(BY SRI.GIREESHA KODGI,CGC FOR R1 & R2;
SRI. R V S NAIK, SENIOR COUNSEL A/W
SMT. RASHMI SUBRAMANYA AND
MISS. ADITHI SHETTY, ADVOCATE FOR R3;
SRI. R N S P ACHANTA, ADVOCATE FOR R4;
SRI. VELLANKI RAVI, ADVOCATE FOR R5;
SRI. UDAYA HOLLA, SENIOR COUNSEL A/W
SRI. VENUGOPAL M S, ADVOCATE FOR R5;
SRI. MAHESH S, ADVOCATE FOR R6)

THIS WRIT PETITION IS FILED UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA, PRAYING TO RESTRAIN THE R5 FROM TAKING ANY PRECIPITATIVE ACTION AGAINST THE PETITIONERS AND DIRECT THE R5 BANK TO ISSUE NO DUE CERTIFICATE / NO OBJECTION CERTIFICATE IN FAVOUR OF THE PETITIONERS WITH RESPECT TO LOAN ACCOUNT NO.00196660004983 AND ETC.,

THESE PETITIONS HAVING BEEN HEARD AND RESERVED FOR ORDER, THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

ORDER

All these petitions broadly having common questions of law & facts inter alia seek to lay a challenge the coercive recovery measures of Housing Loans by the Respondent – lending agency i.e., Punjab National Bank Housing Finance Limited (hereafter 'PNBHFL'). They have also sought for a Writ of Mandamus directing the said Bank to refund the payments already made by them

in terms of orders made by the Adjudicating Officer of RERA and to issue a 'No Due Certificate / No Objection Certificate', by rectifying their individual CIBIL Scores and removing the entries in the loan records which show outstanding amounts of money against their names.

2. After service of notice, the respondents are represented by their respective advocates. The answering respondents have filed their Statements of Objections opposing the writ petitions. Their advocates make submissions resisting the petition prayers, mainly contending that dispute is contractual in nature and therefore, petitioners should be relegated to other civil remedy forum, writ court not being appropriate for adjudication of *lis* of the kind. They also point out that the petitioner-borrowers in terms of loan agreements are bound to discharge the outstanding loans and that they have given certain letters undertaking to do it when the builder failed to. They also press into service '*suppressio veri'* & '*suggestio falsi'*. So contending, they seek dismissal of these petitions.

3. <u>BRIEF FACTS OF THE CASE:</u>

(i) All the petitioners had booked their apartment units with the Respondent – Developer i.e., M/S Mantri Developers Private Limited, in terms of "Pre-EMI Scheme" i.e., Pre-Sanctioned loans vide Tripartite Loan Agreements entered into by & between the Petitioners, Developer & the PNBHFL. Not being happy with the pace of construction, they withdrew their bookings with intimation to PNBHFL and the same came to be endorsed by the Developer. However, in terms of arrangement, the PNBHFL had disbursed the loan amount directly to the Developer allegedly without ascertaining the stages of construction, though the extant RBI Circulars mandate such ascertainment.

(ii) Petitioners too had made certain payments to the Developer towards their contribution which included the remittance of *'margin monies'*. Despite withdrawal from the project, they did not get their monies back from the Developer and therefore had complained to the RERA under Section 31 of the Real Estate (Regulation and Development) Act, 2016. Obviously PNBHFL was not a party to these proceedings. The RERA directed the Developer "to return the own contribution amount to the

complainant within 30 days…if not, it will carry interest at 10.25%." It also directed the Developer "to discharge the loan raised in the name of the complainant with all its EMI and interest if any."

(iii) The Developer having not obeyed the orders of the RERA, coercive proceedings for the recovery of housing loans were taken up by the PNBHFL and this gave the '*base cause of action*' for the petitioners to structure these Writ Petitions for restraining the same and for seeking allied directions in the Writ jurisdiction.

4. Having heard the learned counsel for the parties and having perused the petition papers, this Court is inclined to grant indulgence in the matter as under and for the following reasons:

(a) There have been Tripartite Housing Loan Arrangements between the Petitioners, the Developer & PNBHFL, is not in dispute. Clause (f) in the Tripartite Agreementhas the following text:

> *"(f) If the Borrower desires to withdraw and/or in case of death of Borrower and/or if Borrower fail to pay the balance amount representing the difference between the loan sanctioned by PNBHFL and the actual purchase price of the said property, the entire*

> *amount advanced by the PNBHFL will be refunded by the Developer as agreed in the Agreement of Sale and Agreement of construction after deduction of cancellation charges to PNBHFL forthwith".*

There is a lot of force in the vehement submission of learned Senior Advocate Mr. C.K. Nandakumar appearing for the petitioners that where *"the borrower desires to withdraw and/or fails to pay"* the differential of the amount as mentioned in the above clause, the entire loan amount advanced by the PNBHFL, has to be repaid exclusively by the Developer only. This view gains further support from the following text of clause (l) in the agreement:

> *"(l) In the event, the Borrower cancels his allotment/booking/allocation of the said property or in the event of PNBHFL canceling his allotment/allocation of the said flat on behalf of the borrower, by virtue of the power of attorney executed by the Borrower in its favor, the Developer undertakes to refund the entire amount as agreed in the Agreement of Sale and Agreement of Construction, after deducting cancellation charges, etc. to PNBHFL. PNBHFL shall after deducting all the outstanding amounts refund the surplus, if any, to the borrower".*

Clause (f) is borrower specific, whereas clause (l) includes both the borrower and the PNBHFL who as the agent of borrower may cancel the allotment or booking.

Further, this clause imposes an obligation on the Developer to refund the amount received from the borrower in the event of cancellation.

(b) The vehement contention of learned Senior Advocate Mr. Udaya Holla appearing for Respondent - PNBHFL that under clauses (a) & (b) in the Tripartite agreement, both the borrower and the Developer are jointly & severally liable to repay the loans, is bit difficult to countenance. The said clauses are reproduced for the ease of understanding:

> *"(a) The PNBHFL shall pay the entire loan amount towards sale consideration of the property, upon a demand being raised by the Borrower on the basis of a demand letter from the Developer.*
>
> *(b) It is agreed between the parties that PNBHFL should make the disbursement made to the Borrower, Developer and such disbursement shall be considered as disbursement made to the Borrower".*

These clauses read together impose an obligation on the part of both the borrower and Developer, is true. However, it is only when the transaction as intended is accomplished, and not when it proves abortive in the circumstances envisaged under clause (f). Even clause

(c) which provides for holding of the property by the Developer in trust for the PNBHFL, at the pre-sale stage supports such a view. Clause (d) which also gives a right to the PNBHFL to retain the title deeds of apartment units by way of security for the repayment of loan, also lends credence to this.

(c) A conjoint reading of various clauses in the Tripartite Agreement makes it very clear that even when the booking/allotment is cancelled and as a consequence thereof, borrowers' obligation to serve the debt evaporates into thin air, the interest of lending agency is protected, provided that the sanctioned housing loan was released to the Developer only after ascertaining stagewar construction of the apartments, in terms of extant RBI Guidelines and Circulars issued by National Housing Bank. One such National Housing Bank Circular dated 18.11.2013 (at paragraphs 2 & 3) reads as under:

> *"2. These housing loan products are likely to expose the HFCs as well as their home loan borrowers to additional risks, e.g. in case of disputes between individual borrowers and developers/builders, default/delayed payment of interest/EMI by the developer/builder during the agreed period on behalf of the borrower, non completion of the project on time, etc*

> *3. As the higher risks associated with such lump sum disbursal of sanctioned housing loans and customer suitability issues, HFCs are advised that disbursal of housing loans sanctioned to the individuals should be closely linked to the staged of construction of housing projects/houses and upfront disbursal should not be made in case of incomplete/under-construction/green field housing project/ houses"*

However, the non fruition of such protective clauses, because of reckless release of sanctioned loan even in the absence of any construction on the site cannot put the borrowers to peril, such a release being made with the consent of borrowers concerned, notwithstanding. After all, what PNBHFL has to follow is the instructions issued by the National Housing Bank since they have statutory force, under section 14 (k) of the 1987 Act, which enables *"providing guidelines to the housing financing institutions to ensure their growth on sound lines."*

(d) The contention of learned advanced on behalf of PNBHFL that clause (h) that occurs next in line to clause (f) in the agreement imposes a joint responsibility on both the borrower and Developer in any circumstance and therefore by the *'rule of last*

antecedent', what is arguably stated in clause (f) pales into insignificance, lacks acceptability and reasons are not far to seek: Firstly, juristic opinion as to ready invokability of such a rule in matters of loan agreements is in a fluid state; secondly even otherwise it cannot be invoked as a thumb rule; thirdly clause (h) by its very terms engrafts the rule of indemnity for the lapses attributable to the Developer and not to the borrower; and lastly, even in non-testamentary instruments where there is a conflict between the earlier clause and the later, and it is not possible to give effect to all of them by a harmonious construction, then ordinarily it is the earlier clause that overrides the later vide *RAMA KISHORELAL Vs. KAMAL NARAIAN*[1]*.* If construction of the kind advanced on behalf of PNBHFL is accepted, the clause specifically engrafted for protecting the interest of borrowers would be rendered nugatory. The following extract from *Chitty on Contracts*[2] is also worth adverting to:

> "…*Every contract is to be construed with reference to its object and the whole of its terms and accordingly, the whole context*

[1] 1963 Supp 2 SCR 417
[2] Chitty on Contracts, General Principles, 27th Edition, Volume I, 581 – 587 (1994)

must be considered in endeavoring to collect the intention of the parties, even though the immediate object of inquiry is the meaning of an isolated word or clause. It is a true rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected ex antecedentibus et consequentibus; every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done. And so Lord Davey said in N.E RAILWAYS vs. HASTINGS, quoting Lord Watson: The deed must be read as a whole in order to ascertain the true meaning of its several clauses, and the words of each clause should be interpreted as to bring them into harmony with the other provisions of the deed if that interpretation does no violence to the meaning of which they are naturally susceptible."

(e) Mr. Holla in his inimitable style heavily banked upon clause (k) of the Tripartite Agreement for repelling invocation of clause (f) by the borrower contending that there could not have been a unilateral cancellation of allotment/booking/allocation, consent of his client being a *sine qua non* for that. The said clause reads as under:

> *"The Borrower shall not cancel the allotment/booking/allocation of the said property made to the Borrower without obtaining a 'No Objection Certificate' from the PNBHFL in this regard".*

The terminology of clause (f) which is already extracted above, is obviously much different from that of clause (k); clause (f) speaks of the events of *'withdrawal'*, *'death'* or *'failure to pay'*, whereas clause (k) mentions the sole event of cancellation by consciously employing the word *'cancel'*. These words employed in the Tripartite Agreement bear a meaning so exact that the reader can disregard the surrounding circumstances and the context in ascertaining the sense in which they are employed. It is not that the loan agreement is drafted & drawn as between the peasants, arguably having no much exposure to the outer world. The policy framed by the lending agency, i.e., PNBHFL with rich experience in the field has animated the format of Tripartite Agreement. These two clauses are independent of each other. Added, such a contention is conspicuously absent in the pleadings of PNBHFL and even otherwise it would not have made much difference. What is being construed is the terms of a loan agreement and not the provisions of a Statute of Westminster. It hardly needs to be stated that *words are to be construed according to their strict and primary acceptation, unless from the context of the*

instrument, and the intention of the parties to be collected from it, they appear to be used in a different sense, or unless, in their strict sense, they are incapable of being carried into effect.[3]

(f) The contention put forth on behalf of PNBHFL that there is a separate Bipartite Loan Agreement whereunder petitioners obligation to serve the debt continues independent of the Tripartite Agreement, is bit difficult to agree with, the same being anterior to the new arrangement involving three stakeholders, in respect of the very same subject matter. In fact, such an arguable clause, if any, by virtue of *'novatio'* is subsumed into the Tripartite Agreement itself.. No specific clause of the Bipartite Agreement is notified to the Court justifying PNBHFL to coerce the petitioners to undertake debt servicing disregarding the protection bestowed by the subject clauses. If bank has erred in the course of its business and suffers loss, the poor borrowers who wanted to have a shelter of their own, cannot be put to peril, the Right to residence being constitutionally guaranteed under Article 19(1)(e).

---

[3] *MALLAN vs. MAY* (1844) 13 M. & W. 511, 517

(g) This Court hastens to add that the constitutional mandate for fairness in the acts of instrumentalities of '*State'* under Article 12, respondent PNBHFL answering this description, will fail, if they are not animated by the elements of justice & fairplay. What Professor Upendra Baxi writes[4] referring to John Rawl's '*Theory of Justice'* in treating the singularity of justice & fairness, is worth quoting:

> *"I do not, naturally mean that fairness and justice are magic wands or that conscientious justices will entertain any one single or univocal conception of it... But what I am urging is an approach under which courts will not ask: "How do we balance the need for administrative efficiency with fairness to the individuals affected?" Rather, they will ask: "Is the action fair? If it is, is it not by the same token efficient? If not, must we foster a conception of efficiency which generates incidence of unfairness?" Only when justice or fairness is seen to be an integral aspect of the value of efficiency (or vice versa) will we have a bureaucratic culture more responsive to citizen's rights and status. Only when this happens will small man gain when the big fight forensic battles"*

(h) The contention of Mr. Holla that the petitioners have suppressed the fact that it is on their instruction the sanctioned loan has been released to the Developer and therefore they are liable to be non-suited,

does not impress the court. In any loan transaction of the kind, the bankers take consent of the borrowers as a precautionary measure to release the amount in favour of Developers. That does not dilute the protection otherwise availing to the them under the base arrangement i.e., the Tripartite Agreement. Even otherwise, consent of the kind can only strengthen the liability which the Developer has to shoulder in terms of clause (h) as already discussed above.

(i) The contention of PNBHFL that the case of petitioners arises under a private loan agreement and therefore they should be relegated to ordinary civil remedy, is not tenable. Reasons are not far to seek: Firstly, PNBHFL is not a private lending agency and it functions *inter alia* under the umbrella of the National Housing Bank Act, 1987 whose preamble reads as under:

> *"An Act to establish a bank to be shown as a National Housing Bank to operate as a principal agency to promote housing finance institution both at the local and regional levels and to provide financial and other support to such institutions and for matters connected therewith are incidental thereto".*

---

[4] I.P Massey, Administrative Law, 2nd Edition, 19 – 20 (1985)

Therefore, the Tripartite Agreement cannot be said to be in the exclusive realm of private law of contract. The PNBHFL is an instrumentality of State in the light of *R.D.SHETTY vs. INTERNATIONAL AIRPORT AUTHORITY*[5]. Added, the impugned action & inaction of the PNBHFL far transcend the limits of private law by any public law standard. Thus, the loan transactions of the kind are animated by abundant elements of public law. The provisions of section 14 of the 1987 Act lend credence to this view, its clause (ba) being texted as under:

> *"making of loans and advances for housing or residential township-cum-housing development or slum clearance projects;"*

The version of petitioners gains support also from the observations in *GUJARAT STATE FINANCIAL CORPORATION vs. LOTUS HOTELS PVT. LTD*[6] wherein paragraph 12 reads as under:

> *"Viewing the matter from a slightly different angle altogether it would appear that the appellant is acting in a very un-reasonable manner. It is not in dispute that the appellant is an instrumentality of the Government and would be other authority' under Article 12 of the Constitution. If it be so, as held by this Court in R.D. Shetty vs. The International Airports Authority of India & Ors. the rule*

[5] AIR 1978 SC 1628
[6] (1983) 3 SCC 379

> *inhibiting arbitrary action by the Government would equally apply where such corporation dealing with the public whether by way of giving jobs or entering into contracts or otherwise and it cannot act arbitrarily and its action must be in conformity with some principle which meets the test of reason and relevance."*

Reliance of Mr. Holla on paragraphs 10 & 11 of the latest decision in *PHOENIX ARC PRIVATE LIMITED vs. VISHWA BHARATI VIDYA MANDIR*[7] would not come to the rescue of his clients, the observations therein being facts specific. It hardly needs to be stated that a case is an authority for a proposition that it lays down in the fact matrix of a given case and not for all that which logically follows from what has been so laid down vide *QUINN vs. LEATHAM*[8].

(j) The vehement contention advanced on behalf of the answering respondents that disputed facts galore in the case of petitioners and therefore they do not merit adjudication at the hands of writ court also does not merit acceptance. More often than not, petition averments taken up under writ jurisdiction are disputed, so that readily the litigant can be relegated to alternate forum. It is not that in every case involving disputed

[7] (2022) 5 SCC 345

facts, this should happen as a matter of course. If what is disputed can be fairly adjudged on the basis of evidentiary material availing on record in the light of pleadings of parties, the constitutional court cannot shirk its responsibility of adjudging a fit cause brought before it; it cannot divert the injured litigant to some other legal clinic for treatment, he having already spent time, money & energy. Even the Apex Court echoed this view in *ABL INTERNATIONAL LIMITED vs. EXPORT CREDIT GUARANTEE CORPN. OF INDIA LIMITED*[9]. The *Magna Carta* (1215) which is considered to be a foundational document of constitutional jurisprudence world over, at stanza 40 declares: "*Nulli vendemus, nulli negabimus, aut differenmus, rectum aut justiciam: To no one will we sell, to no one will we deny or to no one we shall delay right or justice.*" A stanza like this is a North Star for Courts to sail through to the destination in the vast ocean of laws.

(k) Article 226 of our Constitution confers extraordinary jurisdiction on the High Courts not only to issue prerogative writs for the enforcement of

---

[8] (1901) A.C 495
[9] (2004) 3 SCC 553

Fundamental Rights but also for '*any other purpose*'; it is wide & expansive, although discretionary & equitable. The Constitution does not place any fetter on its exercise. D.D.Basu[10] an acclaimed Indian jurist writes:

> "*Every action of State or its instrumentality which is illegal, in contravention of prescribed procedure, unreasonable, irrational or mala fide, is open to Judicial Review. Remedies are available even in cases of tort or contract…Access to justice by way of public law remedy would not be denied when a lis involves public character…the constitutional power of the High Court under Arts 226 and 227 can be invoked to set right their errors and prevent gross injustice to the party complaining*".

The above gains support from the recent decision of the Apex Court in RADHA KRISHNA INDUSTRIES vs. STATE OF HIMACHAL PRADESH.[11] A view to the contra would defeat the broad conferment of writ remedies constitutionally internalized freeing the system from the traditional shackles of English Law, as is evident from the Constituent Assembly Debates[12]. Otherwise, our Constitution would be only a '*Continental jargon*'. What

---

[10] Durga Das Basu, '*Shorter Constitution of India'*, 15th Edition, Volume 2, Lexis Nexis, 1038-39 (2014)
[11] 2021 SCC OnLine SC 334
[12]Constituent Assembly Debates, Volume VII, 9th December 1948

Justice Oliver Wendell Holmes observed in *DAVIS vs. MILLS*[13] is apt:

> *"Constitutions are intended to preserve practical and substantial rights, not to maintain theories …"*

(l) Mr.Holla lastly pressed into service a latest decision of this court in M/S NITESH RESIDENCY HOTELS PVT.LTD vs. UNION OF INDIA[14] in support of his contention that where disputed facts are involved in a case of banking transaction, resort to writ remedy is misconceived. That was a case involving a private bank whose impugned action did not have any public law indicia and that the matter was perfectly in the realm of loan contract that did not have any statutory flavour unlike the case of petitioners herein. This court made it one of the grounds to deny relief to the litigant therein. However, the facts of this case are miles away from it, as already discussed above. Therefore, much milk cannot be derived from the said decision. Added, much of the so called '*disputed questions of facts'* has withered away because of orders of the RERA though PNBHFL was not a

[13] 194 U.S. 451 (1904)
[14] W.P.No.2004/2022 disposed off on 8.8.2022

party *eo nomine* thereto. The operative portion of one such order is worth reproducing:

> *"(b) The Developer is hereby directed to return the own contribution amount…to the complainant within 30 days from today. If not it will carry interest @10.25% from 31st day.*
>
> *(d) The Developer is hereby directed to discharge the loan raised in the name of the complainant with all its EMI and interest, if any.*
>
> *(f) The complainant is hereby directed to execute the cancellation deed in favour of the Developer after the entire amount has been realized…"*

In the above circumstances, these petitions having been allowed in part, this Court makes the following:

ORDER

(i) A Writ of Mandamus issues restraining the Respondent-PNB Housing Finance Limited from taking any coercive measures against the petitioners for recovering any amount comprised in the Loan Agreements and Tripartite Agreements in question;

(ii) a Writ of Mandamus issues directing the respondents i.e., Reserve Bank of India, National Housing Bank, Punjab National Bank Housing Finance Limited & TransUnion CIBIL Limited, to process petitioners' claim for reframing the CIBIL scores and for issuing *No Due Certificates* in accordance with law, within sixty days; and

(iii) a Writ of Mandamus issues to the respondent – M/S. Mantri Developers Private Limited, to comply with the subject orders made by the Adjudicating Officer, RERA within sixty days.

Nothing observed herein above shall be constructed as constricting the respondent-Punjab National Bank Housing Finance Limited from taking up any proceedings for recovering the outstanding loans in question from respondent-M/S. Mantri Developers Private Limited.

Costs made easy.

This court places on record its deep appreciation for the able assistance and research rendered by its Official Law Clerk Cum Research Assistant Mr. Faiz Afsar Sait.

Sd/-
JUDGE

Snb/Bsv/cbc