OD-14

ORDER SHEET

AP/71/2024

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

NILIMA VINIMAY PRIVATE LIMITED
VS
PRIYANKA RESIDENCY PRIVATE LIMITED

BEFORE:
The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA
Date : 2nd July, 2024.

Appearance:
Mr. Somnath Gangopadhyay, Adv.
Mr. Syed Nurul Arefin, Adv.
Mr. Rahul Singh, Adv.
..for the petitioner

Mr. Chayan Gupta, Adv.
Mr. Rajesh Upadhyay, Adv.
Mr. Shoham Sanyal, Adv.
Ms. Surabita Biswas, Adv.
..for the respondent

The Court: Learned counsel for the parties submit that despite their best efforts, the attempts at settlement have failed. As such, the application is taken up for hearing on merits.

The petitioner is the owner of a property and the respondent the developer. The parties entered into a development agreement containing an arbitration clause, on the strength of which the present application under Section 9 of the Arbitration and Conciliation Act, 1996 has been filed.

The petitioner claims that the petitioner has issued a notice under Section 21 of the said Act, thereby invoking the arbitration clause, which is disputed by learned counsel for the respondent.

Be that as it may, learned counsel appearing for the petitioner places reliance on several clauses of the development agreement to indicate that the said provisions restrict the respondent/developer from transferring even the developer's allocation of the newly constructed property without first handing over the owner's allocation, which comprises of 30% of the newly constructed building.

Learned counsel submits that since the respondent is attempting to so transfer and has entered into agreements for sale with several purchasers with such intention, there is imminent chance of such transfers being effected, prompting the filing of the present application. There being extreme urgency, the petitioner seeks an ad interim order.

Learned counsel for the respondent/developer also cites certain clauses of the agreement which clearly provide that the developer may enter into agreements for transfer of the property. However, it is further clarified by learned counsel that the respondent does not have any intention to transfer its share of the property without handing over the allocation of the owner.

Heard both parties.

Certain clauses have been relied on by the petitioner, which are germane in the context. The owner's allocation of 30% share or interest of the total constructed places or area and the developer's allocation of 70% of the same have been respectively delineated in Clauses 1.14 and 1.15 of the agreement. Clause 8.2 of the agreement stipulates that the developer shall not have the right to give possession of any space/flat in the new building to be constructed at the same premises to any person or persons until possession of the fully completed flats/units are delivered to the owners of the space mentioned therein as owner's allocation and the same shall be deemed to have been completed after the owner's allocation and/or the new building is provided with water supply, electricity and water lines to the respective flats/units forming part of the owner's allocation.

Again, Clause 11.6 of the agreement provides that after completion of the new building and after handing over the possession of the owner's allocation to the owner or its assigns/transferees, the developer shall be entitled to deliver possession of the flats, comprised in or forming part of the developer's allocation and to execute the deeds of conveyance in respect thereof.

Thus, read in conjunction, Clauses 8.2 and 11.6 restrict the developer from handing over possession of the fully completed flats/units even pertaining to the developer's allocation in favour of third parties prior to giving possession of the space/flat in the new building to the owner in terms of the owner's allocation. In fact, the last limb of Clause 11.6 clarifies that even apart from not delivering possession of the flats of the developer's allocation to third parties, the deeds of conveyance in respect thereof shall also not be executed prior to handing over possession of the owner's allocation to the owner or its assigns.

As per the clauses relied on by the developer as well, the same position is corroborated. For example, Clause 3.3(e) provides that prior to the completion of the new building and delivery of the owner's allocation, the developer would not create any lien or encumbrance or mortgage on the new building etc. and that the developer shall be entitled to apply for and obtain any loan or financial assistance for the purpose of making construction without in any way encumbering the owner's allocation.

Insofar as the second limb is concerned, the said pertains clearly to the owner's allocation. However, the first part of Clause 3.3(e) clearly provides that prior to completion of the building and delivery of the owner's allocation, the developer would not create "any liens or encumbrances or mortgages on the new building etc.". Hence, the first limb not only prohibits the developer from encumbering the owner's allocation but also debars the developer from creating any lien or encumbrance or mortgage in respect of the entire building as a whole (including the developer's allocated portion).

The said clause itself would have been sufficient to restrict the developer even from entering into agreements with third parties, which gives rise to actionable claims in their favour and tantamounts to encumbrance being created, unless Clause 11.3 was not there in the agreement.

Clause 11.3, in no uncertain terms, provides an exception to Clause 3.3(e) by providing that with effect from the date of sanction of building plan and the actual commencement of construction, both the owner and developer shall be entitled to enter into agreements for sale and/or transfer in respect of their respective allocations and all the amounts received in respect thereof shall remain with them respectively.

Thus, Clause 11.3 has to be read as an exception into Clause 3.3(e) which would otherwise have prohibited the developer from even entering into agreements in respect of its own share. Such right having been given, the developer's act of entering into such agreements with third parties in respect of the developer's portion/allocation is not prohibited by the agreement and, per se, does not amount to contravention of any provision of the agreement.

However, the other clauses referred to above, particularly, Clauses 8.2 and 11.6, restrict the developer from not only handing over possession but also entering into deeds of conveyance in respect of the developer's allocated prior to handing over possession of the owner's allocation to the owner or its assigns/transferees.

Thus, on a comprehensive reading of the agreement, the petitioner is found to have made out a strong prima facie case for injunction restraining the respondent from transferring and/or alienating and/or handing over possession of the property, including the developer's share as well as the owner's share, prior to handing over possession of the owner's allocation to the owner or its assigns in terms of the agreement.

The balance of convenience and inconvenience is also in favour of the petitioner, since the petitioner/owner would have to initiate a host of litigation if transfers are finalized in favour of third parties, having been left with no means to enforce its rights. The injury thus suffered would be irreparable and irreversible.

Also, there is extreme urgency involved, since the respondent/developer has already started entering into agreements for transfer with third parties and expresses its intention to further do so.

At this juncture, learned counsel for the respondent, on instruction, submits that the application itself may be disposed of restraining the respondent from transferring and/or alienating and/or handing over possession of the developer's allocation with a rider that nothing in this order shall prevent the developer from entering into agreements for sale/transfer of the flats relating to the developer's allocation in favour of third parties.

There being substance in such contention in view of the above findings of this Court, the application itself can be disposed of in terms of such observations.

Accordingly, AP/71/2024 is disposed of by restraining the respondent/developer by an order of injunction from selling, transferring and/or alienating the disputed property in favour of third parties and/or from handing over possession of the property in favour of third parties. However, nothing in this order shall prevent the developer/respondent in any manner from entering into agreements for transfer and/or sale of the flats/spaces or any portion falling within the developer's allocation of the property in favour of third parties.

It is further clarified that this Court has not entered into the merits of the disputes which have arisen between the parties which would be the subject-matter of the arbitration ultimately. This order will also be subject to the final award of the arbitrator as well as any interim order, if passed by the learned Arbitrator in the arbitral proceedings, as and when initiated between the parties.

The parties shall take immediate steps to ensure that the arbitral proceedings commence at the earliest.

It is further clarified that since no affidavits have been called for, it is deemed that none of the allegations made in the application have been admitted by the respondent.

(SABYASACHI BHATTACHARYYA, J.)

R.Bhar/bp