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

IN ITS COMMERCIAL DIVISION

COMMERCIAL ARBITRATION PETITION (L) NO. 3903 OF 2023

Mohammed Ali M. Sali (since deceased)
Through Legal Heirs (a) Fatima Nalakath
Sahusintavide & Ors. ...Petitioners

Versus

Rajaram Chavan Real Estate Private Limited ...Respondent

WITH
INTERIM APPLICATION (L) NO. 4575 OF 2023
IN
COMMERCIAL ARBITRATION PETITION (L) NO. 3903 OF 2023
ALONG WITH
COMMERCIAL ARBITRATION PETITION (L) NO. 5353 OF 2023

Shadab Y. Mukadam ...Petitioner

Versus

Mohammed Ali M. Sali (since deceased)
Through Legal Heirs (a) Fatima Nalakath
Sahusintavide & Ors. ...Respondents

Mr. E.A. Sasi *a/w. Tejas Shinde, for Petitioner in CARBPL/3903/2023.*

Mr. Mutahhar Khan *i/b. Lokesh Zade for Petitioners in CARBPL/5353/2023.*

Mr. Simil Purohit, *Senior Advocate a/w. Mr. Rishikesh Soni i/b. Ashok Purohit & Co., for Respondent No.2*

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CORAM : SOMASEKHAR SUNDARESAN, J.
RESERVED ON : JANUARY 17, 2026.
PRONOUNCED ON : MARCH 5, 2026.

JUDGEMENT :

1. The Commercial Arbitration Petition (L) No. 3903 of 2023 is a Petition filed under Section 37 of the Arbitration and Conciliation Act, 1996 ("***the Act***"), challenging orders passed by the Learned Arbitral Tribunal on February 14, 2019 ("***First Impugned Order***") and December 15, 2022 ("***Second Impugned Order***"), under Section 17 of the Act (collectively, "***Impugned Orders***"). This Petition is filed by the legal heirs of the original Petitioner ("***Owner***"), late Mohammed Ali M. Sali, who are aggrieved by the Learned Arbitral Tribunal refusing to hand over the possession of 16 flats developed by the Respondent, Rajaram Chavan Real Estate Private Limited ("***Developer***"), as an interlocutory measure pending conduct of the arbitration proceedings. This Petition is referred to as "***Owner's Petition***".

2. The Commercial Arbitration Petition (L) No. 5353 of 2023 is also a Petition filed under Section 37 of the Act, impugning the same Impugned Orders, and is filed by Flat Purchasers led by Mr. Shadab Y. Mukadam, a flat purchaser, seeking a direction for possession of flats

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legitimately acquired by them under validly executed registered agreements with the Owner, which have been withheld by the Developer, with such denial of possession not having been interfered with by the Learned Arbitral Tribunal. This Petition is referred to as the "***Flat Purchasers' Petition***". An Intervention Application being Interim Application No. (L) 4575 of 2023 came to be filed by the Flat Purchasers in the Owner's Petition.

3. Both the captioned Section 37 Petitions have been heard together. By consent of the parties, they were taken up for final hearing. These matters were originally heard in 2025 along with ten connected petitions under Section 9 of the Act filed by the Flat Purchasers, along with Review Petition No (L) 20967 of 2022 in Arbitration Petition No. 769 of 2017, an earlier Section 9 Petition of the Flat Purchasers; an Interim Application No. (L) 36224 of 2024, being an intervention application filed by tenants of the Owner in Commercial Arbitration Petition No. 128 of 2017, a disposed of Section 9 Petition filed by the Owner against the Developer; and a connected contempt petition of the Tenants. This was heard as per the then applicable roster and reserved, and thereafter, due to efflux of time, clarifications were sought from the parties and de-reserved.

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4. The parties also indicated that they were in the process of reaching a potential settlement, which would work out the matter entirely. The matters were de-reserved and set for hearing afresh. However, as it transpired, the parties have been unable to settle their disputes and differences and requested the Court to hear the matter and adjudicate the captioned Petitions. The matters were taken up as per the extant roster for hearing in November 2025 on a day-to-day basis.

5. In December 2025, the parties requested that the matter be stood over to enable them to pursue and conclude a settlement, but in January 2026, the parties jointly indicated that settlement had remained elusive and requested that the matters be heard and adjudicated by this Court. Therefore, the Section 37 Petitions were heard as per the extant roster and are being adjudicated finally by this judgement. The parties agreed that the Section 37 Petitions could be heard and disposed of, leaving the parties to move the other proceedings before the relevant benches having roster in those matters.

<u>Context and Factual Background:</u>

6. At the heart of the relationship and disputes among the parties is a redevelopment project contracted between the Owner and the Developer by way of a Joint Development Agreement dated August

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20, 2009 ***("JDA").*** The JDA envisaged the development of land bearing CTS No. 372/A (part) and CTS No. 372/B situated in Kurla, Mumbai, admeasuring about 3,000 square metres ***("Subject Land").*** The Developer made a refundable and recoverable advance payment of Rs. 35 lakhs to the Owner and the Developer was to have a lien on the Subject Land. The Developer had contracted to provide 4,500 square feet to the existing 22 tenants of the Owner; 3,000 square feet to a tenant Mr. Pandurang Wagh ("***Wagh***"); and in addition, the Owner would be entitled to 50% of the free sale component arising out of the development potential on the reserved area. Therefore, in the aggregate, 7,500 square feet of developed area was attributable to the tenants of the Owner.

7. Wagh was an occupant of a structure on the portion of land that had been reserved for a recreational ground under the applicable development plan. Currently, that structure has been demolished. The Owner and Developer have disputes over Wagh's entitlement and the approach to de-reservation of the plot and the accrual of rights from the reserved land should it not be de-reserved.

8. The JDA provided that unless and until the Owner discharges his share of the construction costs for the component attributable to the

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tenants' rehabilitation, the Owner would be prohibited from selling 25% of the free sale component falling within the Owner's entitlement. The balance 75% of the free sale component falling in the Owner's entitlement could be sold by the Owner, but the sale proceeds would need to be first utilized towards discharging the amounts due to the Developer.

9. Until the entire amounts due were paid by the Owner to the Developer, the Owner was prohibited from creating any third-party rights in the aforesaid 25% component. The Developer was also entitled to a lien and charge on the Owner's share of the free sale component to the extent of the amounts owed by the Owner to the Developer. Upon failure by the Owner to discharge his obligations, the Developer was entitled to sell the portion of the Owner's share at Rs. 5,000 per square foot to recover the outstanding amount.

Allocation in 2013:

10. Pursuant to the JDA, the redevelopment was undertaken. On September 4, 2013 the Developer addressed two letters to the Owner, one of which specifically demarcated the flats that would fall within the entitlement of the Owner and the Developer respectively ("***Allocation Confirmation Letter***"). The Developer also identified two lien flats,

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which were meant not to be sold by the Owner in terms of the JDA. In these letters, the Developer specifically identified sixteen flats, namely Flat Nos. 101, 103, 104, 109 and 111, and Flat Nos. 201 to 211 ("***Subject Flats***") as falling within the Owner's entitlement. Two flats, namely Flat Nos. 111 and 207 were identified as flats that the Owner was not entitled to sell ("***Lien Flats***"). In other words, admittedly, under the JDA, according to the Owner, the Subject Flats were within the Owner's entitlement to sell while the Lien Flats were subject to a prohibition on sale by the Owner.

11. In 2013 and 2014 the Owner and the various Flat Purchasers executed and registered Agreements for Sale in respect of the Subject Flats falling within the Owner's entitlement in the free sale component with full liberty to sell them. The Owner received part consideration and also confirmed that the balance consideration was payable only against delivery of possession of the flats. The Lien Flats were not covered by the sales effected in 2013 and 2014.

<u>Confirmation in 2016:</u>

12. On March 9, 2016, the Owner enquired with the Developer about the status of the completion of construction and receipt of the occupation certificate, since the Flat Purchasers had been making

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enquiries. In reply, on April 29, 2016 ("***OC Confirmation Letter***") the Developer wrote to the Owner requesting the Owner *to inform the Flat Purchasers* that *the Occupation Certificate would be received within 15 days*. Indeed, the Occupation Certificate was received on May 4, 2016.

Litigation Among the Parties:

13. On November 28, 2016, the Owner addressed a letter to the Developer, calling on the Developer to hand over possession of the flats to be delivered to the tenants and the Subject Flats to be delivered to the Flat Purchasers. In reply, the Developer asserted that the Owner owed a sum of Rs. 1.75 crores as outstanding and raised other disputes.

14. This led to the Owner filing Commercial Arbitration Petition No. 128 of 2017 against the Developer, invoking Section 9 of the Act ("***Owner's Section 9 Petition***"). The Owner demanded that the obligation to deliver flats owed to the tenants ought to be discharged and possession ought to be handed over. The Flat Purchasers sought to intervene in the Owners' Section 9 Petition by filing Chambers Summons (CHSCD/45/2017) on March 10, 2017. The Flat Purchasers asserted that they had been promised possession by December 31, 2014 and had yet not been given any possession.

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15. A Learned Single Judge of this Court passed an order dated April 5, 2017 in the Owner's Section 9 Petition giving directions to the Owner and the Developer in respect of the obligations owed to the tenants. The order also held that the Flat Purchasers could not intervene, not being parties to the arbitration agreement between the Owner and the Developer, indicating that they would need to pursue their independent remedies.

16. On May 26, 2017, a consent order was passed in the Owner's Section 9 Petition, which, among others, led to the pending disputes between the Owner and the Developer in relation to possession of the Subject Flats, and any adjustment or reversals claimed on those transactions being referred to arbitration ***("2017 S.9 Order")***. The 2017 S.9 Order also directed the parties to maintain *status quo* in relation to the Subject Flats until the Arbitral Tribunal is constituted in the matter and is able to consider interlocutory arrangements and pass appropriate orders.

17. Separately on August 4, 2017, the Flat Purchasers filed Commercial Arbitration Petition No. 553 of 2017 under Section 9 of the Act ("***Flat Purchasers' Section 9 Petition***"), against the Owner and

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the Developer, seeking to be put in possession of the Subject Flats either directly or as an agent of the Court Receiver.

18. On October 13, 2018, the Owner filed an appeal against various orders passed in the Owner's Section 9 Petition including the 2017 S.9 Order. This Appeal came to be dismissed as an order of disposal passed by consent was held to be not appealable.

First Impugned Order:

19. On October 15, 2018, the Learned Sole Arbitrator was appointed to adjudicate the disputes between the Owner and the Developer. This is what eventually led to the Impugned Orders and the Section 37 Petitions now under consideration. In the arbitral proceedings, on February 14, 2019, the First Impugned Order came to be passed, whereby the interim reliefs sought by the Owner against the Developer were dismissed. The reliefs sought had been in relation to de-reservation of the area reserved for recreational ground; and the handing over of possession of the Subject Flats.

20. As regards the second relief about possession of the Subject Flats, the Learned Arbitral Tribunal held that the Developer was entitled to sell flats out of the Owner's free sale component if the Owner failed to

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pay amounts owed by him. The amounts owed towards construction costs and other obligations under the JDA were noticed. It was held that the Owner's contentions about how the amounts paid to the Developer and also recovered by the Developer by sale of flats out of the Owner's entitlement in the course of the Owner's Section 9 Petition, had led to the Developer having excess security than the amounts owed, is a matter that could only be determined upon final adjudication. It was held that the Owner's precise liability could not be quantified at an interim stage.

21. In a nutshell, the Learned Arbitral Tribunal accepted the Developer's contention that if the Owner were permitted to deal with the Owner's free sale component, it would render the provisions of the JDA otiose. Therefore, the *status quo* agreed to by consent in the Owner's Section 9 Petition, was left undisturbed.

Flat Purchasers' Section 9 Petition:

22. Meanwhile, just about three weeks later, by an order dated March 7, 2019 ("***FP Section 9 Disposal Order***") the Flat Purchasers' Section 9 Petition was disposed of by a Learned Single Judge. The Court found that the Flat Purchasers were sandwiched in the litigation between the Owner and the Developer. It was held that at all material times, the Developer had always been aware of the rights that had been

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created in favour of the Flat Purchasers. It was found that the Flat Purchasers indeed had legitimately acquired rights to the Subject Flats and had paid substantial sums. The Flat Purchasers had contended that the Developer had permitted the Flat Purchasers to enter into the Subject Flats in December 2015 to undertake interior work, and even if this is disputed by the Developer it was not relevant since the Developer was not oblivious to the entitlements of the Flat Purchasers.

23. It was held that the Developer had not alleged that the agreements with the Flat Purchasers were illegal and indeed no steps had been taken by the Developer to challenge the agreements with the Flat Purchasers. It was also noticed that the claim of the Developer was purely a money claim. Only because the *status quo* order contained in the 2017 S.9 Order had been passed by consent, and it had not been disturbed by the Learned Division Bench, no relief was granted by the Section 9 Court.

24. The Flat Purchasers then filed Interim Applications in the Owner's Section 9 Petition seeking a review of the 2017 S.9 Order, to the limited extent of the order directing maintenance of *status quo* on the Subject Flats until resolution of disputes in the arbitration. In these Applications, a Learned Single Judge of this Court passed an order

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dated March 17, 2022, clarifying that the 2017 S.9 Order could not possibly come in the way of the Flat Purchasers independently establishing their rights in any proceedings that they instituted. It was held that since the Flat Purchasers were not parties to the Section 9 Petition initiated by the Owner, no order made by consent in those proceedings could bind the Flat Purchasers.

25. Separately, the Flat Purchasers filed an Appeal against the FP Section 9 Disposal Order. This came to be disposed of on November 28, 2022 by a Learned Division Bench of this Court, stating that the Flat Purchasers may move an appropriate Section 17 Application before the Learned Arbitral Tribunal which would be decided notwithstanding the FP Section 9 Disposal Order.

Owner's Second Section 17 Application:

26. The Owner filed a fresh Section 17 Application before the Learned Arbitral, which was dismissed by the Second Impugned Order dated December 15, 2022. The Learned Arbitral Tribunal held that the relief sought had already been dealt with by the First Impugned Order. Dealing with whether there had been any change in circumstances, the Learned Arbitral Tribunal held that the findings of the Court in the FP Section 9 Disposal Order, the filing of a statement of defence by the

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Developer, which the Owner contended, established the admission of receipt of monies in excess of what was claimed against the Owner, and the undue hardship faced by the Flat Purchasers would not constitute a change in circumstances.

27. The Learned Arbitral Tribunal reiterated that it would not be possible at the interim stage to ascertain the exact scope of amounts owed by the Owner to the Developer and therefore, it could not be ascertained if the Developer was enjoying security in excess of its monetary claim. Therefore, it was held that there is no change in circumstances warranting re-consideration of reliefs in the fresh Section 17 Application filed by the Owner.

Commercial Suit by a Flat Purchaser:

28. Meanwhile, in parallel, one of the Flat Purchasers filed Commercial Suit (L) No. 8458 of 2023 which led to a Learned Single Judge of this Court granting relief of possession of the Subject Flat in that case. It was explicitly held by an order dated July 20, 2023 ***("Commercial Suit Order")*** that the direction sought by the Flat Purchaser to be put in possession as an agent of the Court Receiver does not adversely affect the claim of the Developer. It was explicitly held that the interim arrangement between the Owner and the Developer

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could not be a basis for depriving the Flat Purchaser of possession of the flat legitimately acquired by him. In any case, it was held that the direction to put the Flat Purchaser in possession as an agent of the Court Receiver would not be an order granting full possession and could not disturb the interim arrangement between the Owner and the Developer, and that nothing in the orders passed by this Court would operate as a hurdle for putting the Flat Purchaser in possession as an agent of the Court Receiver.

29. Examining the registered Agreement for Sale between the Owner and the Flat Purchaser, as indeed the Allocation Confirmation Letter, it was found that the Developer had acknowledged the Flat Purchaser's rights, and a strong *prima facie* case had been made out and that failure to grant interim relief would make the Flat Purchaser suffer by having to pay equated monthly instalments ("***EMIs***") on the home loan to finance the Subject Flat, without enjoyment of possession of the Subject Flat. The Court observed that the other Flat Purchasers would need to make out their own case independently.

Commercial Suit Appellate Order:

30. Aggrieved by the Commercial Suit Order, the Developer filed an Appeal (L) No. 20428 of 2023 which was dismissed by Learned

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Division Bench, by an order dated September 12, 2023 ***("CS Appellate Order")***. The CS Appellate Order recorded that the order of *status quo* was an order passed by consent between the Owner and the Developer, and that the registered Agreement for Sale predated the *status quo* order. The Allocation Confirmation Letter clearly recognised the Owner's entitlement to deal with the Subject Flat. The Developer was always aware of the Owner dealing with the flats and took no steps to restrain the Owner, should the Developer have felt entitled to so restrain him. While the Developer's claim may be denominated as a claim for area, it was effectively a money claim, as already observed by two benches, which the Learned Division Bench was in agreement with. In any case, no steps had been taken for adjudication of the area by the Developer and it was found that the Flat Purchaser had an "*overwhelmingly strong prima facie case*".

31. It was held that before claiming entitlement to the Subject Flat, it was incumbent on the Developer to establish default on the part of the Owner of an obligation owed to the Developer for him to appropriate the area from out of the Owner's share. Effectively, it was held that the Developer was attempting to deprive the Owner of his entire entitlement to claim possession of flats already legitimately sold to third parties, solely upon the contention of the Developer that the

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Owner is in default. Therefore, it was held that the Developer's claim for possession of the flat was ex facie untenable and not lawful. Paragraphs 16 to 18 of the CS Appellate Order is emphatic and clear in how it crystallises the factual situation and how competing claims stand in relation to one another. The Developer was directed to hand over the keys to the Subject Flat to the Court Receiver in four weeks, who would place the Flat Purchaser in possession as an agent of the Court Receiver without payment of any royalty, as directed in the Commercial Suit Order.

32. The CS Appellate Order was challenged in Special Leave Petition (C) No. 21725 of 2023 before the Supreme Court. It was dismissed as withdrawn, with the Court noting the Developer's submission that it would take up all contentions available in law so far as other persons similarly situated are concerned.

<u>Contentions of the Parties:</u>

33. It is against the aforesaid chequered factual backdrop that the contentions in the respective Section 37 Petitions need to now be considered by me.

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34. The short question that falls for consideration is whether, taking into account the scope of review under Section 37 of the Act, it can be said that the Learned Arbitral Tribunal was justified in passing the Impugned Orders, in the manner that it did. Needless to say, the jurisdiction of a Section 37 Court is rather specific and narrow and it is not open to a Section 37 Court to substitute a plausible view adopted by the Learned Arbitral Tribunal with a view that appears to be more plausible to the Section 37 Court. Unless the interlocutory arrangement appealed against is considered perverse and arbitrary or falls foul of any other facet of what a reasonable interlocutory arrangement would be in the facts and circumstances presented to the Learned Arbitral Tribunal, the Section 37 Court would not ordinarily intervene, bearing in mind the principles laid down in ***Wander v. Antox***[1], which has been repeatedly followed in the Section 37 jurisdiction.

35. In this context, I have heard at length, Mr. Mutahhar Khan, Learned Advocate on behalf of the Flat Purchasers, Mr. E. A. Sasi, Learned Advocate on behalf of the Owner and Mr. Simil Purohit, Learned Senior Advocate on behalf of the Developer. With their assistance, I have examined the material on record.

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

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36. Mr. Khan would contend that the Impugned Orders are *ex facie* perverse in their interpretation of the JDA. He would submit that the agreement between the parties was explicit in its terms as to what the Owner's entitlement to the free sale component would be and how any lien over such component would be structured between the parties. The Developer's lien stands extended over all the free sale Subject Flats, which is contrary to the very provision of the contract and ignores vital documentary evidence in the form of the Allocation Confirmation Letter and the OC Confirmation Letter. The Owner had sold the flats to the Flat Purchasers with full knowledge of the Developer and it would follow that those sales were legitimate and the Owner ought not to be exposed to an unlimited security interest when the parties had consciously structured the extent of their security interest and that too to the detriment of the Flat Purchasers.

37. Mr. Khan would also allude to the fact that the Developer took no independent steps to challenge the rights and entitlements acquired by the Flat Purchasers as has been judicially noticed and held in the FP Section 9 Disposal Order, the Commercial Suit Order and the CS Appellate Order. It has also been judicially noticed that the Developer's claim is essentially a money claim and that cannot be converted into a fully secured claim and that too in a manner that

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impedes validly created third party rights. Mr. Khan would submit, the Developer's contention that no possession can be claimed until adjudication of the entire arbitration proceedings would be a blanket security for all time to come and this would fly in the teeth of the JDA and the conduct of the parties consistent with the JDA, from which flows, the legitimacy of the Flat Purchasers' acquisition of the Subject Flats out of the Owner's fully acknowledged free-sale component.

38. In any case, Mr. Khan would submit that all that the Flat Purchasers are seeking is to be put in possession as agents of the Court Receiver and this would not in any case create any finality to jeopardise the Developer's claim. If and when the Developer overcomes the hurdle of demonstrating that his claim is not a money claim, the possession in the hands of the Court Receiver would abide by the outcome of the arbitration proceedings. Mr. Khan would also submit that the extraordinary hardship caused to legitimate Flat Purchasers needs to be redressed.

39. Mr. E. A. Sasi, Learned Advocate on behalf of the Owner, would submit that the terms of the JDA were explicitly clear in terms of the deadlines that had to be met and the activity to be carried out by the Developer. He would give an overview of various provisions of the JDA

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to indicate that if the reserved plot were de-reserved and constructed upon, the Owner would be entitled to an additional 50% constructed area free of cost after settling with Wagh. Mr. Sasi would submit that Wagh had forfeited his rights owing to sub-letting, and constructing an unauthorised structure and making permanent alterations to structures, which have even led to the structure being demolished by the Municipal Authorities. The grievance against such demolition is subject matter of Writ Petition.

40. In a nutshell, Mr. Sasi would submit that the JDA specifically points to the Developer having to construct 7,500 square feet of area for the tenants, with the rest of the area being squarely covered by the free sale entitlements contracted between the parties, which is further clarified by the Allocation Confirmation Letter and the assurance held out in the OC Confirmation Letter.

41. Against that backdrop, Mr. Sasi would point out that the Developer has a money claim of Rs. 3.75 crores and Rs. 1.75 crores towards construction costs, against which the Developer has Rs. 7.32 crores belonging to the Owner. The Developer's total claim is only Rs. 2.58 crores and therefore, he is holding security far in excess and is

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withholding the reserved plot as well without any consideration being made to the Owner.

42. Invoking the Commercial Suit Order and the CS Appellate Order, which correctly deal with the legal position, Mr. Sasi would submit, the Flat Purchasers should be put in possession. On instructions, he would also confirm that the Owner would have no quarrel with the residual consideration payable by the Flat Purchasers also being deposited with the Court Receiver, so that the same could be subject to the outcome of the arbitral proceedings.

43. In sharp contrast, Mr. Simil Purohit, Learned Senior Advocate on behalf of the Developer, would contend that there is no perversity in the Impugned Orders. He would submit that the 2017 S.9 Order had categorically directed the parties to maintain *status quo* and that any adjustment or reversal in respect of transaction in the flats would be referred to arbitration, which arbitration is pending. Mr. Purohit would defend the First Impugned Order to contend that it has rightly held that at the interim stage it would not be possible to determine the exact extent of the Owner's liability owed towards the Developer. The First Impugned Order (dated February 14, 2019) was not challenged and the Section 37 Petition was filed on February 08,

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2023, pegged to the Second Impugned Order (dated December 15, 2022), and therefore, the challenge to the First Impugned Order is contended by him to be time-barred. He would submit that since it has been held that there is no change in circumstances since the First Impugned Order, the challenge to the Second Impugned Order cannot overcome the limitation to challenge the First Impugned Order, which has attained finality.

44. Mr. Purohit would also submit that the FP Section 9 Disposal Order noted the hardship faced by the Flat Purchasers, but did not grant relief. He would contend that the Developer is not pursuing just a monetary claim. He would rely on clauses II(f) and II(d) of the JDA to contend that it was the Owner's sole responsibility to deal with the 22 tenants and if the area provided to the tenants exceeded 4,500 square feet, the same would need to be deducted from the Owner's share which they would be entitled to as per the JDA. He would also submit that it was the Owner's obligation to settle with Wagh, the tenant who occupied 3,000 square feet in the reserved portion and should any alternate accommodation need to be given to Wagh, the same would need to come from the Owner's share. That apart, Mr. Purohit would submit that the construction costs for the tenants were to be borne by the Owners and after the JDA, the area for the tenants was re-negotiated and it

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increased from 4,500 square feet to 6,073 square feet and such additional area was and is to be borne by the Owner which the Owner has refused to do. Therefore, he would contend, the Owner has to hand over an area of 1,573 square feet to the Developer and this is part of the Counter Claim. Therefore, he would submit that the Impugned Orders were right in not granting any reliefs at the interim stage.

45. Mr. Purohit would submit that the Owner was required to engage with the Developer to have the Agreement for Sale prepared in consultation with the Developer's solicitors to safeguard the Developer's interests, but the Owner executed the agreements with the Flat Purchasers on his own and appropriated the amounts without any reference to the Developer. The Developer, Mr. Purohit would submit, has contended in the arbitration that the Developer should be declared as the Owner of the units located on the ground floor at the rate of Rs. 5,000 per square foot. The Counter Claim also seeks a declaration that the agreements with the Flat Purchasers should be declared as not binding on the Developer, therefore, he would submit the Developer's claim is not to be characterized as a monetary claim.

46. Mr. Purohit would also submit that in the Owner's Section 9 Petition, by an order dated July 19, 2017, the Owner had been directed

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to deposit a sum of Rs. 40.25 lakhs, which, till date, has not been deposited. He would point to the ongoing arbitration between the Owner and the Flat Purchasers being for specific performance and for possession. The Owner being the Respondent therein has opposed the claim of the Flat Purchasers and since those proceedings are pending, the Flat Purchasers would not have any right to approach this Court, under Section 37 of this Act or under Section 9 for possession at the interim stage. He would submit that the arbitration is being delayed, because the Owner has delayed filing his evidence in-chief before the Learned Arbitral Tribunal and he would submit that unless and until the final Arbitral Award is passed, no relief should be granted to the Owners or to the Flat Purchasers.

47. Mr. Purohit would also submit that if the area reserved for recreational ground under the development plan is not handed over, the Municipal Authorities could revoke the building approval and also the Occupation Certificate in respect of the buildings. He would submit that the Owner has no desire to hand over alternate accommodation to Wagh, and the Writ Petition by Wagh is pending. That dispute too is something that would likely jeopardise the status of the Developer's interests in the re-development project, which need to be protected.

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48. Mr. Purohit would submit that the Flat Purchasers are third parties to the Arbitration Agreement and have no locus to challenge the Impugned Orders under Section 37 of the Act. The other appropriate proceedings that they ought to initiate ought not to be under Section 37 or any other application under the Arbitration Act. It ought to have been proceedings such as the commercial suit filed by one of the Flat Purchasers. Mr. Purohit would oppose reliance being placed on orders passed in the Commercial Suit by one of the Flat Purchasers since the others have not chosen to file such suits. Therefore, not having filed suits themselves, they cannot take benefit of findings in the Suit in the Section 37 proceedings.

Analysis and Findings:

49. The points for determination for adjudicating these Petitions may be summarised as follows:

a) Whether the Flat Purchasers are at all entitled to challenge the Impugned Orders, not having been parties to the arbitration agreement; and

b) Whether the Impugned Orders are right in not interfering with the entitlement of the Flat Purchasers to the

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Subject Flats being held up in arbitration proceedings between the Owner and the Developer.

Findings on Jurisdiction –Locus for Section 37:

50. At the threshold, I wish to deal with the jurisdictional question of whether the Flat Purchasers could at all invoke the jurisdiction under Section 37 of the Act, not being parties to the arbitration agreement. In this regard, Mr. Khan's reliance on the decision by a Learned Single Judge of this Court in a bunch of Section 37 Petitions, the lead petition being ***Prabhat Steel Traders***[2], is illuminative of the declared law on whether non-parties to an arbitration agreement, who are affected by findings in decisions under Section 17 of the Act, would at all have locus to mount a challenge under Section 37 of the Act.

51. The Learned Single Judge who considered such an identical objection, in Petitions filed by such third parties to the arbitration agreement, but whose interests had been affected by the Section 17 Order, had the following to say:-

> *"42. The question therefore arises for consideration of this Court is whether a third party who is aggrieved by any such order of interim measures granted*

2 *Prabhat Steel Traders Pvt. Ltd. v. Excel Metal Processors Pvt. Ltd. and Others, with connected petitions – 2018 SCC OnLine Bom 2347*

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by the arbitral tribunal can file an appeal under section 37 of the Arbitration & Conciliation Act, 1996 after obtaining the leave of the Court or otherwise and whether can impugn such order of the arbitral tribunal in respect of any goods or properties in respect of any such right, title or interest claimed by such third party or in any other manner affected by such interim measures or not.

43. This Court in case of Narayan Manik Patil (supra) in the notice of motion filed by a third party who was affected by an order of the Court appointing the Court Receiver in respect of his property held that such third party aggrieved by the appointment of the Court Receiver himself can approach the Court and have the Court Receiver discharged. It is held that the power of the Court to be justified to a third party who is adversely affected by an order passed without affording him an opportunity of being heard could in any event be traced to section 151 of the Civil Procedure Code, 1908.

44. This Court held that where the Court finds that any order appointing the Court Receiver affects the rights of a third party and the circumstances discloses that such third party ought to have been impleaded or proceeded against in accordance with law before affecting its rights, it is open to the Court to discharge the Court Receiver and to leave it to the parties to the proceedings to adopt appropriate proceedings against the third party and to apply therein for interlocutory reliefs against such third party including by appointment of a Court Receiver. In the said judgment, it is held by this Court that even as a matter of practice, the Courts refuse to pass interlocutory orders which would adversely affect third party in the matters where it is brought to the notice of the Court that the third party rights have been created and are in existence. The principles laid down by this Court in the said judgment in my view would apply to the facts of this case. Even in this matter, the respondent no. 1 had placed before the learned arbitrator that the

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> ***goods in respect of which the relief or interim measures was sought by the respondent no. 2 did not belong to the respondent no. 1, but belong to the third parties****. Learned arbitrator however, did not go to the said crucial aspect and appointed the Court Receiver in respect of various Coils which were admittedly claimed by these petitioners in the arbitration petitions and the plaintiffs in the suit."*
>
> ***[Emphasis Supplied]***

52. I am in respectful agreement with the aforesaid iteration of applicable principles. The upshot of the Learned Single Judge's reading of the ruling in ***Narayan Manik Patil***[3], is that if a third party is affected by an interlocutory arrangement made for adjustment of equities between the parties directly engaged in the proceedings, they cannot be left unheard. The foundational principle would be the wider concept of how acts of the Court should prejudice no one and that ordinarily, no Court ought to pass any interlocutory orders which would affect a third party. Where third party rights have already been validly and legitimately created and are in existence, such third party ought to be impleaded and must be heard.

53. In fact, in my view, this is the very principle on which the innumerable proceedings under Section 9 of the Act are filed, entertained and adjudicated in this Court, where members of co-

3 *Narayan Manik Patil & Ors. v. Jayawant Patil – (2009) 2 BCR 247*

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operative housing societies, even when they are not parties to the arbitration agreement between a developer and the society, are made parties to a Section 9 Petition, and are routinely directed to vacate their premises in terms of orders passed by the Section 9 Court.

54. The other legal principle that would conceptually apply is the principle of such third parties vitally being affected by the proceedings being up for consideration as "veritable parties" by reason of their intricate involvement in the subject matter of the arbitral proceedings. Such third parties may not be able to invoke the arbitration agreement themselves, and positively trigger a dispute resolution, donning the hat of *dominus litis*, because the other parties have not agreed to resolve their disputes with such parties by way of arbitration. However, the parties with privity to an arbitration agreement who are engaged in arbitration proceedings, and choose to make interlocutory arrangements by consent, cannot inflict any adverse impact on such third parties. At the least, if an interlocutory order is passed which affects the vital interests of such third parties, the statutory remedy available to them to address their grievances by grant of an interim measure under Section 17, would permit such persons to invoke Section 37 of the Act to appeal against such decision, as has been held in ***Prabhat Steel Traders***, where the Learned Single Judge, went on to

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hold that a third party could even apply for an impleadment or intervention in Section 9 proceedings and can apply for modification and variation of the order of interim measures passed by a Court. The following extracts from the judgment would be noteworthy :

> *"46. Be that as it may, **even if such third party is not impleaded as a party to such application filed under section 9 of the Arbitration & Conciliation Act, 1996, such third party can certainly apply for impleadment or intervention in such proceedings filed under section 9 of the Arbitration & Conciliation Act, 1996 and can apply for modification and/or variation of the order of interim measures passed by a Court**. In my view, such third party cannot be asked to file a civil suit and to challenge the order of interim measures granted by the arbitral tribunal. **The validity of the order passed by the arbitral tribunal under section 17 of the Arbitration & Conciliation Act, 1996 cannot be challenged in a civil suit. The Civil Court does not sit in an appeal against an order of the arbitral tribunal passed under section 17 of the Arbitration & Conciliation Act, 1996.***
>
> *47. **The question thus arises for consideration of this Court is that whether the remedy of an appeal under section 37 of the Arbitration & Conciliation Act, 1996 can be availed off by such a third party who is affected by an order of interim measures granted by the arbitral tribunal under section 17 of the Arbitration & Conciliation Act, 1996.** Learned counsel for the respondents did not dispute the proposition that if a third party is impleaded in the proceedings under section 9 of the Arbitration & Conciliation Act, 1996 filed by a party to the arbitration agreement or the rights of any third party is affected by an order passed by a Court in an application under section 9 of the Arbitration & Conciliation Act, 1996 filed by a party to the arbitration agreement, **such third party can apply for***

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> ***impleadment or intervention in such proceedings and to apply for modification and/or for variation of such order. If such third party does not succeed in such application for modification or variation of the order passed by a Court in favour of a party to the arbitration agreement affecting the right, title and interest of such third party, such third party can file an appeal under section 37 of the Arbitration & Conciliation Act, 1996*** *before the Court under section 2(1)(e) of the Act."*
>
> ***[Emphasis Supplied]***

55. As regards the reference I have made above to the innumerable Section 9 Petitions that are filed in the context of redevelopment of buildings owned by societies, it is well known that such intervention has its foundation in the decision of the Learned Division Bench of this Court in ***Girish Mulchand Mehta***[4]. There is no room to hold that by an interim measure, the rights of a third party could be interfered with, without hearing such third party. The Learned Division Bench examined Rule 803E of the Original Side Rules of this Court and held that when it comes to Section 9 of the Act, the remedy of seeking interim measures would also cover persons who need not be either a party to the Arbitration Agreement or to the arbitration proceedings.

56. In the facts of that case, a third party had been impleaded, because the grant of the relief sought would have, as an incidence of the

4 *Girish Mulchand Mehta v. Mahesh S. Mehta – (2010) 2 MH LJ 657*

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wider relief, affected the interests of such third party. The Court entertained an Appeal filed by such third party under Section 37 of the Act and considered the challenge. It is another matter that as a facet of the merits of the matter, the third party did not prevail in the Appeal. The Learned Single Judge in ***Prabhat Steel Traders*** has rightly concluded in this regard in the following manner :-

> *"50. In view of the fact that powers of Court under section 9 to grant interim measures and powers of the arbitral tribunal under section 17 of the Arbitration Act are identical in view of the amendment to section 17 with effect from 23rd October 2015, in my view, even a third party who is directly or indirectly affected by interim measures granted by the arbitral tribunal will have a remedy of an appeal under section 37 of the Arbitration Act. The principles of law laid down by the Division bench of this Court in the case of Girish Mulchand Mehta and Durga Jaishankar Mehta v. Mahesh S. Mehta and Harini Cooperative Housing Society Ltd. (supra) can be extended to this situation.*
>
> *54. Though a stranger to an agreement cannot be allowed to be impleaded as party to the arbitral proceedings before the arbitral tribunal and more particularly under section 17 of the Arbitration Act nor can such third party seek impleadment to the proceedings before the arbitral tribunal, he is however not precluded from challenging the said order before the arbitral tribunal under section 17 if he so aggrieved by such order by invoking the remedy of an appeal under section 37 of the Arbitration Act.*
>
> *88. Insofar as the submission of the learned counsel for the respondent no. 2 that since the petitioners or the applicants were admittedly not the parties to the arbitration agreement, none of them could be a party to the*

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> ***arbitration proceedings before the learned arbitrator is concerned, there is no dispute about this proposition.*** *However,* ***since the order passed by the learned arbitrator for interim measures at the behest of one of the parties to the arbitration agreement which would prejudice the right, title and interest of a third party, such third party who is not allowed to seek impleadment in the arbitration proceedings or to apply for modification and/or vacating the order of interim reliefs, will have a right of appeal under section 37 of the Arbitration & Conciliation Act, 1996 against such order. I am not inclined to accept the submission made by the learned counsel for the respondent no. 2 that there is any statutory bar against a third party from filing an appeal under section 37 of the Arbitration Act*** *though an order is passed by the arbitral tribunal in the proceedings filed by the parties to the arbitration agreement under the provisions of the Arbitration & Conciliation Act, 1996 would affect the rights of such third party. It is not the case of the respondent no. 2 that even a party to the arbitration agreement could not have filed an appeal under section 37 of the Arbitration & Conciliation Act, 1996, before the Court be defined under section 2(1)(h) on the ground that such appeal would be in the middle of the arbitration process.*
>
> ***[Emphasis Supplied]***

57. I would wholeheartedly agree with the aforesaid observations and would respectfully adopt the same in the specific facts of this case. It is clear to me that Section 37 permits a challenge to decisions made under Section 17 of the Act. Even if one were to depend on the meaning of the term "party" as a party to the arbitration agreement, it is well settled that the meanings given in definitions are capable of variation where the context otherwise requires. Section 37 is a check and balance

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against decisions under Section 17 of the Act. The context in the Act, which is a self-contained code, is to provide a wholesome check and balance in the course of conduct of arbitration proceedings. A person aggrieved by a decision under Section 17 has been given Section 37 as the avenue for such check and balance. That is meant to run its full scope and such legislative policy objective cannot be lost sight of.

58. The Flat Purchasers have entered into registered flat purchase agreements with the Owner who has been squarely authorized by the JDA in 2009, to transact with the flats that fall within his entitlement. The contracted fetter on such right in the form of a lien was translated into specifically earmarked flats by the Allocation Confirmation Letter of 2013. The OC Confirmation Letter made an assurance of completion with specific reference to the Flat Purchasers in 2016. The Flat Purchasers validly and legitimately acquired the Subject Flats through registered sale agreements executed in 2013 and 2014. The Developer has mounted no challenge to these agreements as being founded on non-existent title. The Developer's claims are based on his interpretation of the JDA and his security interests flowing therefrom. These are to be adjudicated in the arbitration proceedings. In the interim, it cannot follow that the legitimate interest of the Flat

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Purchasers can be jeopardised with no recourse to the statutory right to challenge under Section 37 of the Act.

59. For the aforesaid reasons, I find that the Flat Purchasers can indeed maintain a challenge under Section 37 of the Act considering that the Impugned Orders are passed under Section 17 of the Act, and they do not interfere with the *pro-tem* measure of *status quo* that had been put in place since May 2017 when the 2017 S.9 Order was passed.

Findings on Merits:

60. Once it is held that the Flat Purchasers can maintain their challenge to the Impugned Orders, whether the grounds for interference are made out is to be considered. As already stated above, the scope of interference under Section 37 of the Act is limited.

61. Orders passed under Section 17 of the Act are indeed interlocutory in nature. They are capable of being moulded and modified and varied as time goes by and the conduct of the proceedings are underway. In that sense, the scope of jurisdiction under Section 17 of the Act read with Section 37 of the Act are co-extensive and work in a continuum with developments on the subject matter informing the approach to the interlocutory measures sought and dealt with. That

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apart, purely on facts, one must first examine whether the Impugned Orders are well informed by the material on record and the provisions of the JDA and the written conduct of the parties thereafter.

62. Against that backdrop, it would be appropriate to first examine implications of the material on record and see if the Impugned Orders are perverse or patently illegal in their consideration of the material. Should any vulnerability arise, in exercise of the scope of the Section 37 jurisdiction, one must examine if the vulnerability can be redressed. In this approach, it would also be useful to examine findings judicially returned on the very same subject matter at hand. This has to be carefully seen for the period before the Impugned Orders and the period after the Impugned Orders.

63. It is clear on the face of the record that the JDA provided for the tenants being provided tenements of an area of 7,500 square feet and anything above that was the free sale area. The Developer would contend that dealing with the tenants was the Owner's responsibility but the Developer was left to fend for himself in engaging with the tenants. The Owner contends that the Developer went behind the Owner's back and freely eroded the Owner's entitlements by providing greater area. These are disputed questions of fact that would be adjudicated at the

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time of trial in the arbitration proceedings. For purposes of this judgement, the focus has to be on whether in the dispute between the Owner and the Developer, the interests of the Flat Purchasers can be undermined.

64. While the JDA was executed in 2009, it is clear that factoring in all the developments since then and until September 2013, in which period, the parties had disputes and differences over the redevelopment, the resolution reached by them culminated in the Allocation Confirmation Letter. It is apparent that the clear and specific allocation of entitlements reduced to writing in the Allocation Confirmation Letter is not some initial sharing plan but one arrived at after the full flow of events. The Allocation Confirmation Letter identified precisely, the specific flats that fell within the Owner's entitlement from the free sale component. The Subject Flats fall within such confirmed entitlement. The Owner went on to sell the Subject Flats to the flat purchasers. Each of these is said to be through registered sale agreements. In 2016, three years later, when the Owner followed up on the timing of the delivery and the Occupation Certificate, the Developer issued the OC Confirmation Letter, assuring the certificate would come in 15 days, and it indeed came in by then. Till date, there is no whisper of any action

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taken by the Developer to challenge and question the validity of the agreements between the Owner and the Flat Purchasers.

65. Worse, the JDA read with the Allocation Confirmation Letter clearly identifies the flats over which the Developer would have a lien. This would mean that the Developer not only confirmed what the Owner was entitled to sell, but also reduced to writing, the scope of coverage of his lien under the JDA. The sales of the Subject Flats took place thereafter. Legitimate third-party rights were created in favour of the Flat Purchasers. Such rights could not have been trampled upon in the teeth of the aforesaid facts. The *status quo* ordered in the 2017 S.9 Order was merely a *pro tem* arrangement. It was for the Learned Arbitral Tribunal to examine the facts and the merits and arrive at a fair interlocutory arrangement. It is in this light that the finding in the First Impugned Order – that the actual amounts that would be owed by the Owner to the Developer could only be ascertained at the end of the trial in the arbitration proceedings and thereby extending the lien over the Owner's entire entitlement to free sale area – is perverse. It flies in the teeth of the Developer's own position on the scope and extent of the lien in the Allocation Confirmation Letter. It ignores vital evidence in the form of the OC Confirmation Letter.

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66. In the Second Impugned Order, the subsequent developments sought to be relied upon by the Owner were dismissed as not being new developments. The two grounds introduced by the Owner were the pleadings of the Developer about what has been realised by sale of two flats under this Court's orders and the acknowledgement of receipt of funds. While this may ordinarily not be a new facet going by what was claimed by the Owner in his pleadings, admission in pleadings in response, is a facet that could turn the needle and ought to have been considered.

67. By the time of the Second Impugned Order, there was judicial comment in the 2017 S.9 Order on the status of the Flat Purchasers and the weakness in the prima facie case of the Developer insofar as it related to claiming a security interest over property already sold to the Flat Purchasers with the full knowledge of the Developer. The Second Impugned Order dismisses the same on the premise that the same order in fact did not alter the position. It ought to have been remembered that while a third party would not be able to invoke Section 9, when the Learned Arbitral Tribunal was exercising jurisdiction under Section 17 and a judicial comment on the very same subject matter and facts were brought to the attention of the Learned Arbitral Tribunal, the implications of the Subject Flats already having been sold to the Flat

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Purchasers with the full knowledge and tacit consent and the absence of any challenge to the sale to counter this position, ought to have been dealt with by the Learned Arbitral Tribunal.

68. Even thereafter, the Flat Purchasers claim to have been allowed to carry out the work of interiors in their respective flats with full knowledge of the Developer who was always in possession of the property of the Flat Purchasers in question. It is remarkable that the Learned Division Bench commented on the reaction in the course of Commercial Suit that the Developer's protest against such a contention did not inspire confidence. It must be remembered that the Commercial Suit Order and the CS Appellate Order would come about only in July 2023 and September 2023 respectively. The Impugned Orders cannot be tested on the anvil of these subsequent judicial findings even through on a prima facie basis that are subsequent in time. However, it cannot be forgotten that the Section 37 jurisdiction is an extension of the jurisdiction under Section 17 of the Act. Interlocutory arrangements operate in a continuum as events unfold. This Court would not be right in ignoring these observations and yet must also examine the material on record on its own.

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69. The OC Confirmation Letter was written by the Developer to the Owner on April 29, 2016, three years after the Allocation Confirmation Letter. In this letter, it is squarely stated by the Developer that "*in case if you have received any letter from the flat purchasers, we request you to kindly inform them that the Occupation Certificate will be issued within 15 days*". It is noteworthy that this letter is a response to a letter dated March 9, 2016 issued by the Owner to the Developer. Specifically, the Owner has referred to Flat Purchasers following up with him about the Occupation Certificate, reminding the Developer that possession was meant to be handed over by December 31, 2014. The Owner requested the Developer to complete the construction work and obtain the Occupation Certificate within 15 days of the receipt of that letter.

70. Having examined the record, I am of the view that indeed the JDA entailed allocation of areas between the Owner and the Developer and this was crystallised in the Allocation Confirmation Letter of 2013, which led to legitimate rights being created in favour of the Flat Purchasers. Even the follow up in 2016 from the Owner about the status of the Occupation Certificate drew no protest or surprise from the Developer, who instead asked the Owner by way of the OC Confirmation Letter, to inform the Flat Purchasers that the Occupation Certificate

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would be received in 15 days. To my mind it is clear that the Developer had consciously restricted his lien to the identified Lien Flats. The Developer had unequivocally communicated the right of the Owner to alienate the Subject Flats. This was done. Disputes thereafter about the income from such sales is a matter of a money dispute. Even if the area is to be considered the denomination of the dispute, the rate of Rs. 5,000 per square foot contracted by the parties was a pointer to the rate at which value was to be adjusted.

71. Transactions in immovable property cannot be tied down in value terms forever. The JDA itself entailed development within a specific timeframe of 24 months from the date of obtaining vacant possession. The rate of Rs. 5,000 per square foot contracted for identifying the portion of Owner's entitlement that could be sold has a temporal element and is meant to indicate the area that could be sold to recover what is but a right to receive money. It is clear to me that when the material is read holistically, what was contracted between the parties is that the Developer would need to bear the financial obligations as contracted. The parties have disputes over how the facts are to be read. This is subject matter of adjudication. Pending such adjudication, it cannot be said that the entire area of the Owner's entitlement,

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including what was already legitimately sold without challenge from the Developer would form subject matter of a lien.

72. It cannot also be forgotten that the Developer himself has even issued a confirmation to a bank about noting the bank's encumbrance rights over the Subject Flats financed. A letter dated September 23, 2016 by which the Developer has written to the Branch Manager of Chembur Branch of the State Bank of Hyderabad, noting the lien over the property financed in favour of the Bank forms part of the record. This letter explicitly notes the Bank's interests and confirms that such interest has been noted in the Developer's books against Flat No. 104 in the 'A' wing (one of the Subject Flats). This Subject flat is a flat acquired by a Flat Purchaser from the Owner, which is also squarely and explicitly referred to by the Developer.

73. Mr. Purohit would try to get over the lien letter issued in favour of one of the Flat Purchasers by indicating that similar lien letters do not exist in respect of other Flat Purchasers. This contention too does not turn the needle in favour of the Developer, inasmuch as the Developer was dealing with one of the species in the larger genus of Flat Purchasers. If no flat could ever be sold to any Flat Purchaser by the Owner, there is no point in differentiating between the lien being

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confirmed to one bank and not being confirmed to other banks of other Flat Purchasers. In fact, this Subject Flat was suit property in the Commercial Suit that led to the Commercial Suit Order and the CS Appellate Order. To overcome this, Mr. Purohit would submit that there was no such confirmation to any bank about the other Subject Flats. That contention seeks to sidestep the core point – that the alienation of the Subject Flats was with the full approval and confirmation by the Developer.

74. The confirmation to a bank is a symptom of the position of the parties before the litigation started. It is a well settled principle that correspondence and conduct of parties *ante litem motam* (before the litigation began) has greater probative value and is more reliable than those created *post litem motam* (after the litigation began). The Allocation Confirmation Letter, the OC Confirmation Letter and the letter of assurance to the bank, all carry serious probative value and this ought to have been considered by the Learned Arbitral Tribunal. Instead, the Learned Arbitral Tribunal has taken a view that regardless of these instruments, the JDA executed in 2009 containing references to entitlement of the Developer to area if dues are not paid by the Owner, renders the approach perverse and not a plausible and reasonable one.

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75. It is in that light that I cannot ignore the persuasive strength of the three judicial findings on the same subject matter – in the FP S9 Disposal Order (after the First Impugned Order but before the Second Impugned Order); the Commercial Suit Order and the CS Appellate Order (both, after the Second Impugned Order), which are available on the record at the time my consideration of the Section 37 Petitions.

76. I have also carefully examined the other material on record such as the confirmation of accounts exchanged between the Owner and the Developer. A letter dated May 12, 2012 from the Developer to the Owner indeed highlighted the fact that the costs that were meant to be borne by the Owner were being borne by the Developer and also dealing with various reasons for delay in the development. The parties already had a dispute before the Allocation Confirmation Letter, about the payments due and the monetary claims that the Developer believed that the Owner ought to bear. It is noteworthy that this letter was dated over one year prior to the Allocation Confirmation Letter of September 4, 2013.

77. Therefore, the arrangement set out in the Allocation Confirmation Letter and other correspondence exchanged between the parties on the very same day, would indicate that the conduct of the

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parties on September 4, 2013 is conduct even after payment disputes arose between the parties. It cannot be forgotten that the Developer specifically confirmed to the Owner that "*except flat Nos. 111 and 207 which you are not to sell*" the other flats named in that letter were squarely authorized as flats that the Owner would be entitled to sell. It is based on such entitlement that the Owner executed the sale agreements with the Flat Purchasers.

78. Having examined the record in the course of the Section 37 jurisdiction, I am of the view that it is impossible to take a view that the interests of the Flat Purchasers created with full knowledge, authority and approval from the Developer can be wished away. At the same time, I am careful to leave the adjudication of facts to the Learned Arbitral Tribunal.

79. Therefore, it would only be appropriate to borrow from the formulation contained in the Commercial Suit Order as upheld in the CS Appellate Order and direct the Developer to part with possession of the Subject Flats to the Court Receiver of this Court, who shall hand over possession to the Flat Purchasers as agents of the Court Receiver without payment of royalty. In exchange, the Flat Purchasers shall tender and deposit with the Court Receiver, the entire balance

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consideration payable for the Subject Flats, which shall be kept in a fixed deposit to abide by the outcome in the arbitration proceedings.

80. It is remarkable that in the disputes over payment of construction costs between the Owner and the Developer, the interests of the Flat Purchasers have been held to ransom for so long by refusing to acknowledge their legitimately-created entitlement to have possession despite having paid consideration in terms of the registered flat purchase agreements.

81. It can be safely stated that the Learned Arbitral Tribunal simplistically holding that the quantum of amounts or Owner's entitlement area that would fall within the control of the Developer can be held to be perverse for rewriting the JDA read with the Allocation Confirmation Letter, which itself was a product of a conscious resolution of the then-prevailing disputes between the Owner and the Developer. What needs to be considered is the interplay between the claim of the Developer to construction payable by the Owner and the Owner's claim that the Developer has already realised more than what is owed to him; and juxtapose that with the rights legitimately and validly created by the Owner in favour of Flat Purchasers even before new disputes between the Owner and the Developer gained steam towards the end of 2016.

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82. The interests of the Flat Purchasers have been validly contracted in accordance with law and in accordance with the entitlement of the Owner under the JDA. The alleged non-compliance by the Owner with other provisions of the JDA would indeed give a cause of action to the Developer, but whether such cause of action is meant to be secured by way of a lien over the flats acquired by the Flat Purchasers is a completely different matter altogether. Seen in this light, holding up the interests of the Flat Purchasers with whom the Owner has validly contracted sale of flats falling within his entitlement, constitutes the Learned Arbitral Tribunal having granted security in advance by way of encumbrance over the Subject Flats to secure other facets of performance under the JDA that are disputed between the Owner and the Developer.

83. In this view of the facts, the Developer can be said to have been secured in anticipation of trial on damages when *prima facie* it is writ large that specific performance in terms of area being handed over is potentially not possible, or even fair if possible, and for which damages would not suffice. It can be determined in the trial what the Developer is entitled to, in the arbitral proceedings. Even if the Learned Arbitral Tribunal felt it fit to grant a lien by way of an interlocutory measure under Section 17 of the Act, the Learned Arbitral Tribunal

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ought to have been mindful of the pre-existing legitimately created rights in favour of the Flat Purchasers and it was not open to make inroads into those rights without any consideration of the interests of the Flat Purchasers that have been validly contracted with the acknowledgement and confirmation by the Developer.

84. It is a settled principle of law that when an equitable relief is considered by a Court or a quasi-judicial forum in exercise of an equitable jurisdiction, the measure that is purported to balance and adjust equities ought not to create new inequities on other parties who have otherwise conducted themselves in accordance with law. This principle would apply to the Section 17 jurisdiction, which is primarily guided by contract but is not meant to be blind to equities created by the parties to the contract whose instrument is subject matter of enforcement.

85. It is in this light, that the with prejudice offer made on behalf of the Flat Purchasers ought to be considered. Mr. Khan had specific instructions to submit that the Flat Purchasers would even be willing to hand over the balance consideration to the Developer provided the Flat Purchasers are given possession, but with the settlement attempts having failed, a case is made out to mould the relief.

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Certain Other Facets:

86. The de-reservation attempts envisaged in the JDA too had a temporal element to it – 12 months from the JDA. The parties have competing versions on how to account for Wagh. The Developer contends that absence of settlement with Wagh can lead to the Occupation Certificate itself being cancelled while the Owner contends that Wagh's illegal structure has been demolished and there can be no such existential threat. These are all facets left to the Learned Arbitral Tribunal. The adjudication of these Section 37 Petitions is restricted to resolving the foundational errors that cut to the root of the matter, and that approach lends itself to interceding in respect of the Flat Purchasers' interests in the interlocutory measures that are meant to preserve the subject matter of the arbitration agreement. All facets are left to the Learned Arbitral Tribunal to adjudicate and conclude on the basis of evidence led in the course of the trial.

87. For good order's sake and completeness, a word would be in order on the point about limitation. Section 17 proceedings are in the nature of interlocutory proceedings and occupy the nature of a continuum. In the instant case, there have been continuous developments with multiple iterations of the same subject matter

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coming about in various forums. The Flat Purchasers were hamstrung running from pillar to post with the parties to the arbitration proceedings occupying the forums with jurisdiction under Section 9 and Section 17 of the Act. After the First Impugned Order, the Flat Purchasers indeed pursued their own petition under Section 9 and also filed an interim application in the Owner's Section 9 Petition to review the 2017 S.9 Order. They pursued an appeal as well against dismissal of their own Section 9 Petition, which was disposed of on November 28, 2022. The Second Impugned Order was passed on December 15, 2022.

88. These are bona fide efforts that they were taking to redress the situation they found themselves in. Meanwhile the Owner filed a second Section 17 Application, which led to the Second Impugned Order. The Flat Purchasers then filed their Section 37 Petition. Their efforts indicate that they were not idling and were not negligent. They pursued the remedies as best advised and indeed filed the challenge to the Second Impugned Order in time. Developments in parallel also took place, which would place a different emphasis on the underlying facts, and the Flat Purchasers filed the Section 37 Petition within reasonable time. While this was not pressed hard by Mr. Purohit, this facet is also dealt with for the sake of completeness.

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Conclusions and Directions:

89. Undertaking of transactions as contracted in the JDA, is a legitimate exercise of enterprise to take an informed decision on the embracing of legal risks. The parties have adjusted their respective positions and allocated responsibilities between each other. It is in that context, that the JDA of August 2009, the Allocation Confirmation Letter of September 2013, the OC Confirmation letter of April 2016, the lien confirmation in favour of the bank in September 2016, must all be read in conjunction to get a realistic and holistic picture of the nature of the commercial transactions between the parties.

90. In itself, this may be a matter of appreciation of evidence at the *prima facie* stage, but the key is to see if the manner of appreciation returns a view that no reasonable person would take. We have three instances of judicial forums consistently appreciating the same evidence to return the view that a reasonable person would take.

91. The view of the Learned Arbitral Tribunal simply adopts a blanket lien over every inch of property developed for unascertained liability that would be affixed only at the end of arbitration, and pending that, held up the interests of even legitimate third parties. That is why I have interfered with the Impugned Orders, which are vulnerable on the

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premise of being perverse and ignoring vital and material evidence that ought to have been examined and dealt with and forms part of the record.

92. In this view of the matter, having examined the material record and the contents of the Impugned Order, in my opinion, I am afraid a case has been made out for interfering with the Impugned Orders, insofar as the Flat Purchasers' Petition is concerned. As regards the Owner's Petition, in my opinion, the same terms of disposal of the Flat Purchasers' Petition would be dispositive of it. The examination of accounts and the amounts owed and paid and reconciliation of numbers may be conducted before the Learned Arbitral Tribunal. In the second Section 17 Application, the Owner had restricted his prayer to the Subject Flats and in this challenge, I do not go beyond that scope.

93. The Learned Arbitral Tribunal is requested to put the parties to terms to complete the arbitration proceedings at the earliest, imposing such measures including costs on any party indulging in dilatory tactics, if any, to ensure that the proceedings are brought to a closure at the earliest.

94. Both the Petitions are disposed of with the following directions:

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a) Each Flat Purchaser is directed to deposit the balance consideration due on the respective Subject Flat with the Court Receiver within a period of four weeks from the upload of this judgement on the website of this Court;

b) The Developer too shall deliver the keys to the Subject Flats to the Court Receiver within a period of four weeks from the upload of this judgement on the website of this Court;

c) Upon the expiry of four weeks from the upload of this judgement on the Court's website, the Court Receiver shall release the keys of each Subject Flat to the respective Flat Purchaser and an agency agreement shall be executed without payment of royalty, making the Flat Purchaser an agent of the Court Receiver;

d) The consideration amount received from each Flat Purchaser shall be kept in a fixed deposit account for the period that grants the maximum interest rate and that shall be kept renewed from time to time in accordance with the applicable rules for such deposits, with the deposited

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amounts and accruals thereon, abiding by the outcome in the arbitral proceedings;

e) Each party shall file an affidavit before the Learned Arbitral Tribunal indicating the specific factual update on the aforesaid process; and

f) The Learned Arbitral Tribunal is directed to convene at the earliest and issue directions for conduct and completion of the arbitration proceedings at the earliest.

95. I anticipate that a request for stay would be made at pronouncement of this judgement. I have already provided for a timeline in the aforesaid directions which should suffice should any party be desirous of carrying the matter higher. With the aforesaid directions, all the captioned proceedings are ***finally disposed of***.

96. Interim Application too stands ***disposed of***.

97. 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.]

Chaitanya

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