

IN THE HIGH COURT AT CALCUTTA
(Constitutional Writ Jurisdiction)

Appellate Side

Present:

The Hon'ble Justice Krishna Rao

WPA 2740 of 2012

Hira Charan Narjinari & Ors.

Versus

State of West Bengal & Ors.

For the petitioner : Mr. P. K. Dutta
Mr.C. K. Dutta
Ms. Krishna Mullick
..... Advocates

For the respondent no. 2 : Mr. Jayanta Kumar Das
Ms. Madhumanti Das
.....Advocates

For the State : Mr. Suman Sengupta
Mr. Sanatan Panja
.....Advocates

Heard lastly on : 30.11.2021

Judgment on : 06.01.2022

Krishna Rao, J.: The writ petitioners have challenged the order passed by the Secretary, Government of West Bengal, Housing Department dated 11.07.2011 in the review petition filed by the petitioners as well as the

respondent no. 4 against the order passed by the Authorised Officer
dt.15.01.2008

The Counsel for the petitioners submitted that sometimes in the year 2004-2005, the petitioners have entered into agreements with the respondent no. 4 to purchase their respective flats. On completion of the constructionn works of the respective flats, the respondent no. 4 has handed over the flats to the petitioners and after taking possession of the flat, the petitioners found that the area of the flats are not in accordance with the specified area mentioned in the agreement. When the petitioners came to know about the discrepancies i.e. area of the flat as well as the other discrepancies, the petitioners have requested the respondent no. 4 to rectify the discrepancies but the respondent no. 4 has not paid any heed to the request of the petitioners and thereafter the petitioners have made a complaint to the Authorised Officer under Section 6 of the West Bengal Building (Regulation of Promotion of Construction and Transferred by Promoters) Act, 1993 stating the following :

“4. The complainants state that in utter violations of the stipulations in the referred Agreement, the developer raised the building absolutely in unskilled and unscientific manner prejudicial to the interest of the complainant besides the other Flat occupiers in as much as.

(a) The ground floor level including the car parking space and the community hall is lower than the road surface level, the resultant outcome of which is water-logging upto knee height during normal rainfall in the car parking space in the ground floor of the building as well as at the community hall besides the entire open space in the ground floor of the building making the same absolutely unfit for habitation during the rainy season, as well as, in case of occasional downpour. Some photographs of the aforesaid situation are also attached herewith, since the ground floor level lying and situates at a level lower than the road surface, all the stagnant water percolates inside the ground floor of the building from the road. The situation

becomes more worse in view of the fact that there exists faulty water outlets in the ground floor of the said building as a necessary consequences of which, in case of the lightest rainfall, not to speak of the heavy showers of the monsoon, the entire ground floor including the car parking space and the community hall, are submerged unto knee deep water causing serious damages to all car owners of the flat besides the fact that the same creates nuisance and annoyance besides health hazards to the inmates of the said building. Time without number, the complainants including other bonafide flat occupants made repeated representations both orally and in writing to rectify the aforesaid major defect but all such representations on the part of complainants as well as on behalf of other flat occupants made to developer yielded no positive result. The situation is also alarming in view of the fact that owing to constant water logging in the ground floor of the building, there is every likelihood of electrical short-circuit as the water percolates also into the meter room lying and situates in the common areas of the building in the ground floor and lift even in case of normal rainfall whereas the buildings of the surrounding area remain free from any water percolation from the adjoining roads.

(b) The construction of the building also appears to be absolutely sub-standard in view of the fact that various cracks as well as marks of water seepage are found in various portions of the flats of complainants and also various inner and outer surface of the building.

(c) Air conditioner is yet to be installed in the community hall which was displayed in the sign board and booklet circulated in order to invite the attention of prospective buyers of the flats including the complainants.

(d) The arrangement for installation of individual electric meters has not yet been made although complainants deposited a sum of Rs. 4000/- each with CESC through Developer a long time back for such installation. The lift is sub-standard. The standing platform in the lift cabin is very weak and not fixed properly. Accident may occur at any moment.

(e) the entry and exit passages to and from the main gate of the building is still incomplete, in as much as, setting of tiles into that area is yet to be made for which lot of inconveniences are caused for ingress and egress to and from the building by the flat occupants including the complainants.”

In the said complaint, the petitioners have prayed for a direction upon the developer for rectification of the defects in the construction of the

building as mentioned above. The petitioners have further prayed for a direction upon the developer for providing reasonable compensation for shortage of area of the flat of the petitioners.

On receipt of the complaint the Authorized Officer had initiated a proceeding under Section 6 of the Act of 1993 and notices were issued to the parties. During the hearing, the Authorized Officer had also deputed one Official Engineer to inspect the respective flats of the petitioners to ascertain the actual measurement of the respective flats. The Official Engineer had submitted his report and in the said report it was found that the promoter had acted in violation of the provisions of the Act of 1993 and in deviation of the plan and proforma agreement for sale as submitted before the Authorized Officer for registration and promotion in terms of the provisions of Section 3 of the said Act. It was also found that the respondent no. 4 had carried out construction work illegally and also charged excess amount from the petitioners.

After perusing the record and the report, the Authorized Officer has found that the proforma agreement for sale as well as the plan submitted by the respondent no. 4 while obtaining permission from the competent authority is different from the agreement for sale which was entered with the petitioners. During the proceedings, it was also found that the respondent no. 4 had also altered the sanction plan by making alteration in the structure of the flat without consent and knowledge of the petitioners. After hearing the parties and after considering the materials on record, the authorized officer passed an order dated 15.01.2008 wherein the authorized officer has partly allowed the claim of the petitioners by holding that the

seize of the flats provided by the promoter is much less than the agreed flats seizes as per the agreement for sale. The authorized officer directed the respondent no. 4 either not to recover the consideration money in respect of the excess area of the said flats or to refund the consideration amount equivalent to the excess area shown in the agreement if the same is already deposited by the petitioners along with interests at current Savings Account rate of nationalized bank.

The petitioners were not satisfied with the order passed by the Authorized Officer as the Authorized Officer has not considered all the grievances of the petitioners and accordingly the petitioners have preferred a review application before the Authorized Officer under Section 6 A of the said Act.

Being aggrieved and dissatisfied with the order passed by the Authorized Officer dated 15.01.2008, the respondent no. 4 had filed a writ petition before this Court being WP No. 7626 (w) of 2008. This Court had refused to interfere with the order passed by the Authorized Officer on the ground of availability of alternative remedy to the respondent no. 4 under Section 6 A of the Act of 1993. After the order passed by this Court, the respondent no. 4 had preferred a review application in terms of the provision under Section 6 A of the Act of 1993.

Both the review applications were disposed of by the Authorized Officer on 19.12.2008 without affording any opportunity of hearing to the parties as well as without assigning any reason.

Being aggrieved with the order dated 19.12.2008 passed by the Authorized Officer in the review applications, the petitioners as well as the

respondent no. 4 have preferred writ applications before this Court and this Court had disposed of both the writ applications by a common order dated 23.07.2009 by setting aside the order passed by the Authorised Officer in Review applications dated 19.12.2008 and directed the Authorised Officer to consider the revisional applications of both the parties afresh after affording due opportunity of hearing to all the parties.

In terms of the order passed by this Court the Authorized Officer had reopened the revisional proceedings and passed an order on 14.12.2009 directing for fresh measurement of the flats by the Engineer from the office of the Authorised Officer in presence of all the parties. As per the direction of the Authorised Officer, on 07.04.2010 a joint measurement was taken by the engineer in presence of both the parties and after completion of the measurement the engineer had submitted the report to the Authorised Officer.

The respondent no. 4 was not satisfied with the joint measurement and raised objection to the said measurement on the ground that the joint measurement was not taken properly. As per the objection raised by the respondent no. 4, the Authorised Officer has accepted the objection of the respondent no. 4 and found that the super built up area was not assessed at the joint measurement and directing the parties to have the super built up area measured through a surveyor for proper adjudication of the dispute but the petitioners have raised objection to the said decision of the Authorised Officer.

Without considering the objection raised by the petitioners and without obtaining report from the surveyor with regard to the Superbuilt

area as desired by the Authorised Officer, on 11.07.2011 the Authorised Officer had disposed of the said revisional applications filed by the petitioners as well as the respondent no. 4 by passing the following order:

“In view of the above it may be said that actual measurement of the flats in question having regard to the Agreement for Sale Deeds is essential to resolve the issue. But the purchases could neither show this Authority what is the actual measurement of the flats in question nor they appoint a Surveyor mutually with the promoter and get the actual measurement done so that how much less in size the flats in question are ascertained having regard to Agreement for Sale Deeds.

Hence, it is not proved that the flats in question are less in size than the agreed size.

There was another issue with respect to these applications. It is submitted that the promoter sold 3 cottah of land out of total 45 cottah (approx) of land of the project and thereby the purchasers are adversely affected. The promoter pointed out that there was actually 72 flats to be constructed on 45 Cottah of land. At that stage the promoter entered into agreement with the purchasers. Subsequently they sold 3 Cottah disputed land and revised the plan to construct 64 flats in the remaining land.

In view of this Authority, had there been 45 Cottah of land then it would have been divided among 72 flats owners. The share of each flat owner would have been 0.625 Cottah. In the revised scheme 42 cottah of land is shared by 64 flats owners. On circulation it comes to 0.65625 Cottah per flat owner.

Thus in the new scheme the purchasers stand benefited by 0.03 cottah of land. Hence, the promoter has not made any wrongful gain out of the sale of 3 Cottah Land.

With the above views both the Revision applications are disposed of.”

The Counsel for the petitioner submitted the order passed by the Authorised Officer is perverse and had passed the said order without giving an opportunity of hearing to the petitioners and prayed for setting aside the order passed by then Authorised Officer on 11.07.2014.

Per Contra, the Counsel for the respondent submitted that the petitioners have entered into separate individual agreements for purchasing of their respective flats at “Regent Greens” situated at 196 D/2, Picnic

Garden Road, District- South 24 Parganas being satisfied with the prescribed areas and designs of the respective flats as shown in the booklet during booking by the agents, namely M/s. Ashray Properties and Amit International. It was further submitted that the building was constructed as per the sanction plan provided by the competent authority and the said building was raised and constructed in skilled and scientific manner with the superior quality of materials. After execution of the agreement the petitioners used to visit and inspect their respective flats during the construction regularly and after completion of the work the petitioners have taken the possession of their respective flats and at the time of taking possession, the petitioners have not raised any objection though they have expressed their satisfaction in writing towards construction of the flats. The petitioners were provided with the occupancy certificate. The petitioners at the time of taking possession the petitioners have assured that they will make the balance payment as per the terms of the agreement within 15 days from taking of possession of their respective flats. It is further submitted that in-spite of assurance made by the petitioners, the petitioners failed to pay the balance amount and have started raising frivolous demands to evade making payment to the respondent. The respondents further submitted that the petitioners have made a false complaint to the competent authority. The respondent had submitted the Architect Certificate and the certificate given by the Chartered Engineer according to which the agreement were entered between the petitioners. The Counsel for the respondents further submitted that the Authorized Officer without considering that the application filed by the petitioners is not maintainable

as the petitioners have filed their joint application though the cause of action of the petitioners are separate and different, the respondent further submitted that all the petitioners were not a party to any agreement and without appreciating the materials on record the Authorized Officer had passed non-speaking order directing the respondent to refund the alleged excess amount to the petitioners.

As the respondents was not agreed with the order passed by the Authorized Officer, the respondent no. 4 had filed a writ petition before this Court being W.P No. 7626(w) of 2008 and the said writ petition was disposed of on 24.09.2008 by granting liberty to the respondent no. 4 to prefer revisional application before the competent authority within 10 days from the date of. In compliance with the order passed by this Court, the respondent no. 4 had preferred revisional application before the competent authority. On 19.12.2008 the revisional application filed by the respondent no. 4 as well as the the revisional application filed by the writ petitioners were disposed of by upholding the order dated 15.01.2008. As the order dated 19.12.2008 was not a reasoned and speaking order and accordingly the respondent no. 4 had preferred a writ petition before this Court and this Court had disposed of the said writ petition on 23.07.2019 by setting aside the order dated 19.12.2008 and remanded the matter to the Revisional Authority for fresh consideration. In terms of the order passed by this Court dated 23.07.2009 the Revisional Officer had disposed of on 11.07.2011 both the revisional applications i.e. the revisional application filed by the writ petitioner as well as the respondent no. 4 by holding that it is not proved that the flats in question are less in size then the agreed size.

The Counsel for the respondent further submitted that the Revisional Authority by considering all the aspects had passed the order dated 11.07.2011 and the said order does not required any interference.

This Court considered the rival submissions of the parties and the documents available on record. It is admitted that the writ petitioners have purchased their respective flats from the respondent no. 4 and the petitioners have taken possession of their respective flats. Only after taking possession of the flats, the petitioners came to know that there is a ambiguity with regard to the size of the flats as well as the other construction work in the said flats. When the petitioners have noted the ambiguities, the petitioners have requested the respondent no. 4 to rectify the same but in-spite of the requests made by the petitioners the respondent no. 4 has not carried out or paid any heed to the request made by the petitioners and accordingly, the petitioners have filed their dispute before the Authorised Officer by invoking Section 6 of the West Bengal Building (Regulation of Promotion of Construction and Transferred by Promoters) Act, 1993.

Section 6 of the said Act reads as follows:

“6. Adjudication of disputes.- Any purchaser may, if he has any dispute regarding the purchase of any flat, make an application in such form as may be prescribed to such officer as the State Government may appoint for adjudication of the dispute in such manner as may be prescribed.”

After receipt of the dispute from the petitioners the adjudicating officer had initiated proceeding and issued notice to the parties wherein the

respondent no. 4 being the promoter has also appeared. During the hearing of the dispute between the parties, the adjudicating officer had deputed an Official Engineer to inspect the respective flats of the petitioners and also to ascertain the actual measurement of the respective flats. In terms of the order of the Authorized Officer the Official Engineer had submitted the report. After receipt of the report it was found that the flats which was delivered to the petitioners having less area than the area mentioned in the agreement and accordingly, the Authorized Officer passed order on 15.01.2008 by directing the promoter not to take the consideration money of the sale value for those excess area of the flats and if the promoter has already received the excess amount of sale value, the promoter was directed to refund the same to the petitioners within 30 days along with interests at the current Savings Account at the rate of Nationalized Bank.

The petitioners were not agreed with the partial order of the Authorized Officer dated 15.01.2008 and accordingly, the petitioners have preferred a revisional application before the Authorized Officer. The respondent No. 4 being agreed with the order dated 15.01.2008 had preferred a writ petition before this Court being W.P No. 7626(w) of 2008 and this Court had disposed of the writ petition by granting liberty to the respondent no. 4 to prefer revision application before the Authorized Officer and accordingly, the respondent no. 4 had also filed a revision application before the Authorized Officer. After receipt of revision application filed by the respondent no. 4 as well as the petitioners, the Authorized Officer has taken up both the revisional applications together for hearing. During the

hearing, the Authorized Officer had passed an order on 18.04.2011 by holding that it is necessary that the parties have fresh joint measurement of the flats under dispute, including super built up area, through a surveyor for proper adjudication. The Authorized Officer directed the parties to appoint a surveyor by mutual consent and the surveyor so appointed will prepare measurements sheet of superbuilt up area of each flat under dispute.

After the order passed by the Authorized Officer dated 18.04.2011, the writ petitioners through their Ld. Advocates have submitted their objection on the ground that the law does not qualified and/or define “super built up area”. The West Bengal (Regulation of Promotion of Construction and Transferred by Promoters) Rules, 1965 does not provide for or connote the term “super built up area” and prayed for review/modification of the order dated 18.04.2011.

The Authorized Officer had passed an order directing the parties to appoint surveyor to have a joint measurement including the super built up areas but the petitioners have raised their objection for modification of the order.

The Authorized Officer without considering the objection raised by the petitioners and without adjudicating the objection raised by the petitioners and without obtaining the report from the surveyor with regard to the super built up areas, as directed by the A.O, the Authorized Officer had passed an order on 11.07.2011 holding that it is not proved that the flats in question are less in size than the agreed size, though an earlier two occasions reports

were called for and reports were available on record which one in favour of the petitioner.

While passing the order, the Authorized Officer has held that the actual measurement of flats in question having regard to the agreement for sale deeds are essential to resolve the issue but the purchaser neither show this authority what is the actual measurement of the flats in question nor they appoint a surveyor mutually with the promoter and to get the actual measurement done so that how much less in size the flat in question are ascertain having regard to the agreement for sale deeds.

The order passed by the Authorized Officer dated 11.07.2011 is contradictory to the order dated 18.04.2011 and the reports available on record. The Authorized Officer vide order dated 18.04.2011 has held that it is necessary that the parties have a fresh joint measurement of the flats under dispute including super built up areas through a surveyor for proper adjudication of dispute but there is no report received by the Authorised Officer while passing the order dated 11.07.2011. The Authorised Officer had also not decided whether the report submitted by the Official Engineer earlier is acceptable or not and also not taken into consideration of the earlier reports.

After considering the above facts this Court is of the view, the order passed by the Authorized Officer is not sustainable under law and accordingly the same is set aside and quashed.

The Authorised Officer i.e, the Secretary, Government of West Bengal, Housing Department, New Secretariat Building is directed to hear the review applications of both the parties a fresh after giving an opportunity of hearing to the parties and to pass appropriate reasoned and speaking order within a period of three months from the date of communication of this order.

W.P. No. 2740 (w) of 2012 is stand allowed.

Parties shall be entitled to act on the basis of a server copy of the Judgment and Order placed on the official website of the Court.

Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Krishna Rao, J.)