

**IN THE COURT OF ADJUDICATING OFFICER,
REAL ESTATE REGULATORY AUTHORITY(RERA), BIHAR, PATNA**

**RERA Complaint Case No.15/2018
(Adjudicating Officer Case No.10/2018)**

1. Sweta Kumari
2. Anjani Kumar - Both
R/o ShyamaSadan, Mohanpur Petrol Pump House, ... Complainant(s)
Punaichak, Patna-800001

Versus

M/s Magadh Housing through its Directors:-

1. Dr.Manindra Nath Mishra
2. Sri Kanhaiya Kumar Verma – Both R/o CA/62 P.C.
Colony, Kankarbagh, Patna-800020 ... Respondent(s)

Present:

**Sri Ved Prakash
Adjudicating Officer**

Appearance:

- | | |
|-----------------------|----------------------------------|
| 1. For Complainant(s) | Mr. Ranjan Prakash,
Advocate |
| 2. For Respondent(s) | Mr. R.K. Srivastava,
Advocate |

ORDER

14-03-2019

This complaint petition is filed by the complainants, SwetaKumari @ KumariSwetaand her husband, Anjani Kumar against M/s Magadh Housing and its Directors, Dr.ManindraNath Mishra and Kanhaiya Kumar Verma under the provisions of Section-31 of Real Estate (Regulation and

Development) Act, 2016 (hereinafter referred as 'Act, 2016) for relief as per Sections 18 and 19 of the Act, 2016 for payment of Rs.22,74,525/- with interest @ 18% per month. They have further sought reliefs for litigation cost of Rs.51,000/- and for compensation of Rs.10,00,000 for their mental agony and physical harassment.

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2. In nutshell, the case of the complainants is that the Respondents are registered Partners/Directors engaged in running Real Estate business. The Respondents proposed to construct a Multi-Storied residential complex in the name and style of 'MAHENDRA MANSION' comprising of area 13610 sq.fts situated at Mouza-Dhanuk, P.S. Danapur, Thana-20, Touzi No.5553, Khatha No.131, Plot No.1249. The complainants on an advertisement published by the Respondents and knowing the proposal accepted it and a Sale Agreement was executed and registered on 27-09-2012 for Flat No.404, in Block-A having area of 1070 sq.fts along with a 4 wheeler parking space No.404 on the consideration amount of Rs.25,27,250/- @ Rs.2,175/- per sq.ft. The complainant paid Rs.4,00,000/- through cheque and Rs.17,00,000/- through loan sanctioned by Central Bank of India (C.B.I.) to the Respondents and a Tripartite Agreement was signed on 15-11-2012 between the complainants,

Respondents and C.B.I. Accordingly, the above Bank disbursed the amount of loan directly to the Respondents on various dates. The respondents received Rs,22,74,525/- through the Bank and on self-mode from the complainants. As per para-20 of the above Sale Agreement, the Respondents have to deliver possession of the above flat and parking space to the complainants by 03-06-2013 with a grace period of six months from the date of Sale Agreement. The Respondents always gave false assurances that the flat will be completed very soon, but still the flat is incomplete. During this period, the complainants had to pay an E.M.I. of Rs.22,000/- per month to the Bank without delivery of the flats and they were residing in a rented house after paying Rs.15,000/- per month as a rent. In spite of repeated oral and written requests, the Respondents failed to deliver the possession of the flat and since the complainants could not pay instalment of the loan amount, so it became N.P.A. and the Bank has taken possession of the Flat No.404 of Magadh Housing on 27-04-2018. The Demand Notice along with interest was served to the complainants for Rs.19,39,481/- excluding miscellaneous and legal expenses. It is further case that the Bank had also initiated further proceeding against the complainants in D.R.T., Patna and after publication, the

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complainants were shown as defaulters. The complainants have paid more than 90% of the consideration amount, but the Respondents have failed to deliver possession of the completed flat to the complainants. Therefore, the amount of Rs.22,74,525/- paid to the Respondents by the complainants may be ordered to be refunded to the complainants along with 18% interest. They may be further directed to pay compensation of Rs.10,00,000/- along with litigation cost of Rs.51,000/-.

3. After appearance, the Respondents have also filed reply pleading inter-alia that the contents of the complainants are incorrect. The reality is that the flat in question was allotted to the complainants through a written Sale Agreement and they have paid the claimed amount of consideration, which is a matter of record. They have further stated that the said flat is complete as per Building Bye-laws existing in the year 2011. The Hon'ble Supreme Court of India in case of R. Satya Narayan Vs. (Smt.) Shantha and Others has held that the Building Bye-laws existing at the time of sanction of the Plans by concerned authority would be applicable in the case. It is further stated that since 2013, the apartment is complete and only finishing work is due, which is permissible u/s 4.5 of the Modified Building Bye-laws. Thus, there is no need to prior

permission for further furnishing work of the building. The Respondents are always ready to deliver the flat to the complainants, but they have always refused to take possession of the flat in question, because they have not fulfilled the requirement of the concerned Bank. It is further case that para-23 of Sale Agreement says that in case of dispute/difference between the parties before or after delivery of possession, the same shall be referred for arbitration under Arbitration Act, 1996 and shall be binding upon both the parties. So, this Court has no jurisdiction to entertain the complaint petition of the complainants. As such, the complainants are not entitled for any relief and the complaint petition has to be dismissed with cost / may be referred to Arbitration.

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4. On the basis of above facts, the following points are formulated for adjudication of the case:-

- (i) Whether this Court has jurisdiction to entertain the complaint petition of the complainants under RERA Act, 2016?
- (ii) Whether the complainants should have referred the dispute before the Arbitrator under the Arbitration Act, 1996?
- (iii) Whether the flat/apartment may be transferred/delivered even without finishing works to the allottee by the land-lord/builder?

- (iv) Whether the complainants are entitled for the amount of Rs.22,74,525/- with interest pendente lite against the Respondents?
- (v) Whether the complainants are entitled for interest @ 18% per month on the paid advance consideration money of Rs.22,74,525/-?
- (vi) Whether the complainants are entitled for compensation of Rs.10,00,000/- against the Respondents for their mental agony and physical harassment?
- (vii) Whether the complainants are entitled for litigation cost of Rs.51,000/- against the Respondents?

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5. Points (i) and (ii):

Both these points being inter-linked, are taken together for discussion. Learned lawyer for the Respondents submitted that as per para-23 of the Sale Agreement dated 27-09-2012, in case of dispute/difference between the parties, the matter may be referred to an independent Arbitrator under the Indian Arbitration Act, 1996. He further submitted that the complaint petition should have been lodged before an Arbitrator, but the complainants failed to do so. Hence, this case is not maintainable, as this Court has no jurisdiction to entertain the complaint petition of the complainants. On other hand, learned lawyer for the complainants submitted that Section-18 of RERA Act, 2016 provides that the dispute may be brought before the relevant local authority formed under RERA Rules. The RERA Rules supersedes as it is a special law and has an over-riding effect over the provisions of Arbitration Act, 1996. So, being special law, the Court established under Real

Estate (Regulation and Development) Rules, 2017 (hereinafter referred as RERA Rules, 2017) has the jurisdiction to entertain the complaint cases lodged by aggrieved persons. He further submitted by citing judgment dated 06-12-2017 of the Hon'ble Supreme Court of India passed in Civil Appeal No.20913/2017 - Atma Ram Properties Pvt. Ltd. Vs. The Oriental Insurance Company Ltd. submitted that special law will prevail over the general law. Further, as per provision in para-24 of the Sale agreement deed, the Courts established in Patna having original jurisdiction have power to entertain and settle the disputes between the parties. This Court is established for deciding the disputes between the parties in Patna. As such, there is no force in submission of learned lawyer for the respondent and this Court has jurisdiction to entertain the grievances of the complainants.

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6. Admittedly, both the parties have referred para-23 of the Sale Agreement dated 27-09-2012, wherein they have agreed that in case of any dispute, the matter may be lodged in the Court established in Patna. Now, the RERA Act, 2016 and Bihar RERA Rules, 2017 have come into existence and this Court has been established u/s 31 and 71 of RERA Act, 2016. Section-89 says that provision of RERA Act, 2016 have over-riding effect over the general laws. It is admitted position that RERA Act, 2016 is a special law for entertaining the complaints of allottees, land owners and developers with respect to their grievance against one and other. The Hon'ble Supreme Court in judgment dated 06-12-2017

in Civil Appeal No.20913/2017 Atma Ram Properties Pvt. Ltd. Vs. The Oriental Insurance Company Ltd. has held that the special law shall prevail over general laws. Section-12, 14, 18 and 19 of RERA Act, 2016 says that the promoters/builders/allottees and land owners have to complete their responsibilities. As per Section-18, the builder/promoter has to deliver possession of the building as per agreement and if he fails to complete and unable give possession of the building/apartment in time, then the allottee may file a complaint against him before this Court under RERA Act, 2016 for capital amount, interest and compensation. In this way, RERA Act, 2016 supersedes and has an over-riding effect over the provisions of Indian Arbitration Act, 1996. Hence, submission of learned lawyer for the respondents appears incorrect in the eye of law and this Court has jurisdiction to entertain the grievances of aggrieved party like developer, land owner and allottee. Accordingly, the Point No.(i) is decided in positive in favour of the complainants and against the Respondents and Point No.(ii) is decided in negative in favour of complainants and against the Respondents.

7. Point No.(iii):

The learned lawyer on behalf of the respondents by citing judgment of Hon'ble Supreme Court in the case R. Satya Narayan Vs. (Smt.) Shantha and Others submitted that in the instant case the bye-laws existing at the time of sanction of Plan of the building would be applicable. The apartment was

completed in the year 2013 and only finishing works is due, and the flat may be transferred and delivery of possession may be given to the complainants, as it is permissible u/s 4.5 of Modified Building Bye-laws. There is no need to prior permission for furnishing work of building in question. The Respondents are always ready to hand over possession of flat, but the complainants refused to take possession, because he has not fulfilled the requirement of concerned Bank. On other hand, learned lawyer for the complainant submitted that building is admittedly in complete and in spite of repeated requests, Respondents failed to complete it and give delivery of possession. The submission of learned lawyer for Respondents is incorrect and Bye-laws also does not support his views and reasonings. The learned lawyer for Respondents has wrongly interpreted section 4.5 of Bye-laws in light of cited rulings. In addition to above reasons, Apartment Act, 2006 and RERA Act, 2016 also support that unless and until any project is not completed, it cannot be Registered and Transferred to allottee.

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8. Sale Agreement dated 27-09-2012 was executed between both the parties. Para-7 to 10 of said Deed says about delivery of possession of flat to complainants by builder/developer-cum-Respondents, wherein it has been mentioned that on completion of building, the developer shall notify to the Vendee that Building is completed. In para-20 of Deed, it has been scribed that the developer shall hand-over peaceful possession of flat to Vendee up

to June, 2013 with grace period of 6 months from the date of Agreement. Further, in para-21 of Deed it has been mentioned that in case developer fails to deliver the possession of flat complete in all respect on due time and there is delay, then the Vendor shall pay 18% interest per annum. The flat could not be completed and delivered within above mentioned period. Now, learned lawyer for Respondents has submitted that flat is completed in 2013 and only finishing work is due, which is permissible by then existing Building Bye-laws of 1981 Section 4.5 and there is no need to prior permission for furnishing work of Building. On going through Section 4 of Bye-laws 1981, it appears that it deals with heading Application for development or Building Permission, wherein permission is required to make any material alteration in Building from Authority. In Section 4.5 there is no need for application and building permission for certain work like painting, white washing etc. It shows that learned lawyer for Respondents has tried to mis-interpret Section 4.5 of Bye-laws, as this Section does not restrict to construct/furnish the Building, rather for minor work alteration, there is no need for permission from Authority. Here in the instant case, building structure is ready and furnishing work is due, which can be done by Builder. In this way, even the Bye-Laws, 1981 existing at the time of sanction of Plan does not authorise the Respondents to hand over the incomplete flat to

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complainants. Hence, the ruling cited by learned lawyer does not help to Respondents.

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In addition to above, Section 7(2)(i) of apartment Act, 2006 says that Builder/Promoter shall not allow persons to enter into possession until Completion Certificate is duly given by the Local Authority and no person shall take possession of Apartment until such Completion Certificate has been issued by Local Authority. Section 2(q) of RERA Act, 2016 also says that completion Certificate certifies that real estate project has been developed according to the sanctioned Plan, Layout Plan and specification as approved by Local Authority. Section 2(Zf) also suggest that occupancy certificate issued by Competent Authority permits occupation of any building as provided under local laws, which has provision for civic infrastructure, such as, water, sanitation and electricity. Section-14 of RERA Act, 2016 also reiterates that the proposed project shall be developed and completed by Promoter in accordance with the sanctions Plans, layout Plans and specification as approved by the Competent Authority. As such, the Respondents have failed to complete project as per sanctioned Plan, Layout Plan and specifications as approved by Competent Authority and still he has not produced Completion/Occupancy Certification showing that Project is completed. It also supports that the project is on-going and knowingly and intentionally the Respondents have not applied for registration under RERA Act, 2016. Therefore, there is no force in argument of learned lawyer for

Respondents. Hence point no.(iii) is decided in negative and against the Respondent and in favour of complainants.

9. Point No.(iv) and (v):

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The learned lawyer for complainants submitted that flat in question was to be delivered by 30-06-2013 with grace period of 6 months from the date of execution of Sale Agreement. In spite of repeated oral/written requests, the Respondents have failed to complete and deliver the project to the complainant within a reasonable time. Due to delay in delivery of possession of completed flat, the complainants faced two types of problems firstly, they could not get possession of flat, so they remained in rented house on rent of Rs,15,000/- per month and secondly during this period they were paying E.M.I. of Rs.22,000/- per month to Bank against the loan of Rs.17,00,000/- borrowed by them from Central Bank of India, which has become a huge amount. In this way, they became unable to pay loan E.M.I. of Bank, so Bank has seized the Flat No.404 on 27-04-2018 for default of loan amount of Rs.19,39,491/- on basis of Tripartite Agreement dated 15-11-2012. On other hand, learned lawyer for Respondent submitted that loan was borrowed by complainants from Bank, so it is their liability and knowingly and intentionally they have failed to pay loan and not taken possession of flat from Respondents and Respondents are not responsible for latches on the part of complainants.

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10. Admittedly, the Respondents have agreed in Sale Agreement that they shall deliver possession of Flat No.404 to complainants on 30-06-2013 with grace period of 6 months, but they failed to deliver the completed flat within above period. It has come in para-6 of Tripartite Agreement dated 15-11-2012 that in the event of failure of the builder to complete the project, the builder shall pay the entire amount so received by it from the Borrower or on behalf of Borrower to the Bank. It may be reality that complainants were paying rent of Rs.15,000/- per month along with E.M.I. of Rs,22,000/- per month, so they became unable to pay E.M.I. of Bank and defaulted, that is why the Bank has seized the flat, claiming loan of Rs.19,39,491/- as due from the complainants, as they have stated that they have borrowed loan of Rs,17,00,000/- for purchasing the completed flat.

11. As discussed neither the Respondents completed the project nor produced Completion Certificate. Section-18 of RERA Act, 2016 says that the Builder/Promoter has to deliver possession of the building/Apartment as per Agreement and if he fails to build or unable to give possession within time, then the allottee may claim refund of amount along with accrued interest thereon and compensation as per this Act. The complainants have claimed that they have paid Rs.4.00 lacs and Bank has disbursed Rs.18,74,525/- to Respondents on different dates. Accordingly, total Rs.22,74,525/- was paid to Respondents. The respondents have not denied it. As per Tripartite Agreement, since the Builder

has failed to complete the flat, so he has to return the above amount to the complainants/Bank. In para-21 of Sale Agreement, it has been scribed that in case there is delay in handing over the possession/transfer of ownership of flat completed in all respect, the Vendor/Respondent shall be responsible to pay 18% interest per annum.

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12. The total consideration of flat is Rs.25,27,250/- and the complainants have paid Rs.22,74,525 on different dates. It shows that they have correctly submitted that 90% of consideration amount has been paid by them, but they received nothing fruitful. It is clear from legal as well as factual aspect that Paid Advance Consideration amount should be refunded by the Respondents to the complainants. Rules 17 and 18 of RERA Rules, 2017 states that Promoter/allottee shall pay two per cent above the interest rate prevalent Prime Lending Rate of S.B.I. within 60 days. The complainants have paid Rs.4.00 lacs on 12-10-2012 and the Bank has disbursed:-

Rs.7,11,990 on 23-11-2012

Rs.1,88,200 on 24-01-2013

Rs.2,16,160 on 09-03-2013

Rs.2,52,725 on 25-05-2013

Rs.2,52,725 on 27-01-2014

Rs.2,52,725 on 30-04-2014

I was inclined to order for payment of agreed rate of interest 18%, but it is too high and taking equity for both the sides, interest rate described in rule-17 and 18 of RERA Rules, 2017 may be

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applied for payment of interest along with capital amount of Rs.22,74,525/- paid in different dates to Respondents. Now, Prime Lending Rate in India is 9.45%. if 2% is added, then the rate of interest will be 11.45. This rate of interest will be levied from the date of payment of money to Respondents by complainants and Bank. Accordingly, 11.45% interest will be claimed from 12-10-2012, when Rs.4.00 lacs was paid to Respondents. 11.45% interest will be claimed from 23-11-2012 for Rs.7,11,990/- etc. Hence points no.(iv) and (v) are decided in positive in favour of complainants and against the Respondents.

13. Point No.(vi) and (vii):

Learned lawyer for complainants submitted that Section-18 of RERA Act, 2016 empowers complainants to claim compensation along with interest in case of default of Respondents in delivery of possession to complainants, if complainants are withdrawing from project. Now, there is no hope to complainants to remain with the flat, so they have withdrawn from contract and claimed 18% interest and paid amount and compensation of Rs.10.00 lacs for mental agony and harassment. On other hand, learned lawyer for Respondent denied the claim and submitted that when Respondents are ready to deliver possession, no interest and compensation can be allowed, as there is not force in submission of learned lawyer for complainants. Every problem is creation of complainants and for which Respondent cannot be held liable.

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14. Due to non-completion of flat, delivery could not be done. It is reality that complainants were eagerly waiting for possession, but Respondents for one or other reasons did not furnished the flat and tried to deliver without furnishing the flat and their learned lawyer tried to justify his claim in garb of order of Hon'ble Appex Court, but as discussed he has tried to mislead on the legal issues, which are purely incorrect. It is also a fact that complainants were paying rent as well as E.M.I., which were too high. Hence, they tried to pursue the Bank and Respondents also. But everything has gone in vain. Now record shows that they are hopeless of flat due to tight attitude of Respondents, so they have withdrawn from sale agreement with Respondents. In such a large process naturally there has become mental and physical harassments to the complainants, which may be compensated in term of money.

15. As per Section 72, the Respondents have been benefitted with heavy amount of money paid by complainants and on other hand the complainants have paid Rent of Rs.15,000/- per month and E.M.I. of Rs.22,000/- per month, in which they have paid interest along with capital loan. The complainants have paid Rs.22,74,525/- to Respondents and this amount is with them till today, which they have used on their business without giving delivery of flat to complaints. Now, the complainants will not get other flat on same rate in the same locality. The present rate of flat in the locality has not come on record, but naturally from

2012, the flat rate has gone high. Taking all situation into mind and amount paid by complainants, I think, compensation amount Rs.5.00 lacs will justify the end.

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16. The complainants have run from pillar to post and lastly have filed this complaint case for refund of their amount against the Respondents. The complainants have claimed Rs,51,000/- as litigation cost, which is high, but at the same time pursuing at Bank, Respondents, engaging lawyers payment of fee etc. is hard task and cost of which may be provided to complainants. I think, in all proceedings, the complainants would have incurred Rs.25,000/-. Accordingly, I hold that the complainants are entitled for Rs.25,000/- as litigation cost against Respondents. In this way, the Points no.6 and 7 are decided in positive in favour of complainants and against the Respondents.
17. From the above discussions, it is apparently clear that Respondents failed to deliver the possession of flat within stipulated period to the complainants, that is why, reasonably they have cancelled the agreement for sale and demanded their paid amount along with interest and compensation. Considering the available facts, evidence and other materials, I hold that the complainants are entitled for Paid Advance Consideration money of Rs.22,74,525/- along with accrued interest at the rate of 11,45% against Respondents, but this interest will be levied from the date of payment of respective amount. The complainants are also

entitled for compensation of Rs.5.00 lacs along with litigation cost of Rs.25,000/- against the Respondents.

18. Therefore, this complaint case of complainants is allowed on contest on litigation cost of Rs.25,000/- against the Respondents.

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The Respondents are directed to pay Rs.22,74,525/- to the complainants. The Respondents are further directed to pay accrued interest at the rate of 11.45% on above amount of Rs.22,74,525 from the date of receipt /disbursement of particular amount from Complainants/Bank. The Respondents are further directed to pay compensation of Rs.5.00 lacs to complainants. The Respondents shall comply the order within 60 (sixty) days, failing which the complainants may enforce the same through process of the Court.

Sd/-
(Ved Prakash)
Adjudicating Officer
14-03-2019