

REAL ESTATE REGULATORY AUTHORITY, BIHAR

Telephone Bhavan, Patel Nagar, Patna-800023.

Before the Bench of Mrs. Nupur Banerjee, Member

Complaint Case Nos. CC/53/2018

Bijesh Prasad @ Brajesh PrasadComplainant

Vs.

M/s Chitra Homes Pvt. Ltd.Respondent

Project: Chitra Residency

For Complainant: Mr. Sharad Shekhar, Advocate

For Respondent: Mr. Mayank Rukhriyar, Advocate

07 /09/2022

ORDER

This matter was last heard on 04-08-2022.

1. The complainant, Bijesh Prasad @ Brajesh Prasad, a resident of village Mustafapur, P.S. Khagaul Bazar, District Patna, has filed a complaint petition against the respondent firm M/s Chitra Homes Pvt. Ltd., a promoter and developer company, for the following directions:

(i) for direction to the respondent company to do early completion of the entire construction and development work in accordance with the terms and conditions stipulated in the agreement;

(ii) to hand over possession of the flats to the complainant at the earliest after completing the entire construction work and finishing work as per agreement and after obtaining the completion certificate by the competent authority;

(iii) to pay late fine and compensation of Rs.2 crore for inordinate delay in completion of the project and delivery of possession of the allotted flats;

(iv) to pay compensation of Rs. 1 crore for defective construction in violation of the terms and conditions of the agreement;

(v) to give a written undertaking for completion of construction work and delivery of possession of the allotted flats to the complainant within a specific time period;

(vi) to make rectification of construction defects and lacking of facilities as mentioned in para-5.6 of the petition;

(vii) to direct the respondent to make earliest allotment and delivery of well-furnished agreed flats to the complainant with all facilities and amenities;

(viii) to execute fresh agreement in favor of the complainant for removal and rectification of all the defects and pay compensation for violation of the terms and conditions of the agreement.

2. In short, the case of the complainant is that the respondents had entered into a registered development agreement dated 18.05.2010 with the complainant and both of them jointly signed the said agreement registered on 27.05.2010 for development of land and construction of earthquake proof multi storied building within a period of 3 and ½ years. Thereafter, the map was duly approved in January, 2011. According to the approved map plan, 36 flats were to be built over the plot of land of the complainant, which was amalgamated with some other plots of land of other person on the basis of other deeds of agreement with them. It is further stated that thereafter, the respondents had entered into a Flat Distribution Agreement dated 14.01.2011 with the complainant which was duly signed by the parties, according to which out of total 36 flats, two flats were voluntarily gifted to the builder and the rest 34 flats were distributed to the three land owners. It is also stated that thereafter, on 19.01.20211, Flat Exchange Deed of Agreement was made in between the complainant and the respondent and flat No. G-7, was allotted to respondent and flat No.207, was allotted to compliant. Even after expiry of more than seven years from the date of signing of the Exchange Deed of Agreement, not a single flat has been made ready by the respondent for making it in deliverable possession and lots of construction work is still required to be done and on inspection being made in May, 2017 by complainant, it was found that there is no chance of completion of construction work and delivery of possession of the flats to the share of the complainant till the end of 2018. It was also found that the respondents have made illegal and unauthorized construction over the parking area. So many defects have been found in the construction work. It is further stated that in case of delay, the developer was liable to pay compensation but even after expiry of 3 and ½ years, the respondents have not paid any amount of compensation or percentage till now. Thereafter, a legal notice was sent to the respondent on 04.03.2014 against which a reply notice dated 27.03.2014 was sent to the complainant but the respondents have not taken any heed for redressal of grievance of the complainant. It is further stated that even after expiry of about three years from the aforesaid time period in July, 2015, still the completion of construction work is not complete till July, 2018. They also used substandard building materials in construction of the building. Seeing all these things the proposed buyers did not like to purchase the flats resulting in loss of crores of rupees to the complainant for which the respondents are liable to compensate. It is also stated that if the project might have been completed

in time, then the complainant might have sold out his share of 7 flats but it is incomplete and there are so many defects to be removed and some facilities as mentioned in para-4.24 are found lacking in the building. Hence, this complaint.

3. A notice dated 20.08.2018 was issued to the respondent company under Sections 03, 12, 18 and 19 of the RERA Act, 2016 and Rule 36 of the RERA Rules 2017 to appear and file their reply. In response to the said notice the respondents have filed its reply on 18.02.2019 stating therein that the present complaint does not merit any consideration on the sole ground of concealment of material facts by the complainant. The complainant does not fall under the definition of allottee as there is no sale/ transfer in favor of the complainant, there is merely a flat distribution agreement between two stakeholders of the project. It is further stated that the issue of non-registration of the project is pending before the Authority in a suo moto case. The respondents have denied all the allegations made in the notice and states that the project in question is complete as per the sanctioned map and final finishing work of the flats in the share of the complainant is pending on account of inter se dispute between the parties. It is further stated that all the works have been done properly and possession of the flats have already been handed over to the purchasers, therefore, the present complaint is not maintainable at all.

4. Thereafter, a supplementary affidavit has been filed on behalf of the complainant in which it is stated that the complainant has recorded the latest video of the flats on 13.02.2019 in which it clearly shows irregular and incomplete construction of the aforesaid building/ flats. The complainant has made several requests for possession of the flats as per agreement. During the ongoing project and incomplete construction, the respondent has sold many of the flats.

5. Again third supplementary reply has been filed on behalf of the respondents in which it is stated that the complainant has admitted of having the possession of two flats bearing Flat Nos. 101 and 108. On 09.04.2019 the complainant has returned the key of flat no. 108 on the ground that some construction is still pending in the said flat. It is stated that the respondents had handed over the possession of the flat after completing the construction. They admit that some repair works are required in flat no.108 and after repairing, the possession of the flat will be returned to him very soon. Flat no. 204 is ready for possession and therefore, they are submitting the keys in a sealed cover to be handed over to the complainant. On the request of the complainant major upgradation works have been made and for the same additional costs are required to be paid by the complainant.

6. An application u/s 35(i) of the RERA Act, 2016 read with Section 63 of the Act has been filed on behalf of the complainant for conducting an

enquiry of the project in which it is stated that the averments made in the third supplementary affidavit dated 02.05.2019 are baseless and unfounded. It is stated that the project is still incomplete with major issues. Flat No. 204 has been delivered with incomplete work. The respondent has not installed the generator, firefighting system, electric panel, some other electric wiring etc. They have not prepared drainage system. It is further stated that Flat no.306, 406, 407 and 207 are still incomplete and possession of the said flats has not been given. The respondent has constructed four flats in the parking area in violation of building byelaws.

7. In pursuance of the order of the Double Bench dated 02.05.2019 a report was submitted by a three-man committee on 15.05.2019 in which the finding of the Committee is that Multistoried building is four storied with 32 flats and at ground floor, four more flats have been constructed. 16 flats are occupied and more than half a dozen flats were not complete. Lift was recently installed and up and down landing of both the stairs have not been covered. Constriction was found to be very poor and proper finishing of the entire apartment was not done. So many defects, such as sewerage system, electric wiring, parking space, generator, transformer, deviation in the construction were found. The allottees have not been given the completion/ occupancy certificate till date. Signature and seal of the Mukhiya in the office copy of the notice of completion was said to be not available in the office of the Mukhiya. The Architect was not present on the site. Therefore, it can be said that the building was not fully complete as on the date of the visit, notice of completion said to be given under the signature of Architect to Mukhiya was denied by the Mukhiya Sri Ramashish Singh to receipt it. The picture of Chitra Residency was taken from mobile phone and a copy of which are attached with the report.

8. A supplementary affidavit has been filed on behalf of the respondents on 24.02.2020 in which it is stated that the present case is a result of inter se dispute between the parties which is liable to be adjudicated as per arbitration clause of the Agreement, therefore, the present complaint case is not maintainable. It is stated that the project in question is already complete and the share of the complainant has been withheld on account of inter se dispute. It is submitted that the question of maintainability is required to be decided before passing of the final order as held by the Hon'ble High Court in C.W.J.C.No. 12243 of 2019.

9. Again an objection petition has been filed on behalf of the respondents on 15.01.2021 that before passing final order in the matter firstly suo moto case may be decided in the light of the order passed in C.W.J.C.No. 12243/2019.

10. A report dated 02.03.2021 has also been submitted by the Inspection Team of two members and in sum and substance the finding of the

Inspection Team is that the works are incomplete and no further development after submission of the report in SM Case No.225/2018 has been done by the respondent.

11. Lastly a supplementary petition has been filed on behalf of the respondents on 18.07.2022 in which it is stated that the respondents have filed a case before the A.O. claiming his dues and damage. It is stated that the complainant destroyed the flats in their share and the complainant admitted that extra work has been done in his share for which he is duty bound to pay for the same, cost of which has been specified in para-9 of the petition. The complainant is also required to pay GST for taking the possession of the flat.

12. During the last hearing, at the very outset, learned counsel for the respondent has submitted that on the last occasion, he sought time to file a rejoinder. He has filed a supplementary affidavit. On 11.05.2022 the complainant agreed that there was extra work done by the respondent in their flat. He further submitted that they have challenged the maintainability of the case because the project was completed before inception of the Act. Therefore, registration is not applicable in their project. RERA has no jurisdiction to entertain this case because the project is completed before the Act came into force. He submitted that unless the project has been registered, RERA cannot entertain any complaint before it. First, they wanted commission for the shares of flat sold by the respondent. The second thing is that they asked to do some up gradation in the project which we did for which they have not paid the extra money. We have fulfilled his part of promise. They have taken possession.

The complainant has placed on record copy of development agreement dated 18-05-2010, flat distribution agreement dated 14/01/2011, exchange agreement dated 19/01/2011, legal notice dated 04/03/2014, reminder rejoinder notice and legal notice dated 11/05/2017.

Learned counsel for the complainant has submitted that, he has not received a copy of the supplementary affidavit. He further submitted that the issue is not regarding the commission, regarding extra work. He brought the complaint for incomplete seven flats which incomplete till date. The respondent has not taken completion certificate. The building is not complete. Two enquiries have been conducted. The action u/s 35 and 59 of the Act has been taken against the promoter for not registering the project. There is no fire fighting. There is no division of the flat. He further submitted that the enquiry report has been submitted on 02.03.2021 by the Assistant Engineer and the Legal Advocate, RERA and ten discrepancies were found. OC and CC have not been provided to him. Flat Nos. 406 and 407 are still incomplete. His prayer is that they should first take registration of the project and complete the remaining work and submit OC and CC as per law.

Learned counsel for the respondent further submitted during the last hearing that they filed the first reply in 2019. We have challenged the proceedings of the RERA before the Hon'ble High Court on two grounds. The registration cannot proceed unless the decision is taken with regard to objection to the maintainability of the case in reference to the Rues and provisions of Section 3(2)(c) of the Act.

13. In light of submissions made and after the perusal of documents placed, the Bench observes that from the report of the committee along with photographs placed on record and considering the averments of the respondent made in Para 6 of the 3rd supplementary affidavit filed stating therein that the some repair works are required in flat no.108 and after repairing, the possession of the flat will be returned to compliant very soon, the Bench observes that from the submissions and committees report and after the perusal of photographs placed by the committee in respect to building in question and also taking the notes that respondent has not placed any completion or occupancy certificate from which it established and evident that building was complete before the commencement of the Act.

Hence, in view of the above discussion, the Bench finds that the project was incomplete after the commencement of The Real Estate (Regulation and Development) Act, 2016. Therefore, this project will be considered as ongoing project and was registrable as per 1st Proviso of Section 3 of the Act. The Bench further to substantiate their findings placed reliance on the case of M/s Newtech Promoters & Developers Pvt. Ltd. Vs State of U.P & Ors. [2022] (1) RCR (Civil) 357, where the Hon'ble Supreme Court has observed that the Act is not retrospective in nature, rather it is retroactive because it affects the existing rights of the persons mentioned in the Act like promoter, allottee etc. The intent of legislature was to include all ongoing projects which commenced prior to the enforcement of the Act.

Further, In Lavasa Corporation Limited v/s Jitendra Jagdish Tulsiani & Others, Second Appeal (Stamp) Nos. 9717 of 2018 & 18465 of 2018, 18467 of 2018 with Civil Application Nos. 683 of 2018, 791 of 2018, 792 of 2018, the Hon'ble Bombay High court has observed that RERA is brought on Statute Book to ensure greater accountability towards the consumers and significantly reduce frauds and delays, as also the current high transaction costs. It attempts to balance the interests of consumers and promoters, by imposing certain responsibilities on both. It seeks to establish symmetry of information between the promoter and purchaser, transparency of contractual conditions and set minimum standards of accountability and a fast-track dispute resolution mechanism. The RERA, as stated in its 'Objects and Reasons', was enacted for inducting professionalism and standardization in the sector, thus, paving the way for accelerated growth and investments in the long run.

It has been further observed by the Hon'ble High Court that as per Clause (2) of Section 3, the RERA is made applicable even to the projects that are on-going on the date of commencement of the RERA and for which, Completion Certificate has not been issued. In respect of such projects also, Promoters are required to register the projects with the Real Estate Regulatory Authority within three months from the commencement of the RERA, with an option that they can register entire real estate project or part of it. The specific 'Explanation' to the Section 3 of the RERA provides that, where the real estate project is to be developed in phases, every such phase shall be considered as a standalone real estate project.

The Hon'ble Bombay High Court also observed that The Real Estate (Regulation and Development) Act, 2016, as its 'Preamble' shows, is enacted by the Legislature, 'To establish the 'Real Estate Regulatory Authority' for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy redressal and also to establish the Real Estate Appellate Tribunal to hear Appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and Adjudicating Officer and for the matters connected therewith or incidental thereto. The 'Statement of Objects and Reasons' of the Act shows that, the necessity of enacting such Act was realized by the Legislature after perceiving that, the real estate sector plays a catalytic role in fulfilling the need and demand for housing and infrastructure in the country. While this sector has grown significantly in recent years, it has been largely unregulated, with absence of professionalism and standardization and lack of adequate consumer protection.' It was felt that, 'Though the Consumer Protection Act, 1986 is available as a forum to the buyers in the real estate market, the recourse thereto is only curative and is not adequate to address all the concerns of buyers and promoters in that sector.' The lack of standardization was found to be a constraint to the healthy and orderly growth of real estate industry. In view of the above, it was found necessary to have a Central Legislation, namely, the RERA, in the interests of effective consumer protection, uniformity and standardization of business practices and transactions in the real estate sector. The RERA is, therefore, enacted to provide for establishment of the 'Real Estate Regulation and Development Authority' for regulation and promotion of real estate sector and to ensure sale of plot, apartment or building, as the case may be, in an efficient and transparent manner. The object of the RERA is stated to be to protect the interests of consumers in the real estate sector, like the Respondents herein.

Hence, the Bench observes that the respondent should have registered the project within 3 months as provided under 1st Proviso of Section 3 of the Act, since, the respondent failed to register the project, so, the Bench notes

that for violation of section 3 of the Act, Suo-Moto proceeding, bearing case no. SM/225/2018, has already been initiated against the promoter.

14. The Bench observes that authority has jurisdiction to entertain the complainant under section 31 of the RERA Act, 2016 for any dispute arises between the land owner and promoter in respect of their shares of flat which has been not handed over by the promoter to landowner as per the development agreement or such like arrangement between the promoter and the landowner/s. The Bench also observes that as per Bihar Real Estate Regulatory Authority (General) Regulations, 2021 Section- 6 (3) which reads as follow: -

“In cases where there is a development agreement or such like arrangement between the promoter and the landowner/s, unless otherwise mentioned in the agreement, the landowner would be treated as an allottee under the Act as he is getting apartments in lieu of land. In all such cases the promoters of the project would be responsible for fulfilling all obligations under the RERA Act and Rules made there under.”

The Bench also consider and put reliance of the observation of the Real Estate Appellate Tribunal, Bihar (BREAT) at Patna, in REAT Appeal no. 04/2022, where the Hon’ble RERAT has observed that Section 4(1) of the RERA Act, 2016, as well as section 3(f) of Bihar Real Estate (Regulation and Development) Rules, 2017 (hereinafter referred to as the Rules) indicated in definite terms that promoter and landowner are two different entities in case the landowner is not one of the applicants as promoter and held that it is unfounded that the landowner is one of promoters.

In light of the above discussion, the Bench observes that land owner as allottees can file complaint under section 31 of the RERA Act, 2016.

15. So far the issue raised regarding that the present matter to be adjudicated as per arbitration clause of the Agreement is concerned, this Bench while putting reliance on case of Booz Allen and Hamilton Inc v SBI Home Finance Limited & Ors, (2011) 5 SCC 532), where the Hon’ble Supreme Court held that while arbitral tribunals are private forums chosen by parties, the legislature may, as a matter of public policy, reserve the adjudication of certain disputes to public courts and bodies and by implication, exclude certain disputes from being heard in private forums. Therefore, the court will refuse to refer such disputes to arbitration.

Further, In A Ayyasamy v A Paramasivam, (2016)10SCC386, the Supreme Court held that there are classes of disputes that fall within the exclusive domain of special bodies created under legislation that confers jurisdiction to the exclusion of ordinary civil courts. Such disputes would not then be capable of resolution by arbitration.

In M.D. Frozen Foods Exports Private Limited and Others Vrs. Hero Fincorp Limited (2017)16 SCC 741 the Hon'ble Apex Court held that proceedings both under the Arbitration Act and the SARFAESI Act could continue simultaneously.

In Nageshwar Singh Swaraj & Ors. Vs. M/s Rukmani Buildtech Private Limited & Ors, REQUEST CASE No.68 of 2019, the Hon'ble Patna High court has observed that the object and purpose of both the statutes i.e., Arbitration Act & RERA Act, are distinct and different, and there is nothing inconsistent or derogation therein. The Arbitration Act was enacted to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto. Whereas the RERA Act was enacted to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto.

In the light of above discussions and also taking in to the consideration of Judgment of Nageshwar Singh Swaraj & Ors. Vs. M/s Rukmani Buildtech Private Limited & Ors, REQUEST CASE No.68 of 2019, as well as observation of Hon'ble Supreme court and Patna High Court in the above discussed cases, this Bench observes that this Bench can entertain upon the complaint filed by Promoter under section 31 of the RERA Act, 2016 and RERA has jurisdiction to entertain though having Arbitration clauses in the Agreement.

16. The Bench further observes that section 11 to section 17 of the Real Estate (Regulation & Development) Act 2016, casts certain duties upon the promoter to be abided by them in letter and spirit.

In the light of above observations, the Bench hereby directs the respondent company to complete the remaining work and provide all the amenities and facilities as mentioned in complaint petition in consonance to Development Agreement and hand over the possession of the remaining flats of complainant as per the Share Agreement within 60 days of issuance of this order, failing which penalty of Rs.5,000/- would be imposed upon them for each day of delay.

The respondent is also directed to provide the parking space with proper demarcation to complainant and further directs respondent to place a board on the parking area specifying the allotted parking number to respective allottees with their proper demarcation made their in the space available for parking as per the sanctioned plan.

17. As regard issue of extra work is concerned, The Bench notes the submissions of respondent that for the same, the respondent has filed the case before the A.O.

18. The complainant is also directed to cooperate with the respondent in the completion of work.

19. As regards compensation, the complainant is at liberty to press the same before the A.O.

With these directions and observations, this complaint petition is disposed of.

Sd/-

Nupur Banerjee
Member