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

**ARBITRATION APPEAL (L) NO. 9542 OF 2025
IN
INTERIM APPLICATION (L) NO. 20487 OF 2023
IN
ARBITRATION PETITION NO. 119 OF 2024**

1. Kapani Resorts Private Limited
Parsha Shaleen Road, Village Parsha,
PO. Kalath, Manali, Kullu,
Himachal Pradesh,
India – 175 131.
2. Virendra Kapani/Promoter
E-124, 2nd Floor, Grater Kailash,
Part 11, New Delhi,
India – 110 048.
3. Vaibhav Kapani/Promoter
E-124, 2nd Floor, Greaser Kailash,
Part 11, New Delhi,
India – 110 048.

..Appellants

V/s.

Manmohan Kapani
609, River Creast, Dr. Melean V-22101
through special power of attorney Chandni
Sood, daughter of Mr. Sumant Sood resident
of D-190, SF, Defence Colony,
New Delhi 110 024, India.

..Respondent

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**Mr. Nirman Sharma a/w. Mr. Rupesh Gette, Mr. Bhounik Nayyar
Mr. Avesh Ganja, Mr. Sandesh Panchal i/b Satyaki Law Associates
for the Appellants.**

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

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CORAM : **ALOK ARADHE, CJ AND**
M. S. KARNIK, J.

RESERVED ON : **01.04.2025**

PRONOUNCED ON : **25.04.2025**

JUDGMENT (*Per M. S. Karnik, J.*)

1. This Arbitration Appeal under Section 37(1)(b) of the Arbitration and Conciliation Act, 1996 ('the Arbitration Act' for short) challenges an order dated 18.03.2025 passed by the learned Single Judge of this Court in Arbitration Petition No. 119 of 2024. The Arbitration Petition was filed under Section 9 of the Arbitration Act.

2. The agreement has an arbitration clause, and its existence is not disputed. Learned Single Judge for the reasons mentioned in the impugned order has protected the respondent (original petitioner in the Arbitration Petition) 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.”

3. Learned Single Judge ordered that the aforesaid interim reliefs shall hold the field until completion of the arbitration proceedings. It was held that the Arbitral Tribunal shall be entitled to further vary, modify 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.

4. Mr. Nirman Sharma, learned counsel for the Appellants in challenge to the impugned order of the learned Single Judge placed the following facts for our consideration. Appellant Nos.2 and 3 herein (respondent Nos.2 and 3 before the learned Single Judge) and the respondent herein are the share-holders of the appellant No.1-Kapani Resorts Private Limited having 19%, 51% and 13% shareholding each of the issued and paid up capital of appellant No.1-Kapani Resorts. The respondent (referred to as ‘Manmohan’ hereinafter) was allotted 13% of the share-holding of Kapani Resorts on 26.05.2021, being 8,53,416 shares at the face value of INR 30/- per share.

5. On 11.02.2022, the parties herein signed Share Subscription

and Shareholders Agreement dated 11.02.2022 ('the Agreement' for short) in terms of which (Clause 2), Manmohan was to infuse a sum of INR 7,50,00,000/- (equivalent to USD 1 million at that time) into Kapani Resorts in two tranches, and for which he was to be issued 51,72,412 Class B equity shares in two tranches in Kapani Resorts, thus increasing his share holding from 13% to 51%.

6. Some of the important clauses of the Agreement to which our attention was invited to by learned counsel for the appellants are as under: -

"2.1 Subject to, and in accordance with, the terms of this Agreement (including but not limited to the satisfaction or waiver (if applicable) of the conditions precedent), and in reliance of the undertakings, covenants, warranties and indemnities provided hereunder, on the First Tranche Closing Date, the Company shall issue First Tranche Subscription Shares to the Investor for a consideration of INR 2,45,25,806/- (Rupees Two Crore Forty Five Lakh Twenty Five Thousand Eight Hundred and Six only) free and clear of all Encumbrances and together with all rights, title and interest now and hereafter attaching to such Subscription Shares, in the manner provided in this Agreement.

2.2. Subject to, and in accordance with, the terms of this Agreement (including but not limited to the satisfaction or waiver (if applicable) of the conditions precedent), and in reliance of the undertakings, covenants, warranties and indemnities provided hereunder, on or before the Second Tranche Closing Date, the Company shall, only upon express consent of the Investor, issue to the Investor Second Tranche Subscription Shares for a consideration of INR 4,91,25,262/- (Rupees Four Crore Ninety One Lakh Twenty-Five Thousand Two Hundred and Sixty Two only) free and clear of all Encumbrances and together with all rights, title and interest now and hereafter attaching to such Subscription Shares, in the manner provided in this Agreement. It is hereby clarified that the Investor has the

sole discretion but not an obligation to purchase the Second Tranche Subscription Shares.

2.4 The full Subscription Consideration shall be utilized by the Company towards payment of the OTS Amount in the manner set out in the Schedule C, hereto.

2.5. It is hereby expressly agreed and acknowledged by the Parties that the Subscription Consideration shall only be utilized for payment of the OTS Amount and no other purpose whatsoever.

4.2.1 Any claim for indemnity against the Indemnifying Party under Clause 4.1 will be made by an Indemnified Party by notice in writing to the Indemnifying Party ("Claim Notice) setting out details of the alleged breach and the loss suffered or incurred by the Indemnified Party, the amount or an estimate of the amount claimed in respect of the loss (if such amount is known or such estimate can be determined) ("Claim Amount) and be submitted together with documents, if any, that are in possession of the Indemnified Party"

5.1.1 One the First Tranche Closing Date, the following actions shall be take place:

(iii) The Company shall, and the Promoters shall procure that the Company shall convene a meeting of the Board of the Company to approve and authorize the following (in form and substance acceptable to the Investor):

- the amended Articles of Association of Memorandum of Association to incorporate provision of this Agreement therein:*
-"*

7. On 15.02.2022 and 24.02.2022, Manmohan remitted amounts of INR 2,50,00,000/- and INR 5,00,00,000/- respectively to the account of Kapani Resorts, thus totalling a remittance of INR 7,50,00,000/-, which at the time, was an equivalent of USD 1 million. In terms of the Agreement, it had been agreed upon that this amount of INR 7,50,00,000/- would be utilised by Appellant No.1 to settle an outstanding loan owed by Kapani Resorts to

SIDBI.

8. According to learned counsel for the Appellants, in terms of the understanding between the parties, the monetary value of Manmohan's shareholding would increase from 13% to 51% at a face value of INR 38.62 per share. This valuation was arrived at in terms of the valuation report dated 27.01.2022 prepared by an independent valuer. Learned Counsel submits that Manmohan with full knowledge that each share was valued at INR 38.62, had himself requested that the shares be devalued so that his investment of INR 7,50,00,000/- could be adjusted to meet the agreed shareholding from 13% to 51%. As Manmohan was insistent on the issued shares only at a devalued rate, disputes arose between the parties, which led to the filing of multiple proceedings against one another. Manmohan had prior in point of time filed a dispute before the National Company Law Tribunal (NCLT) being a Company Petition under Sections 241-242 of the Companies Act, 2013 alleging oppression and mismanagement. Learned counsel submitted that Manmohan having pursued the remedy before the NCLT, he simultaneously approached this Court through the aforesaid Arbitration Petition to initiate the same subject matter, which is impermissible. It is submitted that despite being aware of the pendency of the suit before the Civil Judge, Manali, H.P, Manmohan did not disclose this fact while filing Arbitration Petition and suppressed the material fact from this Court. Subsequently, Manmohan withdrew the petition and continued proceedings before this Court, according to the learned counsel, effectively engaging in forum shopping. The appellants

objected to this approach on the ground that jurisdiction over shareholder disputes is expressly barred under Section 430 of the Companies Act, 2013 and lies exclusively with the NCLT. Manmohan having realised that he had a better chance in Arbitration Petition withdrew Civil Suit to pursue the Arbitration Petition. The Arbitration Petition was contested by the appellants.

9. Learned counsel for the appellants submitted that the impugned order is in excess of jurisdiction conferred under Section 9 of the Arbitration Act of 1996 as it restrains the appellants from alienating the properties that are not the subject matter of this dispute. It is submitted that the learned Single Judge had no jurisdiction to adjudicate the Arbitration Petition, as disputes between the parties are shareholder disputes governed by Sections 241-242 of the Companies Act, 2013. Learned counsel submitted that the learned Single Judge in granting interim reliefs that hold the field until completion of arbitral proceedings has encroached upon the jurisdiction of the arbitral tribunal under Section 17 of the Arbitration Act of 1996.

10. Mr. Sharma relied upon the decision of this Court in **Future Corporate Resources Pvt Ltd Vs. Edelweiss Special Opportunities Fund and Anr**, 2022 SCC OnLine Bom 3744 to contend that there is delay on the part of Manmohan in filing the Arbitration Petition and hence on the ground of delay itself, the learned Single Judge ought not to have ordered interim measures.

11. On the other hand, Mr. Rohan Rajadhyaksha appearing on behalf of respondent-Manmohan invited our attention to the

findings of the learned Single Judge in support of his submissions. He submits that there is no reason to warrant interdiction with the impugned order in exercise of this Court's powers under Section 37(1)(b) of the Arbitration Act of 1996 since the learned Single Judge has provided for measures during the pendency of the arbitral proceeding which by its very nature is necessary to protect Manmohan's interest in the facts and circumstances of the present case.

Consideration

12. We have carefully perused the impugned order and the paperbook with the assistance of learned counsel. Our attention is invited to the relevant clauses of the agreement and the documents in support of the respective cases of the parties.

13. The parties entered into Restated SSA Cum SHA dated 11.02.2022 pursuant to which Manmohan invested USD 1 million equivalent to approximately INR 7,50,00,000/- in the company – Kapani Resorts, which would increase his equity shareholding in Kapani Resorts from 13% to 51%. This was to enable the Kapani Resorts to service its debt obligations under One Time Settlement (OTS) with Small Industries Development Bank of India (SIDBI) to protect Kapani Resorts from default. Virendra-respondent No.2 and Vaibhav-respondent No.3 were guarantors of the amounts owed by Kapani Resorts for discharging the dues owed to SIDBI. As a result of such infusion of funds by Manmohan, Virendra and Vaibhav were relieved of their guarantee obligation. The assets of Kapani Resorts and the property located at 124, Block-E, Greater

Kailash, Part II, New Delhi (“Greater Kailash Property” for short), the residential property of Virendra and Vaibhav that had been mortgaged to SIDBI was released.

14. Instead of issuing the shares, the funds were used to release the Greater Kailash Property from mortgage which was the personal property of Virendra and Vaibhav. There is no dispute that there is an arbitration clause contained in the agreement. Admittedly, Manmohan infused the sum of INR 7,50,00,000/- which was utilised for meeting the obligations owed by Kapani Resorts under the OTS with SIDBI. The shares admittedly were not allotted to Manmohan in terms of the agreement.

15. Let us see, if there is some plausible explanation by Kapani Resorts as to the reason why the shares are not allotted. Manmohan addressed a legal notice on 07.06.2022 to the appellants calling upon them to fulfill and comply with their obligation under the Restated SSA Cum SHA that allotted 51,72,412 equity shares of Kapani Resorts to Manmohan. Right from the very first notice, Manmohan has always sought performance of the Restated SSA Cum SHA by addressing legal notice for issuance of shares. Manmohan approached NCLT at Chandigarh on 27.07.2022 by filing a Company Petition. A perusal of the relief sought would show that in addition to usual relief sought in oppression/mismanagement, Manmohan had *inter alia* sought performance of Restated SSA Cum SHA in as much as prayer clause 9(1)(i) seeks an order directing issuance of 51,72,412 Class B shares to him and to record the correct shareholding in the Register of Members i.e. to reflect Manmohan’s

51% share in Kapani Resorts. Kapani Resorts in its reply filed No Due Certificate dated 15.03.2022 issued by SIDBI along with Memorandum of Satisfaction of Charge dated 12.02.2022 to full closure of SIDBI loan. It is pertinent to note that order dated 24.11.2022 passed by the NCLT, Chandigarh while directing maintenance of status quo regarding shareholding pattern, records the grievance of Manmohan that despite payment of moneys, Kapani Resorts had not issued said shares. Prima facie, this stand of the Appellants appears not bonafide. The money invested by Manmohan is utilised by the Appellants. Obviously if Manmohan was to be issued 51% shares, the control of Kapani Resorts would go to Manmohan, which was till then with Virendra & Vaibhav. Though Manmohan's money is utilised, not a single share is allotted to Manmohan. There was no attempt on the part of the Appellants to allot shares equivalent to even what according to the Appellants was Manmohan's entitlement. Such explanation by the Appellants is not at all plausible. Learned Counsel for the Appellants submits that the dispute arose because Manmohan himself requested that the shares be devalued so that his investment of Rs.7,50,00,000/- could be adjusted to meet the agreed shareholding from 13% to 51%.

16. The Scope of Section 9 of the Arbitration Act is very broad; the Court has discretion to grant a wide range of interim measures of protection "as may appear to the Court to be just and convenient", though such discretion has to be exercised judiciously and not arbitrarily. The Court is, no doubt, guided by the principles which Civil Courts ordinarily employ for considering

interim relief, particularly, Order 39 Rules 1 and 2 and Order 38 Rule 5; the court, however, is not unduly bound by their texts. This Court in **Nimbus Communication Limited Vs. Board of Control for Cricket in India & Anr.** in Arbitration Petition No. 167 of 2012 observed that the Court, while exercising powers under Section 9 must have due regard to the underlying purpose of the conferment of the power under the Court which is to promote the efficacy of arbitration as a form of dispute resolution. This Court observed thus:

“Just as on the one hand the exercise of the power under Section 9 cannot be carried out in an uncharted territory ignoring the basic principles of procedural law contained in the Code of Civil Procedure 1908, the rigors of every procedural provision in the Code of Civil Procedure 1908 cannot be put into place to defeat the grant of relief which would subserve the paramount interests of justice. A balance has to be drawn between the two considerations in the facts of each case.”

17. We may also rely on the decision of this Court in **Jagdish Ahuja & Anr. Vs. Cupino Ltd.**, 2020 SCC OnLine Bom 849, which in Para 7 holds thus:

“In an appropriate case, where the court is of the view that there is practically no defence to the payability of the amount and where it is in the interest of justice to secure the amount, which forms part of the subject matter of the proposed arbitration reference, even if no case strictly within the letter of Order 38 Rule 1 or 2 is made out, though there are serious allegations concerning such case, it is certainly within the power of the court to order a suitable interim measure of protection. As we have noted above, the amount is either to be deposited into the treasury in accordance with the agreement between the parties or if, for any reason, it is not payable to the revenue towards

the Respondent's tax liability, as is the case of the Appellants here, it is to be paid to the Respondent itself as part of the price of debentures. In fact, when these two options were posed by the learned Single Judge to the Appellants' counsel, in fairness both conceded that there was no third option."

18. Thus, Manmohan has made investment of USD 1 million in Kapani Resorts. This amount was utilized for meeting the obligation of Kapani Resorts under the OTS with SIDBI. Though this amount was invested, Kapani Resorts have not allotted any shares to Manmohan. An attempt was made by learned counsel for Kapani Resorts to justify the non-allotment of the shares, the reasons which we do not at all find convincing. As observed by learned Single Judge, Manmohan has withdrawn the proceedings from the NCLT and that there are no parallel oppression and mismanagement proceedings underway in the NCLT. Virendra and Vaibhav who are managing Kapani Resorts, were personally liable to repay the debts owed by Kapani Resorts to SIDBI. We are in agreement with the learned Single Judge that but for the infusion of the funds by Manmohan, Greater Kailash property would have continued to be mortgaged with SIDBI. The funds infused by Manmohan in Kapani Resorts was utilised to repay the debt of SIDBI and the guarantee in respect of Greater Kailash property was released. Thus, Manmohan's investments helped release of the personal residential assets of Virendra and also personal guarantees of Virendra and Vaibhav. Manmohan on his part fulfilled the obligations whereas Virendra and Vaibhav failed to perform their corresponding obligations.

19. The learned Single Judge has after examining the audited financial statements of Kapani Resorts found that the funds infused by Manmohan have been deployed with SIDBI. The entire amount is still shown in the balance sheet of Kapani Resorts as “Share application money pending allotment”, this in order to deprive Manmohan all the benefits. The learned Single Judge, in our opinion, is justified in *prima facie* finding that there is a clear misappropriation of the funds as the share application money should not be used for anything other than adjustment against share capital. The shares were not allotted within the period of 60 days from 11.02.2022 and 22.02.2022 in terms of Section 42(6) of the Companies Act. Kapani Resorts was then liable to refund the amount paid by Manmohan within 15 days of the deadline provided by the Companies Act. Having noted that the financial condition of Kapani Resorts is precarious, the learned Single Judge was justified in forming an opinion that the interest of Manmohan needs to be protected. Manmohan having made out a strong *prima facie* case, we see no reason to interfere with the order granting protective reliefs in favour of Manmohan. The order passed by the learned Single Judge is well considered one. We see no reason to interfere in this appeal with the impugned order under Section 37 of the Arbitration Act in the limited jurisdiction that we have.

20. Learned counsel for the petitioner raised objection to the nature of protection granted by the learned Single Judge even as regards the Greater Kailash property, which is the personal property of Virendra and Vaibhav. We are however satisfied with the reasons

provided for by the learned Single Judge as to why such a protective measure was necessary, having regard to the manner in which the money invested by Manmohan was used for the personal gains of Virendra and Vaibhav. Learned Single Judge has provided that if the funds are deposited in terms of the order passed, Kapani Resorts shall have leave to approach this Court for vacating the stay imposed on Virendra and Vaibhav in relation to alienating any interest in Greater Kailash property.

21. We do not find any merit in the Appeal. The Appeal is **dismissed.**

(M. S. KARNIK, J.)
Amk

(CHIEF JUSTICE)