

Mukesh Aggarwal vs. SNG Real Estate Private Limited and Ors.

The Hon'ble Rajasthan RERA (Real Estate Regulatory Authority) passed an order on 20.09.2021 in the case of **Mukesh Aggarwal vs. SNG Real Estate Private Limited and Ors.** [Complaint No. RAJ-RERA-C-2020-3958, RAJ-RERA-C-2021-4056, RAJ-RERA-C-2021-4057, RAJ-RERA-C-2021-4058, RAJ-RERA-C-2021-4105, RAJ-RERA-C-2021-4106, RAJ-RERA-C-2021-4144, RAJ-RERA-C-2021-4197, RAJ-RERA-C-2021-4224, RAJ-RERA-C-2021-4225 and RAJ-RERA-C-2021-4229 decided On: 20.09.2021], wherein the Hon'ble Rajasthan RERA directed SNG Real Estate Pvt. Ltd. (the "**Developer**") to handover the under-construction project "Sunrisers" in C-scheme area to RERA and restrained the auction of the flats in the said project by Union Bank.

Brief Facts of the case:

1. The Complainants (six home buyers) through his company M/s Surbhi Electronet Pvt. Ltd. had booked four flats in project "**Sunrisers**" of the Respondent Developer (Builder).
2. Subsequently, an apartment buyer's agreement dated 25.04.2014 was entered into between the Parties, wherein the possession of the said flats was promised to be completed and delivered by March, 2018.
3. The Complainants had also taken loan from ICICI bank against the allotted flats on the strength of tripartite agreement executed by the Complainant, the Respondent Developer and the ICICI bank.
4. In the year 2016, the Respondent Developer fraudulently mortgaged the whole project in favour of the Respondent Bank (Union Bank of India) and raised a loan of Rs. 15 crores, without disclosing the fact that some flats in the project had already been allotted and security interest of the ICICI bank, who had sanctioned home loan to the allottees, had been created thereon under the tripartite agreements.
5. Respondent Bank did not do any due diligence before it sanctioned the project loan as it failed to ascertain even the basic information available in public domain that at least 3 flats of the project had already been registered with CERSAI
6. Subsequently, due to the default of the Respondent Developer in repayment of the project loan to the Respondent bank, the possession of the project was taken over by the Respondent Bank on 03.10.2018.

7. Thereafter, the Respondent Bank has put 19 flats of the allottees to auction, which included 9 flats of the Complainants.

Contention of the Complainants:

1. Pursuant to the above mentioned facts, Complainants contested that, the action taken by the Respondent Bank was arbitrary and prejudicial to the interest of the Complainants. The Respondent Bank could not have created mortgage on the flats which had already been allotted as per the agreements for sale executed between the allottees and the Respondent Developer and had failed to ascertain the status of the mortgage of the said allotted flats from CERSAI and that the Respondent Bank acted in collusion with the Respondent Landowners.
2. Subsequently, the Complainants approached the DRT under SARFAESI Act to stay the auction proceedings initiated by the Respondent Bank, but aggrieved by the interim order of DRT passed against the Complainants, the Complainants approached the DRAT, but they have so far not been able to obtain a stay order against the auction proceedings and their appeal against the said interim order is still pending with the DRAT.
3. Meanwhile, RERA Act, came into force on 01.05.2017, the Complainants filed a case u/s 11(4)(h) and 31 of RERA.

Contention of Respondent Developer:

1. That due to the financial conditions and unfavourable circumstances, the Respondent Developer had raised a loan from the Respondent Bank.
2. Subsequently, due to shortage of labour and funds, the Respondent Developer was unable to pay the loan off and the Respondent Bank instead of co-operating, declared the loan as an NPA and initiated auction proceedings. Thus in such a situation, he was not allowed to enter the project premises, hence the Authority cannot expect him to perform the impossible. If allowed, the Respondent Developer committed to fulfill his obligations towards the Respondent Bank and the Complainants.

Contention of Respondent Landowners:

1. Complainants are not the bonafide allottees as the agreements for sale executed by the Respondent Developer with them are neither stamped nor registered as and, therefore, cannot be relied upon.
2. The complainants cannot claim any relief against the respondent landowners since the latter are not a party to the agreements for sale and there is no privity of contract as between them.

Contention of Respondent Bank:

1. That the loan sanctioned was much before the RERA Act came into force, hence, provisions of SARFAESI Act were applicable to the present case and provisions of RERA Act were not applicable to the present case.
2. That the complaint with DRT and DRAT is still pending hence the RERA Authority does not have the jurisdiction to try the case in hand.
3. That some payment received from the allottee by the respondent developer in the past was adjusted as payment towards the allotted flat, hence the Complainant and the Respondent Developer acted in connivance.

Observations of the Hon'ble RERA Authority:**Jurisdiction of RERA Authority to try the case at hand:**

1. As the complaints relate to a registered project and the handover of the flats was not given as per terms of the agreements for sale, the Complainants are admittedly 'aggrieved persons' for the purposes of section 31 of RERA Act; and therefore, the present complaints are maintainable before RERA Authority.
2. As observed by the Hon'ble Supreme Court in the matter of *Pioneer Urban Land and Infrastructure Ltd. & Anr.*¹ "Remedies that are given to allottees of flats/apartments are therefore, concurrent remedies." Thus, allottees in a real estate project are at liberty to seek parallel remedies available under other Acts.

Jurisdiction of RERA Authority over Parties to the case in hand:

1. The RERA Authority has power to pass directions to the promoters/ real estate agents only. As per section 37 of RERA Act, RERA Authority has powers to "issue such directions from time to time, to the promoters or allottees or real estate agents, as the case may be. As it may consider necessary and such directions shall be binding on all concerned".
2. As per the definition of "Promoter" under section 2(zk) of the RERA Act, a project in which the landowner has a share in the area developed for sale in the project, with the intent of marketing or selling it or any part of it before completion of the project, the landowner will be treated as a promoter. Hence, the Respondent Landowners can be held fully liable for the functions and responsibilities that they are liable to discharge under the development agreement.
3. As observed in *Raghunath Prasad Jain vs. Arihant Dream Infra Projects Ltd.*² "RERA Authority has full jurisdiction to direct a landowner-promoter to fulfill his obligations to the allottees to the extent he is responsible for the same under the development agreement".
4. According to section 58 of the Transfer of Property Act, 1882, "a mortgage is the transfer of an interest in a specific immovable property for the purpose of securing the payment of money advanced by way of loan". And as per Black's Law Dictionary, the word 'assignee' includes "any person on whom interest is transmitted by a transfer which could include vide mortgage". The definition of promoter which includes an 'assignee' will, therefore, take in its purview a bank on whom an interest is created by way of mortgage.
5. Hence the Respondent Bank shall be treated as promoter for all purposes of RERA Act; and, in that capacity, it is liable to fulfill all the obligations of promoter towards the allottees as provided under RERA Act and as per section 37 of the RERA Act, RERA Authority has the jurisdiction to try the case in hand against the Respondent Landowners.

¹ (2019) 8 SCC 416

² Complaint No. RAJ-RERA-C-2017-2105

Observations with respect to the *bonafides* of the Allottees:

1. As per the definition of "Allottees" under section 2(d) of the RERA Act, for a person to be an allottee under RERA Act, it is not necessary that an agreement for sale must have been executed in his favour or that such agreement must have been registered. Section 13 of RERA Act, provides that the agreement for sale be registered under any law for the time being in force, but this provision cannot be read to cover the agreements for sale that had been executed in ongoing projects prior to the commencement of RERA Act.
2. Also, the said agreements were registered under CERSAI and with the sub-registrar, hence, the agreements of sale of the Complainants and the rights of the allottees are completely valid.
3. That recovery of an amount by way of adjustment is a well-accepted business practice, hence not to be considered as a collusion between the Complainants and the Respondent Developer.

RERA Authority held and directed as follows:

1. As per section 11(4)(g) of RERA Act, the Respondent Developer is responsible for payment of outgoing and as per section 11(4)(e), the Respondent Developer is responsible for the formation of an association/ society / co-operative society of allottees.
2. The respondent Bank shall be treated as a Promoter as per section 2(zk) of the RERA Act and shall be responsible for all the obligations of promoter towards the allottees, including the obligation of completing the project. The Respondent Landowners are also to be treated as promoters of the project, though their liabilities are limited to those specified in the development agreement.
3. Action of the respondent Bank to take over the whole project and selling 19 allotted flats in the project to a third party in an incomplete state of the flats and the project, without obtaining prior written consent of 2/3rd of the allottees and prior written approval of this Authority, is in complete violation of section 11(4) (h) and section 15 of RERA Act.
4. Also, the Respondent Bank's action of creating mortgage over the project is invalid as per section 11(4)(h) of RERA Act, which states that *"The promoter shall - after he executes an agreement for sale for any apartment, plot or building, as the case may be, not mortgage or create a charge on such apartment plot or building, as the case may be, and if any such mortgage or charge is made or created then notwithstanding anything contained in any other law for the time being in force, it shall not affect the right and interest of the allottee who has taken or agreed to take such apartment, plot or building, as the case may be."* The solution available to

such Respondent Bank shall be consider restructuring the loan or going to the NCLT under the Insolvency and Bankruptcy Code, 2016 for insolvency resolution or to the High Court under the Companies Act, 2013 for liquidating or winding up the loanee company but not auction. The rights of allottees under RERA Act cannot be made subservient to the rights of lending banks, hence the auction initiated by the Respondent Bank shall stand cancelled. Accordingly, the Respondent Bank shall not transfer the possession of auctioned flats to the auction purchaser and shall not execute any sale deed/conveyance deed in favour of the auction purchaser.

5. The Respondent Bank shall have the option of submitting a scheme of completion of the project to this Authority, within 90 days from the date of issue of this order, if it wants to get the project completed at its level and then hand over possession of the allotted flats to the allottees to the association of allottees and dispose of the un-allotted flats.
6. This Authority will examine the scheme(s) which are feasible to complete the project under section 8 of RERA Act. If the scheme(s) submitted to it is/are not found feasible, this Authority will procure through open auction a third party development manager or promoter to have the project completed.

Disclaimer:

For private circulation to the addressee only and not for re-circulation. Any form of reproduction, dissemination, copying, disclosure, modification, distribution and/ or publication of this Newsletter is strictly prohibited. This Newsletter is not intended to be an advertisement or solicitation. The contents of this Newsletter are solely meant to inform and is not a substitute for legal advice. Legal advice should be obtained based on the specific circumstances of each case, before relying on the contents of this Newsletter or prior to taking any decision based on the information contained in this Newsletter. ZEUS Law disclaims all responsibility and accepts no liability for the consequences of any person acting, or refraining from acting, on such information. If you have received this Newsletter in error, please notify us immediately by telephone.

Copyright © 2014 ZEUS Law. All rights reserved. Replication or redistribution of content, including by caching, framing or similar means, is expressly prohibited without the prior written consent of ZEUS Law.