

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
INTERIM APPLICATION NO.1 OF 2020
IN
WP-LD-VC-44 OF 2020
WRIT PETITION (ST.) NO. OF 2020

Housing Development Finance Corporation Ltd. ... Applicant

In the matter between:

Anandghan Griharachana Sahakari Sanstha Maryadit... Petitioner

Vs.

Union of India and others ... Respondents

Mr. Prateek Seksaria with Mr. Ishwar Nankani, Huzefar Khokhawala, Mrs. Gauri Menon and Ms. Divya Shetty i/b. Nankani Associates for Applicant and Respondent No.8 in Writ Petition.

Ms. Neela Gokhale with Ms. Yogita Ugale for the Petitioner.

Ms. Namrata Zaveri i/b. DSK Legal for Respondent No.2.

Mr. S. S. Panchpor, AGP for Respondents-State.

Dr. Birendra Saraf, Senior Advocate for Respondent No.5

**CORAM : UJJAL BHUYAN &
ABHAY AHUJA, JJ.**

**Reserved on : AUGUST 27, 2020
Pronounced on : SEPTEMBER 22, 2020**

ORDER : (Per Ujjal Bhuyan, J.)

This interim application has been filed by the applicant for recall of the order dated 26.06.2020 passed by this Court in the related writ petition and for a direction to the writ petitioner to provide copies of its registration certificate, bye-laws and list of its registered members with all details *vis-a-vis* the applicant as on the date of filing of the related writ petition. Applicant has been arrayed as respondent No.8 in the related writ petition.

2. We have heard Mr. Prateek Seksaria, learned counsel for the applicant / respondent No.8; Ms. Neela Gokhale, learned counsel for the writ petitioner; Ms. Namrata Zaveri, learned counsel for respondent

No.2; Mr. S. S. Panchpor, learned AGP for the respondents-State; and Dr. Birendra Saraf, learned senior counsel for respondent No.5.

3. It may be mentioned that while hearing the present interim application, Dr. Saraf made a submission that respondent No.5 has also filed an independent interim application for recall of the same order i.e., order dated 26.06.2020 which is however not before us. Therefore, in the hearing on the present proceeding, which took place on 27.08.2020, we also heard Dr. Saraf, learned senior counsel for respondent No.5 in support of the present interim application.

4. At the outset, we may refer to the order dated 26.06.2020 for recall of which the present interim application has been filed. Order dated 26.06.2020 is as under:

1. Heard Ms. Gokhale, learned counsel for the petitioner and Ms. Zavari, learned counsel for respondent No.2.

2. On 23rd June, 2020 we had passed the following order:-

“2. Learned counsel for the petitioner prays for an interim order to restrain respondent Nos.3 to 26 i.e. the banks from recovering the EMIs from the members of the petitioner i.e. home buyers till report by the Interim Resolution Professional is received. On a query by the court she submits that she has served notice on the said respondents, but notwithstanding the same, there is no response from them.

3. Let the matter be called upon again on 26th June, 2020.

4. It is made clear that if there is no representation on behalf of the above respondents, court may consider the interim prayer of the petitioner.

5. Stand over to 26th June, 2020.”

3. Today when the matter is called upon, it is submitted that though respondent Nos.3 to 26 have been informed about the court hearing today, there is no representation on behalf of the said respondents.

4. Learned counsel for the respondent No.2 submits that respondent No.2 has since been confirmed as Resolution Professional.

5. After hearing learned counsel for petitioner and respondent No.2 and considering the averments made in the writ petition, we direct respondent Nos.3 to 26 as an interim measure not to recover the EMIs from the members of the petitioner i.e. home buyers till report is submitted by Resolution Professional i.e., respondent No.2 which shall also be informed to the court.

6. Stand over to 7th August, 2020.”

5. From the above, it is seen that on 23.06.2020 we had passed an order on the prayer of learned counsel for the writ petitioner for interim relief. It is seen that on a query by the Court, learned counsel for the petitioner had submitted she had served notices on respondent Nos.3 to 26 but there was no response. While deferring the matter to the next date, it was clarified that if there was no representation on behalf of the said respondents, Court would consider the interim prayer of the petitioner. On the next date i.e., 26.06.2020, it was submitted that respondent Nos.3 to 26 were informed about the court hearing; however, there was no representation on behalf of the said respondents. Learned counsel for respondent No.2 submitted that respondent No.2 has since been confirmed as Resolution Professional. After hearing the matter, this Court passed an interim order directing respondent Nos.3 to 26 not to recover the Equated Monthly Installments (EMIs) from the members of the petitioner i.e., home buyers till report is submitted by the Resolution Professional i.e., respondent No.2 which should be informed to the Court.

6. The main ground on which recall of the aforesaid order has been sought for is that contrary to what was submitted before the Court, petitioner did not serve notice on respondent Nos.5 and 8 therefore, by making incorrect statement, petitioner had obtained favourable interim order from the Court in the absence of the applicant i.e., respondent No.8 as well as respondent No.5. On this ground alone, the interim order should be vacated or recalled. Additionally, it is contended that the writ

petition is devoid of material facts. List of members of the petitioner has not been annexed to the writ petition; who are the home buyers who had availed of loans from respondent No.8 and by extension respondent No.5 have not been stated and that without such material particulars, petitioner has obtained a blanket interim order from the Court which has caused prejudice to financial institutions like respondent Nos.8 and 5. That apart, there is no element of state involvement in the matter. Respondent No.8 and by extension respondent No.5 are private entities with whom the home buyers have contractual obligations. Being financial institutions, respondent Nos.8 and 5 had advanced loans to enable the home buyers to purchase flats but by virtue of the interim order the borrowers are now not required to repay the loan amounts. The dispute is purely private and therefore, the writ petition itself is not maintainable. When the writ petition itself is not maintainable, question of granting interim relief on the basis of such writ petition does not arise.

7. Before we advert to the rival submissions, we may briefly advert to the pleadings.

8. In the related writ petition, Anandghan Griharachana Sahakari Sanstha Maryadit is the petitioner. Petitioner is a co-operative housing society registered under the Maharashtra Co-operative Societies Act, 1960. Petitioner represents a group of flat purchasers who have purchased flats in the project called 'Anandghan'.

8.1. The builder namely, D. S. Kulkarni Developers Limited had declared a scheme for construction of residential flats in a plot of land admeasuring approximately 10,000 sq.mtrs. situated at Gat No.186, Village Kirkatwadi, Taluka Haveli, District Pune. According to the petitioner, the project consisted of 11 residential towers from Tower A to Tower K, each having 12 floors of different areas. In all, there are about 930 flats in the said project.

8.2. Following advertisement by the developer, several persons came forward to buy flats. As a matter of fact, 460 flats out of total 930 flats were booked. 426 have entered into flat booking agreements out of whom 34 have received allotment letters during the period 2014-15. It is stated that many of the flat purchasers had paid more than 90% of the cost of the flat to the developer prior to December, 2016. As per the agreement, the flats were to be handed over to the buyers on or before December, 2016.

8.3. Notwithstanding such assurance, construction of the flats came to a halt in 2018 leaving the flat buyers high and dry. They had invested their life savings in the purchase of flats and had obtained housing loans from various financial institutions including banks. They had deposited the necessary amounts with the developer but possession of the flats was not handed over to them. On the contrary, they have been forced to pay EMIs to the respective banks.

8.4. The developer had executed agreements with flat buyers under section 4 of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963, which have been duly registered.

8.5. Tripartite agreements were entered into between the respective bank, builder and flat buyer. The finance was made available under a scheme called '*Aadhi Ghar Paise Nantar*' meaning thereby that firstly the purchaser will get home and only thereafter he would have to pay. In view of such assurance, many of the flat buyers had booked flats. As per such agreement, the developer had agreed to pay the EMIs till possession of the flats was handed over to the flat buyer. Period of two years was specified on the basis of the promise made by the developer that possession would be handed over to the flat buyers within a period of two years. Since the flats were not ready despite the flat buyers having paid the entire agreed consideration in most cases, request was

made by the flat buyers to the developer to resume and complete the construction and thereafter to handover the vacant possession of the respective flats to the buyers.

8.6. In the year 2016-17, several FIRs came to be lodged against the directors of D. S. Kulkarni Developers Limited and its officials. The FIRs were primarily lodged for commission of various offences under the Maharashtra Protection of Interest of Depositors (In Financial Establishments) Act, 1999. That apart, the Enforcement Directorate also swung into action against such directors and officials under the Prevention of Money Laundering Act, 2002. Directors of D. S. Kulkarni Developers Limited have been arrested and are presently in custody in Yerwada jail. Developer has been accused of running a scam scheme whereby and whereunder it was collecting fixed deposits from unsuspecting citizens and had failed to repay the same on maturity. Furthermore, the flat buyers were staring at a situation where they had invested all their hard earned money for purchasing flats and in addition had availed loans from financial institutions but construction of flats was nowhere near completion, not to speak of handing over of possession of the flats to the buyers. While construction and delivery of flats have become completely uncertain, the flat buyers on the other hand are being compelled to pay EMIs to the banks and financial institutions.

8.7. In such circumstances, petitioner had approached the Real Estate Regulatory Authority (RERA) seeking revocation of registration of the builder with RERA under sections 7 and 8 of the Real Estate (Regulation and Development) Act, 2016. However, the authority declined to intervene in the matter. In the meanwhile, Bank of Maharashtra i.e., respondent No.6 filed an application under section 7 of the Insolvency and Bankruptcy Code, 2016 before the National Company Law Tribunal, Mumbai (Tribunal) against the developer i.e., D. S. Kulkarni Developers Limited which has been registered as C.P.(IB) No.1633 / MB / 2019. By order dated 26.09.2019, the Tribunal initiated the corporate insolvency

resolution process against the developer. Mr. Manoj Kumar Agarwal was initially appointed as the Interim Resolution Professional. Subsequently, he has been confirmed as the Resolution Professional. When the flat buyers approached the Resolution Professional, he asked them to file their respective claims.

8.8. In the meanwhile, the lockdown was imposed in view of the coronavirus pandemic. Because of distressed financial condition, flat buyers are unable to pay the EMIs. Many of them are senior citizens. It is under such circumstances that the related writ petition has been filed seeking directions to respondent Nos.3 to 26 desisting from recovering EMIs from members of the petitioner against the amounts disbursed by them to the developer till possession of the flats is physically delivered to the flat buyers.

9. Housing Development Finance Corporation Limited (HDFC) is respondent No.8 and it has filed the interim application. Tata Capital HSG Finance Limited is respondent No.5. According to respondent No.8, it is a company incorporated in the year 1977 under the Companies Act, 1956. It is a financial institution within the meaning of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. It is engaged in the business of advancing loans for construction and / or for purchase of dwelling houses.

9.1. It is stated that D. S. Kulkarni Developers Limited i.e., the developer had acquired development rights from one DSK Global Education and Research Limited *vide* development agreement dated 31.12.2013 for a project known as 'DSK Vishwa' with the specific intention to set up a small village / town of around 6000 units. In order to develop Phase-VI of the project, the developer promoted a residential project by the name of 'DSK Vishwa Phase-VI, Anandghan' in Pune. Several individuals had approached HDFC to avail housing loans for

purchasing flats in the project. The housing loans advanced to the borrowers by HDFC were to be repaid by way of EMIs as provided in the respective loan agreements entered into by each of the borrowers with HDFC. Out of the total 47 borrowers, 16 had opted for the '*Aadhi Ghar Paise Nantar*' scheme promoted by the developer. These 16 borrowers entered into tripartite agreements with the developer and HDFC for availing finance under the aforesaid scheme. Remaining 31 borrowers did not opt for the said scheme. Thus the tripartite agreements were executed in respect of only 16 borrowers. As per the tripartite agreements, the developer had assumed the liability of the borrowers to the limited extent of payment of pre-EMI for a period of 24 months from the date of first disbursement or till possession / completion of the flat, whichever was earlier. However, HDFC has contended that such liability of the developer has in no way relinquished or reduced the liability of the borrowers towards HDFC; besides, such liability being joint and several between the borrowers and the developer.

9.2. It is further contended that such tripartite agreement was in addition to the loan agreement executed between HDFC and the respective borrowers. Both the two agreements would have to be read in conjunction. As per the tripartite agreement, pre-EMI was paid by the developer for the 16 borrowers upto March, 2017.

9.3. In February, 2018, Mr. D. S. Kulkarni, Managing Director of the Developer was arrested under the Maharashtra Protection of Interest of Depositors (In Financial Establishments) Act, 1999 and the said project came to a complete halt. After the developer stopped paying, HDFC has not received any payment from 14 out of the 16 borrowers under tripartite agreement.

9.4. Regarding the corporate insolvency proceeding, it is stated that HDFC has informed the Interim Resolution Professional that it is the first and exclusive charge holder of the various units in the said project

and that no resolution plan or liquidation proceedings be undertaken that may be prejudicial to the interest of HDFC.

9.5. While most of the 31 borrowers have paid EMIs till July, 2020, out of the 16 borrowers who had opted for tripartite agreement, one has paid the loan by prepayment and another has paid the EMIs upto July, 2020. Remaining 14 borrowers have not paid any amount to HDFC.

9.6. HDFC had disbursed housing loans for the said project to the tune of Rs.11,33,56,720.00 but because of the interim order, it has been hampered / restricted from recovering its dues.

9.7. It is stated that no notice was served upon HDFC about the court proceeding. For the first time an email dated 29.06.2020 was forwarded to the HDFC by one of the borrowers whereafter few more emails were received. Referring to the affidavit of service filed on behalf of the petitioner it is stated that notice of hearing was sent to three email addresses out of which delivery to two email addresses had failed. In so far the third email address is concerned i.e., customercare@hdfc.com, it is stated that the said email address does not receive emails with large files and the email from the advocate for the petitioner with the notice of hearing was rejected due to size restrictions. Besides, this email address is not the official email address of HDFC.

9.8. It is in such circumstances that the interim application has been filed.

10. Petitioner in its reply to the interim application has stated that order of this Court dated 02.06.2020 was sent to all the respondents *vide* email dated 09.06.2020. This was followed by another email dated 17.06.2020 clearly mentioning the next date of hearing i.e., 23.06.2020. On 18.06.2020, counsel for the petitioner filed an affidavit of service along with proof of service. *Vide* email dated 25.06.2020, link and

password for the court hearing on 26.06.2020 was sent to HDFC. The aforesaid emails were sent to the email addresses available on the website of HDFC. Though HDFC has stated that the email id customercare@hdfc.com does not receive emails with large files, however the link for court hearing was sent to the said email address. Despite receiving the email, applicant HDFC failed to appear before the Court. It is further stated that applicant HDFC is not complying with the interim direction of this Court and is continuing to deduct EMIs from the accounts of the flat buyers to whom loans were advanced by HDFC but disbursed directly to the developer. When the applicant HDFC had itself displayed details of its email address on its website through which its customers were required to communicate and correspond with them, it is not open to HDFC to say that the said email address is not frequently accessed by its officials. HDFC was fully aware of the court proceedings. Notice on the HDFC is to be construed as constructive notice and only on the said ground the interim order may not be vacated.

11. Both Mr. Seksaria and Dr. Saraf arguing for recall of the interim order submit that no material particulars have been pleaded in the writ petition; who are the members of the petitioner, from which financial institution they had borrowed money for purchasing flats, quantum of such borrowings, amount repaid - nothing has been indicated. By making sweeping submissions, not backed by facts, an omnibus interim order has been obtained which is causing serious prejudice to the respondents like HDFC and Tata Capital HSG Finance Limited. No notices were served upon the said respondents i.e., respondent Nos.3 to 26 and by making incorrect statements, interim order was obtained. That apart, dispute raised by the petitioner is purely private and civil; no element of public law is discernible. In such circumstances, this Court may not invoke the writ jurisdiction under Article 226 of the Constitution of India as the writ petition itself raising private grievance is not maintainable. Therefore, the interim order may be recalled.

12. On the other hand, Ms. Neela Gokhale, learned counsel for the petitioner in her spirited reply submits that it is not a fact that notices were not served upon the respondents. Notices were duly served and to that effect, affidavit of service was filed by the petitioner before the Court. Despite having knowledge about the court proceeding, the said respondents watched from the sidelines without making any intervention. Only after the interim order was passed, the respondents that too two of them, have now come forward crying prejudice. She submits that the related writ petition raises issues of considerable public importance and therefore, before finally hearing the writ petition, the interim order may not be recalled. She submits that on any day, petitioner is ready to argue the case. Regarding non-furnishing of particulars, she submits that she may be given liberty to file supplementary pleadings to bring on record all relevant and material particulars.

13. Submissions made by learned counsel for the parties have been duly considered.

14. From the above, it is evident that order dated 26.06.2020 is sought to be recalled on the following grounds:-

- (1) Non-service of notice;
- (2) Inadequate material particulars pleaded by the petitioner in the writ petition; and
- (3) Dispute between the parties is a private dispute with no element of public law involvement. Dispute is of contractual nature, and therefore, parties should be relegated to the civil law remedy.

15. We take up the contention relating to non-service of notice first. In its reply affidavit as well as in the course of hearing, learned counsel for the petitioner has stated that after this Court passed the order dated 02.06.2020, the same was sent to all the respondents *vide* email dated

09.06.2020 which was followed by another email dated 17.06.2020. In so far the applicant is concerned, emails were sent to the email address of HDFC i.e., customercare@hdfc.com. On 18.06.2020, counsel for the petitioner filed an affidavit of service along with proof of service of notice upon the respondents. It is further stated that *vide* email dated 25.06.2020, link and password for the court hearing on 26.06.2020 was also sent to applicant HDFC. As against this, applicant HDFC has stated that the email address customercare@hdfc.com does not receive emails with large files and email from the advocate of the petitioner with the notice of hearing was rejected due to size restrictions.

15.1. From the above, it is evident that petitioner had sent notice of the case to the applicant HDFC in its id mentioned in its website. Thus, a view may be taken that applicant HDFC was aware of the court proceeding. When it says that email from the advocate of the petitioner was rejected due to size restrictions, it is indicative of the fact that applicant HDFC was in the know of the email sent by the petitioner. Despite that it had not shown any diligence; rather, now seeks to hide behind technicalities. Therefore, the contention advanced by applicant HDFC as well as by respondent No.5 does not appear to be fully correct. At best, it is a highly technical objection. When applicant HDFC was aware of the court proceeding, it is not understood as to why it refrained from participating in the court proceeding. At least on this ground, Court is not inclined to recall the order dated 26.06.2020.

16. This brings us to the other two issues raised by the applicant i.e., respondent No.8 as well as by respondent No.5. Since both the issues are intertwined, we consider both the issues together. It is true that in the writ petition, petitioner has not furnished all particulars. While petitioner is a co-operative housing society, it has not furnished the list of its members. It has also not furnished details of loan transactions of its members with respondent Nos.3 to 26. Though the petitioner is represented by its chairman Mr. Santosh Digambar Honkapre, it is also

not stated that from which financial institution he has availed loan or whether he has availed loan at all. These particulars are relevant and material considering the contours of the *lis* being presented before the Court. However, on this ground, we do not feel that petitioner should be non-suited. As a matter of fact, though this point has been raised by the applicant HDFC in its interim application, it has also not furnished the relevant particulars for consideration of the Court. Though it has stated that 47 of the flat buyers had borrowed loan from it, out of which 16 had opted for the scheme '*Aadhi Ghar Paise Nantar*' requiring tripartite agreements between the financial institution, developer and the flat buyers, it has not furnished the particulars of those 47 or 16 borrowers; though it has annexed to its interim application one loan agreement dated 28.08.2015 between it and borrowers Mr. Amol Anil Arjunwadkar and Mrs. Mansi Amol Arjunwadkar, besides one tripartite agreement also dated 28.08.2015 between it, the developer and borrowers Mr. Amol Anil Arjunwadkar and Mrs. Mansi Amol Arjunwadkar.

17. The situation which has thus emerged is that the applicant had provided loans to some of the flat buyers by making direct payment to the builder. In respect of those who had opted for '*Aadhi Ghar Paise Nantar*' scheme, builder had assured that for two years prior to payment of EMI or handing over of flats, whichever is earlier, it would pay the applicant. It appears that the developer is embroiled in certain scam. Managing director of the developer was arrested in February, 2018 under the Maharashtra Protection of Interest of Depositors (In Financial Establishments) Act, 1999. Construction has come to a complete standstill. While the home buyers are far away from getting possession of their flats, if at all they get the same, they would nonetheless have to pay EMIs to the applicant though the loan amount was never paid to them directly. This is indeed a piquant situation which cannot be overlooked and simply brushed aside.

18. Admittedly, National Company Law Tribunal, Mumbai has

invoked provisions of the Insolvency and Bankruptcy Code, 2016 in respect of the developer. Resolution Professional has been appointed who has initiated corporate insolvency resolution process. May be in the ultimate analysis, resolution of the grievance of the flat buyers as represented by the petitioner *vis-a-vis* the lending institutions perhaps may have to be looked into by the Resolution Professional. That was why we had directed that till report is submitted by the Resolution Professional, EMIs should not be recovered by respondent Nos.3 to 26 from the home buyer members of the petitioner. This is of course a tentative view. In such circumstances, we are of the considered opinion that it may be too premature for us to recall the order dated 26.06.2020 at this stage by taking the view that the writ petition involves purely private dispute between the contracting parties without any element of public law involvement. This aspect may require further deliberation.

19. In such circumstances, we are not inclined to recall our order dated 26.06.2020 at this stage. However, as prayed for by the applicant, petitioner shall furnish copies of its registration certificate, bye-laws and the list of its registered members with all details *vis-a-vis* availing of loan for purchase of flat as on the date of filing of the writ petition. Applicant i.e., respondent No.8 and respondent No.5 may file their reply to the writ petition.

20. Subject to the above, interim application is dismissed.

21. This order will be digitally signed by the Private Secretary of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

(ABHAY AHUJA, J.)

(UJJAL BHUYAN, J.)