



REAL ESTATE REGULATORY AUTHORITY (RERA), BIHAR

Complaint Case No. RERA/CC/17/2018

Mr Upendra Kumar Mishra.....Complainant

Vs

M/s ApnaAwas Construction Pvt Ltd, Patna..... Respondent

Present: For the Complainant - In person
For the Respondent - Mr Praveen Kumar, Advocate
For the Authority ----- Mr Sumit Kumar, Advocate
Ms Shivi, Advocate



25/01/2019

ORDER

1. Mr Upendra Kumar Mishra s/o Late J P Mishra, a resident of L-902, Celebrity Greens, Sector B, Sushant Golf City, Saheed Path, Lucknow has filed a complaint under section 31 of the Real Estate (Regulation and Development) Act 2016 on 29th May 2018 against M/s Apna Awas Construction Pvt Ltd, Patna for changing the layout of the project unilaterally and making long delay in handing over the possession of the apartments. In pursuance to the filing of complaint, a notice was issued to the Managing Director, M/s Apna Awas Construction Pvt Ltd, Patna in June, 2018 directing him to submit his response within 30 (thirty) days of receipt of the notice. The respondent company filed their response to the complaint on 21st July 2018, a copy of which was sent to the complainant on 18th September 2018. Hearings were held on 09/10/2018, 22/11/2018 and 06/12/2018 in which Authority was

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also assisted by the Learned Advocates of the Authority Mr Sumit Kumar and Ms Shivi. In course of hearing, an opportunity was also given to the complainant and respondent company to sit together to see whether any reconciliation could be arrived at, between the complainant and the respondent company. But both failed to arrive at any conciliation between them.

Complaint of the Petitioner:

2. The Complainant in his complaint petition has stated that he along with his other three brothers were the joint owners of the property "Kamal Kutir", Anisabad, Patna. He informed that he along with two other brothers/their successors entered into a development agreement with M/s Apna Awas Construction Pvt Ltd, Patna on 19/12/2011 and 10/02/2012 for development of a real estate project namely "Raj Kamal Mansion". These documents were also registered with District Registration Office, Patna. He claimed that the Developer had agreed to build a G+4 multi-storied building, comprising of 16 flats in the said agreement, to be allocated on 40: 60 ratio between Land-owners and the Developers. According to the development agreement, the building was required to be completed with all specifications including lift, generator etc within thirty months with a grace period of three months (thirty three months in all) from the date of getting vacant possession of the land or sanctioning of the building plan, whichever is later. According to the complainant, the project was to be completed latest by June, 2016 as the plan was sanctioned by Certified Architect of PMC on 16/03/2013.

3. The Complainant further claimed that as per agreement if the developer fails to complete the project by 15/06/2018, then the whole incomplete



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structure was to be returned back to the owners with whatever structure had been made. He claimed that though the complainant had sent the notice to the developer on 18/06/2016, no response was received. He claimed that the builder had not yet given possession of the Apartments to the complainant.

4. The Complainant further claimed that in violation of the agreement and without the consent of the owners, the Developer had changed the lay out plan of the project and has also not constructed the fourth floor of the building. He claimed that the builder got a new plan of the project approved without their approval/signature on 16/03/2013. He claimed that the Developer had constructed 12 apartments with 12 car garages against the proposal of 16 Apartments, 16 car garages and servant quarters as committed in the development agreement. He has further alleged that the developer was developing the building (Raj Kamal Mansions) as part of another project Mandi Vatika without their permission. The Complainant had sought as an interim relief, an order to restrain the Developer from registering/selling/renting/using any portion in the building and to hand over at least two apartments to the complainant with all the agreed specifications. The Complainant has also sought following final relief from the Authority:-

- 1) Direct the opposite party to allot a carpet area @ 1633 sqft to each owner. This carpet area is as per original drawing approved by the complainant.
- 2) Direct the opposite party to pay a sum of Rs 30,000/- towards legal expenses to the complainant.
- 3) Direct the opposite party to pay Rs 15 lakhs towards mental agony, torture and physical stress caused to the complainant who is a Senior Citizen.



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- 4) Direct the opposite party (1) to pay an amount of Rs 3,000/- per month from 10/08/2015 to 09/12/2015 as per Clause 9.9 page 10 of the agreement developer has stopped payment after 09/08.2015 in contravention of agreement.
- 5) Direct the opposite party (1) to pay owners Rs 15,000/- per month after 10/12/2015 as per Article V Clause 5 by the end of each month.
- 6) Direct the opposite party to pay interest on the amount due from the date due @ 18% till date.
- 7) Direct the opposite party to construct and give one servant room per flat to each owner as per agreement page-15.
- 8) Direct the opposite party to construct the W/C at developer's cost in conformity with building laws of Bihar within three months in each flat.
- 9) Direct the opposite party to surrender excess area beyond shown in drawing of developer's agreement.
- 10) To pass such further order of relief as the Hon'ble Authority deem fit and proper in the circumstances of the case including blacklisting of the firm based on Apartment Act and thus render justice.



Response of the Respondent Company:

5. The Respondent Company through their Director Mr Prabhat Kumar Singh in their response dated 21st July 2018 stated that the allegations made by the complainant were wrong, misleading and done with maliciously motivated intention.

6. The Developer confirmed that two development agreements were signed and executed on 19/12/2011 and 10/02/2012 respectively. The first development agreement dated 19/12/2011 had been executed by

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Smt Lovleen Mishra wife of Late Shailendra Kumar Mishra and Mr Ratnendra Kumar Mishra with the Respondent for development of their property. The second development agreement dated 10/02/2012 had been executed by Mr Upendra Kumar Mishra, the Complainant and the Respondent Company for development of his share of the property. The respective shares of all the three co-owners were to be developed as one piece and parcel of the building in terms of the agreement.

7. The Respondent Company/Developer further claimed that as per the development agreement, 40% of the constructed area was to be allocated to the owners whereas 60% of the area was to be the share of the developer. The agreement provided that after getting the building plan approved by the competent authority, the Developer shall forthwith get the vacant possession of the plot.



The Respondent Company/Developer has admitted that in the development agreement the land owners and the developer had agreed to a pre-conceptual plan for G+4 structure construction, which was attached to the agreement. However, the Developer claimed that a G+3 building structure plan only was prepared and sanctioned vide Plan Case no. P-Dhirakchak/PPN (G+3)/325 by the certified architect of the Patna Municipal Corporation in March, 2013.

9. The Respondent company claimed that the plan for G+3 structure was presented and got sanctioned from certified architects by them as the competent authority had notified in December, 2012 that construction on a road measuring six meters in width would only be allowed building structures up to G+3 level only. As a result, the preliminary conceptual plan as agreed upon between the land-owners and the developer had to be altered. This has

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resulted into reduction in the number of floors and the area and considerably reduced the FAR and thus reducing the carpet area etc.

10. The Respondent Company further claimed that this change in the lay out plan and reduction in the carpet area etc was well within the knowledge of the complainant and the complainant had even taken a period of about eight months, till November, 2013 to decide whether they would proceed ahead with the project.

11. The Respondent Company also claimed that in the meanwhile, the Patna High Court Order in CWJC No.8152/2013 in May 2013 had put an embargo on any construction on the twenty feet wide road. Accordingly the police station had issued notices to them to stop work on their projects. They claimed that on 23.6.2015, the aforesaid case was finally decided and thereafter construction work could resume. Accordingly, the construction was completed by the end of 2017 and thereafter they have been regularly asking the complainant to take possession of his share of apartments.



12. The Respondent Company claimed that the location of the building fell in the flight path of the airport and necessary approval granted by the Airport Authority of India in locations such as Phulwari Sharif, Anisabad and Police Colony was only up to 11 meters since this flight zone is the red zone.

13. They have also claimed that the Bihar Building Bye-laws 2014 has allowed FAR up to two only and allowed construction up to G+3 story with maximum height of the building up to 12 meters.

14. The Respondent company claimed that the building was ready for possession and they have already informed the complainants to take

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possession of their 40% share. However, they were avoiding totake possession for the last one year.

Supplementary Replies/Rejoinders:

15. The complainant in his rejoinder to the reply of the respondent has denied all the allegations made by the respondent company and stated that the respondent have themselves admitted that a G+4 storied building was to be developed as per development agreement signed on 10/02/2012. Further the agreement was effective with immediate effect. The complainant further claimed that the agreement was for a carpet area of 1633 sqft approx to each owner in the G+4 storied structure and has stated that with G+3 structure the ratio between owner and builder would get reversed to 60:40. He claimed that the developer was handed over the vacant possession of the plot on 10/11/2011 itself, the day first deed was signed by other two owners. He further stated that one room was given for storage of their goods and money was given to them by cheque immediately thereafter as per para 9.9 of the Agreement. Para 9.9 of the agreement reads as follows :-

“The owner hereby provides vacant possession of the above mention plot to the Developer immediately after sanctioning of the building plan from the empanelled Architect with Patna Municipal Corporation. However the Developer shall provide one flat to the Owner or its rent to the maximum of Rs3000, and this sum will be given in advance. The Developer shall start the construction work immediately and will carry on the construction work from start to finish in a regular manner and the Developer will not leave the construction of the building in the middle. The developer shall also give one room each to the Owner in Nandi Vatika, Dhirakchak, Patna for storage of their goods besides the aforesaid amount written above.”

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16. He further stated that the money was released to them only after getting the vacant possession of the plot. The complainant contended that they were not notified of any such development related to approval of the revised/modified plan in complete violation of agreement and the act of reducing the carpet area at its own discretion and alleged that going ahead with new plan without taking owners' signature on it is not less than sabotage of the Agreement. The complainant reiterated that they were not intimated about any change in the lay out plan or carpet area. Their written/verbal concurrence/approval was not obtained on any document or plan submitted to the concerned municipal authorities etc. He also challenged the reasons provided by the respondent company in the delay in completion of the project by stating that no generic embargo was given for stopping construction work for the entire Patna. If it was so, no evidence was produced in support of the claim. Further notice by the police was with reference to G+4 buildings and for particular area. The instructions from Police authorities would not be applicable to their project.



17. In its supplementary affidavit filed by the developer on 22/11/2018, the respondent company admitted that the development agreement signed on 10/02/2012 was binding on both parties. He also admitted that para 9.9 of the development agreement stipulated delivery of possession of land by the land owner to the respondent builder with immediate effect on signing of the agreement. This would, they contended, however not indicate that this was really adhered to and complied with in actuality. They claimed that they had informed the land owner of the changes in law and the fact that only G+3 structure would be constructed. They reiterated that the land-owners however took eight months period to think over the circumstances created due to

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change in law and thereafter only gave their consent for construction of the project. They also contended that the present case would not fall within the ambit of RERA as the agitation of the complainant pertains to breach of terms of the agreement which gave rise to question of disputed facts. Thus it cannot be decided by this Authority and the remedy lies elsewhere.

Hearing:

18. In course of hearing, the learned counsel for the respondent company Mr Sanjay Singh reiterated the statement made in their written response to the complaint and stated that the original plan to construct G+4 multi-storied building on the piece of land of the land owners proposed in the development agreement was not passed/approved by the empanelled architect of the PMC since there was only 20' (6.10metres) wide road and therefore they were allowed to construct G+3 multi-storied building only. He further stated that the map was passed on 16/03/2013 and at every stage the complainant was informed of the position. The respondent company stated that the complainant was in full knowledge of everything and the delay has happened due to Hon'ble Patna High Court's directions to put an embargo on construction of multi-storied buildings on twenty feet roads for almost two years.

19. In his deposition, the complainant however submitted that the claims made by the respondent company regarding giving information to the land owners regarding changes in the lay-out plan were totally false. The respondent company neither verbally nor in writing ever informed the complainant anything about the construction of the building. He quoted the Bihar Building Bye-laws according to which the respondent company had to inform him about any changes in the map within ten days of its occurrence.

Sanjay Singh
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20. The respondent company also contended on the second day of hearing that the present case would not fall within the ambit of RERA as the case of the complainant pertains to breach of terms of the agreement which gave rise to question of disputed facts. Thus it cannot be decided by this Authority and the remedy lies elsewhere. They however informed that both parties, as per direction of the Authority, sat together for conciliation but could not arrive at any mutual agreed solution. The Respondent company has made available on the direction of the Bench, a copy of the letter of approval of plan by the certified architect and notification/order dated 12.12.2012 regarding changes in the building by-laws.

21. Issues for consideration

There are following issues for consideration before the Bench:

Firstly whether the said real estate project "Raj Kamal Mansions" was covered under the Real Estate (Regulation and Development) Act 2016;

Secondly whether there was any agreement signed between the Complainant and the Respondent Company for development of a Real Estate Project and whether the provisions of the agreement was superseded by any subsequent or supplementary agreement;

Thirdly whether the Developer has unilaterally made material changes in the lay out plan and proceeded ahead with the construction of the project without prior specific and unambiguous written approval of the land-owner;

Fourthly whether the said real estate project was completed in time or whether there was delay in giving possession of the apartments to the Complainant;

Analysis

22. Firstly, there is no dispute on the facts of the case. It is an admitted fact that the real estate project "Raj Kamal Mansions" was an ongoing project as

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on 1st May 2017, the date on which all provisions of the Real Estate (Regulation and Development) Act 2016 became effective/operational throughout the country except Jammu & Kashmir. The respondent company has also applied for registration of this ongoing project with the Real Estate Regulatory Authority, Bihar in April 2018, i.e. prior to the filing of complaint by the Petitioner. In their application, the Respondent company has claimed that the work of project was started on 10th March 2016 and was likely to be completed on 31st December 2018. Hence it is confirmed that the provisions of the Real Estate(Regulation and Development) Act 2016 and Bihar State Real Estate (Regulation and Development) Rules 2017 would be applicable in the present case.

23. As regards the second issue, both parties have admitted in unequivocal terms that they had signed an agreement on 12th February 2012 for development of a project namely "Raj Kamal Mansions". Both parties have also submitted the copies of the Development Agreement to the Authority. They have stated that the petitioner along with other two brothers had entered into agreement with the respondent company for development of a G+4 multi-storied building namely "Raj Kamal Mansions".

24. Further, neither the Complainant nor the respondent company has claimed existence of any secondary or supplementary agreement between the complainant and the respondent company. Hence there is no dispute on the fact that no secondary or supplementary agreement existed or entered into between the complainant and the respondent company.

25.As regards the third issue, the development agreements submitted by the respondent company dated 19/12/2011 and 10/02/2012 stipulated that the developer would build a 4-storied building (G+4) comprising of 16 flats, to be allocated on 40:60 ratio between the land owners and the developer. However, the developer has constructed only G+3 building based on approval of map of the project by a certified architect on 16/03/2013. The respondent company has stated that they were forced to make changes in the building structure as the Government of Bihar made changes in the building bye-laws on 12th December 2012 whereby only G+3 structures could only be developed/constructed on a twenty feet (6.3 metres) road.

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26. However, both parties have contradicted each other on issue of informing the complainant regarding approval of G+3 multi-storied building by the certified architect of the PMC. Whereas the Respondent company has stated that they had informed the complainant about approval of G+3 multi-storied building by the certified architect and that it was only after his concurrence, the construction work was started, the complainant has said that the respondent company has neither verbally nor in writing ever informed the complainant about the approval of G+3 construction of the building, let alone taking prior approval of the changes made in the structure of the building, lay out plans etc. The Developer did not produce any documentary proof, letter, email etc that he had actually communicated to the land owners about the material changes that were being introduced in the project, let alone seeking their written approval/concurrence for the material changes in the lay out plan etc.

27. The Development agreement (Article V -5.1 g) also provided that the Developer would ensure that the final drawing to be submitted for sanctioning of the Certified Architects (Competent Authority) would be first approved by the Owners/Land-lords. Further paragraph 9.15 of the Development agreement also provided that even internal changes to be made subsequently in the multi -storied building, which were not likely to effect the Owner's share or common facilities, would be notified in advance to the owners.

28. Neither the developer nor the complainant have stated that the developer has obtained any written consent from the land owners before making changes as agreed in the development agreement. The developer has claimed in his written response as well as verbal deposition that they had informed the complainants about the changes in the structure of the building. However they could not produce any evidence- documentary or otherwise to conclusively prove that they had indeed informed the land-owners, let alone having taken prior permission, as required in the development agreement.

29. As change in the building structure from G+4 to G+3 building structure was a major change and would result in drastic reduction in the entitlement of the complainant, the Bench feels that prior written approval of the

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complainant ought to have been obtained by the Developer before taking the approval of the certified architect. This was also necessary as per Development agreement signed between the developer and the complainant. It is therefore established beyond reasonable doubt that the promoter has not followed the provisions of the agreement which has resulted into significant loss to the complainant.

30. As regards the fourth issue, the complainant has stated that as per development agreement, the project was required to be completed within thirty three months (inclusive of the grace period of three months) i.e. by 15th December 2015. Further, the project has not yet been completed by the promoter. The completion/occupancy certificate has also not been received, which is a mandatory requirement under the Real Estate (Regulation and Development) Act 2016 and Bihar Apartments Ownership Act 2006 before giving possession of any apartment to the allottees. The Complainant stated that the claim of the promoter that they have been requesting for taking over possession for the last one year was baseless and lacked conviction as the completion/occupancy certificate for the project has not yet been received from the competent authority and Bihar Apartments Ownership Act 2006 forbids anyone from taking the possession and entering the apartments unless occupancy certificate for the project has been received from the competent authority.



31. In their counter reply, the respondent company has stated that there was ban on construction of multi-storied buildings on twenty feet (6.3 metres) road due to instructions/orders of Hon'ble High Court in CWJC 8152 of 2013 in May 2013. They stated that the ban was lifted in June 2015 only. They further claimed that the project was started in June 2015 and was completed by the end of 2017. It was also stated that they had been requesting the complainants to take over the possession of their share of apartments for the last one year but they have been avoiding it on one pretext or the other.

32. Examination of records however revealed that there were two development agreements dated 29.11.2011 and 13.3.2012 signed between three brothers/families and the promoter for development of the project RAJ KAMAL Mansions, to be completed within 30 months with grace period of

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three months. However, the developer took inordinately long period of more than a year to get the plan approved from a certified Architect on 13th march 2013. Thereafter they claimed that Hon'ble High Court banned construction of multi-storied apartments on twenty feet roads in May 2013. Learned counsel of the Authority has made available the copy of the order dated 10th May of the Hon'ble High Court in CWJC 8152 of 2013. The order of the Hon'ble Court was as follows: "till further orders, no apartment complex or multistoried building can be constructed beyond 11 meters and upto 15 meters in height unless the entire stretch and length of road in front abutting the building is uniformly and throughout 20 feet in width." Thus the Hon'ble High Court's order meant for multi-storied apartments of 11 metres and upto 15 meters in height on twenty feet roads. It is primarily meant for G+4 buildings. As the present project was only G+3 building, there was no ban on construction of G+3 multi-storied buildings on twenty feet roads.

33. Further, perusal of instructions issued by the Police Station (PS) revealed that there were no directions of SK Puri PS for stopping the construction of all under-construction buildings of the promoters. Further, S K Puri PS would be mandated to issue instructions for constructions undertaken in their PS jurisdiction only. "Raj Kamal Mansions" being located at Anisabad did not fall under the jurisdiction of SK Puri PS. Moreover there was no mention of this project in the letter of S K Puri PS. Hence it is established without any reasonable doubt that the ban ordered by the Hon'ble High Court was not applicable for this project. Hence there was no reason as to why the project could not start immediately after approval of the Plan in March 2013. Further the claim of the promoters that the construction work of the project was commenced in June 2015, was not even supported by their application, for registration of the Project with the Authority, filed in April 2018. Hence the Respondent company has been shifting stands at different time with different authorities.

34. Moreover the claim of the promoters that the Project was completed by the end of 2017 was also without any foundation as the estimated date of completion of the project, in their own application for registration with RERA submitted in April 2018, was shown as 31st December 2018. Even as on the date of the last hearing in December 2018, the complainant claimed that

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completion/occupancy certificate of the project has not been submitted/received by the promoters, which was not denied by the promoters. Without receipt of the Occupancy certificate, the complainant was justified to hold that the project was not yet complete and hence, he was precluded from taking possession of the apartments under Bihar Apartment Ownership Act 2006. Thus there was delay of atleast three years in handing over the possession of the apartments to the complainant as of now.

35. In sum, it was proved beyond any reasonable doubt that the promoters made unilateral changes in the lay out plans and did not take prior approval/concurrence from land-owners/complainant before getting the map/plan of the G+3 Structure approved by the certified Architect, which was required under the Development agreement signed by the promoters with the land-owner. Further, there was inordinate delay in approval of the plan/map of the project. Had the Developers got the plan/map approved prior to 12.12.2012, the G+4 structure also for the project could have been approved, as was done by the developer in their other similar projects during the same period. Thus, the complainant is right that he has lost significantly due to changes made in the lay out plan without their prior concurrence/approval. Further, there was inordinate delay in completion of the project by the developer and reasons cited by him for delay were not found tenable for G+3 building constructions.

Order

36. Based on the above-mentioned findings, the Bench therefore orders that the loss suffered by the complainants should be compensated by the promoters. Equity therefore demands that the percentage share of the complainant should be increased to 45% i.e. 1.8 apartments (with due fractional adjustment) should be handed over to the complainant with immediate effect. The Developer was required, in terms of provisions of the development agreement, to return the land with incomplete structure to the land-owner after delay of six months from completion of grace period (i.e. thirty three months of construction period). However, in order to protect the interests of other allottees/consumers, we are not inclined to do so. We, however, direct the Developer to pay a monthly rental of Rs 10,000 per

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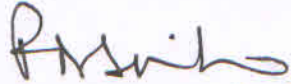
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month from 16.12.2015 to the date of handing over the possession of the apartments. Further as the entire common areas would be handed over to the association of allottees/society by the promoters in terms of the Section 17 of the Real estate (Regulation and Development) Act 2016, all additional land, on which construction has not been done, provided to the promoters by the land owners would go to the Association of Allottees/Society for use of the allottees/ consumers.

37. As the Real estate (Regulation and Development) Act 2016 and Bihar Apartment Ownership Act 2006 prohibit the allottees from entering the premises without issue of the occupancy certificate by the Competent Authority, it is directed that the promoter should obtain the occupancy certificate from the competent Authority at the earliest and hand over the possession of the apartments to the complainant. Since the promoters have also suffered significantly due to reduction in their share as a result of modifications made in the original plan, no other relief sought by the complainant is allowed.




(R. B. Sinha) 25/1/2019
Member


(Dr S. K. Sinha) 25.01.2019.
Member

Patna, 25th January 2019

