

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.296 of 2021

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M/s Nesh India Infrastructure Private Ltd. having its registered office at Nesh Inn Building 19 and 20, Kidwaipuri, P.S.- Budha Colony, District- Patna at present C/o S.B. Sinha, Commercial Block, Tiruvantpuram City, AG Sector Ashopur Road, Khagaul, Danapur, Town and District- Patna Through its Managing Director Mr. Shashi Bhushan Sinha (M) aged about 53 years, Son of Late Chandrika Prasad, resident of 501, Laxmi Hari Niwas, Nageshwar Colony, Kavi Raman Path, P.S.- Buddha Colony, District- Patna- 800001.

... .. Appellant/s

Versus

1. Savita Sah Wife of Sri Ram Babu Sah A 416, Hazari House, South West Corner of Park, A.G. Colony, Patna- 25.
2. Sita Ram Singh Son of Sri Indira Deo Singh A-488, East Corner of Park, A.G. Colony, P.S.- Shastri Nagar, District- Patna, Pin Code- 800025.

... .. Respondent/s

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Appearance :

For the Appellant/s :	Mr. Abhinav Srivastava, Advocate Mr. Raushan, Advocate Mr. Sahil Kumar, Advocate Mr. Suman Hisaria, Advocate
For the Respondent/s :	Mr. D.K. Sinha, Sr. Advocate Mr. R.B. Shah, Advocate Mr. Dharendra Narain Mallik, Advocate

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CORAM: HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA

C.A.V. JUDGMENT

Date : 12-11-2024

This Miscellaneous Appeal has been preferred against the judgment dated 04.11.2020 passed by the Real Estate Appellate Tribunal, Bihar, Patna (hereinafter referred to as ‘Appellate Tribunal’) in REAT Appeal No.08 of 2019 by which the appeal preferred by the appellant has been dismissed and the order dated 09.08.2019 passed by Real Estate Regulatory



Authority, Patna (hereinafter referred to as 'RERA') in RERA Case No.CC81/2018, CC/82/2018 and CC/83/2018 was upheld.

2. The brief facts of the case are that complaint petitions under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as the 'Act, 2016') were filed against the appellant i.e. M/s Nesh India Infrastructure Pvt. Ltd. (Builder/Developer) with respect to possession of their share of flats in A.G. Enclave Tiruvantpuram City after issuance of Completion Certificate and Occupancy Certificate of the project, compensation at prescribed rate for the period of delay in handing over the flats and additional share for constructing the building of seven floors instead of five floors as agreed. The complaint petitioners are the owners of the pieces of land measuring 5926.3 sq.ft. allotted by Alok Sahkari Grih Nirman Samiti, a society registered under Bihar and Orissa Co-operative Societies Act, 1935. The appellant had proposed to develop a residential building, namely, Tiruvantpuram City on pieces of land measuring 9978.297 sq. meter owned by 40 odd land-owners. In the registered Development Agreement dated 25.08.2011 being done in the light of Bihar Apartment Ownership Act, 2006, it was agreed that the builder shall provide flats of super built up area of 2.25 times of their given land admeasuring area of 2000 sq.ft. i.e. 4500 sq.ft. to each of them along with a parking space for a four-wheeler vehicle with each flat. In view of clause 5 of Development Agreement, a



separate supplementary agreement was also executed on the same day between the owners and developers for determination of actual share portion wherein the builder agreed to give three flats each of 1440 sq.ft. as follows:-

I. Ms. Savita Sah (respondent no.1) – Flat No.- C/311, C/312 and D/104, Phase 1, AG Enclave.

II. Mr. Sitaram Singh (respondent no.2) - Flat No.B/207, B/309 and D/103, Phase-1, AG Enclave.

III. Mr. Navin Kumar Sinha – Flat No.B/205, B/206 and B/208, Phase-1, AG Enclave.

3. It was also prescribed in the said agreement that the petitioners will not have to pay anything to the developer in this respect at the time of possession. The Development Agreement also stipulated that the project would be completed within two and a half years of signing of the Development Agreement with a grace period of six months. It was also agreed that if the developer fails to complete the construction of flats within the stipulated time frame, the developer shall be liable to pay to the land-owner compensation at the rate of Rs.8000/- per flat per month to each of them till handing over the possession of completed flats. It was further provided under clause 21 of the agreement that if the said multi-storied building is further extended vertically adding more number of floors then the share of additional construction shall be distributed proportionately among the complainants.



4. The petitioners claimed that the project was not completed even after seven years and the appellant also demanded illegal money then the petitioners, who are three land owners of the agreement, filed complaint under Section 31 of the Act, 2016 which was decided in favour of the complainants/petitioners. Vide order dated 09.08.2019, the RERA directed to hand over possession of three specified flats along with covered parking space for a four-wheeler vehicle with each flat to each petitioner after taking completion as well as occupancy certificate of the said project within sixty days of issue of that order and liberty was given to the petitioners to approach Civil Court or Consumer Court with respect to proportionate share on 6th and 7th floor of the project, being unable to decide the same and for the claim for compensation, the liberty was given to file a separate application before the Adjudicating Officer of the Authority.

5. Against the said order, the appellant filed the appeal before the Real Estate Appellate Tribunal and the Appellate Tribunal has held that the appeal has no merit and dismissed the appeal in context of respondent nos.1 and 2, however, the appeal with respect to Navin Kumar Sinha (complaint petitioner no.3) was disposed of in view of the compromise petition jointly filed by them. Thus, the order passed by learned RERA was affirmed by learned Appellate Tribunal in REAT Appeal No.8/2019 by dismissing the appeal



on 04.11.2020.

6. Being aggrieved and dissatisfied by the said order, the appellant filed this Miscellaneous Appeal.

7. Heard learned counsel for the parties.

8. Learned counsel Sh. Abhinav Srivastava for the appellant has submitted that the Appellate Tribunal has failed to appreciate that in terms of provisions contained under the Act, the land-owner cannot prefer a complaint under Section 31 of the said Act and as such any dispute arising between the land-owner and the developer with respect to compliance and execution of the terms of the Development Agreement cannot be decided by RERA in terms of the provisions contained under Section 31 of the said Act, 2016. It has further been submitted that the supplementary agreement which had formed the basis for the claim of the respondents had not been registered having no binding effect, therefore, the order passed by RERA directing the appellant to hand over three flats in favour of the complainants/respondents was completely misconceived in the eyes of law.

9. Learned counsel for the appellant has further submitted that the learned Appellate Tribunal has failed to appreciate that in terms of the provisions contained under the original agreement, the dispute arising between the parties was to be resolved by an Arbitrator to be appointed in accordance with the Arbitration & Conciliation Act but without seeking to



refer the matter to an Arbitrator, the complaint under Section 31 of the Act, 2016 was entertained by the RERA which is not permissible in the eyes of law.

10. On the other hand, learned senior counsel Sh. D.K. Sinha for the respondents has supported the impugned judgment and argued that this appeal has no merit and is liable to be dismissed. He has contended that the complaint under Section 31 of the Act, 2016 is maintainable in view of the fact that the petitioners (land-owners), are consumers who have chosen the special forum constituted under the Act, 2016 the dispute between the parties are not arbitrable. He has further submitted that the learned RERA and the Appellate Tribunal by reasoned judgments rightly held that the complaint under the Act, 2016 is maintainable and accordingly, the impugned judgment is not liable to be interfered by this Court. He has next submitted that the coordinate Bench of this Court in judgment dated 28.08.2024 in CWJC No.15444 of 2021 arising out of the said agreement dated 25.08.2011 executed between the parties has held that RERA has jurisdiction to decide the complaint.

11. Having heard the learned counsel for the parties and on perusal of the materials on record, it is clear that the main objection of the appellant is that RERA has no jurisdiction to decide the complaint under Section 31 of the Act, 2016 filed by the petitioners/respondents on the ground firstly, that land owners are not consumers and secondly, that there is arbitration



clause in Development Agreement in view whereof the dispute is liable to be referred to Arbitrator and not to be decided by RERA or Appellate Tribunal. The further objection of the appellant in this appeal is that learned RERA and Appellate Tribunal have failed to appreciate that the supplementary agreement dated 25.08.2011 is not a registered document having no binding force which cannot be taken in evidence.

12. The objections raised by the Developer/appellant were not found justified by RERA which was confirmed by the Appellate Tribunal. The learned RERA in order dated 09.08.2019 observed *inter alia* as under:

(i) Protection of the interests of the consumers/allottees is one of the primary intents/objectives of the Act, 2016 as enshrined in the preamble of the Act and, therefore, the project was covered under the Act, 2016;

(ii) Since land-owners are deemed to be consumers under the Act, 2016 and rules made thereunder would be fully applicable in the instant case;

(iii) The judgment of Hon'ble Supreme Court in the case of **Banga Daniel Babu Vs. M/s Sri Vasudeva Constructions & Others** reported in **AIR 2016 SC 3488** was relied wherein it was held that the land owner under the Development Agreement is a consumer under the Consumer Protection Act;

(iv) Since the Act, 2016 is the latest law passed by



the Parliament for speedy redressal of the real estate sector, it would prevail over the Arbitration and Conciliation Act, 1996. Under Section 89 of the Act, 2016 the Authority is fully competent to decide the claims between land owner and Developer despite being an arbitration clause in Development Agreement;

(v) The Hon'ble Supreme Court in the case of **Booz Allen Hamilton Inc. Vs. SBI Home Finance Ltd.** reported in (2011) 5 SCC 532 observed that the disputes which are to be adjudicated and governed by statutory enactments, established for specific purpose to sub-serve a particular public policy, are not arbitrable; and

(vi) The supplementary agreement is in continuation and part of the main Development Agreement dated 25.08.2011 which is duly signed, never been objected by developer and without the execution of supplementary agreement, the Development Agreement cannot be considered as complete because of the fact that in consideration of land, the share of land owner was not specifically mentioned in the Development Agreement. However, unregistered document can be used as evidence of collateral purpose as provided in the proviso to Section 49 of the Registration Act.

13. The learned RERA further held that:

(i) The claim of compensation on account of delay in completion of the project was covered under Section 18 of



the Act, 2016 and, therefore, it is required to be adjudicated by Adjudicating Officer appointed under Section 71 of the Act, 2016.

(ii) The claimants may approach the Civil Court or Consumer Court for their claim, if they so wish, with respect to proportionate share in additional construction of two more stories undertaken by the Promoter/Builder subsequent to the execution of the Development/Supplementary Agreement.

(iii) On the issue of compensation, the complainants may, if they wish, file a complaint petition before Adjudicating Officer, RERA, Bihar vide Section 31 read with Section 71 of the Act, 2016 and under Rule 37(1) of the Bihar Real Estate (Regulation and Development) Rules, 2017.

14. Respondents/land-owners have invoked Section 31 of the Act, 2016 and filed complaint case on the ground of non-observance of the terms of the Development Agreement dated 25.08.2011 before RERA. The appellant has opposed the maintainability of the complaint case under Section 31 of the Act, 2016. The provision of Section 31 of the Act, 2016 uses the phrase 'any aggrieved person' is having a wide import to include land owner within its ambit. The legislature has used the word 'consumer' in the preamble of the Act, 2016 that the objective of the Act, 2016 is to protect the interest of the consumers in the real estate sectors and to establish an adjudicating mechanism for speedy dispute redressal. The



Hon'ble Supreme Court in **Banga Daniel Babu** (*supra*) held that land owners are consumers under the Consumer Protection Act. In paragraph no.21 of the judgment in the said case, the Hon'ble Supreme Court held as under:

“21. On studied scrutiny of the aforesaid clauses, it is clear as day that the appellant is neither a partner nor a co-adventurer. He has no say or control over the construction. He does not participate in the business. He is only entitled to, as per the MoU, a certain constructed area. The extent of area, as has been held in Faquir Chand Gulati (2008) 10 SCC 345 does not make a difference. Therefore, the irresistible conclusion is that the appellant is a consumer under the Act.”

15. In the present case, Development Agreement dated 25.08.2011 was executed between the land-owners and the appellant/builder in which land-owners provided the land to get multi-storied residential complex developed and constructed on the said land to acquire built-up area in the same in shape of residential flat, parking area etc. as consideration for the value of the land conveyed by the owner to the developer. A separate supplementary agreement dated 25.08.2011 was also made between the owners and the developer for determination of actual portion for each as per clause 5 of the Development Agreement for construction and development of the land. As per clause 8.2 of the Development Agreement, the agreement shall not ever be deemed to constitute a partnership of any sort between the parties thereto.

16. Both the development as well as supplementary



agreement are entered on the same date i.e., 25.08.2011. In the present case, the project was registered under the Act, 2016. The supplementary agreement was in continuation of the registered Development Agreement. It appears from clause 8.2 of the Development Agreement that there was agreement between the parties that the agreement shall not constitute a partnership of any sort between the parties, which goes to show that the parties were not co-adventurers. There was no revenue sharing arrangement between the parties.

17. Regulation 6 (3) of the Bihar Real Estate Regulatory Authority (General) Regulation, 2021 which was notified on 5th of August, 2021 clarified that where there is a development agreement or such an agreement between the promoter and the landowner unless otherwise mentioned in the agreement, the land owner(s) would be treated as an allottee under the Act, 2016 as he is getting apartments/flats in lieu of his land and in all such cases, the promoters of the project would be responsible for fulfilling all obligations under the Act, 2016 and the rules made thereunder. The said Regulation being clarificatory and explanatory in nature, the same shall be treated to have retrospective effect and accordingly, the land owners are to be treated as allottees under that Act, 2016 as he is getting apartment/flats in lieu of his land.

18. The Coordinate Bench of this Court in **Bihar Home Developers and Builders, through its authorized and**



registered Partner Sh. Rajiv Ranjan Kumar Vs. Narendra Prasad Gupta reported in **(2021) SCC OnLine Pat 1355** upon analysis of Sections 88 and 89 of the Act, 2016 has held that the Act, 2016 is not inconsistent with the provisions of the Arbitration Act.

19. The land-owner, who gets some apartments, may retain the same or may dispose of his share of apartment with corresponding undivided shares to others. The land-owner will have no say or control in the construction and his only right is to demand delivery of his share of constructed area in accordance with specification and in terms of the contract. There is a consideration for such construction, flowing from the land-owner to the builder. Availment of services of the builder by land owner for house construction, to that extent, the land owner is a consumer and the builder is a service provider.

20. If a special statute creates a special right or liability and provides for the determination of each right and liability for the specified court or the public forum so constituted and whether the remedies beyond the ordinary domain of the Civil Courts are prescribed and answered in affirmative, the dispute is not arbitrable.

21. As per clause 17 of the Development Agreement dated 25.08.2011, in case of any dispute or difference between the parties arising out of or relating to the Development Agreement, shall be settled/decided in accordance



with the Arbitration and Conciliation Act, 1996. Very idea of arbitration is that it has considerable advantage as it gives freedom to the parties to choose an arbitrator of their choice and it is informal, legible and quick. Simplicity, informality and expedition are hallmarks of arbitration. Arbitrators are required to be impartial and independent, arbitrate natural justice and follow a fair and just procedure. These are the basic concept of arbitration.

22. Learned counsel for the appellant has submitted that there is a specific agreement, when the dispute arises, to refer the matter to arbitration. In this regard, he has submitted the judgment of Hon'ble Supreme Court in **Vidya Drolia and Ors. Vs. Durga Trading Corporation** reported in **2020 Online SC 1018** for the proposition that when there is an arbitration agreement, the dispute should be referred to arbitration.

23. Section 79 of the Act, 2016 bars the invocation of the jurisdiction of a Civil Court. However, an arbitral Tribunal is not a Civil Court, though it is a judicial authority having some trapping of Court. The law is well settled that when two remedies are available, the claimant has the option to elect either of them.

24. In the case of **Emaar MGF Land Ltd. Vs. Aftab Singh** reported in **(2019) 12 SCC 751**, the Hon'ble Supreme Court was ceased of an issue where an application under Section 8 of the Arbitration Act has been rejected by the



Court as the litigant had already chosen the forum under the Act, 2016. In this context, the Hon'ble Supreme Court in paragraph 63 held as follows:

*“63. We may, however, hasten to add that in the event a person entitled to seek an additional special remedy provided under the statutes does not opt for the additional/special remedy and he is a party to an arbitration agreement, there is no inhibition in disputes being proceeded in arbitration. It is only the case where specific/special remedies are provided for and **which are opted by an aggrieved person** that judicial authority can refuse to relegate the parties to the arbitration.”*

25. Statutory rights under the Act, 2016 takes precedence over contractual agreement between the parties and the presence of an arbitration clause does not oust the jurisdiction of RERA under the Act, 2016 which gives powers to RERA to regulated real estate dispute.

26. The judgment in **Vidya Drolia** (*supra*) while not directly a RERA case, the Hon'ble Supreme Court clarified that the arbitrability of disputes depends upon the nature of the right involved. Rights created by the statute like RERA, which provides special protections to a particular class of people, are typically non-arbitrable.

27. There are various classes of disputes which are generally considered by the Courts as appropriate for decision by public fora, there are classes of disputes which fall within exclusive domain of special fora under legislation which confers exclusive jurisdiction to the exclusion of an ordinary Civil



Court. That such disputes are not arbitrable in view of the general principles that a dispute which is capable of adjudication by an ordinary Civil Court is also capable of being resolved by arbitration. However, if the jurisdiction of an ordinary Civil Court is excluded by the conferment of exclusive jurisdiction on a specific Court or Tribunal as a matter of public policy, such a dispute would not then be capable of resolution by arbitration.

28. The well recognised examples of non-arbitrable disputes are:

- (i) Disputes related to rights and liabilities which give rise to or arise out of criminal offences.
- (ii) Matrimonial disputes relating to divorces, judicial separation, restitution rights, child custody.
- (iii) Guardianship matters.
- (iv) Insolvency and winding up matters.
- (v) Testamentary matters (grant of probate, letter of administration and succession certificate).
- (vi) Eviction of tenancy matters governed by special statutes where tenant enjoys statutory protection against eviction and only the specified Courts are conferred jurisdiction to grant eviction or decided the disputes.

29. The Act, 2016 provides for:

- (i) Registration of real estate project and registration of real estate agents.
- (ii) Defines the functions and duties of promoters.
- (iii) Defines the right and duties of allottees.
- (iv) Real Estate Regulatory Authority and Real



Estate Appellate Tribunal is established and their functions and powers are defined.

(v) Provisions for imposing penalties for the offences committed under the Act are made. Certainly, arbitrators cannot impose penalty and imprisonment.

30. It has been urged that by going through the objective or the purpose for which the Act, 2016 was enacted, such authorities alone must be held entitled to decide all issues concerning the Project registered under the Act, 2016. It has been further submitted that the Act, 2016 is a specific legislation, and special authorities are created under the Act, 2016 for regulation and promotion of the real estate sector and issues concerning a registered project are specially entrusted to functionaries under the Act, 2016. However, Section 18 of the Act, 2016 gives a right “without prejudice to any other remedy available” in effect some other remedy is acknowledged and saved subject always to the applicability of Section 79.

31. In Imperia Structures Ltd. Vs. Anil Patni & Anr. reported in **(2020) 10 SCC 783** three-Judge Bench of the Hon’ble Supreme Court held that the redressal mechanism/provisions under the Act, 2016 do not act as a bar to complain under the Consumer Protection Act, 1986. It has been further held that the Consumer Protection Act, 1986 and the Act, 2016 have concurrent remedies. There is nothing to show that there is any inconsistency or repugnancy between the provisions of the Act, 2016 and the Arbitration & Conciliation



Act as an alternative. The remedies under the Act, 2016 are harmonious addition to and not in discordant derogation of any other remedies available to an allottee. The barten of discretion to opt for an appropriate remedy lies with an allottee. Once a remedy has been opted, the allottee cannot then choose another remedy.

32. Section 88 of the Act, 2016 is akin to Section 3 of the Consumer Protection Act and provides that provisions of the Act, 2016 shall apply in addition to and not in derogation of other applicable laws. In **Emaar MGF Land Ltd. (supra)** the Hon'ble Supreme Court has held that the remedy under the Consumer Protection Act, 1986 is confined to the complaint filed by a consumer as defined by the aforesaid Act, for defects and deficiency caused by the service provider. The existence of an arbitration clause was not a ground to restrain the consumer from proceeding with the consumer complaint. The three-Judge Bench of the Hon'ble Supreme Court in **IREO Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors.** reported in **(2021) 3 SCC 241** held that an allottee may elect or opt for one out of the remedies provided by law for redressal of its injury or grievance. An election of remedies arises when multiple concurrent remedies are available, and the aggrieved party chooses to exercise one, in which event he loses the right to simultaneously exercise the other for the same cause of action. It was further observed that in **Imperia Structures Ltd. (supra)**



it was held that remedies under the Consumer Protection Act were in addition to the remedies available under the special statutes, the absence of bar under Section 79 of the Act, 2016 to initiate a proceeding before a fora which is not a Civil Court read with Section 88 of Act, 2016 makes the position clear. Section 18 of the Act, 2016 specifies that the remedies are without prejudice to any other remedy available. The choice or discretion is given to the allottee whether he wishes to initiate appropriate proceedings under the Consumer Protection Act or file an application under the Act, 2016.

33. It is relevant to mention here that the coordinate Bench of this Court vide Judgment dated 28.08.2024 in **M/s Nesh India Infrastructure Pvt. Limited** (*supra*) which was filed against the order dated 10.08.2021 passed by the Appellate Tribunal directing the appellant to deposit the total amount of compensation, interest and litigation cost directed by the adjudicating officer of RERA, Patna, held in paragraph nos. 38 & 39 as under:-

“38. The registered Development Agreement dated 25.08.2011 executed by and between the parties defined as well as described the character and type of relationship between them and is therefore essential for the purpose of this case. The said development agreement explicitly is neither a joint venture agreement nor does it manifest a partnership of any sort between the parties thereto. There is no whisper of any revenue/profit sharing between the parties as well. The landowners were not involved in the day-to-day construction activities. Even otherwise, the Bihar Real Estate Regulatory Authority (General) Regulations, 2021



notified on 05.08.2021 which has been held to have retrospective operation for the reasons elaborated in the foregoing paragraphs, leaves no iota of doubt on the locus of landowners to institute and the RERA to adjudicate. The mechanical interpretation as advanced by the petitioner-company to the provisions of the Act will clearly defeat the very object and purpose of the statute which among other things is to regulate and promote the real estate sector and provide for an efficient and transparent mechanism to protect the interest of consumers in the real estate sector.

39. The interplay of all the provisions contained in the Act of 2016 and the regulations made thereunder coupled with the real purport of the registered Development Agreement, can lead to no other inference, but to hold that, the complaint preferred by respondents no 4 and 5 before the Adjudicating Officer is definitely maintainable. Thus, having regard to the totality of facts and circumstances pertinently the terms of the registered Development Agreement and having regard to the entire purport and object of Real Estate (Regulation and Development) Act, 2016, it is absolutely clear that the present dispute squarely falls within the jurisdiction of Act of 2016 and thus amenable to the RERA.”

34. In view of the aforesaid discussions, in opinion of this Court, the dispute involved in this case is squarely covered under the Act, 2016 which provides special provisions for dealing with the dispute arising under the Act, 2016. This Court finds no reason to interfere with the findings of the learned RERA and Appellate Tribunal and the same is accordingly, confirmed.

35. This Miscellaneous Appeal has no merit. In the result, the instant Miscellaneous Appeal is **dismissed**. The impugned judgment dated 04.11.2020 passed by learned



Appellate Tribunal is confirmed.

36. There shall be no order as to cost.

37. Pending applications, if any, stand disposed of.

(Sunil Dutta Mishra, J)

Harish/-

AFR/NAFR	AFR
CAV DATE	07.10.2024
Uploading Date	12.11.2024
Transmission Date	

