

## LEGAL SCRUTINY OF THE SUBVENTION SCHEME AND CONSEQUENTIAL LIABILITY OF THE STAKEHOLDERS IN THE REAL ESTATE SECTOR

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### ABSTRACT

The legal scrutiny of the subvention scheme in the real estate sector involves a detailed examination of regulatory compliance and the liabilities of developers, financial institutions, and buyers. Subvention schemes, where developers pay the interest on a buyer's loan until property possession, are designed to attract buyers by reducing their immediate financial burden. However, these schemes often present significant legal challenges concerning transparency, fairness, and regulatory adherence.

Developers who fail to meet their subvention commitments may face substantial legal liabilities, leaving buyers unexpectedly responsible for loan repayments, thereby impacting their financial stability. This raises critical questions about the enforceability of subvention agreements and the protection of consumer rights. Financial institutions involved in these schemes must conduct thorough due diligence and ensure the fairness of loan terms to protect home-buyers.

The law mandates transparency and accountability, aiming to protect consumer interests and maintain market integrity. Courts often scrutinize subvention scheme disputes to determine contractual obligations and ensure an equitable distribution of liabilities, which can lead to significant financial and reputational consequences for developers and financiers.

Navigating the complex interplay of contract law, consumer protection regulations, and financial compliance requirements is essential for stakeholders to mitigate the risks associated with subvention schemes.

### KEYNOTES:

Subvention schemes, Real Estate Regulatory Authority Act (RERA)<sup>1</sup>, SARFAESAI Act<sup>2</sup>, Contract Act<sup>3</sup>, Reserve Bank of India (RBI).

### INTRODUCTION

The concept of subvention schemes in the real estate sector involves developers covering interest payments on home loans for a certain period, typically to ease the financial burden on buyers and make property purchases more attractive. This scheme is intended to benefit homebuyers by reducing their immediate financial outlay, thereby facilitating real estate acquisition. However, its relevance has been under scrutiny due to various challenges and the need for robust regulatory and legal frameworks to ensure fairness and accountability.

One major challenge associated with subvention schemes is the lack of due diligence by banks and developers. Banks sometimes fail to rigorously assess the financial health and track record of developers before approving loans under these schemes. This oversight can lead to developers defaulting on their commitments, resulting in financial strain for buyers who may end up paying both home loan EMIs and rent. Additionally, developers might delay project completion or fail to adhere to promised timelines, exacerbating the financial burden on buyers and leading to legal disputes.

To help with some of these problems, the RBI has released recommendations. The need for openness and careful planning in introducing new products by banks is highlighted in these standards. Banks must make sure developers follow through on their promises and be transparent about all fees and penalties associated with the subvention programs. There has to be strict enforcement of these

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<sup>1</sup> The Real Estate (Regulation and Development) Act, 2016, No. 16, Acts of Parliament, 2016 (India).

<sup>2</sup> The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, No. 54, Acts of Parliament, 2002 (India).

<sup>3</sup> The Contract Act, 1872, No. 9, Acts of Parliament, 1872 (India).

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standards since disagreements and additional issues might arise when banks do not comply with these requirements.

The problems caused by subvention schemes can only be solved with the help of the law. Another important regulatory tool that improves openness and responsibility in real estate transactions is the RERA<sup>4</sup>, which is similar to the Consumer Protection Act<sup>5</sup> in that it gives a framework for homebuyers to seek recourse for complaints about unfair practices and service deficiencies. Financial institutions, developers, and purchasers are all regulated under the Indian Contract Act of 1872<sup>6</sup>.

However, the SARFAESI Act<sup>7</sup> stresses the significance of the builder's adherence to financial obligations under the subvention plan, even if the act's primary emphasis is on recovering defaulted loans.

Judiciary interpretation, stakeholder rights protection, and standard-setting compliance are crucial functions within the framework of the Subvention Scheme's legal review. Judicial review of the scheme's contractual duties, clause validity, and compliance with applicable statutes is an important part of their job.

Concerning the validity and equity of Subvention Schemes, the highest court in the land has the authority to rule on major legal disputes and establish national consistency in the application of laws. Decisions made by the Supreme Court have the power to define legally binding precedents, remove legal grey areas, and make sure that all parties involved in the real estate industry follow the rules. To guarantee that developers deliver on their commitments and that purchasers are not misled by the Subvention Scheme's provisions, the Court has placed an emphasis on consumer protection in many historic decisions. Determining shareholder accountability and the legality of subvention Schemes relies heavily on the interaction between judicial scrutiny and legislative purpose.

Overall, while subvention schemes aim to facilitate property purchases, they come with challenges that necessitate comprehensive regulatory and legal oversight. The RBI guidelines, coupled with the Consumer Protection Act<sup>8</sup>, RERA<sup>9</sup> and the Contract Act<sup>10</sup>, collectively work to address these challenges and ensure that the interests of homebuyers are protected.

## CONCEPT OF SUBVENTION SCHEME AND ITS RELEVANCE

Homebuyers sometimes lack the necessary cash to purchase the house, therefore subsidy programs seem to be a privilege. Each party involved in a subsidy scheme—the buyer, the bank, and the developer—is legally obligated to abide by a single, enforceable agreement. The homeowner is required to pay an initial "booking amount," which typically falls between five and twenty percent of the property's total value. The bank will pay any additional funds that are due as a loan.

However, Equated Monthly payments are used to repay the loan to the bank. There are two parts to this process that determine who is liable—the builder or the buyer-

- **Builder Payment (or Pre-EMIs)**—From the time the buyer receives title to the house, the builder is liable for making the EMI payments to the banks.
- **Buyer Payment (or Regular EMIs)**—The onus of the EMIs is placed on the buyer as soon as the buyer is granted possession of the unit.

Builders are incentivised to finish the project on time through these agreements or schemes because they are paid by the bank based on the amount of work they accomplish, and they also get out of the loan interest payment burden.<sup>11</sup>

In India, several prominent builders have employed subvention schemes to attract buyers and facilitate sales in the real estate market. Developers like DLF, Supertech, Karle Town and Godrej Properties

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<sup>4</sup> *Supra* note 1

<sup>5</sup> The Consumer Protection Act, 2019, No. 35, Acts of Parliament, 2019 (India).

<sup>6</sup> *Supra* note 3

<sup>7</sup> *Supra* note 2

<sup>8</sup> *Supra* note 5

<sup>9</sup> *Supra* note 1

<sup>10</sup> *Supra* note 3

<sup>11</sup> Devesh Saxena, Liability of Borrowers under Subvention Schemes: No EMI until Possession, SND LEGAL ASSOCIATES (Jan 12, 2022), <https://www.sndlegallassociates.com/post/liability-of-borrowers-under-subvention-schemes-no-emi-until-possession>.

have offered subvention schemes where buyers pay a small initial amount, typically 5-20% of the property value, while the builder covers the interest on the home loan for a predefined period, usually until possession. This arrangement reduces the immediate financial strain on buyers and makes purchasing a property more accessible.<sup>12</sup>

The relevance of subvention schemes in India lies in their ability to stimulate demand in a sluggish real estate market. These schemes are particularly appealing during economic uncertainty or downturns, offering financial relief and flexibility to buyers. For builders, subvention schemes can improve cash flow and project funding, ensuring timely project completion. However, the effectiveness of these schemes has been questioned, especially when builders fail to deliver on time or face financial difficulties, leading to legal disputes and financial stress for buyers. The Reserve Bank of India's regulations and the Real Estate (Regulation and Development) Act (RERA)<sup>13</sup> aim to safeguard buyers' interests, ensuring transparency and accountability in such schemes.<sup>14</sup>

### CHALLENGES OWING TO SUBVENTION SCHEME

Subvention schemes in real estate present several challenges, notably due to the lack of due diligence by banks and instances of non-compliance with RBI guidelines. Banks often fail to rigorously evaluate the financial stability and project delivery track record of developers before sanctioning loans under these schemes. This oversight can lead to developers defaulting on their commitments, leaving homebuyers to bear additional financial strain, such as managing both EMIs and rent payments. Furthermore, banks sometimes do not adhere strictly to RBI guidelines, such as failing to provide clear and comprehensive information about the scheme's terms and any associated costs. This can mislead borrowers, who may not fully grasp the financial implications of the scheme. In some cases, banks neglect to monitor developers' performance effectively, allowing project delays and financial mismanagement to occur unchecked. Subvention schemes have been under investigation for some time now since the responsibility associated with them isn't as clear-cut as it first seems. Developers often take advantage of subvention schemes to trick purchasers these days. The plan's Achilles' heel becomes apparent in the event of a real state developer default or project delay. The property buyer is the one who ends up paying the price for all these mistakes or manipulative conditions. Under these conditions, the buyer takes a major financial hit because the bank extended the loan in his name and now he's the one who has to pay it back. The fact that the builder is personally liable for the loan means that his failure to pay or late EMI payments may have a devastating effect on the buyer's credit. The buyer's borrowing limit may be reduced after their credit score is destroyed.

Subvention scheme agreements often include a "shifting liability clause" that allows developers to evade accountability for their mishandling of funds. The responsibility for repaying the interest on the house loan would fall on the home-buyer if the builder were to renege on this obligation, according to this provision. Therefore, there's no longer any need to argue that homebuyers benefit from subsidy programs.

The buyer may only claim the tax advantage after he takes possession of the home or when his EMI payments begin, even if the premium price is an indirect contribution to the pre-EMI interest. Because the buyer is always responsible for paying rent and EMI, a subsidy plan might end up being a double-edged sword. After looking at everything, it's clear that the buyer is always the one who ends up tormented.<sup>15</sup>

When a builder becomes insolvent, the situation can be devastating for homebuyers, who often find themselves trapped in a financial and legal quagmire. Under the Insolvency and Bankruptcy Code

<sup>12</sup> Rishi Mehra, How Subvention Schemes work: Advantages and Disadvantages, 99acres (Feb 02, 2024), <https://www.99acres.com/articles/subvention-schemes-work-advantages-disadvantages.html>.

<sup>13</sup> *Supra* note 1

<sup>14</sup> Preeti Kulkarni, Buying a house on a subvention scheme? Tread with caution, Economics Times (March 11, 2019), [https://economictimes.indiatimes.com/wealth/real-estate/buying-a-house-on-a-subvention-scheme-tread-with-caution/articleshow/68330234.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/wealth/real-estate/buying-a-house-on-a-subvention-scheme-tread-with-caution/articleshow/68330234.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

<sup>15</sup> Shweta Gupta, Subvention Scheme: A Scam or A Boon!, TAX GURU, (Feb 18,2020), <https://taxguru.in/finance/subvention-scheme-scam-boom.html>.

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(IBC), 2016<sup>16</sup>, an automatic moratorium is imposed once the insolvency process begins. This moratorium freezes all legal proceedings against the builder, preventing homebuyers from filing or continuing any case to recover their investments or enforce their rights. During this period, financial creditors, like banks and other lending institutions, take precedence in the resolution process, leaving homebuyers in a vulnerable position as unsecured creditors. This legal framework creates a scenario where the builder, despite failing to deliver the project, receives protection from any immediate legal action, while homebuyers are left with ongoing financial obligations, such as paying pre-EMIs (equated monthly installments) on loans for properties they have yet to receive.

The situation is exacerbated by the fact that the insolvency process can be prolonged, sometimes taking years to resolve. During this time, homebuyers, who may already be paying rent, are forced to continue servicing their loans, effectively doubling their financial burden without any assurance of receiving the promised home. The plight of the homebuyers in Supertech's Hilltown and Hues projects exemplifies this issue. With the builder insolvent, buyers found themselves unable to take legal action, trapped by the moratorium, and financially strained by the requirement to continue paying pre-EMIs. Their situation highlights the harsh realities of the current legal framework, where homebuyers are left helpless and at the mercy of a protracted insolvency process that does little to prioritize their interests. This underscores the urgent need for legal reforms that ensure homebuyers are adequately protected and not sidelined in favor of larger financial creditors.<sup>17</sup>

## **LEGAL INTERVENTION: ROLE OF RBI, LEGISLATION AND JUDICIARY**

The Reserve Bank of India (RBI), legislation, and judiciary play crucial roles in the legal scrutiny of subvention schemes in the real estate sector. The RBI regulates financial practices, ensuring compliance and transparency. Legislation provides the legal framework governing these schemes, defining stakeholder responsibilities and liabilities. Judicial intervention interprets and enforces laws, addressing disputes and ensuring justice. Collectively, these entities strive to safeguard consumer interests, maintain market stability, and uphold accountability among developers, financial institutions, and investors, mitigating risks and ensuring fair practices within the sector.

### **RBI**

The Reserve Bank of India (RBI) has established specific guidelines to regulate subvention schemes in the real estate sector, aiming to ensure transparency and protect consumer interests. According to RBI directives, banks and financial institutions are required to exercise caution and due diligence when offering loans under subvention schemes. The key guideline mandates that the financial institutions must disclose the terms of the product clearly to borrowers, ensuring that they understand the financial implications, including any hidden costs or penalties associated with delayed payments or non-fulfillment of the developer's obligations.<sup>18</sup> RBI guidelines emphasize that products offered by the banks or Housing Finance Institutions should not be misleading or involve unfair practices that could lead to financial distress for homebuyers. Banks and Financial institutions are expected to provide clear and detailed information about the scheme's terms, including the duration for which the interest payments will be covered by the developer and the total cost of the loan over its lifetime. The RBI also requires that any changes to the scheme or additional charges be communicated to borrowers transparently.

Moreover, the RBI mandates that banks must ensure that developers comply with their contractual commitments under the subvention scheme. Financial institutions are advised to monitor the performance of developers and their adherence to project timelines to avoid potential conflicts or financial disputes with buyers<sup>19</sup>. The Reserve Bank of India (RBI) has issued strict guidelines mandating that home loans be disbursed in stages, linked to the progress of construction, to protect

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<sup>16</sup> The Insolvency and Bankruptcy Code (IBC), 2016, No. 31, Acts of Parliament, 2016 (India).

<sup>17</sup> Neeti Shikha, Guest Editorial: Cross Border Insolvency in India: What Lies Ahead?, 30, IIR, 2, 163, (2021)

<sup>18</sup> Reserve Bank of India, Master Circular Housing Finance, RBI/2015-16/46 DBR.No.DIR.BC.13/08.12.001/2015-16 (Issued on July 01, 2015).

<sup>19</sup> Reserve Bank of India, Master Circular- Loans and Advances – Statutory and Other Restrictions, DBR.No.DIR.BC.10/13.03.00/2015-16 (Issued on July 01,2015).

homebuyers and ensure that funds are used appropriately<sup>20</sup>. This stage-wise disbursement is designed to mitigate risks for both lenders and borrowers, ensuring that the loan amount correlates with the actual work completed on the property. However, in practice, many banks and financial institutions often bypass these guidelines, disbursing loans in one go or in large sums regardless of construction progress. This non-compliance is often due to collusion between developers and lenders, where financial institutions, motivated by profit, overlook the RBI's directives.

This malpractice not only exposes homebuyers to greater financial risk but also exacerbates the problem when builders become insolvent, as buyers are left paying for properties that may never be completed. These guidelines are part of the RBI's broader effort to enhance consumer protection and maintain stability in the real estate sector. By enforcing these regulations, the RBI seeks to create a fair and transparent environment for real estate transactions, reducing the financial risks associated with subvention schemes and ensuring that homebuyers are adequately informed and protected.<sup>21</sup>

### **CONSUMER PROTECTION ACT<sup>22</sup>**

To protect the interests and rights of customers, India has enacted the Consumer Protection Act, 2019<sup>23</sup> (CPA). Several new features that improve consumer protection in the contemporary economy are introduced by this Act, which supersedes the Consumer Protection Act, 1986. It gives people agency by acknowledging their right to know, to choose, to be heard, and to seek remedy. The Act's creation of the Central Consumer Protection Authority (CCPA) is a defining element; the CCPA will have extensive authority to conduct investigations, combat unfair commercial practices, and safeguard consumer rights.

Additionally, the Act establishes guidelines for product liability, which hold vendors, service providers, and product makers liable for damages caused by subpar or faulty goods or services. In addition, the CPA 2019<sup>24</sup> grants the Central Government the authority to take all necessary steps to safeguard consumers' interests and rights and to prohibit unfair trading practices.<sup>25</sup>

Moreover, the Act simplifies the process for consumers to file complaints by allowing them to do so from any place, even electronically, and without the requirement of engaging a lawyer. The Act mandates strict penalties for misleading advertisements and unfair trade practices, thereby deterring businesses from exploiting consumers. Additionally, it provides for mediation as an alternative dispute resolution mechanism, offering a faster and more cost-effective means for consumers to resolve disputes. Overall, the Consumer Protection Act, 2019<sup>26</sup>, represents a comprehensive effort to empower consumers and ensure that their rights are upheld in all transactions.

### **THE REAL ESTATE (REGULATION AND DEVELOPMENT ACT, 2016 (RERA)<sup>27</sup>**

The Real Estate Regulatory Authority Act's stated goal is to establish a main market where buyers and sellers are treated fairly and equitably. Each state and territory is now required by law to establish its own framework for regulating the operation of government.<sup>28</sup> Assisting buyers and regulating the real estate market are RERA's principal goals. It has established some standards that builders must follow and certain rights for buyers. In the past, builders made a killing by deceiving unsuspecting purchasers due to the lack of a coherent policy governing the sale of property. This was all because sensible legislation was lacking to regulate the real estate business.

<sup>20</sup> Reserve Bank of India, Master Direction – Non-Banking Financial Company – Housing Finance Company (Reserve Bank) Directions, 2021, RBI/2020-21/73 DOR.FIN.HFC.CC.No.120/03.10.136/2020-21 (Issued on Feb 17, 2021).

<sup>21</sup> Anil K Khaware, Builder-Bank and home buyer & subvention scheme, Society Law and Justice (Dec 22, 2023), <https://societylawandjustice.com/articles/f/builder-bank-and-home-buyer-subvention-scheme>.

<sup>22</sup> *Supra* note 5

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Supra* note 5, s 94

<sup>26</sup> *Supra* note 5

<sup>27</sup> *Supra* note 1

<sup>28</sup> Ashiana, Rights & Duties of Home Buyers under RERA, ASHIANA HOUSING, (March 2, 2020) <https://www.ashianahousing.com/real-estate-blog/rights-duties-of-home-buyers-under-rera>.

**Rights of the buyer under RERA:**

Rights of allottees are defined under Section 19 of the RERA<sup>29</sup> and includes the following:

1. Right to obtain Information<sup>30</sup> related to the purchase of property, that what is authorized plan and the design plan and furthermore the data about the rules and guidelines settled on made under the agreement,
2. The buyer has the right to know the completion schedule, which includes the duration of the task and all its components, broken down into stages. This includes information about water, sterilisation, power, and any other services that were agreed upon between the seller and buyer in accordance with the sale agreement.<sup>31</sup>
3. Right to claim possession<sup>32</sup>: The buyer shall entitle to claim the ownership of apartment, plot or building including common areas in case all formalities have been finished and necessary amount is paid.
4. Right to claim Refund<sup>33</sup>: The buyers have the to claim for refund of amount paid and compensation from the promoter, if the promoter fails to do as mentioned in the agreement for property.
5. Right to have document<sup>34</sup>: The purchaser or allottee has directly over ownership of documents and plans of the property and can also have the physical possession of property.<sup>35</sup>

**SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT (SARFAESI)<sup>36</sup>**

Mortgage and commercial properties may be sold at auction by banks and other financial institutions in the event that borrowers do not pay back their debts according to the SARFAESI Act, 2002<sup>37</sup>. As a result, financial institutions might take recovery or rebuilding actions to lower their nonperforming assets.<sup>38</sup>

The SARFAESI, 2002<sup>39</sup>, while designed to help banks and financial institutions recover non-performing assets, has significant adverse implications for homebuyers when a builder defaults. Under this Act, banks can seize and sell the mortgaged property without the court's intervention if the borrower fails to meet their obligations. In cases where a builder has taken a loan to fund a project and subsequently fails to pay the pre-EMI or defaults on the loan, the SARFAESI Act<sup>40</sup> enables the financial institution to initiate recovery proceedings against the homebuyers. Even though the homebuyer is not the principal borrower, they are still liable for the repayment of the loan, often leading to the bank filing cases against them under SARFAESI<sup>41</sup>. In such cases, the banks disregard the subvention scheme and hold home-buyers liable to repay the loan and EMIs.

This creates a highly unfair scenario for the buyer, who not only loses the property they have invested in but also faces the legal and financial repercussions of the builder's default. Buyers, who are often unaware of the builder's financial arrangements, find themselves caught in a legal trap, having to repay loans for properties they never received. The SARFAESI Act<sup>42</sup>, in its current form, does not differentiate between the principal borrower (the builder) and the end consumer (the homebuyer),

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<sup>29</sup> *Supra* note 1

<sup>30</sup> *Supra* note1, s 19(1)

<sup>31</sup> Sukhleen Saluja, Understanding the Rights of a Buyer under RERA, LAWLEX.ORG, (June 4, 2020), <https://lawlex.org/lex-pedia/understanding-the-rights-of-a-buyer-under-rera/22381>, June 4, 2020

<sup>32</sup> *Supra* note1, s 19(3)

<sup>33</sup> *Supra* note1, s 19(4)

<sup>34</sup> *Supra* note1, s 19(5)

<sup>35</sup> Shephali Kapoor, Rights and duties of homebuyers under RERA, 99acres, (Dec 05, 2019), <https://www.99acres.com/articles/rights-and-duties-of-homebuyers-under-rera.html>, Dec 05, 2019.

<sup>36</sup> *Supra* note 2

<sup>37</sup> *Id.*

<sup>38</sup> Chintan Mehuriya, Highlights On Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest (SARFAESI), JSA-CS, [https://jsa-cs.com/image/highlight\\_on\\_securitisation.pdf](https://jsa-cs.com/image/highlight_on_securitisation.pdf).

<sup>39</sup> *Supra* note 2

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

thereby disproportionately affecting the latter. The lack of protection for homebuyers under SARFAESI<sup>43</sup> is a significant flaw, as it fails to recognize the buyer's role as an innocent party who is merely fulfilling their contractual obligations. The Act's stringent provisions allow banks to recover their dues at the expense of the buyer, who may have no recourse to recover their investment or seek alternative legal remedies. This underscores the need for amendments to SARFAESI<sup>44</sup> that provide better protection for homebuyers and ensure that they are not unfairly penalized for the defaults of builders.

### **THE CONTRACT ACT, 1872<sup>45</sup>**

The Indian Contract Act of 1872<sup>46</sup> is a foundational legal framework that governs contracts in India. It lays down the essential elements of a valid contract, such as offer and acceptance, lawful consideration, capacity of parties, free consent, and a lawful object. The Act is comprehensive, covering various types of contracts, including those related to the sale of goods, services, and employment. It provides the legal basis for the enforcement of agreements, ensuring that parties to a contract fulfill their obligations as agreed upon. If any party fails to meet their contractual obligations, the Act offers remedies such as compensation, specific performance, or rescission of the contract.<sup>47</sup> One of the key aspects of the Indian Contract Act<sup>48</sup> is that it codifies the principles of English common law, adapting them to the Indian context. It also addresses issues like fraud, misrepresentation, undue influence, and coercion, ensuring that contracts are made fairly and justly. The Act's provisions apply to all forms of contracts, whether written or oral, and its influence extends to all sectors of the economy, making it a cornerstone of commercial and legal practices in India.<sup>49</sup>

### **Role of Judiciary**

In the dynamic landscape of real estate transactions, subvention cases have gained prominence due to their complex nature and far-reaching implications. However, the arrangement was that the homebuyers had to pay EMIs once possession is given and till that time the builder shall pay the EMIs to the banks or NBFCs. These cases often involve builders defaulting on Pre-Equated Monthly Income (EMI) payments, leaving homebuyers in a precarious position. One such controversy unfolded, leading to a legal saga that underscores the challenges faced by homebuyers, financial institutions, and the judiciary.

Faced with this dire situation, the petitioner in the case of Hridesh Pathak<sup>50</sup> sought recourse in the Delhi High Court. In light of the critical nature of the situation, the High Court issued a temporary restraining order compelling the financial institutions to stop harassing the homebuyers. This buffer zone became wider as the trial progressed, giving the impacted some relief. Additionally, the High Court mandated that banks and NBFCs modify the CIBIL ratings to protect homeowners from financial harm, knowing full well the effect this would have on the scores.

However, this alleviation was ephemeral. On March 14, 2023 in a batch, matters lead with Supertech Urban Homebuyers Association (SUHA) v U.O.I. & Ors.<sup>51</sup>, After Justice Purushendra Kumar Kaurav's ruling, the High Court revoked the relief that had been given. Despite being maintainable, the writ petitions were rejected in the judgement due to the contractual character of the issue. Justice Kaurav stressed that the disagreements between the homeowners and the builder should not be handled via writ jurisdiction but rather through suitable civil or consumer forums due to the contractual character of the cases. The court acknowledged that the petitions may be maintained, but it declared

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Supra* note 3

<sup>46</sup> *Id.*

<sup>47</sup> Manisa Saha, Role of contracts in real estate development in India, I-PLEADERS, (Feb 24, 2024), <https://blog.ipleaders.in/role-of-contracts-in-real-estate-development-in-india/>

<sup>48</sup> *Supra* note 3

<sup>49</sup> 2 Mulla, Commentary on The Indian Contract Act, 1872, Delhi Law House (2022).

<sup>50</sup> Hridesh Kumar Pathak Vs. Bank of Maharashtra W.P. (C) 6774/2021

<sup>51</sup> Supertech Urban Homebuyers Association (SUHA) v U.O.I. & Ors.W.P.(C) 9491/2020

them unentertainable, highlighting that contractual conflicts should not be resolved by writ jurisdiction. This decision shows that the courts are leaning towards transferring disputes involving contracts to other, more appropriate venues, so that tribunals or courts can deal with the complexities of these types of cases.

### **Supreme Court Intervention:**

After facing a setback in the Delhi High Court, the homebuyers of Supertech's Urban Homebuyers Association (SUHA) refused to give up their fight for justice. Order dated 14.03.2023<sup>52</sup> lifted the interim relief that had previously been granted, leaving the homebuyers in a vulnerable position.

Undeterred, the homebuyers, led by petitioner Sanjeev Kumar, escalated the matter to the Supreme Court through a Special Leave Petition (SLP) titled Sanjeev Kumar v. U.O.I. & Ors.<sup>53</sup> In their plea, they sought the reinstatement of the interim protection that had shielded them from the financial pressures and uncertainties surrounding their investments in the Supertech projects.

The Supreme Court, recognizing the gravity of the situation, took a significant step by reviving the interim protection. In its pronouncement, the Court emphasized the need to maintain continuity in legal safeguards, stating, "Since the petitioner has had the benefit of interim protection from 25.05.2022 till the date on which the impugned order was passed, the petitioner shall be entitled to the benefit of the same interim protection till the next date of hearing." This decision provided crucial relief to the homebuyers, allowing them to continue under the shield of the Court's protection as the legal battle progressed.

The Supreme Court's intervention is a critical development in this case, highlighting the judiciary's role in ensuring that homebuyers are not left without recourse in complex real estate disputes. The case remains subjudice, with further hearings to determine the final outcome. As the proceedings continue, this case is being closely monitored, given its potential implications for the rights of homebuyers and the enforcement of contractual obligations in the Indian real estate sector. There is a complex web of real estate law that the subvention cases untangle. The Delhi High Court's refusal to hear writ petitions demonstrates the judiciary's unwillingness to become involved in disputes that are seen as having a contractual character. Homebuyers should be protected from the consequences of builder defaults by having clear legal frameworks and protections in place.

The complex interplay between homeowners, builders, and banks is on full display in subsidy instances. The case's winding path through the courts, from the Delhi High Court to the Supreme Court, illustrates the difficulty of reaching a fair resolution to such disagreements. The refusal of the Delhi High Court to hear the writ petitions highlights the contractual character of the cases, while the involvement of the Supreme Court highlights the need for judicial supervision to protect homebuyers' rights.<sup>54</sup>

With its decision in *Bikram Chatterji and Ors. Vs. Union of India and Ors.*, the Hon'ble Supreme Court ushered in a new era for subsidy programs.<sup>55</sup> In this case, the Amrapali company, the developer, promised homebuyers that they would have ownership of their properties within 36 months, but they ended up liquidating between 50 and 100 percent of the loan amount. Nevertheless, no such possession was relinquished, even if there was an excessive wait. Homeowners were left without property or income when the developer failed to pay the land lease as well as the interest on the loan obtained via subvention programs. The following mistakes and flaws in the whole subvention plan, loan, and defaulting catastrophe were scouted out by the Hon'ble Supreme Court after much debate and many accusations-

- It was established that the lenders must ensure they conducted thorough inspections and due diligence when they sanctioned the loan before pursuing the buyer for interest pendency, since the lack of vigilance on their part was called into doubt.

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<sup>52</sup> *Id.*

<sup>53</sup> Sanjeev Kumar v. U.O.I. & Ors.W.P.(C) 5369/2021

<sup>54</sup> Anshul Gupta, Supreme Court Revives Hope for Homebuyers in Subvention Matter, LIVE LAW, (2024) <https://www.livelaw.in/law-firms/law-firm-articles-/supreme-court-homebuyers-subvention-matter-ibc-cirp-moratorium-ang-partners-pre-equated-monthly-income-nbfc-249129>

<sup>55</sup> *Bikram Chatterji and Ors. Vs. Union of India and Ors.*2019 SCC Online SC 901



- The idea that "fraud vitiates everything" is evident, and the Court has an obligation to protect homeowners from being deceived while simultaneously rescuing them. Homebuyers should not be held entirely responsible for paying the EMIs due to these unfair subsidy programs.

Purchasers of primary residences may benefit from these two landmark milestones in terms of reducing their debt payback obligations. The onus for carrying out due diligence shifted on banks and other financial institutions after the aforementioned ruling. Therefore, homebuyers cannot be forced to pay back the bank for the builder's defaulted loan, interest, or even EMIs, unless the bank's failure of due diligence is shown beyond a reasonable doubt.

## CONCLUSION

The legal scrutiny of subvention schemes in the real estate sector entails an in-depth analysis of their regulatory compliance and the resulting liabilities for developers, financial institutions, and buyers. A subvention scheme is a financial arrangement where the developer bears the interest cost on a buyer's loan until the property is handed over, aimed at reducing the immediate financial burden on buyers. Prominent developers like DLF, Supertech, and Amrapali have utilized these schemes to attract buyers by offering an ostensibly more affordable path to property ownership. However, while subvention schemes are designed to boost sales and make property purchases more accessible, they have introduced significant challenges and risks.

Many builders have defaulted on their subvention commitments, leading to severe financial consequences for buyers. Defaults, insolvency, and project abandonment have been notable issues, as seen with developers like Amrapali and Jaypee Infratech. Such defaults leave homebuyers unexpectedly responsible for loan repayments, causing financial instability and distress. The lack of due diligence by banks further compounds these problems. Banks have often failed to adequately assess the financial health of developers and the viability of their projects before approving loans under subvention schemes.

The subvention schemes in real estate transactions, designed as internal agreements between builders and banks, reveal a complex interplay of interests that significantly impacts homebuyers. These schemes often allow buyers to defer payments while the builder services the interest on their behalf. However, when a builder defaults on their obligations, the repercussions fall disproportionately on the buyers. Despite the contractual agreements primarily existing between the builder and the bank, the bank may hold the homebuyers accountable for loan repayments, even though the financial arrangements were largely influenced by the builder's promises. Under the Indian Contract Act of 1872, the contractual relationship between the bank and the homebuyer becomes central in case of default. While the builder's failure to deliver the promised property or adhere to the subvention scheme creates a significant issue for buyers, the legal recourse often focuses on the contract between the bank and the buyer. This situation exposes buyers to undue financial strain as they are compelled to continue paying pre-EMIs and meet other obligations despite the builder's breach. The builder's indifference exacerbates the plight of buyers, who are left with limited options for redress. The contract between the bank and the buyer, therefore, gains prominence, sidelining the builder's responsibility and leaving homebuyers at a considerable disadvantage. This dynamic underscores a critical flaw in the current legal and financial framework, highlighting the need for reforms to better protect homebuyers and ensure that builders uphold their contractual commitments.

A number of legislative actions have been taken to lessen the impact of these difficulties. The RBI has released regulations to control lending practices linked to subsidy programs, stressing the need of careful research and prudent lending. Buyers have recourse under the consumer protection laws when developers engage in unfair acts or use deceptive advertising. To safeguard consumer rights and preserve market integrity, the RERA<sup>56</sup> requires developers to be open and accountable by registering their projects and adhering to certain requirements. Agreements, particularly those involving subvention schemes, are governed by the Contract Act, which determines their enforceability. On the

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<sup>56</sup> *Supra* note 1

## LEGAL SCRUTINY OF THE SUBVENTION SCHEME AND CONSEQUENTIAL LIABILITY OF THE STAKEHOLDERS IN THE REAL ESTATE SECTOR

other side, if the builder doesn't pay the pre-EMIs, the homebuyers would have a tough time under the SARFAESI Act<sup>57</sup>.

The role of the judiciary in resolving conflicts stemming from subvention systems is equally essential. Courts like the Supreme Court, the Karnataka High Court, and the Delhi High Court are now dealing with a backlog of cases that demonstrate the far-reaching effects of these initiatives. To ensure developers fulfil their responsibilities and safeguard consumer interests, RERA rulings have further emphasised the need for openness and responsibility in the real estate industry.

Although real estate subvention programs aimed to increase developer sales and make property purchases more accessible, they have instead brought about major problems including defaults, bankruptcies, and abandoned projects. Problems with due diligence and banks' failure to follow RBI rules have put purchasers in a difficult financial position. To safeguard purchasers and guarantee the real estate sector's long-term viability, stringent regulatory frameworks and strict enforcement are essential. Before opting for a loan under a subvention scheme, a buyer should consider several key points to safeguard their hard-earned money and credibility:

Before committing to a loan under a subvention scheme, buyers must carefully evaluate crucial factors to protect their financial interests and maintain their credibility. Understanding the detailed terms and conditions of the subvention scheme is fundamental. Buyers should ensure they grasp how the scheme works, including the specifics of how and when the builder will cover the pre-EMI payments and the conditions that could lead to a lapse in this arrangement. It's important to scrutinize the builder's financial stability and reputation, as the scheme's viability depends heavily on the builder's ability to meet their obligations.

Researching the builder's track record in delivering projects on time and their past financial performance can provide insights into potential risks. In addition, buyers should carefully review the loan agreement with the bank to understand their financial commitments and the consequences if the builder defaults. It's advisable to secure written assurances from the builder about the project's timeline and their responsibilities under the scheme.

Consulting with a legal advisor can help buyers interpret complex contractual terms and identify any hidden risks associated with the scheme. Exploring alternative financing options is also prudent. Comparing the subvention scheme with other available financial products can help buyers determine if there are less risky or more advantageous options. Understanding the legal implications of any potential defaults and the remedies available will help buyers navigate the complexities of the scheme. By thoroughly assessing these aspects, buyers can make informed decisions, safeguard their investments, and ensure that their financial commitments are manageable and secure.

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<sup>57</sup> *Supra* note 2