

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

COMMERCIAL ARBITRATION PETITION NO. 646 OF 2025

Pashmina Realty Private Limited Petitioner

Versus

Ekta Housing Private Limited Respondent

Mr. Sharan Jagtiani, Senior Counsel a/w Yash Momaya, Falguni Thakkar & Anshita Sethi i/b. DSK Legal, for the Petitioner.

Mr. Simil Purohit, Senior Counsel a/w Chirag Kamdar, Abinash Pradhan, Garima Agarwal & Yash Dedhia i/b. Wadia Ghandy & Co., for Respondent.

CORAM: SOMASEKHAR SUNDARESAN, J.

DATE: JANUARY 22, 2026

JUDGEMENT:

Context and Factual Background:

1. This Petition is an Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (“***the Act***”) impugning the order dated May 8, 2025 (“***Impugned Order***”) passed under Section 17 of the Act, granting certain interim reliefs in favour of the Respondent, Ekta Housing Private Limited (“***Ekta***”) imposing certain restraints, and issuing directions to the Petitioner, Pashmina Realty Private Limited (“***Pashmina***”).

2. The disputes and differences between the parties arose out of a Development Management Agreement dated July 11, 2016 (“***Agreement***”), after Pashmina terminated the Agreement by its notice dated March 9, 2020 (“***Termination Notice***”), alleging, among others, failure by Ekta to comply with three conditions in the Agreement. These conditions are emphasized on behalf of Pashmina as being *essential* to the Agreement (“***Essential Conditions***”).

3. Pashmina also alleges failure by Ekta to adhere to the business plan formulated by the parties; alleged failure to secure project funding; and alleged abandonment of a project originally floated by Pashmina with the brand name *Pashmina Lotus*, which was then re-branded as *Ekta Pashmina Lotus* after execution of the Agreement. After the Termination Notice, the project is said to have been re-branded yet again as *Pashmina Lotus*, although Ekta continues to be shown as a promoter along with Pashmina in the records of the Real Estate Regulatory Authority (“***RERA***”).

4. The Impugned Order contains findings of a strong *prima facie* case in favour of Ekta and on an adjustment of equities, concludes that a strong *prima facie* case warrants the grant of certain reliefs

claimed by Pashmina. The Learned Arbitral Tribunal has allowed the Section 17 Application partially and granted the following reliefs:-

a) *That pending, making and publishing of the award by the arbitral tribunal and for a period of 4 weeks thereafter, the Respondent, its officers, employees, staff members, servants, agents and any person claiming throughout under it, be restrained by an order and injunction of this Hon'ble Court from acting in furtherance of/in pursuance of the said purported Termination Notice dated 9th March, 2020 (Exhibit LLL hereto);*

b) *That pending, making and publishing of the award by the arbitral tribunal and for a period of 4 weeks thereafter, the Respondent, its officers, employees, staff members, servants, agents and any person claiming throughout under it, be restrained by an order and injunction of this Hon'ble Court from acting in any manner inconsistent with its obligations under the said Agreement dated 11th July, 2016 (Exhibit 'A' hereto);*

c) *That pending, making and publishing of the award by the arbitral tribunal and for a period of 4 weeks thereafter, the Respondent, its officers, employees, staff members, servants, agents and any person claiming throughout under it, be restrained by an order and injunction of this Hon'ble Court from taking any coercive step, and/or to act in any manner or kind prejudicing and/or precipitating the rights, interest and/or obligations of the Petitioner in the said Project and/or under the said Agreement dated 11th July, 2026 (Exhibit 'A' hereto);*

e) *That pending, making and publishing of the award by the arbitral tribunal and for a period of 4 weeks thereafter, the Respondent, its officers, employees, staff members, servants, agents and any person claiming throughout under it, be restrained by an order and injunction of*

this Hon'ble Court from selling the unsold premises/flats/units in the said Project (defined in paragraph 3.9);

n) That pending, making and publishing of the award by the arbitral tribunal and for a period of 4 weeks thereafter, the Respondent, be ordered and directed to disclose on oath, true and correct accounts of all Realisations/ consideration received towards the sale of premises/flats/ units in the said Project, and all expenses incurred in related to the said Project, from the date of Agreement, i.e., 11th July, 2016, till the date of such disclosure, and to forthwith provide the Petitioner inspection of the said accounts;

q) That pending, making and publishing of the award by the arbitral tribunal and for a period of 4 weeks thereafter, the Respondent, be ordered and directed to disclose on oath, details of all agreements/conveyances or any other document whether in nature of sale, mortgage, charge, license or any other nature whatsoever entered into with third parties in respect of premises/flats/units in the said Project (defined in paragraph 3.9) and/or the said Property (defined in paragraph 3.1) and/or the said Additional Lands (defined in paragraph 3.6.4), or any part thereof, from the date of the said Purported Termination Notice, i.e., 9th March, 2020, till the date of such disclosure;

Contentions of the parties:

5. I have heard at length, Mr. Sharan Jagtiani, Learned Senior Advocate on behalf of Pashmina and Mr. Simil Purohit, Learned Senior Advocate on behalf of Ekta. With their assistance, I have examined the material on record to assess the parties' respective positions, bearing in

mind the scope of jurisdiction under Section 37 of the Act when assessing a challenge to an order passed under Section 17 of the Act.

6. Before articulating their respective positions, it would be appropriate to mention that when considering a challenge to the Section 17 Order, the Section 37 Court must examine if the findings, analysis and conclusions in the Section 17 Order could be regarded as unreasonable, implausible or perverse, necessitating interference by the Section 37 Court. Without getting into a comparison of the scope of jurisdiction under Section 37 Court when assessing a challenge to an arbitral award under Section 34 of the Act, it would be appropriate to state that it is not for the Section 37 Court to substitute one plausible view of the Learned Arbitral Tribunal with another plausible view that the Section 37 Court considers more appropriate.

7. On the contrary, the scope of enquiry would be to examine whether no reasonable person would have taken the view that the Learned Arbitral Tribunal took and whether the position adopted by the Learned Arbitral Tribunal is perverse, in order to ascertain if, and what kind of, interlocutory intervention is necessary. It must be borne in mind that the Section 17 Order is an interlocutory order and the time-

tested principles laid down in *Wander v. Antox*¹ would squarely apply to challenges to Section 17 orders.

8. Mr. Jagtiani, at the threshold, would indicate that his contentions bear in mind the aforesaid position in law. He would submit that the reliefs granted in the Impugned Order are implausible by such degree that they warrant interference by this Court in exercise of jurisdiction under Section 37 of the Act. Mr. Jagtiani would contend that the three Essential Conditions that lie at the heart of the Agreement and have been breached by Ekta are: (i) Pashmina's obligation to obtain the Commencement Certificate no later than October 10, 2016; (ii) Pashmina's obligation to realize sale proceeds of at least Rs.20 crores by disposal of 85,000 sq.ft. of saleable area in the project at an average rate of not less than Rs.16,000/- per sq.ft. of saleable area no later than December 12, 2016; and (iii) Pashmina's obligation to arrange for new debt, characterized as "Third Party Capital" in the sum of not less than Rs.50 crores no later than November 11, 2016.

9. The requirement to infuse funds into the project, namely, realizing sale proceeds of Rs. 20 crores and arranging Third Party Capital of Rs.50 crores were meant to retire high cost debt already incurred in the project whereby, a loan extended by India Infoline

¹ *Wander Ltd. Vs. Antox India (P) Ltd. – 1990 Supp SCC 727*

Finance Ltd. (“*IIFL Loan*”) would be repaid. Both these conditions also entail the extension of time beyond the stipulated deadlines – the realization of sale proceeds of Rs.20 crores could have been done 15 months later i.e. by October 11, 2017 while the Third Party Capital could also have been arranged by October 11, 2017. However, such extension of time would be visited with a stipulation that Ekta would bear the interest burden on the IIFL Loan for the period of extension.

10. Mr. Jagtiani would contend that there has been an abject default in respect of each of the aforesaid Essential Conditions. The Commencement Certificate was obtained only on March 1, 2017 (having been applied for only on February 14, 2017); the realization of Rs.20 crores from the sale of units was admittedly reached only by August 9, 2019; while the Third Party Capital was arranged by way of a Term Sheet dated November 8, 2017, which translated into a loan agreement and attendant documentation executed only in January 2018.

11. According to Pashmina, such breach of the Essential Conditions is adequate to justify the Termination Notice. In any case, after the issuance of the Termination Notice (March 9, 2020), Ekta’s Section 9 Petition was heard by a Learned Single Judge of this Court and judgement was pending for four years. Upon retirement of the

Learned Single Judge, the Petition was disposed of, appointing the Learned Arbitral Tribunal in disposal of the Section 9 Petition, which was converted into a Section 17 Application. The intervening period of over four years until final disposal of the Section 17 Application by the Impugned Order (May 8, 2025) is pressed into service by Mr. Jagtiani, to contend that the interim relief could never have been granted, owing to changed circumstances rendering specific performance inappropriate, with particular regard to the facet of balance of convenience.

12. During such intervening period, there was no protective measure in favour of Ekta, and Pashmina continued the project on its own, with no activity whatsoever on Ekta's part. Therefore, Mr. Jagtiani would contend that for the Impugned Order to be passed five years after the Termination Notice, without regard to the events that have transpired in the interregnum, the Impugned Order represents grant of specific performance at an interim stage. Specifically, he would contend that the interest due on the IIFL loan was in the sum of Rs.31.2 crores and Ekta was obligated to pay such interest for the period of delay in meeting two of the Essential Conditions entailing infusion of monies to retire the high-cost debt. Mr. Jagtiani would characterise the contentions of Ekta as an assertion that all timelines had been given a

go-by by the parties and that Pashmina had accepted the performance unconditionally. Ekta has also pleaded that no demand for interest had ever been made by Pashmina, for the non-payment of interest to be relevant factor to justify termination. A letter dated August 16, 2017 (“**August 2017 Letter**”) dealing with two additional parcels of land being introduced into the project would evidence, according to Ekta, that there is no obligation to pay any interest at all. Each of such contentions, Mr. Jagtiani would submit, is incorrect.

13. Clause 23.8 of the Agreement explicitly requires a waiver to be in writing.; there is nothing to evidence even remotely that performance by Ekta had been accepted by Pashmina unconditionally; there is no requirement to make a demand for interest to be paid; and the August 2017 Letter has no relevance to the obligation to pay interest.

14. Therefore, he would submit that the Termination Notice was valid and reasonable, and there is a strong *prima facie* case in favour of Pashmina, which renders the Impugned Order perverse. Mr. Jagtiani would also contend that the Learned Arbitral Tribunal has conflated its perception of a strong *prima facie* case with the existence of balance of convenience in favour of granting relief to Ekta. He would submit that

there is no finding about irreparable harm and no discussion on how it would be convenient to grant the interim reliefs.

15. In particular, since the Agreement is merely a service contract and is not a partnership or a joint venture, he would submit, Ekta's interest in the project was monetary in nature and damages would suffice to compensate Ekta even if the termination were held to be incorrect. Therefore, it is untenable to perceive any need to protect Ekta.

16. In sharp contrast, Mr. Purohit, on behalf of Ekta, would submit that the Impugned Order is a balanced, reasonable and an appropriate interlocutory measure, which returns eminently plausible findings of fact and analysis of the necessary preservation pending arbitration. Mr. Purohit would submit that an amount of Rs.30 crores had been paid by Ekta to Pashmina upfront to bail out Pashmina's distressed condition. The project is in the neighbourhood of another project being implemented by Ekta and Pashmina reached out for collaboration and the parties agreed to re-brand the project to indicate to the world at large that this was a joint project. He would submit that Ekta is even named as co-promoter in the RERA registrations, even after Pashmina reversed the co-branding.

17. Each of the three so-called Essential Conditions had indeed been met by Ekta, Mr. Purohit would submit. Pashmina had accepted and benefitted from such compliance. The Commencement Certificate was admittedly received on March 1, 2017, which was embraced and the project went ahead on its terms without any objection being raised to the timeline of compliance. That apart, by the August 2017 Letter, Pashmina willingly expanded the scope of collaboration with Ekta and in fact, two more parcels of land were added to the project, bringing to bear greater development potential – a far cry from being dissatisfied with the alleged breach of time commitment.

18. Referring to the August 2017 letter, Mr. Purohit would indicate that this letter would demonstrate that it was with Ekta's money that the additional lands were paid for. Far from protesting about delayed compliance, Ekta's money was used to expand the project to cover more parcels of land. According to him, the allegation of non-compliance is purely an afterthought, hoping to justify resiling from commitments made in the Agreement after getting bailed out.

19. Mr. Purohit would point out that the sale of units to the tune of Rs.20 crores had been achieved by August 9, 2019, by sale of 1,41,276 square feet. As of the date of the Termination Notice, a total of 1,47,341

square feet of saleable area had been sold. The realisation from such sales was Rs. ~23.93 crores. Indeed, such proceeds and receipts were utilized by Pashmina to repay the IIFL loan and fund the project. Throughout the contemporaneous period of such realisation, not once did Pashmina demand that interest on the IIFL Loan must be borne by it.

20. Mr. Purohit would submit that the Agreement entailed that interest must be paid *to IIFL* only if such a demand were made by IIFL and it is not a condition of the Agreement that Pashmina must be paid such amount regardless of any demand from IIFL. The pleadings about the claim for such interest are bland and are not backed by any documents, he would submit. A plain table containing certain figures purporting to be the interest amount, without a whisper of evidence of interest paid to IIFL, cannot be the basis of contending that there has been a breach by Ekta in failing to pay the interest due on the IIFL Loan.

21. Likewise, Mr. Purohit would submit that a term sheet with JM Financial Credit Solutions Limited (“***JM Financial***”) was executed on November 8, 2017, by which time the project, as envisaged by the parties had expanded way beyond the scope envisaged originally. While Ekta was required to bring in Third Party Capital to the extent of Rs.50

crores, a commitment of Rs.200 crores was brought in. One loan agreement for Rs.150 crores and another for Rs. 50 crores were actually executed in January 2018. The Third Party Capital had been utilised without protest and utilised to retire high-cost debt.

22. Mr. Purohit would further point out that the Third Party Capital raised from JM Financial was secured by a mortgage over the project; a commitment by Pashmina expressed in a clause in the loan agreements that no event had taken place to enable termination of the Agreement; and even a guarantee by Ekta, limited of course, only by the extent of its earnings under the Agreement. These facts would completely undermine the contentions made on Pashmina's behalf about the veracity of Pashmina's stance both on the purported breach of the Essential Conditions and indeed on the Agreement being a mere service contract where consideration is denominated in service fees. The comfort given by Pashmina to JM Financial about the absence of any cause to terminate the Agreement was driven by Pashmina's creditworthiness being worthless and JM Financial looking to Ekta's creditworthiness and role as a promoter of the project. Such confirmation has been made more than once and it is not a boilerplate provision in the contract.

23. As late as January 31, 2018, Pashmina even agreed to make Ekta a joint signatory to the Project Costs Account and on May 16, 2019, Ekta was to be made a joint signatory to all bank accounts. Various sale agreements were executed and registered and co-signed by Pashmina and Ekta – far from indicating a position of Ekta having no role but as a service provider.

24. Mr. Purohit would also point out that as of the date of the Termination Notice, out of the two buildings in question, the entire structure of Building No. 1 had been completed, whereas three wings of Building No.4, which is meant to comprise four wings, had also reached different stages of progress.

25. As a matter of law, Mr. Purohit would submit that when a party asserts that a certain condition in a contract is essential and vital and the breach of which would lead to a right to terminate, the party claiming the breach has a right to elect as to whether to terminate or to continue with the contract. If the party alleging the breach chooses not to take a decision, it may lose the right to terminate. Towards this end, he would place reliance on a decision of the ***Tele2 International²*** which

² *Tele2 International Card Company SA & Ors v. Post Office Ltd. – [2009] EWCA Civ 9*

has been followed with approval in a judgement by a Learned Division Bench of this Court in *KPH Dream Cricket*³.

Analysis and Findings:

26. Having heard the Learned Senior Advocates for the parties at length and having examined the record with their assistance, in my opinion, no case is made out for arriving at a view that the Learned Arbitral Tribunal has been perverse in its approach towards assessment of appropriate interlocutory protective reliefs in the matter. It goes without saying that all observations made below are *prima facie* in nature, since the validity of the *prima facie* findings in the Impugned Order is under consideration in this judgement.

27. To begin with, the timeline of action by the parties indicates that the relationship between the parties grew and expanded over the very period time in which Pashmina now alleges that breach of time-essential provisions had occurred. The parties went on to collaborate in expanding the project with additional lands being included with funding from Ekta.

³ *Board of Control for Cricket in India (BCCI) v. KPH Dream Cricket Private Limited –2010 SCC Online Bom 1900*

Alleged Breach of Essential Conditions

28. Each of the three so-called Essential Conditions, significantly relied upon by Mr. Jagtiani, calls for comment. *First*, the Commencement Certificate, said to have been due by October 11, 2016, was obtained on March 1, 2017. Pashmina's bid to find fault with this delay in compliance, and that too in a manner so grave as to justify the issuance of the Termination Notice is inexplicable. There is not a whisper of a contemporaneous protest about this delay. In fact, five months later, the August 2017 Letter was issued and agreed on, which in fact shows that the project was expanded by adding two more parcels of land to the project.

29. Equally, the project was renamed akin to how a joint venture is carried out. Ekta was added as a promoter in RERA filings. The true nature of the arrangement between the parties is discernible not just from the terms contained in the Agreement but also by the conduct of the parties alongside and after the execution of the Agreement.

30. *Second*, the allegation of breach of the condition of effecting sales to realise Rs. 20 crores, by sale of saleable area of 85,000 square feet and applying the rate of Rs.16,000 per square feet also does not inspire confidence. To begin with, the realisation on sale of 85,000

square feet at the rate of Rs.16,000 per square feet would yield a turnover of Rs.136 crores. A lot more has been sold for a lot less and the parties will explain this to the Learned Arbitral Tribunal in the course of the proceedings. Evidently, the parties jointly executed all the contracts for the sales. Both parties present their version of how much was sold by what point in time but evidently the Rs. 20 crore mark was indeed reached towards the end of 2019.

31. The question before this Court is whether the conduct of the parties could point to an election being made by Ekta concurrently, not to find fault with the alleged delay to justify a step as drastic as the Termination Notice. The benefits from the sales were enjoyed by Pashmina without protest. Each sale was executed jointly by Ekta and Pashmina with the third party purchasers, and all sales were effected with the full involvement and approval of Pashmina. Therefore, with each sale, there is a repeated iteration that Pashmina had acquiesced in the manner of performance. Nothing parallel in time has been brought to bear to show an objection, much less, a rejection of such sale being treated as compliance with the Essential Condition stipulating sales realisation of Rs.20 crores. On the contrary, it would appear that the parties had clear consensus on continuing with the activity of sales.

32. *Third*, for arranging the Third Party Capital, evidently, a term sheet was delivered by November 8, 2017. There was a delay on the part of Pashmina in securing the No Objection Certificate for the new funding, from IIFL and IDBI Trustee. These were to be received within 30 days, but were eventually received in January 2018, after which the agreements to document and secure the infusion of the Third Party Capital were executed. The amount raised was in fact Rs.200 crores as opposed to the contractual reference to a sum of Rs. 50 crores. There is nothing on record to show that Pashmina objected to the Third Party Capital of four times the committed amount being arranged at the relevant time or asserted that Ekta had missed the bus and that such money would not be accepted.

33. In my opinion, Mr. Purohit validly places reliance on *KPH Dream Cricket* and *prima facie*, it appears that even if on paper the deadlines may appear to have been missed, Pashmina appears to have chosen to not be bothered about it and had the right to terminate a go-by concurrent with the alleged breach of deadline.

34. The Termination Notice would be issued two years later in 2020. At the relevant time, the money realised from the Third Party Capital was raised, and merrily applied to retire the IIFL Loan, and the

project enjoyed the fruits of compliance with the condition to raise the Third Party Capital. On this count too, in my opinion, the elaborate arguments about how timely compliance was missing, to justify the Termination Notice, appear facetious.

Interest Burden on IIFL Loan for Delayed Compliance:

35. The one common element to both the obligations, namely, of realising sale proceeds of Rs.20 crores and contracting Third Party Capital of Rs.50 crores is the burden of interest payable on the IIFL loan for the period in which there was a delay in meeting these conditions. Needless to say, for any loan, interest, being the time value of money, would continue to accrue. If the timelines to which Pashmina would like Ekta to be held were applied, it should be possible to compute the accrued interest on the IIFL Loan on a diminishing balance basis to account for the inflow of monies as and when the sale proceeds were realised. There is nothing on record to indicate such computation. A generic assertion of a generic amount said to have been incurred towards interest has been pleaded by Pashmina. That is not backed by any documentary basis to show what was the interest paid on the IIFL Loan during the period of alleged delay.

36. In the absence of specific pleading and specific documentation to indicate the accuracy of the interest amount purportedly payable under the Agreement for such delay, no fault can be found with the Learned Arbitral Tribunal's clear *prima facie* findings in the Impugned Order. Whether Ekta could at all successfully contend that no interest was at all paid to IIFL is a matter that can be considered by the Learned Arbitral Tribunal at the stage of the final hearing. At this stage, going by the evidence on hand and the material before the Learned Arbitral Tribunal, the question to be considered is whether any perversity is visited on the Impugned Order. My answer is in the negative.

Strength of Prima Facie Case:

37. At this *prima facie* stage, it is clear to me that the Learned Arbitral Tribunal has accurately assessed the strength of Ekta's claim of there having been no breach of the Essential Conditions to justify the Termination Notice. For its part, Pashmina has not made out a strong *prima facie* case of not having elected to treat the default as one necessitating termination. The Termination Notice was issued just around the onset of the Covid-19 pandemic. Ekta immediately moved the Section 9 Court. The Petition was even reserved for orders in 2020,

but went without a judgement for a gap of four-years. After that stage, the Section 9 Petition was converted into a Section 17 Application and the Learned Arbitral Tribunal has considered the case and eventually passed the Impugned Order.

38. Ekta, for its part, has moved with promptitude and has sought protective reliefs forthwith. Pashmina blames Ekta for not chasing and following up on an outcome in the Section 9 Petition. Be that as it may, such an element could only be relevant for the facet of balance of convenience, in the light of the delay in eventual consideration of protective relief. The gap between the enjoyment of benefits from the efforts made pursuant to the Agreement, and the Termination Notice is what needs to be seen for purposes of the strength of the *prima facie* case.

39. As late as December 2018, the parties jointly relaunched the project and the marketing materials reflected the brand name of both parties. It is in December 2018 that Pashmina allegedly closed the Project Costs Account, maintained jointly with Ekta and opened a new bank account on its own, without involving Ekta. It is at this stage that the relationship between the parties started deteriorating even while through 2019, the parties continued to co-sign various agreements for

sale. Even if one were to accept Pashmina's claim to have a right to run the project on its own, with Ekta merely providing development and construction services, what is evident is that as late as August 2019, sales were being jointly effected in accordance with the Agreement.

40. Towards the end of 2019, it is apparent that Ekta demanded that Pashmina release payments due to various vendors and contractors and also demanded consideration claimed by Ekta under the Agreement as being payable as of September 2019. This is when the disputes arose between the parties and eventually led to the Termination Notice being issued. In my opinion, when one looks at the totality of the factual matrix, the Termination Notice is clearly an afterthought and out of sync with the conduct of the parties in the preceding period, coinciding with the agreed deadlines and the eventual “delayed” compliance with the actions for which deadlines had been set. In my view, no fault can be found with the Learned Arbitral Tribunal returning a strong *prima facie* case in favour of Ekta, holding that the Termination Notice was not justified. The Learned Arbitral Tribunal appears to have been reasonable in its assessment of the strength of the *prima facie* case, and rightly did not think there was no basis to preserve and protect the subject matter of the arbitration agreement.

41. One contention by Mr. Jagtiani must be dealt with clearly. He would refer to the representation by Pashmina to JM Financial not just in the loan agreement of January 1, 2018 but also in the Mortgage Deed dated October 19, 2019, that no event has occurred which would entitle any person to terminate the Agreement. This, he would submit should be treated as a warranty about a third party having gained no such right. This contention has to only be stated to be rejected. An agreement can only be terminated by the parties to it. A representation made by one of the parties to the Agreement – by Pashmina – would obviously count as Pashmina's assurance that even as late as October 2019, Pashmina had perceived no basis to enjoy a right to terminate the Agreement. Therefore, the strength of the *prima facie* case is indeed emphasized and underlined by this factor, as has been rightly noticed by the Learned Arbitral Tribunal.

Consideration of Balance of Convenience:

42. This leads me to the next facet of the matter as to whether the sheer efflux of time during the period in which the parties awaited judgement on the Section 9 Petition could be regarded as undermining the balance of convenience against grant of relief to Ekta. Towards this end, it is apparent that the work carried out by Pashmina in the

interregnum relates to the terrace slab of 12-floor structures being cast for two of the three wings in Building No. 4, which had been at the level of the plinth foundation at the time of the Termination Notice. So also, for the third wing of Building No. 4, while excavation was going on at the time of the Termination Notice, construction of up to the seventh floor had been carried out by the time of the Impugned Order. Building No. 1 which had been erected by the time of the Termination Notice, has been finished in this period.

43. However, it is common ground that there is far greater development potential with three additional parcels of land having been added to the originally envisaged project with the additional land also being funded by Ekta. One commercial building, already envisaged in the existing sanctioned plans jointly developed by the parties, is yet to be constructed. Therefore, it is not as if the subject matter of preservation has been diluted. The question of balance of convenience is one of considering multiple options for balancing equities and considering the degree of inconvenience arising out of implementing each option.

44. With an estimated development potential of about 2,25,000 square feet said to be available in the expanded project (this is stated

across the bar on instructions and candidly said to be subject to correction) what is clear is that there is consideration value that is up for preservation. It would be most inconvenient to let such value be eroded, rendering the arbitration proceedings an academic exercise because a bailed out and financially-struggling developer would now find compliance with the measures inconvenient.

45. To preserve the same, the Learned Arbitral Tribunal has the fullest power within its means to deal with what would be the best possible protective relief. The preservation and protection envisaged by the Learned Arbitral Tribunal is not just over Building No.1 and Building No.4 which have been worked on during the interregnum of five years since the Termination Notice, but also over the commercial building and all the further and wider development potential envisaged and capable of being envisaged pursuant to the Agreement.

46. I am unable to agree with the extreme insinuation that the Impugned Order brings the project to a standstill. Far from it, Pashmina would be able to continue to implement the Project with Ekta and just as both have co-signed and executed various agreements for sale in the past, the same approach may be continued. Needless to say, any operational directions in this regard can well be sought from the

Learned Arbitral Tribunal, if it is felt that the grant of reliefs as drafted, would necessitate operational moulding.

47. What is apparent to me is that the Learned Arbitral Tribunal has found the intention behind the Termination Notice to be dubious and not supported by a strong *prima facie* case. It cannot be held that the equities would favour the party that is in breach. Not only is further activity due even under the existing jointly-developed business plan, but also there is further development potential on the lands aggregated by the parties in joint consultation with each other pursuant to the Agreement. Therefore, it is not fair to indicate that the Learned Arbitral Tribunal has conflated the strength of the *prima facie* case with the factor of balance of convenience. Instead, the implied reason by the Learned Arbitral Tribunal is that the strength of the *prima facie* case warrants preservation of the subject matter and there is nothing to indicate how it would be inconvenient to grant such preservative measures.

48. One cannot lose sight of Pashmina being in possession and enjoyment of the security deposit of Rs.30 crores. It cannot be said that it would be inconvenient to grant interlocutory relief. To hold that merely because the parties had to wait for four years for an outcome on

the Section 9 Petition, the party that moved the Section 9 Court could be deprived of protection citing sheer afflux of time, would put a premium on contractual misconduct.

49. Therefore, in my opinion, this is not a case of a blind conflation of the strength of the *prima facie* case with the presumption of balance of convenience. On the contrary, to argue that it would be inconvenient to allow the Agreement to be protected from abusive and baseless termination, would place a premium on wanton breach of the Agreement.

50. Therefore, factoring in developments in the interregnum, in my opinion, the scales would still tilt in favour of protecting Ekta from Pashmina lightly terminating the Agreement.

51. While much of the focus by Pashmina's Advocates has been on the manner in which the Learned Arbitral Tribunal has addressed issues, I cannot lose sight of the fact that while assessing whether a Section 17 Order is perverse, the Section 37 Court must examine if the Impugned Order is logical, fair, protective of the subject matter of the arbitration agreement, and thereby responsive to the jurisdiction conferred under Section 17 of the Act. The review does not entail ignoring any implied reasoning that is not explicitly set out in the

Impugned Order. The test instead, is to examine whether the outcome in terms of protective relief, of course backed by reasons, is something that no reasonable mind would have arrived at when examining the factual matrix examined by the arbitral tribunal.

52. It is well settled that an appeal is to be regarded as a continuation of the original proceeding. Unless there is a statutory requirement to the contrary, the powers of the appellate forum are co-extensive with the powers of a forum whose adjudication is under appeal⁴. Equally, an appellate Court exercising the power under Section 37 of the Act to review the exercise of discretion by an Arbitral Tribunal under Section 17 of the Act, would be well guided by the principles set out by the Supreme Court in ***Wander vs. Antox***. The Section 37 Court may interfere only if there is something perverse or implausible in the exercise of discretion. The following extract would suffice:

*14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. **In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions.** An appeal against exercise of discretion is said to be an appeal on principle. **Appellate court will***

⁴ *Jute Corporation of India Ltd. Vs. CIT – 1991 Supp 2 SCC 744*

not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage, it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion.

[Emphasis Supplied]

53. In a plethora of judgements, the aforesaid principles articulated in ***Wander vs. Antox*** have been followed and reiterated.

Conclusion:

54. In this view of the matter, having examined the Impugned Order and the material that had been available to the Learned Arbitral Tribunal, I see no reason to interfere with the Impugned Order.

55. The Petition is therefore ***dismissed***. Considering the length of time for which the proceedings have dragged on without either party being at fault, I refrain from imposing costs for this round of litigation on the principle that costs would follow the event. However, it is made clear that the Learned Arbitral Tribunal shall factor in the costs of this

round of litigation when it assesses costs when adjudicating the arbitration proceedings.

56. 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.]