

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 119 OF 2024

WITH

INTERIM APPLICATION (L.) NO. 20487 OF 2023

IN

ARBITRATION PETITION NO. 119 OF 2024

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Manmohan Kapani
Through Special Power of Attorney
Chandani Sood

...Petitioner

Versus

1. Kapani Resorts Pvt. Ltd.
2. Virendra Kapani/Promoter
3. Vaibhav Kapani/Promoter

...Respondents

Mr. Rohan Rajadhyaksha a/w. *Shlok Chandra, Ms. Pallavi Singh,*
Mr. Sankalp Sharma, for Petitioner.

Mr. Farhan Dubash i/b *Adv. Mithila Damle, for Respondent Nos. 1*
to 3.

CORAM : SOMASEKHAR SUNDARESAN, J.

Reserved on : February 17, 2025

Pronounced on : March 18, 2025

JUDGEMENT :

Context and Factual Background:

1. This is a Petition under Section 9 of the Arbitration and Conciliation Act, 1996 ("***the Act***"). The Petitioner Mr. Manmohan Kapani ("***Manmohan***") is a resident of Virginia, United States of America aged over 90 years. Manmohan infused a sum of USD 1

million into Respondent No. 1, Kapani Resorts Pvt. Ltd. (“**Kapani Resorts**”) pursuant to the Share Subscription Agreement and Shareholders Agreement dated February 11, 2022 (“**Agreement**”). The Agreement has an arbitration clause, and its existence is not disputed.

2. Under the Agreement, the investment of USD 1 million would increase Manmohan’s equity shareholding in Kapani Resorts from 13% to 51%. The end-use of the funds invested by Manmohan was to enable Kapani Resorts to service its debt obligations under a One-Time Settlement (“**OTS**”) with Small Industries Development Bank of India (“**SIDBI**”) and stave off a default. Respondent No.2, Mr. Virendra Kapani (“**Virendra**”) and Respondent No. 3, Vaibhav Kapani (“**Vaibhav**”) were guarantors of the amounts owed by Kapani Resorts to SIDBI. Using the funds invested by Manmohan, Kapani Resorts discharged the dues owed to SIDBI, resulting in Virendra and Vaibhav getting relieved of their guarantee obligations. Likewise, the assets of Kapani Resorts and the property located at 124, Block-E, Greater Kailash, Part II, New Delhi (“**Greater Kailash Property**”), the residential property of Virendra and Vaibhav, that had been mortgaged to SIDBI were released.

3. Therefore, Virendra and Vaibhav got Kapani Resorts to use the funds infused by Manmohan to get the Greater Kailash Property

released, as indeed their guarantee obligations discharged, but simply refused to issue the shares that were required to be allotted to Manmohan. By issuing such shares, they would have lost control over Kapani Resorts, in terms of the commitments made under the Agreement, but evidently, this has not been done. Hence, this Petition under Section 9 of the Act.

4. These proceedings have a chequered history. The parties have engaged in detailed technical objections to one another. The matter was first called out on June 19, 2023. Thereafter, pleadings were completed. On August 11, 2023, Virendra and Vaibhav drew the attention of a Learned Single Judge of this Court to proceedings under Section 241 and 242 of the Companies Act, 2013 (*“the Companies Act”*) alleging oppression and mismanagement. The Learned Single Judge took a view that parallel proceedings ought not to be pursued and Manmohan’s advocates sought time to take instructions.

5. On August 30, 2024, another Learned Single Judge heard arguments and reserved judgement, permitting written submissions to be filed on September 2, 2024. On that date, Virendra and Vaibhav were not represented and the matter was stood over once again. On that day, it was found that arguments not made in Court had been set out in the Respondents’ Written Submissions, and this led to another

round of objections by each side about the conduct of the other side, and more submissions were made, with the matter effectively being reopened.

6. Thereafter, the matter came up before me on January 15, 2025, when Manmohan alone was represented. It was stated on behalf of Manmohan that being a foreign national, the Section 11 Court would be the Supreme Court and not this Court. The matter was then heard partly on two dates. It was then heard on February 5, 2025. Eventually, written notes on arguments of both sides were taken on record and arguments concluded on February 17, 2025.

Contentions of the Parties:

7. I have heard Mr. Rohan Rajadhyaksha, Learned Counsel on behalf of Manmohan and Mr. Farhan Dubash, Learned Counsel on behalf of Virendra and Vaibhav. The facts are quite clear, and controversy between the parties is primarily on the law and on how far this Court, in exercise of powers under Section 9 of the Act, can intervene in respect of a property owned by Virendra (and not by Kapani Resorts), which was released by use of Manmohan's funds.

8. Mr. Rajadhyaksha would submit that the scope of intervention under Section 9 is wide and can be creatively used for an expansive

intervention bearing in mind the nature of the facts and whatever would best preserve the interests of the parties pending arbitration. Mr. Dubash would submit that the properties of Virendra and Vaibhav, although released by SIDBI only because of the use of funds infused by Manmohan, are totally out of the reach of this Court's intervention.

Analysis and Findings:

9. Having considered the material on record with the assistance of the Learned Counsel, as also the verbal submissions and their written arguments, the following is evident:-

- (a) The parties are indeed privy to an arbitration agreement contained in the Agreement;
- (b) Manmohan performed his portion of the bargain struck between the parties – he infused USD 350,000 on February 11, 2022 and USD 650,000 on February 22, 2022. The funds were admittedly utilised for meeting the obligations owed under the OTS with SIDBI;
- (c) Virendra and Vaibhav, who control the management of Kapani Resorts have simply failed to perform their side of the bargain – not only have shares that are to be issued to

Manmohan not been allotted, no worthy explanation has been made to justify why shares were not allotted;

- (d) The objection taken that Manmohan had initiated proceedings for oppression and mismanagement in the National Company Law Tribunal (“**NCLT**”) too is no longer valid since Manmohan withdrew those proceedings from the NCLT;
- (e) Virendra and Vaibhav, who had objected before a Learned Single Judge of this Court about the parallel proceedings in NCLT, objected to the withdrawal being permitted by the NCLT without calling for a reply from them on the application seeking withdrawal. By an order dated January 22, 2025, the NCLT rejected such request and permitted the withdrawal of the NCLT proceedings. As of today there are no parallel oppression and mismanagement proceedings underway in the NCLT;
- (f) But for infusion of funds by Manmohan, Virendra and Vaibhav would be personally liable to repay the debts owed by Kapani Resorts to SIDBI. That apart, the Greater

Kailash Property would have continued to be mortgaged with SIDBI. It was only with the use of funds infused in Kapani Resorts by Manmohan that SIDBI was repaid and the guarantees and the Greater Kailash Property were released; and

- (g) Consequently, Manmohan is out of funds, has not received the shares due to him, the assets of Kapani Resorts have been released, the personal residential asset of Virendra has been released, as indeed the personal guarantees of Virendra and Vaibhav have been released – all without performance of the corresponding obligation owed to Manmohan by Kapani Resorts, Virendra and Vaibhav.

10. That I was considering directions of a nature that would affect the Greater Kailash Property too, i.e., not just the assets of Kapani Resorts was indicated to Mr. Dubash on two occasions, to elicit his inputs and his client's instructions on their approach to this litigation. Mr. Dubash tendered a list of dates, which focuses on how Manmohan had suppressed the approach to NCLT in the Petition, and how it took him 17 months to withdraw the NCLT proceedings. The submissions have also focused on how another Section 9 Petition had been filed in the Delhi High Court and came to be dismissed for want of territorial

jurisdiction. Mr. Dubash has also focused on how the pleadings alleging abuse of the funds invested by Manmohan are untenable since the funds were in fact used to pay SIDBI, which was the contracted end-use objective of the investment. Issues were raised about the process of verification of the power of attorney under which the pleadings have been filed on Manmohan's behalf. The upshot is that, according to Virendra and Vaibhav, Manmohan has come to this Court with unclean hands.

11. I am afraid these objections would not be of any assistance to Virendra and Vaibhav. They have simply displayed a cynically high sense of *hubris* in their approach to the matter and to the proceedings. Admittedly, SIDBI has issued a no-dues certificate dated March 15, 2022. Admittedly, a Memorandum of Satisfaction of Charge was issued by SIDBI on April 12, 2022, and the SIDBI loan has been fully closed. They have admittedly enjoyed every benefit flowing out of the funds invested by Manmohan. They have offered no explanation as to why they have not given up 51% ownership stake in Kapani Resorts till date. It is not acceptable that they now argue that they can only issue shares and must not suffer any restraint until an arbitral tribunal decides what is to be done in the matter after considering the evidence of the parties. In my opinion, it is not acceptable that they rely on Kapani Resorts not

being the owner of the Greater Kailash Property, to argue that no reliefs can be granted over such property.

Greater Kailash Property – Relevant to Arbitration:

12. The Greater Kailash Property can never be treated as extraneous to the disputes between the parties. Virendra and Vaibhav induced and convinced Manmohan to invest in Kapani Resorts to be able to pay SIDBI and get, among others, the mortgage over the Greater Kailash Property discharged. The owners of the Greater Kailash Property brought it into the mix as a property on which they would suffer a mortgage to enable funding of Kapani Resorts by SIDBI. It is with Manmohan's investment that SIDBI has been repaid and the release of the Greater Kailash Property has been secured. Under ***Section 9(1)(ii)(c)***, this Court is empowered to issue an interim measure of protection in respect of the detention, preservation of any property or thing which is the subject-matter of the dispute that is meant to be resolved by arbitration. The Greater Kailash Property and the fetter on the free and marketable title to it is indeed a thing that is subject matter of the dispute. Such title became available to Virendra only because Kapani Resorts, which is a company controlled by Virendra and Vaibhav was funded by Manmohan to pay SIDBI, and the reciprocal promise of issuing shares has not been performed.

13. It is remarkable that Virendra and Vaibhav would work hard to prove how money invested by Manmohan has been used to pay SIDBI with a view to prove that they indeed put it to the contracted end-use, without a whisper on why they have not performed in all this while, their obligations under the Agreement. Even on a *prima facie* basis, the contention of Mr. Dubash (in his written submissions) that no benefit has come to Virendra and Vaibhav out of the investment made by Manmohan is inaccurate – indeed the title to the Greater Kailash Property came back to them and their personal guarantees were released only thanks to the monies invested by Manmohan being used to repay SIDBI.

14. I am of the *prima facie* view that misappropriation of an investor's investment need not take only the form of siphoning of funds out of a company – it can take the form of enjoying the benefits arising out of an investor's infusion of funds, reaping the consequential personal benefits, without complying with the corresponding obligations owed to the investor. Virendra and Vaibhav have reaped the benefit of being discharged from their guarantee obligations and the release of the Greater Kailash Property and yet deprived the investor of the rights owed. Needless to say, all these are subject matter of merits that the Arbitral Tribunal, as and when constituted, would

examine. Pending such consideration by the Arbitral Tribunal, it would only be appropriate for me to issue directions to preserve the subject matter of the dispute and to balance the competing interests of the parties.

15. Mr. Dubash has also contended that some grave danger of alienation of the properties ought to be demonstrated before alienation of the property can be injuncted. The apprehension of alienation ought to be demonstrated, he would submit, without which the Section 9 Court cannot intervene. Such an argument misses the point that grave injury has already been occasioned to Manmohan's interests by the joint and several conduct of Kapani Resorts, Virendra and Vaibhav. That apart, the approval to these proceedings speaks for itself on how the arbitration can be frustrated. It is trite law that the principles underlying attachment before judgement in the Code of Civil Procedure, 1908 ("**CPC**") would guide the Section 9 Court, but equally, the strict rules of CPC would not apply to arbitration proceedings. The very conduct of Kapani Resorts, Virendra and Vaibhav so far in the proceedings would show that despite their obligations contracted under the Agreement and indeed imposed under company law (dealt with below), they have no intention to even commence arbitration much less honour their commitments. This continued risk of Manmohan's

interests being undermined and vitiated does strongly emphasise that the subject matter of the dispute under arbitration runs a high risk of being undermined and squandered. The reliance by Mr. Dubash on ***Sanghi Industries***¹ is misplaced inasmuch as there were serious doubts in that case about the quantum of monies under dispute whereas in the matter at hand, by sheer operation of company law, a refund of the monies invested by Manmohan are due and owing. Besides, in this case, the Respondents are, *prima facie*, cocking a snook at the obligations owed by them under statute and under contract. They have not made out any justification as to why they have not allotted shares to Manmohan, choosing to instead focus on arguing principles of law governing grant of interim relief.

Misappropriation – Section 42(6) of the Companies Act:

16. There is a foundational reason in law that gives support to Mr. Rajadhyaksha's insistence that the money must now be refunded. Mr. Dubash would submit that Kapani Resorts can only be called upon to issue shares and therefore, no intervention should be made by this Court on any asset, beyond securing the share capital of Kapani Resorts. This is totally untenable in law. To examine the precise factual position, I called upon Mr. Dubash to tender the last available

¹ *Sanghi Industries Limited vs. Ravin Cables Ltd. and Another* – 2022 SCC OnLine SC 1329

audited financial statements of Kapani Resorts to make up my mind on the nature of the intervention I ought to make. Mr. Dubash tendered the Balance Sheet as of March 31, 2024, which also shows the position as of March 31, 2023.

17. It is evident that the funds infused by Manmohan have been deployed to pay SIDBI. In order to deprive Manmohan of the benefits, the entire amount is still shown in the balance sheet of Kapani Resorts as “*Share application money pending allotment*”. In other words, it is an admitted position that shares have not been allotted to Manmohan, and the monies have been utilised by Kapani Resorts to repay SIDBI. This is *prima facie*, a clear misappropriation of funds in the eyes of company law – it requires that share application money not be used for anything other than adjustment against share capital, and refund of share application money when the deadline to allot is missed.

18. Section 42(6) of the Companies Act prohibits whatever has been done with the money infused by Manmohan, by Kapani Resorts under the control of Virendra and Vaibhav – the provision is reproduced below:-

Section 42(6):

A company making an offer or invitation under this section shall allot its securities within sixty days from the date of

receipt of the application money for such securities and if the company is not able to allot the securities within that period, it shall repay the application money to the subscribers within fifteen days from the date of completion of sixty days and if the company fails to repay the application money within the aforesaid period, it shall be liable to repay that money with interest at the rate of twelve per cent. per annum from the expiry of the sixtieth day:

Provided that monies received on application under this section shall be kept in a separate bank account in a scheduled bank and shall not be utilised for any purpose other than—

(a) for adjustment against allotment of securities; or

(b) for the repayment of monies where the company is unable to allot securities.

[Emphasis Supplied]

19. Even a plain reading of the foregoing would show that it is now a statutory obligation of Kapani Resorts to refund the monies invested by Manmohan. The allotment of shares ought to have been made within sixty days of February 11, 2022 (for USD 350,000) and of February 22, 2022 (for USD 650,000). Such allotment not having been made, these amounts ought to have been refunded within fifteen days of such deadline to make allotment. Manmohan's right to refund has accrued on expiry of the 75-day period from the date of the receipt of the share application money. Before the funds infused by Manmohan could have been used to repay SIDBI, it was incumbent on Kapani Resorts to allot shares (which would have given control to Manmohan over Kapani

Resorts), after which allotment, it was permissible to use such funds to repay SIDBI. This was a necessary statutory condition precedent that has not been met. Now, the statutory obligation to refund has kicked in on the expiry of 75 days from each tranche of infusion.

20. Therefore, interim relief has to follow to protect the subject matter of the dispute – the refund of funds due and owing to Manmohan. That apart, the Profit and Loss Account of Kapani Resorts for the period ending March 31, 2024 would show that revenues from operations of Kapani Resorts, under the management and control of Virendra and Vaibhav are Rs. 1.33 crores, while the net loss is in the sum of Rs. 1.35 crores. Clearly, this is a precarious position for the *prima facie* right of Manmohan to get his funds back being honoured – a statutory entitlement under Section 42(6) of the Companies Act and an obligation of Kapani Resorts. If Kapani Resorts cannot repay the monies due in law, but the benefits of the use of the monies owed to Manmohan are being enjoyed by Virendra and Vaibhav, protective measures have to follow that effectively binds all the three of them who are enjoying benefits at the expense of Manmohan. Such arrangements would be in place until the Arbitral Tribunal considers the matter and decides on the merits.

21. Evidently, a strong *prima facie* case has been made out on behalf

of Manmohan, for grant of protective reliefs. Grave and irreparable harm and injury would be occasioned to Manmohan if such intervention is not made. The protection that Manmohan enjoyed at the hands of the NCLT (a freeze on the capital structure of Kapani Resorts) too now stands removed owing the withdrawal of the NCLT proceedings in reaction to the objection raised on behalf of Virendra and Vaibhav, who have shown scant regard for legal obligations owed by them under the solemn Agreement executed by them.

22. The contentions made on behalf of Virendra and Vaibhav are all about nit-picking on Manmohan's pleadings and his use of phrases in his pleadings about being taken for a ride. They would argue that they indeed utilised the funds infused by Manmohan for the very purpose towards which he had made the investment i.e. to repay SIDBI under the OTS. However, they have no explanation as to why they have not till date allotted shares to Manmohan. Therefore, they have used his money to release their own assets and the assets of Kapani Resorts, and yet retained control over Kapani Resorts, contrary to the Agreement, and now primarily argue about the scope of intervention this Court can make under Section 9 of the Act, along with technical objections about manner of execution of the power of attorney under which pleadings have been filed.

23. On more than one occasion, I put to Mr. Dubash if his clients would give him instructions that arbitration could commence immediately without Manmohan having to approach the Supreme Court with an application under Section 11 of the Act. Regrettably, his instructions are that Virendra and Vaibhav would not consent to proceed to arbitration. They would only proceed to arbitration after the Supreme Court deals with an application that would need to be made in this regard by Manmohan. Treating an elder who is aged over 90 years in this cavalier manner, after having used his funds to enrich themselves, the equities are stacked high against Virendra and Vaibhav.

24. Against this backdrop, one would need to consider what is an appropriate protective measure to be made pending initiation of arbitration and consideration of interlocutory arrangements by the arbitrator. Evidently, a strong *prima facie* case for refund of the amounts invested by Manmohan exists in law. Evidently, a strong *prima facie* case of the Respondents enjoying the fruits of their violation of the Agreement exists on the record. Evidently, a strong *prima facie* case to show that the properties mortgaged to secure Kapani Resorts' obligations owed to SIDBI now stand released. Indeed, the personal guarantees too stand discharged. All these benefits are being enjoyed without fetter, thanks only to Manmohan's funds, even

while the Respondents frustrate Manmohan's rights under the Agreement and under Company Law.

25. It is clear that every step of the way, Virendra and Vaibhav would present impediments and inconveniences in Manmohan's path. Not only have they not performed their obligations under the Agreement (they own and control the conduct and actions of Kapani Resorts), they would not even meet a reasonable opportunity given to them by this Court to commence arbitration without dragging Manmohan at this ripe old age through another round of pre-arbitration proceedings.

Directions and Order:

26. In these circumstances, it would be just, fair and equitable to protect Manmohan's investment in Kapani Resorts (the subject matter of arbitration) through the following measures:-

- A) Kapani Resorts, Virendra and Vaibhav shall jointly or severally deposit an Indian Rupee equivalent of USD 1 million (valued at the US Dollar-Indian Rupee exchange rate applicable as of the respective dates of their remittance by Manmohan) along with interest at the statutory interest rate of 12% per annum (on the INR equivalent of USD 350,000 from the expiry of 75 days after

February 11, 2022; and on the INR equivalent of USD 650,000 from the expiry of 75 days after February 22, 2022, until the date of deposit) with the Registry of this Court, which deposit shall be made no later than two weeks from the date on which this Order is uploaded on the website of this Court;

- B) Kapani Resorts, Virendra and Vaibhav shall forthwith be prohibited from directly or indirectly, selling, mortgaging, alienating or creating any third-party interest or encumbrance of any nature whatsoever over any and every property of Kapani Resorts;
- C) Virendra and Vaibhav shall forthwith be prohibited from directly or indirectly selling, mortgaging, alienating or creating any third-party interest or encumbrance of any nature whatsoever over the Greater Kailash Property;
- D) If Kapani Resorts, Virendra and Vaibhav jointly or severally comply with the direction to deposit funds as directed above, they shall have leave to approach this Court seeking removal of the restraint imposed on Virendra and Vaibhav in relation to alienating any interest

in the Greater Kailash Property. Towards this end, Kapani Resorts, Virendra and Vaibhav are given leave to mention the matter before the Court showing evidence of having complied with the direction to deposit funds, and upon consideration of the same, this Court may pass appropriate orders. If no such deposit is made, Manmohan shall have liberty to mention the matter and seek appointment of a Court Receiver in respect of all the properties of Kapani Resorts and the Greater Kailash Property.

27. The interim reliefs granted hereby shall hold the field until completion of the arbitral proceedings. The Arbitral Tribunal shall be entitled to further vary, modify or mould the interim protective measures once it has had occasion to consider the merits and takes an informed decision on the need to effect such variation. Indeed, as stated above, each of the parties has been given contingent liberty to move this Court in the framework of the interim arrangement directed above.

28. With the aforesaid directions, this Petition is *finally disposed of*. Liberty to apply as aforesaid.

29. In view of disposal of the Petition all attendant Interim

Applications too stand disposed of.

Award of Costs:

30. Having regard to the nature of the conduct of the Respondents and the unreasonable conduct demonstrated in the matter hitherto, Manmohan shall be entitled to costs in the sum of Rs. 2.5 lakh, payable within a period of one week from the date on which this Order is uploaded on the website of this Court. The unreasonable conduct demonstrated so far, including the steadfast refusal to even commence arbitration without forcing a 90-year-plus individual living outside India to approach the Supreme Court only to have an arbitral tribunal constituted, is but an example of the unreasonable conduct. The Arbitral Tribunal shall have regard to such costs when it makes its own assessment of costs when it adjudicates the matter one way or the other.

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

[SOMASEKHAR SUNDARESAN, J.]