

A.Nos.4505, 4507 and 4508 of 2019**PUSHPA SATHYANARAYANA, J.**

The parties in all these applications are one and the same and the dispute among them is with respect to the same property.

2. The applicants filed O.A.No.4505 of 2019 seeking for an interim direction to the first respondent to deposit a sum of INR 56,34,06,234/- (Rupees Fifty Six Crores Thirty Four Lakhs Six Thousand Two Hundred and Thirty Four Only) to the account of the present original application pending the arbitral proceedings between the applicants and the first respondent and passing of an award therein.

2.1. Similarly, O.A.No.4507 of 2019 was instituted by the applicants praying for an interim direction to the first respondent to deposit 48% of the consideration received by it in exchange for alienating, transferring, selling, pledging or otherwise creating any encumbrances, either directly or indirectly, whether in part or in full, on the property situated at Survey Nos.476/35, 476/2A1, 476/2A2, 476/4A2, 476/2A3A1 in Sholinganallur Village, Tambaram Taluk, Kancheepuram District and/or on the developments constructed

thereupon to the account of the present original application pending the arbitral proceedings between the applicants and the first respondent and passing of an award therein.

2.2. In O.A.No.4508 of 2019, the applicants sought for appointment of an ad-hoc third party receiver and committing the said property to his possession, custody and management, which includes a direction that any sale transaction of an Undivided Share or otherwise of the same shall be made only with his consent and signature and he shall be empowered to receive 48% of the consideration from all such transactions to deposit the same before this Court.

3. The case of the applicants, in a nutshell, is as follows :

(i) The applicants are the joint owners of the property located at Survey Nos.476/35, 476/2A1, 476/2A2, 476/4A2, 476/2A3A1 in Sholinganallur Village, Tambaram Taluk, Kancheepuram District. The first respondent is a construction company, which entered into a Joint Development Agreement dated 09.04.2012 (in short, "JDA") with the applicants for executing a construction project known as "Alexandria" on the applicants' property, agreeing to complete the construction within a period of 30 months. The said period was subsequently modified to 36 months by way of Supplementary Agreement dated

12.12.2012.

(ii) As per Clause 5(a) of the JDA, the constructed area shall be marketed by the first respondent, who is the Developer and the sale proceeds shall be divided in the ratio of 52:48 between the first respondent and the applicants. It is stated that notwithstanding the sharing ratio created under the JDA, the marketing has to be done by the first respondent for the entire project. The JDA further provided for retaining certain apartments out of their share by the applicants, which could be specifically identified.

(iii) As per Clauses 7 and 10 of the JDA, the applicants are not liable for charges or expenses under the JDA, as all the costs, charges and expenses are to be borne by the first respondent. In other words, the applicants are only contributing their valuable property for the project and the costs for the construction of the project are the contribution of the first respondent.

(iv) Clause 15 of the JDA mandates the applicants to execute a Power of Attorney empowering the first respondent to execute sale or conveyance deeds to an extent of 52% of the Undivided Share in favour of the prospective buyers of the flats. Accordingly, the first and second applicants also executed a Power of Attorney on 09.04.2012, while the third and fourth applicants executed the Power of Attorney

on 10.04.2012.

(v) Clause 43 of the JDA provides for arbitration, in the event of disputes.

(vi) The second and third respondents are the adjacent land owners and the first respondent had consolidated the project, by including their lands also into the project. It is also complained that the first respondent had not shared the agreements, it entered into with the said respondents, despite several requests.

(vi) Though there was a delay in the execution of the project, the applicants did not precipitate the said issue. According to the applicants, though the project has been completed, the first respondent has not been transparent in all the transactions and dealings. The first respondent also had not shared the revenue received from the sale of certain units in the said project, though sales have been made without the knowledge of the applicants. The applicants had, on enquiry, learnt that the first respondent had entered into multiple transactions and also entered into unregistered sale agreements with third parties, who are desirous of purchasing the units from the Project. The applicants also had sent various e-mails requesting them to be transparent on the transactions. As there was no response, the applicants apprehended that they have been

defrauded of their rightful revenue share. The applicants also had set out various breaches committed by the first respondent from the JDA and thus, the applicants also apprehend that they were kept in dark, despite several requests.

(vii) An e-mail from the first respondent dated 21.04.2019 had triggered the dispute, wherein, it was stated that besides the revenue sharing, the parties also had an agreement of area sharing. It further stated that the sales having been made only of flats other than the flats to be shared between the first respondent and the applicants, nevertheless, admittedly, the applicants having received no revenue in relation to any sales. The applicants apprehension is that the first respondent had concluded sale transactions or accepted bookings with respect to the flats falling outside those allotted to the second and third respondents. It is further alleged by the applicants that the first respondent had not shared the copies of the relevant accounts and in several cases, the first respondent had only provided sale deeds for the UDS and not the Construction Agreements with the customer for the built-up space and thus, the actual sale value has not been disclosed to the applicants even as on date.

(viii) The first respondent also alleged to have collected additional amounts in the name of statutory charges in violation of

Clauses 7 and 10 of the JDA. In view of the first respondent's failure to procure a tripartite agreement, there is no exclusive area share which the first respondent can claim to be entitled to. Therefore, the applicants would be entitled to revenue share on any apartment sold by the first respondent as per Clause 5(a) of the JDA.

(ix) Hence, as an interim measure, the applicants are entitled for seeking a direction to the first respondent to deposit INR 56,34,06,234/- ; a direction to the first respondent to deposit 48% of the sale consideration received by it in exchange of alienating, transferring, selling pledging or otherwise creating any encumbrances with respect to the subject property ; and also seeking appointment of an ad-hoc third party receiver for the purpose of selling the units only with the consent of the receiver.

4. These applications were vehemently opposed by the first respondent. The main contention of the first respondent is that the applicants, fearing the liability of income tax, failed to execute and register the Power of Attorney granting power to transfer the balance of 48% of the UDS. It is their further case that the applicants informed that for Capital Gain purposes, they would not like to enter into an Allocation Agreement. As the Power of Attorney was not executed by

the first applicant for the 48% of the UDS, the first respondent was not in a position to sell those units without the Allocation Agreement. As there was no agreement on the minimum price, at which, the first respondent shall negotiate and the manner and method of collection of monies and sharing the revenue was also not agreed upon, it is premature to make a claim by the applicants. It is also pointed out that the applicants had admitted before the income tax authorities that no sales have been made with respect to their share in the built-up area.

5. Now the question arises for determination is whether the applicants are entitled for 48% of the sale proceeds and other reliefs, by virtue of Clause 5(a) of the JDA ?

6. At this juncture, it is relevant to note Clause 5(a) and (c) of the JDA, which reads as hereunder :

"5.

a. The parties further covenant while the sharing ratio shall remain 52% to the Developer & 48% to the Land Owners and that instead of allotting specified and identified constructed area to the Land Owners and the Developer in accordance with the aforesaid proportion as agreed in the Development Agreement, with a view

to evolve a market strategy which is acceptable to and beneficial to both the parties, agree that the entire/part constructed area/apartments shall be marketed by the Developer without specific allotment of physical areas to either of them and the sale proceeds shall be divided in the proportion 52% to the Developer & 48% to the Land Owner. The parties have agreed for the sake of convenience and better marketing procedures and efficiency that the marketing shall be done by the Developer with the assistance of the Land Owners wherever necessary at mutually agreed price. It is also agreed that the Land Owners can retain certain apartments out of their share and the same can be identified and earmarked.

b. The Developer agrees to sell on mutually agreed price and collect the sale proceeds and pay the share of the Land Owners within 30 days of such collection. Also the Developer will not charge any service charges, marketing expenses, brokerage or commission for selling the constructed area belonging to the Land Owners.

c. The parties hereto mutually agree and confirm that the sharing of 52% to the Developer & 48% to the Land Owner between the parties hereto is only in respect of the amount as stipulated in the respective agreement of sale cum construction which in respect of the cost of the flat including the cost of undivided of land and the cost of car parking."

7. There is no dispute with respect to the sharing ratio between the applicants and the first respondent. Though the first respondent had contended that it could not sell the flats, which are entitled to the applicants and the respondent, it is pointed out that some of the apartments belonging to the combined list of applicants and the first respondent have been sold by the first respondent. When Clause 5(a) envisages the sharing ratio, it is specifically stated that the sale proceeds shall be proportionate, i.e., 52% to the Developer and 48% to the Land Owner. It is also agreed that the Developer would do the marketing for the entire project. It is only agreed that the land owner can retain certain apartments out of the share and the same can be identified and earmarked. Therefore, Clause 5(a) of the JDA is very clear that the sale proceeds shall be divided in the proportion of 52:48. In such circumstances, when the sales have been made by the first respondent, the applicants are entitled to a revenue share of 48%.

8. However, it is contended by the learned counsel for the first respondent that the first respondent is entitled to 2,54,690 sq.ft of the constructed area, by virtue of the JDA entered into between the respondents 1, 2 and 3. It is stated that the first respondent availed

loan facility for the project from LIC Housing Finance and other financial institutions and had paid a sum of Rs.53 Crores as interest component and as the applicants failed to sign the Allocation Agreement, the first respondent was not in a position to sell the flats and realize its costs. The JDA, even according to the financial institution, as stated in the counter-affidavit, is an area sharing agreement and there is no Allocation Agreement between the parties. The first respondent has mutually made a counter claim that the applicants are liable to pay the said sum of Rs.53 Crores consequent to their breach of the JDA, besides other amounts.

9. Learned counsel for the first respondent also contended that the built up area of 1,82,130 sq.ft. is ready to be identified and it is open to the applicants to choose their choice of units. However, learned Senior Counsel for the applicants would insist upon compliance of Clause 5(a) of the JDA, as per which, the sale proceeds have to be shared in proportion of 52:48. In addition to that, the land owners/the applicants are entitled to certain apartments out of their share and the same can be identified and earmarked. In the absence of any Memorandum of Agreement with respect to the identification and earmarking of the apartments to the share of the applicants, the

argument of the first respondent cannot be accepted. In fact, as averred by the applicants in their affidavit, in so far as the sales that are made by the first respondent and not by the other respondents out of their share area, the applicants are entitled to a revenue share of 48%. Clause 5(b) envisages that the sale proceeds should be paid to the land owners, as agreed, within 30 days of its collection. Therefore, whenever the first respondent sells any apartment, it should have shared the sale consideration with the applicants.

10. Admittedly, the land owners have already executed a Power of Attorney for sale of 52% of the land belonging to them and have retained 48%. Once the first respondent had started marketing the constructed units, the parties have to share it in the ratio of 52:48. It is not the case of the first respondent that none of the units have been sold to any third party. Even if only one unit is sold, as per the JDA, the first respondent is to account for the sale.

11. Though Clause 5(c) of the JDA provides for the fixation of the costs of the flat, including UDS and the cost of Car Parking, based on the respective agreements of sale cum construction, in the absence of fixation of the same that too, when no material or any evidence

available on record to substantiate the claim, the applicants are not entitled to the relief sought for in A.No.4505 of 2019.

12. However, the applicants are entitled to 48% of revenue share from and out of the sale proceeds of the apartment in terms of the JDA that they have entered into with the first respondent. To enable the applicants to have such revenue share, the first respondent shall not sell any apartment/flat covered under the JDA without the knowledge of the applicants. In other words, the apartment/flat covered under the JDA shall be sold with the consent of the applicants.

13. As far as the prayer sought for in A.No.4508 of 2019, in view of the order in A.No.4507 of 2019, the same cannot be granted.

14. It is open to the parties to initiate arbitration proceedings and file application under Section 17 of the Arbitration and Conciliation Act, 1996, for any appropriate relief.

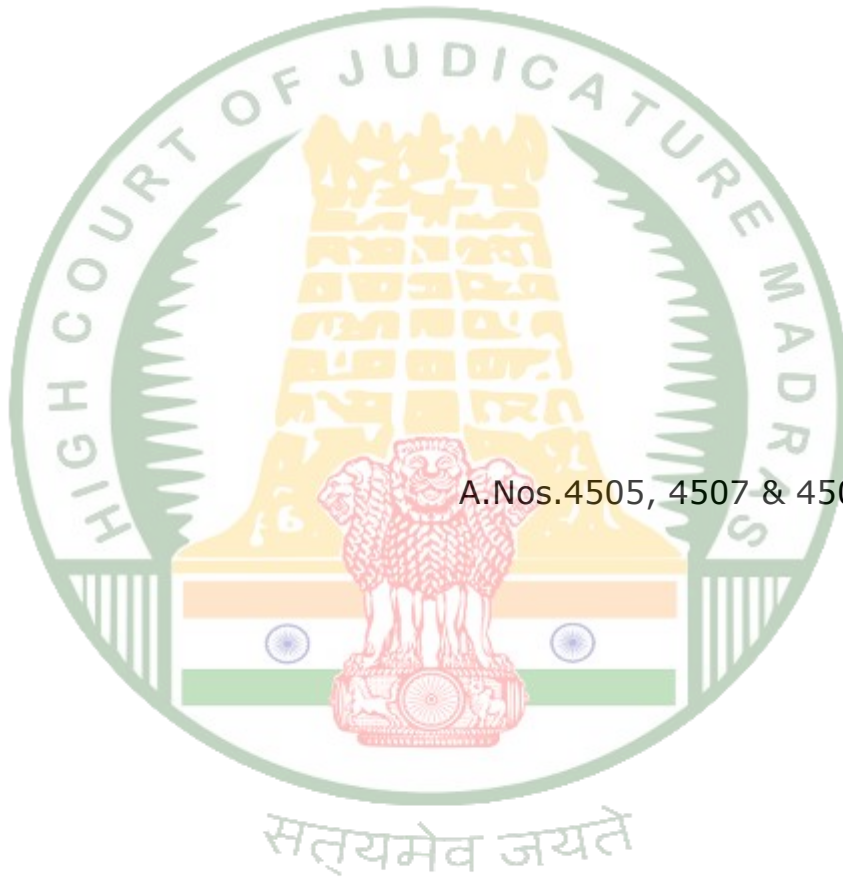
15. In fine, A.Nos.4505 and 4508 of 2019 are dismissed. A.No.4507 of 2019 is disposed of, in the above terms.

09.08.2019

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PUSHPA SATHYANARAYANA, J.

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