Gaikwad RD

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 1360 OF 2023

SBICAP VENTURES LTD,
A company incorporated under the Companies Act, 1956 and presently operating as per the Companies Act, 2013, having its registered office at 202, Maker Tower "E", Cuff Parade, Mumbai 400 005. **...Petitioner**

~ VERSUS ~

1. **JOINT DIRECTOR, DIRECTORATE OF ENFORCEMENT (BENGALURU ZONAL OFFICE),**
   having office at 3rd Floor, 'B' Block, BMTC, Shantinagar, TTMC, K.H. Road, Shantinagar, Bangalore, Karnataka 560 027.
2. **DEPUTY DIRECTOR, DIRECTORATE OF ENFORCEMENT (BENGALURE ZONAL OFFICE),**
   having office at 3rd Floor, 'B' Block, BMTC, Shantinagar, TTMC, K.H. Road, Shantinagar, Bangalore, Karnataka 560 027.
3. **ASSISTANT DIRECTOR,**

DIRECTORATE OF ENFORCEMENT (BENGALURU ZONAL OFFICE),
having office at 3rd Floor, 'B' Block, BMTC, Shantinagar, TTMC, K.H. Road, Shantinagar, Bangalore, Karnataka 560 027. **...Respondents**

APPEARANCES

FOR THE PETITIONER	**Mr Shyam Mehta, Senior Counsel,** *with Pranav Badheka, Ranjit Shetty, Yuvraj Choksy & Tejas Gokhale, i/b Argus Partners.*
FOR RESPONDENTS	**Mr Harsh Dedhia**, *i/b HS Venegavkar.*

CORAM : G.S.Patel & Neela Gokhale, JJ.

DATED : 20th March 2023

ORAL JUDGMENT (*Per GS Patel J*):-

1. **Rule**. Having heard both sides and considered the material, we do not think there is any possible answer to this Petition and therefore we make Rule returnable forthwith and take up the Petition for hearing and final disposal.

2. The Petitioner is SBICAP Ventures Ltd ("**SBICAP**"). It is a company incorporated under the Companies Act 2013 and is a

wholly owned subsidiary of SBI Capital Markets Ltd, which in turn is a wholly owned subsidiary of the State Bank of India ("**SBI**").

3. The challenge in the Petition is to an order of 11th August 2022 passed by the 2nd Respondent, the Deputy Director, Directorate of Enforcement, Bengaluru Zonal Office. The 1st Respondent is the Joint Director of the Directorate of Enforcement. Both are Authorities under Section 49 of the Prevention of Money Laundering Act 2002 ("**PMLA**"). The 2nd Respondent enjoys powers conferred under PMLA read with the Prevention of Money Laundering (Issuance of Provisional Attachment Order) Rules 2013 ("**POA Rules**"). The 3rd Respondent is an Assistant Director of the Directorate of Enforcement, also appointed under Section 49 of the PMLA.

4. The 11th August 2022 impugned order is a provisional attachment of assets worth Rs. 300,43,00,000/-, i.e., over Rs. 300 crores. The attachment was supposed to be in respect of 'assets' of the Mantri Group which includes two entities and one individual, (a) Castles Vista Pvt Ltd, (b) Mantri Developers and (c) Sushil Mantri. SBICAP has a beneficial interest in some assets of Castles Vista.

5. The Mantri Group, essentially through Castles Vista had undertaken a development of a project known as "Mantri Serenity" valued at over Rs. 285 crores. SBICAP had a first charge over certain units in that project. Because of the 11th August 2022 order, that first charge of SBICAP is compromised and has directly affected the funding being sought by flat purchasers in respect of those units. There is, in paragraph 5, a mention of orders of 2020 and 2022 by the Karnataka High Court staying the operation of the FIR of the predicate offence under the PMLA. The FIR regarding the predicate offence was thus, it is submitted, not in effect or operational at the time of the 11th August 2022 impugned order.

6. A brief background about the investment of SBICAP in the project is from paragraph 6. In 2019, the Union Government approved the setting up of a Special Window in the form of an Alternate Investment Fund ("**AIF**"). This was to provide priority debt financing specifically to complete housing projects that had been interrupted or stalled and which were meant for the affordable or middle income housing sector. SBICAP is the Investment Manager of the first AIF established under the Special Window. It formed a fund called the "Special Window for Affordable and Middle-Income Housing Investment Fund-I" also known as the SWAMIH Investment Fund-I ("**SWAMIH**"). This fund is registered with the Securities Exchange Board of India ("**SEBI**"). Its sponsor is the Government of India itself. The idea was to invest in stalled residential projects which did not enjoy support from conventional banking channels. Obviously, the objective was directed towards welfare to provide relief to home buyers, to realize the completion of projects so that home buyers could actually get possession of their long-promised homes. The fund's mandate is to invest in projects to achieve completion. There is no regular interest servicing requirement until the project is complete. The entire intent is to mitigate the debt servicing burden. Two timelines operate in parallel: the first is a stricter timeline for project completion and the second is a relaxed timeline for debt repayment.

7. Many such projects were stalled across the country for various reasons. While the Petition does not actually say this, in this Court itself, at least four and possibly six Mantri Group projects have received this Court's attention. Some of those matters came before one of us, GS Patel J, sitting singly in the company jurisdiction. One group involved two projects in Bengaluru itself. One was brought to completion with the cooperation of the land owners and the flat purchasers who formed an association. Possession was delivered. There were similar projects in Gwalior, Solapur, a second project in Bengaluru and at least two projects in Mumbai. In every one of these cases, there were distressed buyers either for residential or commercial properties. Many of them had taken loans from banks, but without the project being completed, these purchasers were confronted with having to service the debt on their own but without any prospect of realizing the asset for which they had taken the loan in the first place. This is the kind of stressed situation that is the underlying philosophy of SWAMIH. SWAMIH steps in to ensure project completion while closely monitoring fund spending. The funding is only for project completion. No amount of funding is allowed to be diverted. Sums that are due and are collected from purchasers are held in an escrow account controlled by SWAMIH and these are also used only for construction-related expenses. The entire fund is driven by financial input from the Government of India and other public sector financial institutions including Life Insurance Corporation and SBI itself. There is thus a clear fiduciary responsibility.

8. In December 2004, Castles Vista was incorporated. Mantri Developers held the majority stake. Sushil Mantri and his wife held the remainder. There was a Joint Development Agreement of 29th September 2010 with one Gokulam Shelters Pvt Ltd for the development of a residential project called Mantri Serenity. The agreement contemplated that another entity in the Mantri Group, Krishna Lila Park Foundation, and Gokulam would respectively receive 27% and 3% from the sale proceeds. The project had five phases. Each phase had a separate Real Estate Regulatory Authority ("**RERA**") registration. Castles Vista made an investment of Rs. 650 crores which it obtained with financing from Piramal Capital and Housing Finance Ltd.

9. Ten years went by. Castles Vista could not complete the project. Only about 50% work was done. Last mile funding was necessary. Castles Vista came to SBICAP for funding through SWAMIH. After a due diligence, SBICAP agreed to fund Rs.360 crores through a subscription of 36000 non-convertible debentures of a specified description (senior, redeemable, secured and transferable), each of the face value of Rs One Lakh. SBICAP subscribed through SWAMIH to these debentures in seven tranches for a total investment of Rs. 230 crores. An additional Rs. 128 crores needed to be spent for project completion and delivery of possession of the new homes.

10. There was the debenture trust deed dated 30th September 2020 by which SBICAP Trustee Company Ltd was appointed as a Debenture Trustee. There was also an inter-creditor agreement between the Debenture Trustee and Piramal and by this, Piramal ceded its first right in charge in relation to its security in favour of the Debenture Trustee. Thus, Piramal has a second ranking subsidiary charge in comparison to SBICAP. The first charge was created in favour of SBICAP by a Memorandum of Entry dated 30th September 2022 over all the project lands, the project, its construction development including building and so on. There were 622 unsold units across all five phases. There was a Deed of Hypothecation over receivables and this was also dated 30th September 2020. An amended and restated Escrow Agreement dated 30th September 2020 was also put in place as was another Escrow agreement with SBI and the Debentures Trustees. These provided for cash flow mechanisms.

11. The details of these are unimportant for our purposes today. The fact is that the unsold units were mortgaged to SBICAP and the receivables were hypothecated to it.

12. Mantri Groups projects everywhere were in trouble. Some home buyers filed police complaints. The substance of these was that the Mantri Group had taken funds but did not deliver possession. There were also allegations of diversion of funds for non-project expenses, such funds having been received either through loans or from home buyers. Sections 417 and 420 of the Indian Penal Code 1860 were invoked and applied. Now these are scheduled offences under the Section 2(i)(x) and (y) of the PMLA Act. This is why the Respondents registered a case and triggered an investigation under the PMLA.

13. On 7th April 2022, the 3rd Respondent sent a letter to the Debenture Trustee asking for documents regarding credit and loans extended to Mantri Developers Pvt Ltd. There was another notice dated 11th April 2022 calling for further information. The Debenture Trustee clarified on 29th April 2022 that it had not extended a credit or a loan to Mantri Developers at all, but to Castles Vista which was a wholly owned subsidiary of Mantri Developers and that the loan was by SWAMIH, a fund sponsored by the Union of India and managed by SBICAP. The issuance of debentures was also pointed out.

14. There appears to have been no further correspondence from the Respondents.

15. Then came the 11th August 2022 impugned order, a copy of which is at page 53. It is issued under Section 5(1) of the PMLA. The 'reasons to believe' are that the Mantri Group diverted funds received from customers or home buyers to other projects and that this constitutes criminal breach of trust. Since Castles Vista did not complete the Mantri Serenity project in a timely manner, this caused anxiety and stress. As regards the SBICAP rights, the impugned order itself says that Mantri Developers collected funds partly either from loans or from home buyers and then diverted these.

16. But SWAMIH is sponsored by the Central Government for rescuing or resuscitating stressed or stalled projects by providing much needed funding. SWAMIH is the initial debenture holder and it has sanctioned an investment of Rs. 360 crores to Castles Vista of which Rs.230 crores has been disbursed. The impugned order itself noted that SWAMIH has a first charge over the land and building and other hard infrastructure. The repayment of SWAMIH is also noted.

17. SBICAP is not a party to any proceedings before the Adjudicating Authority under the PMLA.

18. There is no disputing the investment by SBICAP or SWAMIH or the creation of the security documents. There is no finding that the assets over which security has been created are proceeds of crime. What is sought to be equated is the *value of the assets* for recovery. But the Petition points out that this approach not only jeopardizes but possibly torpedoes the entire purpose of SWAMIH and for no discernible reason. The effect of this attachment under the impugned order is that banks and financial institutions have stopped lending to flat purchasers. This has a direct impact on the cash flow and the sales in the project. We leave aside for the moment the question of servicing the debt on the SBICAP-driven investment. Even project completion across all five phases is now directly under threat.

19. That the Petitioner has a first ranking charge cannot be disputed. Mr Mehta is correct in saying that this kind of an approach defeats the purpose of the establishment and formation of SWAMIH, the centrally funded project meant to assist desperate home buyers.

20. We do not understand how the impugned order can say that the 'beneficial interest in the attached units might be transferred by the Mantri Group'. There is not the slightest possibility of this ever happening, because these units are all secured to the Petitioner and it is impossible for "the Mantri Group" to effect any such transfer or to transact these assets. Every sale of a flat in this project is subjected to what is called a waterfall mechanism. The funds run through the Debenture Trustee. The funds are first put towards completion of the rest of the projects and are then utilized to repay the amounts due under the debentures. There is no involvement of any Mantri Group entity in this at all and it cannot transfer any interest in the attached units. No such transfer would be recognized or valid in law. The second charge, that of Piramal, continues and is for Rs. 650 crores. Now there is a hypothecation of the receivables in favour of the Petitioner and the Piramal Group. From where this theory is derived that the Mantri Group "might" transfer an interest is unclear; and it is only speculation The Mantri Group must have an interest to be able to transfer it. Absent that interest there is nothing for the Mantri Group to transfer.

21. This may be a classic case of the Enforcement Directorate's reach exceeding its grasp. The impugned order seems to proceed on the footing that since the project was once being taken up by 'the Mantri Group', therefore that group still has divestible rights. This is supposition. It then goes on to say that the Mantri Group 'might' transfer assets, which is guesswork. It implies that whatever 'rights' the Mantri Group once had, these are immutable for all time, which is a presumption. And it more of less insinuates that the SBICAP and SWAMIH involvement is not lawful, is a planned-in-advance as some kind of smokescreen or a nefarious subterfuge — and this last, we believe, belongs in the realm of fantasy.

22. This is not a matter of the assets of a private entity shown to be engaged in money laundering. What the impugned order has thrown into jeopardy are extraordinary amounts of public funds raised from the Central Government, LIC, SBI and nine public sector banks. The Department of Economic Affairs contributes 50% and the balance 50% comes from this consortium. The loss apprehended by SBICAP is between Rs.140 to Rs.180 crores and ED cannot explain how those public funds will ever be recovered.

23. But leave aside the money consideration. What the impugned order does not tell us is how the interest of the home owners or flat purchasers are in any way secured by the impugned order. Will they receive their money back? Will they be able to realize their long-delayed dreams of obtaining possession of completed apartments? There is no illegality in the title or the rights acquired by the SBICAP. There is no charge of money laundering against SBICAP. Yet the impugned order seeks to clamp down on the assets over which SBICAP has a first charge.

24. We are unable to see any provision of the PMLA that has, combined with the non obstante clause, an overriding charge that would defeat, efface or render subservient the rights of a secured creditor. It is even unclear whether the attachment by the PMLA constitutes a sovereign debt in a case like this. Even if it did, it would not prevail over the rights of a secured creditor claiming security under a contract. We are unable to see from the impugned order a single finding rendered after the due process of law that there is anything remotely untoward let alone illegal within the meaning of the PMLA in the Petitioner's acquisition of rights over the flats in question, the project or the receivables. It is no argument to say that the PMLA proceedings are in the public interest. Every statute is in the public interest. But is it being suggested that the SWAMIH fund is *not* in the public interest, despite all that is known? SBICAP is not even made a party to the PMLA proceedings.

25. All this is apart from the fact that the Karnataka High Court has by its orders of 1st October 2020 and 12th July 2022 stayed further proceedings on the FIR containing the predicate offence against the Mantri Group. That would speak to the substratum of the PMLA orders. Mr Mehta tells us that the Petitions before the Karnataka High Court have been finally disposed off with similar orders. We note the statement.

26. We must, we believe, look in this matter to the much larger public purpose that is being subserved by SBICAP, i.e., of completing these delayed projects and of serving the needs of home buyers who have taken loans and have to service their debts.

27. Having regard to these circumstances, we believe that there is no conceivable answer to the Petition. Apart from anything else, no amount of affidavits can supply reasons if these are not to be found in the impugned order itself. We have considered the impugned order to see if there is the slightest justification for moving against the secured assets.

28. Finding none, we proceed to make Rule absolute in terms of prayer clause (a). In the facts and circumstances of the case, there will be no order as to costs.

(Neela Gokhale, J) **(G. S. Patel, J)**