. In view of the aforesaid submissions, respondent No.4 submits that the arbitration clause invoked by the parties emanates from the MOU dated 13th September, 2008 and which admittedly is only in relation to 138 acres. The land forming part of the JDCA dated 28th September, 2006 between Karamchand and Vipul is outside the purview of the arbitration clause of the MOU dated 13th September, 2008 invoked by the parties. Necessarily, land forming part of the JDCA dated 28th September, 2006 cannot form part of the subject

matter of arbitration. No relief's in the petition under Section 9 of the Act can be sought thereto. Therefore, respondent No.4 opposes the confirmation and/or continuation of the status quo order dated 3rd December, 2012 passed in relation to lands other than the Revised Project Land (138.56 acres of land) and which order is sufficient by all means for purposes of protecting the interests of the Investor Group. Otherwise also adequate protection/security cover exists in view of the Escrow Agreement dated 13th September, 2008. In any event, this stay cannot extend to the remaining balance lands and in relation where to rights have already been created in favour of Karamchand and Vipul Group and necessary licenses obtained by Karamchand. Malafide attempts of Solitaire and Silverstone to misinterpret the JDCA's and MOU dated 13th September, 2008 should therefore not be entertained. All other reliefs sought in the subsequent petitions including for appointment of receiver with power to sell lands which are not part of the Revised Project lands are unwarranted, without any legal basis and liable to be rejected.

57. However, respondent No.4 is agreeable to the position that: (a)Vipul pays, (b)Licenses are maintained, (c)Receiver be appointed for Revised Project Lands i.e. 132 acres to ensure that the licenses be revived (since valuation of lands does go down if licenses are not available) and that (d) Petitioner's right are protected by stay of 132 acres(i.e. 138 acres less 6 acres). Moreover, position as agreed to and admitted by Vipul Group be further noted, and is to the effect that (a) there shall be no refund of investments, (b) no change in

shareholding and (c) no sale/disposal of Revised Project land being 132 acres (i.e. 138 less 6 acres).

Case of Respondent No.3

58. The respondent No.3 Silverstone Developers Pvt. Ltd. in OMP No.1123/2012 and petitioner in OMP No.551/2014 has also filed petition under Section 9 of the Act for seeking interim measures against respondents No.1, 2 and 6 to 11 herein who have, as the facts hereinafter mentioned will reveal, have acted in complete violation/breach of the JDCA dated 23rd March, 2006 and the addendum to the JDCA dated 29th August, 2006 ("addendum to the JDCA") read along with the terms of MOU dated 13th September, 2008.

59. It is the contention of the respondent No.3 in OMP No.1123/2012 and petitioner in OMP No.551/2014 that the respondents No.1 and 2 and respondents No.6 to 11 (hereinafter referred to as "the Vipul Group") in collusion with respondent No.4 in first OMP, Karamchand Realtech Private Limited ("Karamchand") have acted in complete violation/breach of the agreements executed between the parties and have failed to perform its obligations under the JDCA and the MOU. It is submitted that due to the failure of the respondents to fulfil its obligations under the JDCA and the addendum of the JDCA read along with the terms of the MOU, the complete value and development of the project is on the verge of collapse as the licences which are the backbone of the Vipul SEZ Developers Pvt. Ltd. ("SPV project") are not being renewed due to the inaction of the Vipul Ltd.

In view of the blatant violations and wrongdoings of the Vipul Group along with Karamchand, Silverstone is seeking to restrain the respondents and/or their agents from alienating or creating third party rights or interest in the assets [immovable (166.724 acres of land)] and movable, land, liabilities, licences and receivables of the Vipul Group and maintain status quo on the assets [immovable (166.724 acres of land) and movable], liabilities, licences and receivables of the Vipul Group.

60. The admitted position is that non-development of the project and deadlock in the management of SPV project, which has left the project in a lurch and there are no signs of any development or improvement in the present situation, respondent No.3 is also praying for appointment of a receiver to carry out acts specified in its petition.

61. It is stated by the respondent No.3 that the investment made by the Silverstone and the other investors was for approx. 165 acres of land. The said investments made by the petitioner have been utilized for the purchase of the project land i.e. approx. 165 acres at the rate of Rs.1.75 Crores per acre. There has been no development in the SPV project for the past four years. The admission regarding no development in the SPV projects implies that Vipul Limited has failed to fulfil its obligation under the JDCA, more particularly provided under Clause 6 of the JDCA. Cancellation of licences regarding the land tantamount to diminishing the value of the land and further will close all doors regarding development of the SPV project.

In terms of the addendum of the JDCA, the project land size was increased from 150 acres to approximately 165 acres who

invested Rs.54.17 Crores as per valuation of the 166.724 acres of land ("Project Land") at the rate of Rs.1.75 crores per acres. In view of such investment, Silverstone/nominee of Silverstone was entitled to be allotted 16.76% of the fully paid-up share capital/stake of the SPV project. Thus, it is clear that the Investor Group collectively holds 49.96% stakes in the SPV project for which the total investment of Rs.161.79 crores was made by them. However, respondent No.2 held 50.04% in the SPV only invested Rs.50.06 crores. Therefore, respondent No.2 has committed default at every stage.

62. It is submitted that from a harmonious reading of the JDCA and the addendum of the JDCA read along with the MOU, it is clear that as per Clause 4.10 of the JDCA any resolution and decision matter in relation to the sale, transfer, lease of the project land will require a mandatory consent or affirmative vote of Silverstone. It is further submitted that the project land as per the JDCA constituted of approximately 150 acres of land. However, the same was subsequently increased to approximately 165 acres from 150 acre in terms of the addendum to the JDCA. Although under the MOU, the parties agreed to revise the area of project land to 138.568 acres, the said modification was subject to the condition that the excess contribution made by respondent No.3, i.e. Silverstone shall be paid back.

63. A logical and plain reading of MOU will make it clear that the agreement to reduce the land from 166 acres of land to 138.568 acres of land was subject to a pre-condition that the excessive contribution made by Silverstone will be paid back to it. It is most

respectfully submitted that any interpretation of the JDCA and the MOU contrary to the same will be arbitrary and unreasonable.

64. It is submitted that the Statement of Project Account dated 22nd October, 2012 was agreed to and signed by the representative/nominees of the Vipul Group, Solitaire, Karamchand and Silverstone. However, such excessive contribution was never repaid by Vipul Limited to Silverstone. Therefore, the rights and interests derived by the Silverstone under the JDCA, the addendum to the JDCA and the MOU i.e. over 166.724 acres of land cannot be said to have relinquished without satisfying the pre-condition as prescribed under Clause 4 of the MOU and ought to be preserved for the purpose of the arbitration proceedings.

65. The DTCP on 30th September, 2013, 10th January, 2014, 21st January, 2014 and 25th March, 2014 had informed Vipul Limited that it has been noticed that the performance of Company in execution of the SPV project and records regarding government dues are not in order. It was further stated that an amount of Rs.14805.15 lacs against EDC/enhanced EDC and IDC is outstanding as on 24th December, 2013 in the earlier licences granted to the respondent No.2 and the said licences are liable to be rejected,

66. Despite repeated request of Silverstone, Vipul Limited being driven by its malafide and ulterior motives has deliberately not taken any steps for renewal of the licences and/or for payment of excessive contribution to Silverstone. Admittedly, the value of land will be reduced to zilch and the investment made by Silverstone will be rendered valueless, in case the licences are not renewed. Further, as

the grant of licence is done on the 'first come first serve' basis, any averment regarding re-application for licence is an eye wash and ought to be rejected at the threshold.

Therefore, it is alleged that from the above it is clear that the submission made by Vipul Limited without apprising this Court of the said minutes of meetings and stand taken by it earlier tantamount to playing fraud on this Court and it has no *locus standi* to seek any equitable relief from this Court. Hence, Vipul Limited has approached this Court with unclean hands, and hence deserves no indulgence from this Court. Vipul Limited has tried to over-reach the Court and abused the process of this Court by concealing material facts.

67. It is submitted that Vipul Limited along with Karamchand is attempting to take advantage of its own wrong doings, by seeking modification of the order dated 3rd December, 2012 on the ground that it has sold the land which forms part of the SPV project to Karamchand separately. It is submitted it is settled proposition of law that no party can take undue advantage of its own wrong, which is based on the Latin maxim *commodum ex injuria sua non habere debet*. Reliance is placed on ***Kusheshwar Prasad Singh v. State of Bihar***, (2007) 11 SCC 447 [Paragraphs 13 to 16]; ***ONGC Ltd. v. Modern Construction & Co.***, (2014) 1 SCC 648 [Paragraphs 19 and 21]; ***Union of India v. Maj. Gen. Madan Lal Yadav***, (1996) 4 SCC 127 [Paragraphs 28 and 29]; ***LIC v. Rajiv Kumar Bhasker***, (2005) 6 SCC 188 [Paragraph 33].

68. It is submitted that in view of the admitted stand that the land will be transferred and further actions will be taken in respect of the

land forming part of the project land of 166.724 acres, it is essential that injunction shall be continued and extended to the present petition also to preserve the subject matter of the dispute i.e. 166.724 acres of land. It is submitted that the purpose of the present petition i.e. to preserve the subject matter of the dispute will be completely defeated if the stay is reduced to 138 acres of land. Therefore, the apprehension of Silverstone regarding Vipul Limited rendering the arbitration infructuous by selling or transferring the subject matter of the dispute is admitted by Vipul Limited itself.

69. Further, it is argued that preservation of the 166.724 acres of land is more important in the present case as Silverstone seeks final relief in the nature of specific performance in the arbitration proceedings. It is submitted that specific relief can be sought in the present case due to the following provisions:

- a. Clause 21 of the JDCA categorically provides that a party to the said agreement may in its sole discretion apply to any Court of law or appropriate forum for specific performance or injunctive relief in order to enforce or prevent any violation of the provisions of the said agreement.
- b. The investment made by Silverstone under the FDI regulations and policies is specifically for the purpose of development of the project land and cannot be utilized for any other purpose.

70. It is submitted that acts/conduct and the submissions of Vipul Limited suffers from the vice of gross suppression and amounts to *suggestio falsi*. It is submitted that as regards the compliance with the condition precedents under the JDCA, it has been continuously

stated by Vipul Limited that the said condition precedents were not satisfied. Further, at paragraph 25 of the reply to Petition in O.M.P. No.551 of 2014, it has reiterated the same and the same is reproduced herein below:

"25. That the conditions precedent set forth in the JDCA and other agreements with other stake holders still remain unsatisfied and unfulfilled."

From the minutes of the meetings of the SPV project it is evident that Vipul Limited has itself waived off the condition precedent under the JDCA as far back as in 2008. The relevant extracts of the minutes of the meeting dated 20th November, 2008 and 10th February, 2009 are reproduced herein below for ready reference:

"Minutes of meeting dated 20.11.2008:

"4. Letter for extension of JDCA Silverstone Group informed to all about the extension letter to be signed by Vipul in terms of JDCA executed between Vipul & Silverstone Group. Vipul Group replied that since all the Condition Precedent enumerated in JDCA have been waived off, the extension letter is no more required to be executed."

Minutes of meeting dated 10.02.2009:

"3. Classification of Contributions made by JV Partners in the Balance Sheet of the Company; Mr. Sanjiv Ahuja informed the Board regarding converting Commitment Deposit as Share Application Money. Chairman apprised that upon execution of MOU dated 13.09.2008 amongst JV partners to SPV i.e. the Company, all Condition Precedent have been fulfilled waived off and hence, to treat Commitment Deposit as Share Application Money, a legal opinion be sought."

71. It is prayed in the petition filed by respondent No.3 that this Court may allow the following prayers:

- (a) Pass an order restraining the Respondents and/or their agents from alienating or creating third party rights or interest in the assets. [immovable (166.724 acres of land) and movable], land, liabilities, licences and receivables of the Respondent No.1, Respondent No.2 and Respondent No.6 to 11; and
- (b) Pass an order of status quo on the assets[immovable (166.724 acres of land) and movable], land, liabilities, licences and receivables of the Respondent No.1, Respondent No.2 and Respondent No.6 to 11;
- (c) Pass an order for appointment of a receiver to do the following:
 - i. To operate the following bank accounts of Respondent No.1 and its subsidiaries:
 - 1. Current account no 909020043318553 in Axis Bank Ltd., New Delhi Branch and Current Account no 091902000003272 in Indian Overseas Bank, Safdarjung Enclave, New Delhi- 29 of Respondent No.1;
 - 2. Current account No.160010200008372 in Axis bank Ltd., Saket New Delhi Branch of Respondent No.9;
 - 3. Current account No.160010200008389 in Axis bank Ltd., Saket New Delhi Branch of Respondent No.10; and
 - 4. Current account No.160010200008341 in Axis bank Ltd. Saket New Delhi Branch of respondent No.11.

- ii. To clear the statutory liabilities of the Respondent No.1;
- iii. To do all the acts to renew the Group Housing Licences namely licence No.7/2010 and licence No.9/2010 for Group Housing Colony, Sector-71, Gurgaon;
- iv. To collect from all parties any shortfall of monies required for running of the business of the Respondent No.1 including payment of licence fee etc. in proportion of their respective shareholding in the Respondent No.1;
- v. To collect sum of Rs.7.09 crore from DTCP being the sum deposited by the Respondent No.1 for licence fee for land being part of 138.568, standing in the name of Respondent No.6 and Respondent No.7;
- vi. To go into the accounts of the Respondent No.1 including getting the same audited by a professional chartered accountant and recover money from the party from whom money is found due and to refund money from whom it is found refundable;
- vii. To sell such excess land which is not required for the present project and use the sale proceeds for payment of licence fee for 138.568 acres and other expenses of the project; and
- viii. To do such other and further acts as may be required from time to time to run the project in respect of 138.568 acres of land as described in the MOD.”

72. It is noteworthy to mention that the Supreme Court while disposing of the petition under Section 11 of the Act seeking appointment of the arbitrator in the instant case vide its order dated

8th December, 2014, being Arbitration Petition No.36 of 2013, has passed the following orders:

“The only exercise that is required to be done in the present proceeding is to nominate an arbitrator on behalf of the Investors Group. Under Clause 13 of the Arbitration Agreement, one arbitrator is to be appointed by the Investors Group and another by the Vipul Group and together the two arbitrators are to appoint the third Arbitrator. The Vipul Group has already nominated Mr.Justice R.C. Chopra, a retired Judge of the Delhi High Court as its arbitrator and the notice sent to the Investors Group for appointment of the arbitrator has not been responded to. Mrs.Justice Reva Khetrapal, a retired Judge of the Delhi High Court is, therefore, appointed as the Arbitrator of the Investors Group. Both the Arbitrators shall now appoint the third arbitrator so that the proceedings in arbitration can commence at an early date.

Arbitration petition is disposed of accordingly.”

73. It is informed by the parties that the arbitral proceedings have already been commenced between the parties. This is essential as a backdrop to the disposal of the present applications as this Court is concerned with the safeguard of the rights prior to or during the arbitral proceedings pending between the parties as per the provisions of Section 9 of the Act.

74. It is further necessary to appreciate, the JDCA dated 29th August, 2006 was executed for the Project Land of approx. 150 acres. Respondent No.2 Vipul Group proposed to acquire the additional 15 acres of land which was required to be purchased. Respondent No.2 entered into the Addendum Agreement separately

with respondent No.3 on 29th August, 2006 recording the additional 15 acres of land. In view of certain misunderstandings, all the parties, i.e. the petitioners and the respondents entered into MOU dated 13th September, 2008. There were many terms and conditions as well as obligations on the part of respondent No.2 mentioned in the said MOU. It is the admitted position that as per the terms and conditions and obligations, respondent No.2 failed to maintain the licences and had also failed to pay the difference of amount while reducing the land from 150 acres to approx. 138 acres with the unqualified consent of all the parties. The said reduction of the land was subject to the refund of the excess amount received by respondent No.2 for which respondent No.2 had to provide the statement of account and to pay the amount accordingly due to the respective parties. In the event of the failure to pay such amounts by the respondent no. 2, there are two-fold disputes arising between the parties; first being the dispute between the investors and respondent No.2 and the second between the investors inter se.

75. The case of respondent No.4, i.e. Karam Chand, the second investor, is that the MOU dated 13th September, 2008 has already been invoked by the parties. As per the revised Project Land (138.568 acres of land) which was acceptable to all the parties who have signed the MOU between them, in case there is any breach of obligation on the part of respondent No.2 or otherwise, the question of revising the Project land of 150 acres as per the original agreement or 165 acres in view of the two fresh petitions filed under Section 9 of the Act by Solitaire and Silverstone does not arise. Various reasons

have been given by respondent No.2 in the counter-affidavit as well as replies in the pending applications.

76. The admitted position is that in addition to OMP No.1123/2012, the petitioners have also filed the fresh petition under Section 9 of the Act being OMP No.624/2014 wherein various additional reliefs in the prayer clause including the relief of specific performance of JDCA dated 29th August, 2006 read with MOU dated 13th September, 2008 have been sought and also a relief to retain their rights over 28 acres of land which includes 13 acres of commercial licence land and additional 15 acres of land.

77. The case of respondent No.3/Silverstone who has also filed the fresh petition under Section 9 of the Act being OMP No.551/2014 is that there is a non-obligation on the part of respondent No.2. The allegation is made by respondent No.3/Silverstone that respondent No.2 and respondent No.4, i.e. Karamchand has violated the terms of the MOU and other agreement arrived at between the parties. Admittedly, respondent No.3 who is the investor has invested the amount for approx. 168 acres of land. There has been no development as per the agreement. In terms of the Addendum of JDCA, the Project Land side was increased from 150 acres to approx. 165 acres.

78. Clause 4.10 of the JDCA clearly stipulates that any resolution and decision matter in respect of sale, transfer, lease of the Project Land will require a mandatory consent of respondent No.3. No doubt, although under the MOU the parties agreed to revise the area of Project Land to 138.568 acres. Since the said modification was

subject to the condition that the excess contribution made by respondent No.3 shall be paid back. Therefore, the prayer is made by respondent No.3 in its petition that status quo order in respect of approx. 165 acres of land, liabilities, licences and receivables of respondents No.1, 2 and 6 to 11 be passed. Further prayer is sought to operate the bank accounts and for appointment of a Receiver in view of the reluctance made by respondent No.2 for obtaining the licences of the said land.

Various judgments are referred by the counsel that while exercising its discretion under Section 9 of the Act, the Receiver can be appointed to strike the balance between the parties.

79. As mentioned earlier, two subsequent petitions have been filed by the Solitaire and Silverstone i.e. petitioners and respondent No.3, being OMP Nos.551/2014 and 624/2014; *inter-alia*, seeking orders restraining the Vipul Group, Vipul SEZ and its affiliate entities and Karamchand from alienating or creating any third party rights in relation to lands and assets (including license and receivables) belonging to the aforesaid companies, including orders in relation to lands other than Revised Project lands and/or over which they have no right, title and/or interests. In these petitions, Solitaire and Silverstone further amongst other reliefs have prayed for appointment of receiver as well for permission to allow the receiver so appointed to conduct sale of remaining balance lands mentioned & referred to in Clauses 1 and 4 of the MOU dated 13th September, 2008 and further use proceeds to discharge DTCP dues.

80. It is apparent and admitted by the parties that after certain clarifications, small disputes arose and the parties have again entered into the MOU dated 13th September, 2008. The parties agree to the position at this point. The further disputes which have arisen between the parties are the breaches arising out of the obligations and compliance of the said MOU. It is already seen that parties by way of the voluntary consent reduced the project land from 150 acres to 138 acres along with the other obligations contained in MOU. The said MOU dated 13th September 2008 is the last expression of the intention of all the parties the consensus arrived at between them. The terms of the said MOU obligates Vipul group to pay back the excess amounts to the respective parties. The terms of the MOU also provides that terms of the JDCA shall be accordingly amended to this extent. In such an event, the dispute arising between the investors inter se or between the petitioner and respondent relating to failure to perform the terms of the MOU would be at the highest a claim before the arbitral tribunal for which the arbitration proceedings are already pending. That by itself would not entitle, the petitioner or other investors to assert their claim over the land measuring 165 Acres (more than 138 acres) which is contrary to the express stipulations of MOU agreed between the parties and seek interim measures in the form of the injunctory relief under the provisions of Section 9 of the Act without seeking proper adjudication of the claims before the arbitral tribunal. This court acting under Section 9 of the Act would therefore not pass any interim order either in the form of interim injunction or mandatory injunction which would

run contrary to the express terms of the contract entered into between the parties. Accordingly, the breaches and defaults arising out of MOU and the monies recoverable therefrom would be at the highest form the claims of the petitioners or other investor before the arbitral tribunal but would not alter the position which have agreed between the parties entitling them to claim the right over the land measuring 150 or 165 acres when the parties expressly agreed to contrary and treat 138 acres as project land between the parties. Consequently, no orders of interim nature preserving the rights in OMP No. 551/2014 can be passed for the residual peace of the land as the said land is outside the purview of the agreed project land between the parties.

81. All the investors, in fact, are blaming Vipul Group for non-compliance of the terms and conditions of the MOU. Even the parties were trying to resolve their disputes but they were not able to do so due to various reasons, change of circumstances and events stated by them. Large numbers of judgments are referred in order to satisfy the Court that the Receiver be appointed who can sell part of the suit land and obtain the licence and permission on behalf of Vipul Group as per the MOU subject to the adjustment of the amount and the final outcome of the arbitration proceedings.

82. Vipul Group/ respondent no. 2 herein, on the other hand, disputes the said position. The main contention of the said respondent is that the licences could not be obtained due to non-cooperation on behalf of the investors and referred various clauses of the escrow account agreement. Respondent No.2 stresses that the

status-quo with respect to the 138.568 acres of land be maintained and respondent No.2 will not dispose of the said revised Project Land as per the MOU dated 13th September, 2008 till the final disposal of the arbitration proceedings.

83. It is argued by the respondent that under the provisions of Section 16 of the Specific Relief Act, specific performance of a MOU cannot be enforced in cases where the party is not ready and willing to perform essential terms of the MOU. Therefore, there cannot be any interim order under the provisions of Section 9 of the Act. In the present case, the petitioners and other two respondents have failed to establish its case either legally or on fact to the exception of Section 14 and 41 of Specific Relief Act. Thus they are not entitled to get any benefit to enforce the terms of the MOU as they themselves are not co-operating with Vipul Group.

84. It is also argued by the counsel for the respondent no. 2 that in case the said respondent is not ready and willing to perform the terms of MOU, the compensation is an adequate relief as per Section 41(e) and Section 14 of the Specific Relief Act, 1963.

85. It is settled law that the disputes relating to specific performance of terms of MOU can be referred to arbitration which falls within the preview of exceptions to the general rule and a party under Section 9 of the Act can ask for such relief as there is no prohibition to this effect in order to shorten the litigation in regular Courts to refer the issues relating to specific performance to arbitration and while passing such order, the Courts can also see the conduct of the parties for the purpose of interpretation of the MOU. In

the present case, there exists a serious dispute between the parties as to whose default resulted in the non compliance of the terms of the MOU. The rival stands of the parties including the respondent no. 2 attributing faults at each other are required to be examined in detail prior to arriving at the finding conclusively in this regard which resulted into the breach of the terms of the MOU. Accordingly, for the prima facie purposes, it would not be possible to award the specific performance of the contract by insisting the compliance of the terms till the time it is thrashed out during the course of the arbitral proceedings as to which of the parties conduct resulted in to the breach of the obligations of the MOU. Thus, it would be wise to refer the dispute as to the specific performance of the MOU as well to the arbitral tribunal which is already seized of the matter as against deciding the same at the interim stage. Whatever are the losses shall definitely be in terms of the money and can conveniently form part of the claim of the arbitral tribunal and as such on this count as well, no interim relief of the specific performance is warranted in OMP No. 551/2014 and 624/2014 which were filed during the course of hearing of main OMP No. 1123/2012.

86. The Court, no doubt, is empowered to appoint the Court Receiver for securing the compliances. However, in view of the disputed position between the parties imputing faults on each other which have resulted into breaches. In such an event, it is proper to leave this aspect on the arbitral tribunal to determine and thereafter pass any interim order if need be in the matter after considering and appreciating the material available on record. After all, the arbitral

tribunal would have the advantage of going into in depth analysis on the aspect of the causes of the breaches and can appropriately devise a mechanism in which the compliances can be insisted under the agreement after forming a considered view in the matter.

87. As mentioned earlier, there is a dispute between the investors also. They may raise the inter-se dispute as well as claims and counter-claims before the Arbitral Tribunal in accordance with law. Similarly, the investors are also entitled to raise the claims and counter-claims against respondent No.2, i.e. Vipul Group before the Arbitral Tribunal.

88. Therefore at this stage I am not inclined to pass an order as prayed in the fresh two petitions being OMP Nos.551/2014 and 624/2014 filed by respondent No.3/Silverstone and the petitioners herein. However, the liberty is granted to them to raise all the pleas mentioned in the said petitions before the learned Arbitral Tribunal. The parties are also entitled to file the application for the interim protection under Section 17 of the Act which includes Investors to move an application for appointment of Receiver for the purpose of obtaining the licences and permissions by the Vipul Group. However, it is made clear that the said application would be considered and decided by the Arbitral Tribunal in accordance with law.

89. Under these circumstances, all the three petitions are accordingly disposed of, with the direction that the interim order passed on 3rd December, 2012 and modification order dated 27th September, 2013 in OMP No.1123/2012 shall continue during the pendency of arbitral proceedings unless the said order is modified by

the Arbitral Tribunal in respect of 132.568 acres (as 6 acres of land already sold with the consent of the parties) as per revised Project Land as per the MOU/ Agreement dated 13th September, 2008.

90. No costs.

(MANMOHAN SINGH)
JUDGE

MARCH 10, 2015