



HARYANA REAL ESTATE REGULATORY AUTHORITY PANCHKULA

Website: www.haryanarera.gov.in

COMPLAINT NO. 961 OF 2021

M/s Express Projects Pvt. Ltd.

...COMPLAINANT

VERSUS

Sanjay Kumar Saini.

....RESPONDENT

CORAM: **Dr. Geeta Rathee Singh** Member

Nadim Akhtar Member

Date of Hearing: 29.11.2022

Hearing: 6th

Present: Ms. Kamal Dahiya, ld. counsel for the complainant.

Sanjay Saini through VC.

ORDER (NADIM AKHTAR - MEMBER)

Perusal of record reveals that Authority had adjourned the said case on the last date of hearing awaiting orders of the Hon'ble Real Estate Appellate Tribunal bearing appeal no. AT/57/2020 as the complainant had raised similar grievances which are being raised before this Authority in the captioned complaint. Ld. counsel for the complainant in his oral averments submitted that appeal pending before the Hon'ble Appellate Tribunal, bearing appeal no. AT/57/2020 was disposed of vide order dated 22.11.2022.

2. Authority had already captured brief facts of the case vide order dated 26.10.2021 and 20.07.2022. Relevant part of the order dated 20.07.2022 is reproduced below;

Perusal of files reveals that today is 5th hearing of the case. Reply has not been filed by the respondent despite availing various opportunities. Respondent was present through video conferencing and has sought last opportunity to file reply and the same is acceded by the Authority. Facts of the complaint has already been captured by the Authority vide order dated 26.10.2021. Relevant part of the said order is reproduced below for reference;

Case of the complainant is that the complainant or judgement-debtor had filed an execution petition no. 911 of 2019 titled as "Express Project Pvt. Ltd. versus Sanjay Kumar Saini" before the Authority for compliance of order dated 28.08.2018 passed in Complaint No. 3 of 2018 titled as "Sanjay Saini versus Express Home Pvt. Ltd." Said execution petition was disposed of by the Authority along with execution petition no. 900 of 2019 titled as "Sanjay Kumar Saini versus Express Project Pvt. Ltd." vide common order dated 03.10.2019. Complainant filed Appeal no. 57 of 2020 before Hon'ble Haryana Real Estate Appellate Tribunal against the order dated 03.10.2019.

2. *The grievance of the complainant is that Authority had observed in last line of para 4 of the order dated 03.10.2019 passed in said execution petition that "Moreover, judgement debtor had conceded of charging of Rs.2 lakhs". He pleaded that the complainant or judgement-debtor never made any statement regarding admitting charging of Rs.2 lakhs in lieu of Exclusive Terrace Rights as observed in the order dated 03.10.2019. Thus, he sought review of order dated 03.10.2019 through present*

complaint so far as it relates to admission recorded in order dated 03.10.2019.

3. *Ld. counsel for the complainant Mr. Kamal Dahiya argued that he has filed an affidavit stating therein that he never admitted said amount of Rs. 2 lakhs being charged from the complainant in lieu of Exclusive Terrace Rights and thus, his consent as recorded in order dated 03.10.2019 be rectified to that effect keeping in view the affidavit filed.*

4. *However, on perusal of case record, it has been found that no affidavit as claimed by Learned Counsel for the complainant Mr. Kamal Dahiya has been filed. Thus, he is directed to file the affidavit in support of his submissions before next date of hearing.*

Respondent has apprised the Authority that an appeal against order of the Authority dated 3.10.2019 is pending before the Hon'ble Real Estate Appellate Tribunal bearing appeal no. AT/57/2020 and complainant has raised similar grievances which are being raised in Authority.

Therefore, Authority observes that since similar issues are being raised before the Hon'ble Tribunal, therefore case is adjourned awaiting orders of the Hon'ble Tribunal.

3. Hon'ble Real Estate Appellate Tribunal bearing appeal no. AT/57/2020 had disposed of the said appeal vide order dated 22.11.2022. Relevant part of the order of Hon'ble Real Estate Appellate Tribunal is reproduced below;

9. The bone of contention between the parties to the present lis has been summarized by this Tribunal in its order dated 02.09.2021 and the relevant portion is as follows:- "During the course of arguments, both the parties have very fairly stated that there is no dispute between the parties for execution of the Conveyance-Deed as per terms and conditions of the

Allotment Letter/Builder Buyer's Agreement. However, they are at dispute with respect to the payment of Rs.2 lacs. Respondent has alleged that this payment was made for purchase of terrace rights, whereas the appellant/promoter has disputed that this amount of Rs.2 lacs was never received by it."

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11. The crux of this aforesaid policy is that the sale purchase agreement may designate the entire 'top floor terrace' for services i.e. for the purpose of placing water tanks, solar water heating equipments, etc. and thus can designate the entire top-floor terrace as 'common roof'. The sale purchase agreement may designate only part of the top floor terrace for aforesaid services and to be used as 'common roof' and the remaining part of the top floor terrace can be designated a separate enclosure, on which the owner of a specific floor gets exclusive usage rights. In another case, the sale purchase agreement may specify the design of building in such a way that the top floor is not required for common services at all and exclusive ownership and usage rights of the entire top floor terrace can be assigned to any of the three independent floor owners and no part of the top-floor is designated as "common roof".

12. In view of the policy referred to above, the stipulated terms of the allotment letter/Apartment Buyer's Agreement dated 01.12.2021 entered into between the parties are of utmost importance and have assumed great significance.

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14. As is explicit from the perusal of the above, the basic sale price of the ground floor having the facility of lawn, and of second floor having the facility of the terrace, is more than the basic sale price of the first floor, where, neither is facility of lawn nor of terrace can be provided.

15. Also, in the advertisement made in the newspaper 'Hindustan Times' (Annexure R/15), it was advertised that second floor was to be sold by the appellant with terrace.

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17. To arrive at the conclusion that whether along with the second floor apartment, the respondent/promoter was

given the terrace rights or not, the stipulation of Clause 15(h) of the said 'Apartment Buyer's Agreement' is most relevant and is of utmost importance, and the same is as follows:

"h. The ownership of the top roof/terrace above the top floor i.e. the Second Floor of the said Building shall be the Owner/Allottee of the Second Floor, who shall not have any right to raise any structure permanent/temporary over the terrace floor and shall also not object to or raise any claim to the company adjusting the FAR in the other building further. The top roof/terrace above the top shall have a provision for the installation of water tanks and antennas/satellite dishes (one each) for the exclusive use by the respective Independent Floor/Apartment Allottees in the Said Building, who shall have the right to use and access the terrace as reasonable hours of the day for the installation/repair and maintenance of the overhead water tanks/antenna/satellite dishes. The Purchaser agrees that he/she shall not object to the same and make any claims on this account."

18. As per this aforesaid stipulation, the ownership of the top roof/terrace above the top floor i.e. the second floor is of the owner/allottee of the second floor. However, the same is subject to the condition that owner/allottee of the second floor shall not have any right to raise any permanent/temporary structure over the terrace floor and he would also not object or raise any claim to the company adjusting the FAR in the other building further. The said top roof and terrace shall also have the provision for the installation of water tanks and antennas/satellite dishes (one each) for the exclusive use by the respective independent floor/apartment allottees in the said building and they will have right to use and to have access to the terrace as reasonable hours of the day for installation/repair and maintenance of the overhead water tanks, antenna, satellite dishes and the purchaser of the second floor will not object to the same and would not make any claim on this account.

19. Undisputedly, as per the terms of the 'Apartment Buyer's Agreement', the respondent/allottee has been

allotted apartment numbered E25/003 on the second floor of the building. As per the aforesaid stipulation, the ownership of the top roof/terrace above the top floor i.e. second floor is of the respondent/allottee, who has been allotted apartment on the second floor, but, the same is subject to the aforesaid condition as mentioned in the stipulation of Clause 15(h) of the agreement.

20. As referred above and mentioned in the order dated 02.09.2021 of this Tribunal, there is no dispute between the parties for execution of the conveyance-deed as per the terms and conditions of the allotment letter/Apartment Buyer's Agreement. Accordingly, in the conveyance-deed to be executed between the parties regarding the unit allotted to the respondent/allottee, this stipulation of Clause 15(h) of the 'Apartment Buyer's Agreement' must be included. Further, as has been observed above, the observations made by the learned Authority in the impugned order that the appellant has conceded of charging of Rs.2,00,000/-, still stand.

4. The grievance of the complainant is that Authority had wrongly/inadvertently recorded in last line of para 4 of the order dated 03.10.2019 passed in execution petition no. 900 of 2019 and 911 of 2019 clubbed together that "Moreover, judgement debtor had conceded of charging of Rs.2 lakhs". Ld. counsel for the complainant drew attention of the Authority to para 3 of order dated 26.10.2021 wherein it has been mentioned that respondent had filed an affidavit in the Authority in lieu of the said observation made. However, perusal of record reveals that no such affidavit was filed on record. Relevant part of the order dated 26.10.2021 is reproduced below;

3. *Ld. counsel for the complainant Mr. Kamal Dahiya argued that he has filed an affidavit stating therein that he never admitted said amount of Rs. 2 lakhs being charged from*

the complainant in lieu of Exclusive Terrace Rights and thus, his consent as recorded in order dated 03.10.2019 be rectified to that effect keeping in view the affidavit filed.

4. However, on perusal of case record, it has been found that no affidavit as claimed by Learned Counsel for the complainant Mr. Kamal Dahiya has been filed. Thus, he is directed to file the affidavit in support of his submissions before next date of hearing.

5. Perusal of record reveals that the said affidavit claimed by respondent to be filed on 26.10.2021 was received on 14.12.2021. In the said affidavit submitted in the registry of the Authority, para 3 reads as follow;

3. That the complainant had never made any statement regarding accepting or admitting the charging of Rs. 2 lakh in lieu of Exclusive Terrace Rights.

4. That such statement was never given either by the authorised representative of the complainant or by the counsel of the complainant while contesting the original complaint no. PKL/03/2018 or during execution proceedings. The Ld. Authority has inadvertently; y mentioned such statement in the said final order dated 03.10.2019.

Ld. counsel for complainant during hearing clearly denied making such statement ever on behalf of the complainant/promoter and further went on to state that neither any representative of complainant/ promoter made any statement, while contesting the original complainant or during execution petition.

6. Respondent appeared through video conferencing. Perusal of record reveals that respondent has not filed reply in the complaint. During today's

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proceedings respondent reiterated the facts of the case, including payment of Rs. 2 lakhs as payment for exclusive terrace rights.

7. Authority had heard oral contentions of both the parties and is of following view;

i. The complainant in the present complaint filed u/s 31 of RERA Act, 2016, has sought the following relief.

1. To give necessary directions to the respondent to execute conveyance deed within the time period as per order dated 28.08.2018 passed by the Hon'ble Authority.
2. To direct the respondent to file new complainant for the fresh issues against the Respondent related to the said project.
3. To rectify/modify the order dated 3 Oct 2019 in complaint no. PKL/900/2019 and PKL/911/2019 passed by the Hon'ble Authority.
4. To hear the present complaint on priority basis due to appeal pending before the Hon'ble Tribunal, Chandigarh.
5. To recommend criminal action against the respondent for the criminal offence of cheating, fraud and criminal breach of trust under section 420, 406 and 409 of the Indian Penal Code.
6. To issue directions to pay Rs.5 Lakh compensation for mental and physical harassment.
7. To issue direction to pay the cost of litigation.



8. Any other relief which this Hon'ble Authority deems fit and appropriate in view of the facts and circumstances of this complaint.

ii. Authority observes that relief sought in para 1 is already resolved undisputedly between parties which is already a part of order passed by the Hon'ble Appellate Tribunal vide order dated 22.11.2022. Relevant part of the order is reproduced below;

The bone of contention between the parties to the present lis has been summarized by this Tribunal in its order dated 02.09.2021 and the relevant portion is as follows:- "During the course of arguments, both the parties have very fairly stated that there is no dispute between the parties for execution of the Conveyance-Deed as per terms and conditions of the Allotment Letter/Builder Buyer's Agreement. However, they are at dispute with respect to the payment of Rs.2 lacs. Respondent has alleged that this payment was made for purchase of terrace rights, whereas the appellant/promoter has disputed that this amount of Rs.2 lacs was never received by it."

iii. Authority observes that it does not have jurisdiction to adjudicate the matter and grant reliefs, sought in para 5, 6, 7 and 8.

iv. The only issue remaining with Authority to adjudicate upon is clause 3 of the relief sought i.e. to rectify/modify the order dated 03.10.2019 passed by the Authority in complaint no. 900 of 22019 and 911 of 2021.

8. Authority is of the view that firstly, complainant has filed the present complaint in the Authority under section 31 of the Real Estate (Regulation and

Development) Act, 2016 r/w Rule 28 (1) of HRERA (Regulation and DEvelopment) Rules, 2017. Whereas vide clause 3 of the relief prayers of complaint file seeks rectification of the order which is provided u/s 39 of RERA Act, 2016.

9. Complainant has not specified in his relief clause that whether he seeks rectification of the entire order dated 03.10.2019 or any specific part therein.

Nevertheless, perusal of record reveals that vide order dated 26.10.2021, para 2, complainant has submitted that he seeks rectification of last line of para 4 of the order dated 03.10.2019. In this regard, Authority is of the view that said observation with respect to acceptance of amount of Rs. 2 lakhs was not made for the first time vide order dated 03.10.2019. Authority had previously recorded the same vide interim order(s) dated 22.08.2019 and 12.09.2019. Relevant part of the order dated 22.08.2019

Sh. Sanjay Saini, decree-holder submitted his objections relating to the conveyance deed. He also raised an issue relating to ownership and usage right of the entire top floor terrace and alleged that the respondent has charged additional 2 lakhs for top floor terrace. Further, he drew attention towards a letter dated 27.03.2009 memo no. LC-2238-JE(S)-2013/ 30774-775 issued by the Town and Country Planning Department, Haryana related to policy instructions regarding registration of independent floors residential plots.

Further, he has sought documents/ deed pertaining to possession letter, allotment letter, building plan and occupation certificate etc and the same were allowed by the Authority with a direction to


the promoter that all these documents be supplied to the allottee before the next date of hearing

As far as the ownership and usage right of entire top floor terrace is concerned, admittedly, promoter has conceded of charging Rs 2 lakhs from the allottee in this regard. Therefore, a direction is given that the entire terrace of the 2 floor excluding the portion which is being used for common services like keeping of water tanks, solar panels and so on, be handed over to the allottee or promoter may return his 2 lakhs with 9 interest before the next date of hearing. Further, the judgement debtors also directed refund of proportionate amount of reduced area of the plot.

Relevant part of order dated 12.09.2019 is reproduced below;

After taking note of the issues raised by the decree holder regarding the ownership and usage right of the entire top floor terrace, the Authority prima facie observed that the promoter has unnecessarily charged Rs. 2 lakhs. The promoter shall either pay Rs. 2 lakhs with 9 interest or to give complainant right to the ownership and usage right of the entire top floor (terrace) except the part being used for installation of water tank etc. as per the agreement. Further, a direction is given that the promoter shall submit a layout plan in which the front parking shall be marked properly.

However, complainant had never challenged/ objected to the said averments during subsequent proceedings neither drew attention of the to such statement at any occasion before disposal of execution petition. Complainant has failed to prove as to why he never approached the Authority earlier for correction or challenging the said allegations during proceedings.





10. In fact the complainant filed this complaint for rectification/ modification in the year 2021, subsequent to filing of appeal in the year 2020. Therefore, it appears to be an afterthought action/delay tactic on part of the complainant. The same be seen from the following table.

Complaint No. / Execution Petition No.	Filed in Authority/ Tribunal	Disposed of vide order dated
03 of 2018	08.06.2018	28.08.2018
900 of 2019 (EXECUTION)	01.04.2019	03.10.2019
911 of 2019 (EXECUTION)	03.04.2019	03.10.2019
AT- 57 of 2020	03.03.2020	22.11.2022
961 of 2021 (PRESENT COMPLAINT)	25.08.2021	29.11.2022

11. Authority is of the view that the relief of rectification/ modification of the observation made by the bench of the Authority shall amount to review of the orders passed by the Authority on 03.10.2019 after taking into consideration the oral and written submissions. However, any change/modification with respect to the observation made by the Authority vide order dated 03.10.2019 will amend the substantive part of the order and is explicitly barred as per proviso 2 of section 39 of RERA Act, 2016. The Authority is conscious of the fact that the learned counsel for the complainant promoter has filed an affidavit stating that neither him nor any representative ever admitted to the acceptance of the payment of Rs. 2 lakhs for Exclusive terrace rights.

12. Authority under section 39 of the RERA Act, 2016 only have the power to rectify clerical mistakes apparent on the face of record. The RERA Act, 2016 does not entrust the power of review on the Authority.
13. Relief sought by the applicant complainant is in the nature of review application and not rectification of error apparent on the face of record and if the relief is allowed the same shall result in amendment of the operative/substantive part/review of the judgement of the Authority.
14. In fact the proviso 2 to section 39 categorically provides that the Authority "shall not" while rectifying any mistake apparent from record, amend substantive part of its order passed under the provisions of the Act.
15. For the above stated reasons, the relief of respondent sought pending before the Authority is not allowed.
16. Case is **disposed of**. Files be consigned to record room after uploading of order on the website of the Authority.


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DR. GEETA RATHEE SINGH
[MEMBER]


.....
NADIM AKHTAR
[MEMBER]