2022 SCC OnLine Del 5028

In the High Court of Delhi at New Delhi

(BEFORE SANJEEV NARULA, J.)

Baljit Singh Bhatia and Others ... Petitioners;

Versus

Union of India and Others ... Respondents.

W.P.(C) 6466/2021 and CM Appl. 20342/2021[§]

Decided on October 6, 2022

Advocates who appeared in this case :

Mr. Akshay Srivastava, Advocate.

Mr. Sanjeev Singh, Ms. Ridhi Pahuja, Mr. Dhruv Chawla, Mr. Dhruval Singh, Ms. Pallavi Aggarwal, Ms. Tanya Bansal and Ms. Garima Saxena, Advocates for R-3.

The Judgment of the Court was delivered by

SANJEEV NARULA, J. (Oral):— The Court is hearing a batch of petitions relating to 'subvention scheme' in builder-buyer agreements. As the Petitioner claimed parity on the basis of prayers sought, the instant petition was tagged along, escaping detailed scrutiny of the background facts.

2. However, today, during the course of submissions in the batch matters, Mr. Sanjeev Singh, counsel for Respondent No. 3 has strenuously argued that Petitioners herein have mislead the Court; the loan transaction in the instant case cannot be categorized as a 'subvention scheme' at all; the Petitioners' case is distinct and distinguishable; and the petition is not maintainable.

3. Accordingly, the petition has been untagged, and counsel for both the sides have been heard extensively on the aspects of maintainability as well as on parity with the batch matters.

4. *What are the reliefs sought?* The present petition under Article 226 of the Constitution of India, seeks the following reliefs:

i. "Allow the present Petition;

ii. Issue a Writ in the nature of the Mandamus/Certiorari or any other writ directing the Respondent No. 3 to not charge any EMIs or take any coercive action against the Petitioners till the CIRP reaches its conclusion;

iii. Issue a Writ in the nature of Mandamus/Certiorari or any other writ directing the Respondent Banks/NBFCs to charge all the Pre-EMIs/full EMIs till the possession is not delivered from the Respondent builder/alike real estate developers;

iv. Pass an appropriate order or direction against Respondent No. 2 for initiating strict action against Respondent banks/NBFCs for violating the rules and regulations laid down by Respondent No. 2 as a regulator for the banking sector;

v. Issue a Writ in the nature of Mandamus/Certiorari or any other writ directing Respondent No. 5 to correct/rectify the CIBIL scores of those Petitioners which have been affected due to the delay or non-payment of the EMI by the Petitioners herein;

vi. Pass an appropriate order or direction appointing a committee of experts to examine the grounds raised by the Petitioner in their representation submitted to the Respondent(s) with a direction to submit a report in a time bound manner;

vii. Pass an appropriate order or directions to the Respondent No. 1 to frame guidelines and monitoring system where the citizens/aggrieved people submitting their objections can be monitored in a transparent and time bound manner"

5. *Who are the parties?* Respondent No. 1 is the Ministry of Housing and Urban Affairs, Union of India ["*UOI*"]. Reserve Bank of India *["RBI*"] is arrayed as Respondent No. 2. Respondent No. 3 is the lender, Tata Capital Housing Finance Limited *["TCHFL"].* Respondent No. 4 is the builder, Golden Peacock Residence Private Limited ["*GPRPL*"]. And lastly, Respondent No. 5 is TransUnion CIBIL Limited.

6. *What are the batch matters about?* The batch relates to subvention scheme, which is typically an innovative housing loan arrangement, whereunder a tripartite agreement is arrived at between : (i) the builder, (ii) the financial institution, and (iii) the homebuyer. As per mutual understanding, builder agrees to bear the burden of EMIs (termed as pre-EMIs) towards repayment of interest on loan advanced by the financial institution to the homebuyer, for the purchase of the property, till such time construction is completed and possession is handed over to the homebuyer. Common grievance of such homebuyer-Petitioners in the batch of petitions, *inter alia*, is that the entire loan amount has been disbursed by the bank/financial institutions to the builders upfront, and is not linked to stage of construction of the property, in contravention of RBI circular(s)/guideline(s) on the issue.

7. *Facts:* The events triggering the instant petition are as under:

8. Petitioners booked a residential flat admeasuring 3900 square feet bearing Unit No. 1204 in a project named 'Michael Schumacher World Tower' at Sector-109, Gurgaon, Haryana *[hereinafter "flat"],* with GPRPL, for a total sale consideration of Rs. 4,30,20,800/-.

9. Petitioners paid a booking amount of Rs. 30,00,000/- *vide* booking receipt dated 23rd August, 2012 and received an allotment letter dated 04th December, 2012.

10. Petitioners entered into a Flat Buyer's Agreement with GPRPL (in 2013/2016),[1] whereunder a payment system was envisaged.

11. Subsequently, Petitioners and TCHFL entered into a Home Loan Agreement dated 02nd February, 2016 for Rs. 1,60,00,000/-, of which a part payment of Rs. 1,00,79,173/- was disbursed to GPRPL.

12. Further, a Tripartite Agreement dated 16th February 2016, was also entered into between Petitioners, GPRPL and TCHFL.

13. Mr. Akshay Srivastava, counsel for Petitioners, candidly admits that in the instant case, the loan transaction is not covered by any subvention scheme, yet he argues, present petition should be heard and tagged along with the batch. His submissions are recorded below:

14. TCHFL disbursed the loan amount to GPRPL upfront, without linking it with stages of construction, which is in flagrant violation of statutory circular(s)/guideline(s)/direction(s) issued by RBI and/or NHB. Petitioners, being gullible and innocent homebuyers, should not be compelled to pay EMIs towards pre-maturely disbursed loan amounts. This according to him a common feature with the rest of the batch.

15. GPRPL has defaulted in completing the construction in a timely manner. The Petitioners had availed of their remedy against GPRPL by filing a consumer complaint.[2] However, insolvency proceedings were initiated against GPRPL,[3] due to which the said complaint is adjourned *sine-die*, and thus, Petitioners have no other remedy today. The law does not provide for any mechanism for Petitioners to take recourse to any remedies in the current situation, thus, issuance of writ is the only efficacious remedy. 8.3. In fact, Petitioners were not even provided a copy of the Flat Buyer's Agreement in the beginning, and it was only after much imploring that GPRPL shared a copy thereof for signing.

16. *Per contra*, Mr. Singh points out that the present petition has been filed as an after-thought, and wrongly tagged with the subventions scheme matters, on the basis of false and frivolous grounds, as is evident from following facts:

17. Petitioners approached TCHFL only after four years of booking/allotment of the said flat. In the meantime, they had been admittedly making payments to GPRPL as per the payment schedule. This clearly establishes the existence of a longstanding relationship between Petitioners and GPRPL.

18. Many other alternative efficacious, statutory remedies exist (such as Consumer Protection Act, 1986/2019), in light whereof, Supreme Court has refused to entertain homebuyer's petitions in similar scenarios.[4]

19. On the one hand, having filed their claims with the Resolution Professional in the corporate insolvency resolution proceeding initiated against GPRPL, Petitioners seek to recover the monies paid at to GPRPL. On the other hand, Petitioners a stay against TCHFL's lawfully recovery of loan repayment. This cannot be allowed as it would lead to unjust enrichment.

20. TCHFL was not made a party in the afore-stated consumer complaint, nor was any claim made against it.

21. Petitioners, in essence, are claiming a private remedy in the garb of writ jurisdiction by impleading UOI (Respondent No. 1) and RBI (Respondent No. 2).[5]

22. As the per the terms and conditions of the Home Loan Agreement dated 02nd February 2016, repayment of the loan was neither subject to, nor linked in any way, to the completion of construction of the flat. Petitioners' repayment liability is, in fact, a separate obligation, independent of any issues/concern/dispute that may arise due to default on the part of GPRPL in raising construction.

23. The main purpose and object of the Tripartite Agreement dated 16th February 2016 was that GPRPL shall ensure creation of equitable mortgage by depositing the titled deeds to the flat, once they come into existence, as is recorded in Clauses 6 and 7 thereof.[6]

24. Further, under Clauses 12 and 15 of the Tripartite Agreement dated 16th February 2016, and also under Article 7 of the loan documents, it was agreed and understood by the parties that in the event GPRPL fails to honour its obligation, the same shall constitute an Event of Default, on occurrence of which, Petitioners shall be liable to pay the entire outstanding amount, and TCHFL would have the right to take appropriate measures against borrowers/builder for recovery of dues.

25. Moreover, as per Undertaking-Cum-Indemnity Bond dated 02nd February, 2016, the liability to pay EMIs relating to construction lay on the Petitioners.

26. In terms of the Sanction letters and the Loan Agreements, the loan facilities were to be repaid in the following manner:

Rate of Interest	*Tenure*	. *Monthly Instalments (EMI)*
10.50% (Variable)	180 Months	Rs. 1,76,864/-

27. Further, as opposed to the allegation of upfront disbursal of lumpsum loan amount of Rs. 1,60,00,000/-, only a partial amount of Rs. 1,00,79,173/- was disbursed.

28. The disbursements to GPRPL were made on basis of specific written request made by Petitioners *vide* 'Request for Disbursal' dated 02nd February 2016, in the following manner:

Name of Payee	*Bank Name & A/C No.*	*Amount*
GPRPL	Axis Bank Ltd.	1,00,00,000/-
CERSAI Charge		573
Balance PF		85,100/-

29. Petitioners have unlawfully ceased making payments towards loan facility, which is also admitted by them in the petition. Their account has been declared as a non-performing asset in May 2018. In fact, even as per Statement of Account furnished along with the Counter-affidavit, the loan amount is shown to be partially disbursed. TCHFL issued a loan recall notice dated 20th October 2020 to the Petitioners, but they failed to clear their dues.

Analysis

30. *On parity:* In the opinion of the Court, the petition is completely misconceived. The present matter, like several others, highlights a situation where Petitioners have exploited the fact that Court is entertaining matters pertaining to subvention scheme to take undue benefit of its *en-masse* orders. Apart from the admission of the counsel for Petitioner that the loan transaction is not covered by any subvention scheme, the present matter cannot be heard along with the batch of petitions, on account of following factors:

31. Clause 1 of Tripartite Agreement dated 16 February, 2016,[7] which spells out the repayment obligation for the loan facility, indicates that disbursal of loan amount to GPRPL at buyer/Petitioners' request, is to be deemed as disbursement made to the buyer/Petitioners themselves. There is no obligation upon GPRPL to make any Pre-EMI/EMI payments. This position is also not contested by the Counsel for Petitioner as well. The Court has also perused the Flat Buyer's Agreement, and in particular, 'Annexure-1 Payment Plan', which shows that the payments due to GPRPL were to be made as per various stages of construction. Thus, Petitioners cannot deny their loan repayment liability by linking it to GPRPL's default in construction, and the instant case does not meet this criterion for qualifying as a 'subvention scheme'.

32. In addition to above, sub-clause (a) of Clause 2.4 (Disbursement) of the Home Loan Agreement dated 02nd February 2016,[8] also evidences that TCHFL had stipulated to pay GPRPL directly on behalf of the buyer/Petitioners, only upon their specific written request for release of instalment of loan, in the form prescribed at Schedule G (*Terms and Conditions Applicable to the Loan with*

Adjustable Interest Rate), as per timelines in Schedule F (*Tentative Disbursement Schedule)* of said Home Loan Agreement. In this light, the attention of the Court is drawn to the Petitioners' disbursal request letter dated 2nd February, 2016 sent to TCHFL, which clearly seeks disbursement of funds to GPRPL. The same is extracted below:

Dated: 2 Feb 2016

To,
The Manager,
Tata Capital Housing Finance Ltd.
SCO-13 Second Floor Sec-14 Gurgaon, Haryana

Sir,

Subject: Disbursement Request Letter

I have been sanctioned a Home Loan of Rs. 16000000 from TCHFL vide Account No. 4584747

I, hereby, request you to arrange the disbursement as follows:

Name of Payee	Bank Name & Account No	Amount (Rs.)
Golden Peacock	Axis Bank Ltd	10000000
Residence Private	91202003 1148 652	
Limited		
CERSAI Charge		573
Balance PF		85100

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I shall collect the disbursement only after fulfilling all necessary documentation as required by Tata Capital Housing Finance Limited.

Thanking you.

Yours Faithfully,

For G.S. FASTENERS PVT. LTD.

Name / Signature of Main Applicant

Authorised Signatory

33. Next, the Statement of Account, filed by TCHFL, indicates that the disbursed amount stood as Rs. 1,00,79,173/- (differential Rs. 6500/- being processing fee), which makes it clear that Petitioners themselves requested the disbursal amount, and the said release was not unilateral or upfront in any manner.

34. Given that the allotment letter was issued by GPRPL in 2013, and the loan facility was sought and availed from TCHFL after a gap of four years, in 2016, for a project that was already under construction, the Court has queried the counsel on the method of linking of loan amount disbursal where construction of concerned projects had already started earlier. To this, Counsel for Petitioner failed to provide a response or even show an iota of evidence of the stage of construction in the present case at the time disbursal of the loan amount to Petitioner, which could demonstrate that the same was not linked to the stages of construction. In the opinion of the court, the plea of upfront disbursal, unlinked to stage of construction, by TCHFL, which was strongly relied upon to clutch on to the subvention scheme by the Petitioners, is factually incorrect and misleading.

35. Having issued the disbursal request letter, Petitioners cannot be

permitted to claim that TCHFL has disbursed the loan amount without their consent. There is thus no palpable contravention of RBI circulars demonstrated, which is pleaded as the main cause of action as well as consequential relief for claiming parity.

36. The above facts go on to show as to how the Petitioners have wrongly got their matter attached with the batch, despite the factual situation being palpably distinguishable. The claim of parity with subvention scheme matters is found to be bald, unsubstantiated and contrary to the facts disclosed.

37. *On maintainability:* Merely adopting common grounds of challenge with the batch cannot give the instant petition the colour of maintainability. Accordingly, the court has next considered whether the instant petition can stand on its own legs, in light of the cause of action demonstrated therein.

38. The instant petition is *ex-facie* not maintainable for the following reasons:

39. The real cause of action is perhaps the failure on part of GPRPL to keep its commitment of completion of construction. The fact that the payment obligations under the loan agreement have not been honoured by the Petitioners is not in controversy. However, merely because the construction of the property is not complete, cannot absolve the Petitioners of such liability which has been undertaken independent of the same, as per the terms of the loan agreement.

40. Unfortunately for the Petitioners, the dispute raised in the instant petition is purely contractual in nature, and the Petitioners' desire to wriggle out of their contractual repayment obligations under the tripartite and loan agreements, cannot lend any colour of maintainability to the instant petition.

41. There is no violation or infringement of any right, much less a fundamental right, which is demonstrable from the facts of the petition.

42. No exceptional or extraordinary circumstance is demonstrated for this Court to exercise jurisdiction under Article 226 of the Constitution of India, in relation to a subject matter which is governed purely by the terms of the contract. 13.5. Petitioners have also not made out any case for contravention of RBI/NHB circular(s)/guideline (s) to seek prayers (iv) and (vii) which are directed towards Respondents No. 1-UOI and No. 2-RBI. The bald assertion of contravention of RBI circulars for making upfront disbursal of loan amount is found to be factually incorrect, as discussed above. No demonstrable irregularity has been shown in the grant of sanction of loan by TCHFL. The claims made in the petition do not indicate any cause of action qua the Ministry of Housing and Urban Affairs, UOI. It is therefore evident that UOI and RBI have been impleaded only to overcome the bar of maintainability.

43. Accordingly, it is clarified that:

44. *Prayer (ii) and (iii)* [seeking directions to TCHFL to not charge any EMIs or take any coercive action against the Petitioners, till the CIRP reaches its conclusion, or till delivery of possession] are thus entirely misconceived.

45. *Prayer (iv), (vi) and (vii)* [which demand that Respondents No. 1 -UOI and No. 2-RBI take action against TCHFL for violation of rules and regulations, form a committee to examine Petitioner's representation; and frame guidelines and monitoring system], too, are entirely unmerited, especially in the absence of any guidelines/rule of RBI which is demonstrated to be flouted. Moreover, once prayers (ii) and (iii) collapse, all consequential prayers too cannot stand.

46. *Prayer (v) & (i)* [seeking correction of CIBIL score] is also a consequential prayer, as is prayer (i), and are also dismissed.

47. Independent of prayers (iv) and (vii), the petition is entirely unmaintainable. The relief sought against RBI, seeking directions for issuance of additional guidelines (which the DRT may not be competent to issue), cannot form the basis to entertain the present petition, in absence of any manifest cause of action, as discussed in the foregoing paragraphs.

48. Petition is dismissed as not maintainable, along with pending applications.

49. In case the Petitioners have any grievances on the grounds urged, recourse may be taken to any other remedy as available to them under law.

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[1] The date of the agreement is disputed. By way of over-writing, the hand-written date on the agreement has been changed from 11th March 2013 to 11th February 2016 (*see e.g.:* Agreement at pages 60 & 91 of the petition). Petitioners claim that the overwriting is fraudulent and attributable to GPRPL (*per* paragraph No. 2 & 4 of the petition). However, this aspect is neither urged by parties, nor ventured into by the Court.

[2] *Bearing* CC/850/2017 before the National Consumer Dispute Redressal Commission, New Delhi.

[3] Before the National Company Law Tribunal, Principal Bench, New Delhi *bearing* (IB)-1591 (PB)/2018 titled *Manjinder Singh Sandhu* v. *Golden Peacock Residence Pvt. Ltd.*

[4] *Upendra Choudhury* v. *Bulandshahar Development Authority*, (2022) 11 SCC 449 paragraph no. 12.

[5] *Rajasthan State Industrial Development and Investment Corporation* v. *Diamond and Gem Development Corporation Limited*, (2013) 5 SCC 470.

[6] Clause 6 -

"The Developer undertakes that on completion of the construction of the housing property the possession of the said Flat/Premises shall be handed over by the Developer to the Purchaser subject to his/her compliance with the terms and conditions of the Agreement to Sell in full after obtaining no objection from TCHFL in writing and the Purchaser shall hold the said Flat/Premises in trust of TCHFL when the possession of the said Flat/Premises is delivered. The Developer further undertakes that the Title Deed/Sale Deed/Deed of apartment in favour of the Purchaser by Developer shall be executed and registered within days after the date of delivery of possession of the said Flat/Premises. The Developer shall deposit the said Title Deed/Sale Deed/Deed of apartment in respect of the said Flat/Premises directly with TCHFL"

Clause 7 -

"Soon after the Title Deed/Sale Deed of apartment is executed and registered, the Purchaser/s undertake/s to take steps for creation of mortgage of the said Flat/Premises in favour of TCHFL, in the form and manner required by TCHFL and as stipulated under the Loan Agreement, as the said house is already mortgaged with the TCHFL to secure the housing loan."

[7] Clause 1 - *TCHFL will make disbursement of the sanctioned loan by making payment to the Developer directly on behalf of the Purchaser in installments in the manner provided in the Agreement to Sell and upon specific written request of the Purchaser subject to the Loan Agreement entered into between the Purchaser and TCHFL and the covenants hereunder agreed to among the parties hereto and any payment made to the Developer shall be deemed to be payments made to the Purchaser and the Purchaser shall, in each case, be liable for the amount of the loan disbursed on his/her/their behalf to the Developer as though the same had been disbursed directly to Purchaser. It is further agreed by the Purchaser that TCHFL shall not be responsible or liable to ensure or ascertain the progress of construction and mere demand for payment would be sufficient for TCHFL to effect disbursement as aforesaid.*

[8] Clause 2.4 - *Disbursement - (a) TCHFL may, subject to the fulfilment of the conditions precedent set out in Article 4 of this Agreement and subject to the Borrower making a disbursement request to TCHFL in the form and manner as set out under Schedule G hereto, disburse the Loan, directly to the builder or to the developer or to the society or to the vendor or in favour of any third party or person as may be directed by the Borrower. The disbursement schedule as requested by the Borrower at the time of execution of this Agreement is as annexed as Schedule F hereto. The Borrower hereby unconditionally and irrevocably authorizes TCHFL to disburse the Loan as per Schedule F attached hereto provided the conditions precedent set out in Article 4 of this Agreement have been fulfilled and the Borrower has made a disbursement by writing a letter informing TCHFL of its intention to do so at least 7 (seven) days prior to any scheduled Disbursement Date/event as provided in Schedule F hereto. In the event that the disbursement is in accordance with this clause, the Borrower agrees and acknowledges that the Borrower shall indemnify and*

keep TCHFL indemnified against all actions, suits, proceedings and all costs, charges, expenses, losses or damages which may be incurred or suffered by TCHFL by reason of any disbursement request or counter instruction given by the Borrower. Notwithstanding the above, TCHFL shall have the right to stop further disbursement of the Loan at any time if TCHFL is of the opinion that as a result of change in circumstances there has been a Material Adverse Effect on the Borrower's financial condition or profits or business and of any material change in the Borrower's business. It is hereby clarified that TCHFL may, at the request of the Borrower, in its sole discretion, amend the schedule of disbursement as provided in Schedule F attached hereto by either increasing the period over which disbursements may be made by TCHFL or by reducing the same, subject to fulfilment by the Borrower of such additional conditions as TCHFL may stipulate in this regard. In the event the Schedule is an event based schedule, TCHFL shall not be responsible for verifying the happening of such events. TCHFL shall be entitled to disburse monies under this Agreement based on certification/intimation of happening of such event from the builder, contractor, developer or other person, as the case may be.

§ 2022:DHC:4157