

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

CO 2846 of 2023

JOYDEEP ROY & ANR.

VERSUS

SRIJAN RESIDENCY LLP & ORS.

For the Appellant : Mr. Pradip Kumar Roy, Adv.,
Mr. Tirthajit Roy Chowdhury, Adv.,
Mr. Nasiruddin Molla, Adv.,

For the Respondent : Mr. Siddhartha Banerjee, Adv.,
Mr. Rahul Karmakar, Adv.,
Mr. Abhisek Baran Das, Adv.,
Mr. Srijoni Chongdar

Hearing concluded on : 3rd October, 2023

Judgment on : 6th October, 2023

Siddhartha Roy Chowdhury, J:-

1. This application under Article 227 of the constitution of India impeaches the Order No. 1 passed in Miscellaneous Appeal No. 272 of 2023 passed by Ld. District Judge 24 Parganas, Alipore. By the Order impugned Ld. District Judge was pleased to reject the prayer for ad interim injunction made by the petitioners.
2. For the sake of convenience, the parties to this proceeding would be referred to as they have been arrayed in the suit.
3. Briefly stated the plaintiff No. 1 an Advocate by profession and plaintiff No. 2, and Assistant Professor of a College decided to

purchase a flat to be constructed by the defendants and after having a detailed discussion with the defendant No. 2 the plaintiffs expressed their desire to purchase the residential unit and the defendants agree to sell the same on 14th of February, 2023. The plaintiffs visited office of the defendants at Bata Nagar and having seen model flat, the plaintiffs decided the purchase a flat measuring about 1307 sqft. at Tower/ Block 14, Flat No. 13 D, 13th Floor of The Royal Ganges Project at premises No. C-4-173/ New Ganga Bandh Road, 24 Parganas (South), at the rate of Rs. 4200/- sqft.

4. The plaintiffs executed/signed the booking form and paid a sum of Rs. 210000/- in favour of defendant No. 2 by cheque, which was duly encashed. A provisional allotment letter was issued to the plaintiffs and the plaintiffs paid a further sum of Rs. 489723/- to the defendant No. 1 & 2 through online transfer/RTGS.
5. The plaintiffs thereafter obtained the housing loan from HDFC Ltd., Deshopriya Park Branch and tripartite agreement was executed among the plaintiffs, defendant No. 1 and the Bank.
6. The plaintiffs thereafter made payment to the tune of Rs. 241881/- towards stamp duty required for registration of the agreement. The defendant company thereafter forwarded draft agreement for sale on 25.07.2023. After going through the said draft the plaintiff failed to pursue themselves to agree to various clauses incorporated in the said agreement as the plaintiffs considered those clauses unlawful arbitrary in nature and pointed out the

same to the concerned authority of the Srijan Residency, LLP/ Srijan Realty Pvt. Ltd. with a request to delete those clauses and copy of the e-mail was forwarded to RERA for their information and necessary action.

7. On 28th July, 2023 the plaintiffs received an e-mail from defendant No. 1 & 2 informing the plaintiffs that the management cancelled the booking of the plaintiffs in the Royal Ganges Projects. According to the plaintiffs such decision was malafide and in the breach of principal of natural justice. There was trading of some communications between the parties but the defendants refused to adhere to the requests made by the plaintiffs to delete the unlawful clauses in the agreement.
8. The plaintiffs, therefore, were left with no other option but to approach the court of law and filed the suit before the Ld. 7th Court of Civil Judge (Senior Division), Alipore, registered as Title Suit No. 1054 of 2023 and moved an application with prayer for ad interim order injunction directing the defendants not to create any 3rd party interest over the suit property, but such prayer was refused.
9. Aggrieved thereby the plaintiffs preferred an appeal before the Ld. District Judge, 24th Parganas (South) under Order XLIII of the Civil Procedure Code and it was registered as Miscellaneous Appeal No. 272 of 2023 and prayed for an ad interim order of injunction but Ld. District Judge, refused to grant relief and passed the impugned order.

10. Challenging the order of the Ld. District Judge Mr. Pradip Roy, submits that Ld. District Judge failed to appreciate the urgency involved in the matter, warranting an ex parte order of injunction. Drawing the attention of the court to some of the clauses incorporated in the agreement Mr. Roy submits that the clauses by which the company reserves the right to mortgage the property to be acquired by the plaintiffs is contrary to public policy in as much as the purchasers as borrowers shall have to mortgage the property with bank to secure loan. The defendant no.1 and 2 cannot mortgage the property of others. There is a clause that if the maintenance amount falls due there would be discontinuance of supply of electricity, water even the entry at the gate would be restricted and in case the arrears of maintenance exceeds Rs. 50000/- the Promoter/Association would acquire a right to sell the flat. According to Mr. Roy this is height of absurdity.
11. It is adverted by Mr. Roy that the defendant No. 1 & 2 with malafide intention consciously incorporated such unlawful condition or terms in the agreements. It is nothing but a ploy to mint money. The plaintiffs were told to book the flat at the rate of Rs. 4200/- sqft. but had to pay at the Rs. 4800/- and if the defendant No. 1 & 2 could cancel the booking they can sell the flat at a much higher price. This unethical trade practice cannot be encouraged.
12. Refuting such contention of Mr. Roy, Mr. Siddhartha Banerjee, Ld. Counsel representing defendants submits that the suit as framed

is not maintainable in view of section 79 of the Real Estate (Regulation and Development) Act, 2016 (herein after referred to as RERA Act). The provision of section 88 of RERA Act is applicable only in case of proceeding taken out under the Consumer Protection Act. To buttress his submission Mr. Banerjee relies upon the Judgement of the Hon'ble Supreme Court in *Imperia Structures Limited vs. Anil Patani and Anr.* reported in (2020) 10 SCC 783. It is further submitted by Mr. Banerjee that the plaintiffs are quite conscious about this provision of law which is why a formal complaint has also been lodged with the Chairman and Secretary of West Bengal Real Estate Regulatory Authority on 31st day of July, 2020 and thereafter the suit was filed on 4th of August, 2023. It is further contended by Mr. Banerjee that the plaintiff, having surrendered to the jurisdiction of West Bengal Real Estate Regulatory Authority are estopped from knocking the door of Civil Court. In support of his contention Mr. Banerjee relies upon the judgement in *Ireo Grace Realtech Private Limited Vs. Abhishek Khanna and Ors.* reported in (2021) 3 SCC 241. According to Mr. Banerjee the defendant no 1 and 2 can mortgage the property, to be developed, so long they retain their ownership over the property. The draft agreement contains such recital as well.

13. In exercise of his right to reply it is contended by Mr. Roy that two kinds of law can always operate on a single field. According to Mr. Roy the Specific Relief Act recognizes the specific performance of contract and a contract can very well be enforced before an

Arbitrator if the agreement contains an arbitration clause. Similarly having entered into an agreement by executing the booking form and by depositing the booking money, stamp duty etc. the plaintiffs have discharged their obligation and they are entitled to approach the Civil Court for appropriate relief. In support of his contention Mr. Roy places his reliance on a judgement of the Hon'ble Division Bench of this court in *Mandira Mookerjee Vs. District Consumer Disputes Redressal Forum and Ors.* reported in *AIR 2005, Calcutta-108*.

14. It is further contended that The West Bengal Real Estate Regulatory Authority is presently not functioning and the plaintiffs cannot be left at lurch and remediless. This is a fit case to exercise the jurisdiction conferred under Article 227 of the Constitution of India.

15. Section 79 of the RERA Act says:-

“79 Bar of jurisdiction-No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act”.

16. Thus upon plain reading of the aforesaid provision, it is abundantly clear that the plaintiffs cannot initiate proceeding before a forum called a Civil Court. There is clear ouster of jurisdiction of Civil Court. In this regard we can profitably rely

upon the judgement of Hon'ble Supreme Court in Imperia Structures Limited (Supra).

“ 27. Section 79 of the RERA Act bars jurisdiction of a civil court to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered under the RERA Act to determine. Section 88 specifies that the provisions of the RERA Act would be in addition to and not in derogation of the provisions of any other law, while in terms of Section 89, the provisions of the RERA Act shall have effect notwithstanding anything inconsistent contained in any other law for the time being in force.

28. On plain reading of Section 79 of the RERA Act, an allottee described in Clause (B) stated in para 24 hereinabove, would stand barred from invoking the jurisdiction of a civil court”

29. XXX

30. XXX

31. XXX

“32. The absence of bar under Section 79 to the initiation of proceedings before a fora a which cannot be called a civil court and express saving under Section 88 of the RERA Act, make the position quite clear. Further, Section 18 itself specifies that the remedy under the said section is ‘without prejudice to any other remedy available’. Thus, the parliamentary intent is clear that a choice or discretion is given to the allottee whether he wishes to initiate appropriate proceedings under the CP Act or file an application under the RERA Act”.

17. Mere submission of booking form coupled with payment of booking amount does not constitute an agreement per se. There was an

offer and the plaintiffs are not in a position to accept the same, as they do have some reservation in respect of some of the clauses. There was no meeting of mind between the parties, one is unwilling to accept the offer given without suggested modification and the other party, not willing to effect any change as suggested, cancelled the booking and intended to walk out. Therefore, the argument advanced by Mr. Roy as to the applicability of Specific Relief Act to enforce the agreement, does not inspire any confidence, in absence of any contract between the parties.

18. From the conduct of the plaintiffs it appears that the plaintiffs are quite aware of the jurisdiction of West Bengal Real Estate Regulatory Authority to adjudicate the issue. Having approached the competent authority under the RERA Act on 31.7.2023, without giving the authority the breathing time, consciously the plaintiffs approached the Civil Court and filed the suit on 4.8.23. When the Civil Court is bereft of jurisdiction to entertain such suit, the application filled under Article 227 of the Constitution of India challenging the order passed by a Civil Court, becomes devoid of merit and is liable to be dismissed, which I accordingly do.
19. Though Mr. Banerjee argues on the point of estoppel by doctrine of election, when there is clear ouster of jurisdiction of Civil Court, I do not find any reason to return the issue, as raised by Mr. Banerjee more so, when the Plaintiff could not have filed the suit before the Civil Court.

20. Before parting with the case, I would like to hold further that the Title Suit No. 1054 of 2023 is not maintainable so is the fate of Miscellaneous Appeal No. 272 of 2023 in view of the statutory mandate as laid down under Section 79 of the RERA Act, 2016 and to avert the abuse of process of law, I am inclined to dismiss both the proceedings.
21. The revisional application is dismissed on contest, however, without any order as to costs. However it is made clear that nothing has been decided touching upon the merit of the case and this will not preclude the petitioner from seeking redressal before appropriate forum.
22. Copy of this judgement be sent to Ld. Trial Court and Ld. District Judge, Alipore, for information and necessary action.
23. Urgent photostat copy if applied therefor, be made available subject to compliance of usual formalities.

(Siddhartha Roy Chowdhury, J.)