THE U.P. REAL ESTATE APPELLATE TRIBUNAL, LUCKNOW

Division Bench Court No. 1

APPEAL-397/2022

MAHAVIR SINGH VERMA .....**Appellant**

Versus

RAM RAGHU BUILDWELLRAM RAGHU BUILDWELL .....**Respondent**

Counsel for Appellant
TUSHAR BAHADUR

Counsel for Respondent
SAURABH MISRA
GAUTAM JOHRI

Hon'ble Mr. Justice Suneet Kumar, Chairman
Hon'ble Mr. Sanjai Khare, Judicial Member
Hon'ble Mr. Rameshwar Singh, Administrative Member

Appeal No.396 OF 2022

Jeevan Lata Verma **…..Appellant.**

Vs.

Ram Raghu Builwell **….Respondent.**

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Appeal No.397 OF 2022

Mahavir Singh Verma **…..Appellant.**

Vs.

Ram Raghu Builwell **….Respondent.**

****

Appeal No.398 OF 2022

Ravi Verma **…..Appellant.**

Vs.

Ram Raghu Builwell **….Respondent.**

1. Heard Sri Tushar Bahadur, learned counsel for the appellant and Sri. Gautam Johri, learned counsel for the respondent promotor and perused the record.

2. On the consent of parties, the batch of appeals (three in number) are being heard together, all the appeals are similar on facts and law. The facts of Appeal No. 396/2022 is being referred to as lead case for the sake of convenience.

3. The appellant allottee is raising challenge to the judgement and order dated 06.04.2022, passed by the U.P Real Estate Regulatory Authority at Lucknow (for short, 'Regulatory Authority'), in complaint no. LKO118/06/0695/2019, passed under Section 39 of Act, whereby, a direction came to be issued to the respondent promoter to calculate interest on the amount deposited by the appellant at Rs.18,12,000/-from the date of allotment letter (08.10.2017), and to issue a fresh recovery certificate.

4. The learned counsel for the appellant submits that the rectification application was not maintainable, further, learned Regulatory Authority exceeded its jurisdiction and authority under Section 39 of the Act.

5. **The questions that fall for consideration are:**

   i) Whether Regulatory Authority, under the garb of Section 39 of the Real Estate (Regulation and Development) Act, 2016 (for short, 'the Act, 2016'), was justified in re-hearing the matter on merit, thereby, altering the substantive portion of the original order (decree), and/or, whether the rectification application was maintainable.

   ii) Whether in the given admitted facts, appellant/allottee is entitled for refund of the amount deposited, along with, interest thereon, at the prescribed rate, in terms of Section 18(1) of Act, 2016 as per the decree.

Question No.1

6. The facts ***inter-se*** parties are not in dispute.

7. The respondent/promoter launched a real estate project under the name and style, "Ram Raghu Ananda." For allotment of a unit in the said project,

appellant initially paid a sum at Rs.15,00,000 on 01.05.2012. However, no unit was allotted to the appellant. Subsequently, on 09.04.2015, appellant made a further payment at Rs.16,00,000 to the respondent/promoter on demand. The total amount paid by the appellant was at Rs. 31,00,000/-.

8. Learned counsel for the appellant, at the outset, submits that the respondent/promoter failed to allot any unit to the appellant in the original project. It was only on 08.10.2017, respondent allotted a unit to the appellant in a different project, namely, "Ram Raghu Palazzo." Pursuant, thereof, a unit bearing No. 'Suite No. 7, Second Floor', was allotted to the appellant, by partially adjusting Rs. 18,12,000/- from the total amount paid by the appellant allottee. It is further submitted by the learned counsel for the appellant that respondent has acknowledged receipt of only Rs.18,12,000/-, which constitutes part payment made towards allotment of the unit. The respondent has illegally retained Rs.12,88,000/- the remaining outstanding amount towards applicable taxes, duties, and cess, which were payable additionally, as per the allotment letter dated 08.10.2017. In this backdrop, learned counsel submits that appellant is entitled to refund of the entire deposit at Rs.31,00,000/- in terms of Section 18(1) of Act, 2016.

9. Learned counsel for the respondent promotor in rebuttal submits, that appellant initially invested some capital in the business of respondent company and the respondent paid interest, thereon till 31.03.2017, to the appellant. The capital amount, including interest, due to the appellant was at Rs.35,87,250/-. It is further submitted by the learned counsel for the respondent promotor that the above amount was paid by the appellant, being purely commercial investment. No allotment of a unit or any kind of relationship of promoter and allottee was established with the appellant. It is further contended by the learned counsel for the respondent that with consent of the appellant, the booking was shifted to a new project, and in pursuance

thereto, out of the total commercial investment at Rs. 35,87,250/-, a specific sum at Rs. 18,12,000/- was adjusted towards the booked unit allotted on 08.10.2017.

10. Admittedly, the project was to be completed on or before 30.04.2019, however, possession of the unit was not handed over to the appellant/allottee by the said due date. Aggrieved, by the delay caused by the respondent/promoter, in delivering possession of the unit, appellant/allottee, on 17.06.2019, filed a complaint under Section 31 of Act, 2016, before the Regulatory Authority, seeking refund of the amount deposited along with interest thereon.

11. The Regulatory Authority, in the aforesaid complaint, passed judgement and order dated 24.01.2020 (decree), whereby, respondent was directed to refund the entire amount deposited at Rs. 47,90,068/- by the appellant, along with, interest at MCLR + 1 percent.

12. The respondent/promoter, thereafter, filed a rectification application on 08.07.2020, under Section 39 of the Act, 2016, seeking rectification of the order dated 24.01.2020 passed by the Regulatory Authority, for correction of the apparent mathematical and factual errors in the computation and the deposited amount noted therein.

13. Regulatory Authority, consequently, vide order dated 23.09.2020, directed the Accounts Section to compute the amount deposited by the appellant. In pursuance thereof, Accounts Section submitted its report on 08.10.2020, recording that the total deposit made by the appellant/allottee with the respondent was at Rs.31,00,000/-.

14. The Regulatory Authority, vide order dated 06.01.2021, rectified the order dated 24.01.2020 (decree), revising the refundable principal amount from

Rs.47,90,068/- to Rs. 31,00,000/-. Pursuant to the rectification order, Regulatory Authority issued Recovery Certificate (RC) on 03.03.2021 against the respondent promoter to satisfy the decree. The appellant allottee did not oppose the correction sought by the respondent promotor, admittedly, the corrected amount was the deposited sum of money by the appellant.

15. It appears that the amount at Rs.31,00,000/-, rectified vide order dated 06.01.2021, did not correspond to the actual principal amount reflected in the allotment letter of the unit i.e., Rs. 18,12,000/, consequently, respondent promoter filed another rectification application (second) under Section 39 of the Act, 2016, seeking recall, and/or, correction of the discrepancy towards the amount. The rectification application was rejected by the Regulatory Authority on 19.07.2021, with an observation that the second rectification application was not maintainable. Thereafter, respondent promoter preferred another application (third) seeking recall/rectification of the said order. The matter thereon was heard on merit, by the Regulatory Authority, and the impugned order came to be passed, whereby, a direction was issued to the respondent promoter to calculate interest on the amount at Rs.18,12,000/- from the date of allotment letter (08.10.2017), and issue a fresh recovery certificate. Hence, the present appeal.

16. The learned counsel for the appellant submits that the application filed by the respondent under Section 39 was not maintainable and order passed thereon by Regulatory Authority was without jurisdiction. The order tantamounts to review of the principal order upon adjudication on merit. It is urged that such power and authority is not vested on the Regulatory Authority under Act, 2016.

17. **Section 39 of Act, 2016 is extracted:**

> ***39. Rectification of orders.—The Authority may, at any time within a period of two years from the date of the order made under this Act, with a view to rectifying any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties:***
>
> *Provided that no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act:*
>
> ***Provided further that the Authority shall not, while rectifying any mistake apparent from record, amend substantive part of its order passed under the provisions of this Act.***

18. Section 39 of the Act, 2016, confers a limited and circumscribed power of rectification upon the Regulatory Authority. The provision enables the Regulatory Authority to amend any order passed by it within two years, so as to rectify '**mistakes apparent on the face of the record'**, including, clerical and arithmetical errors, brought to its notice by the parties. The jurisdiction under Sec 39 of the Act, 2016, is very narrow in scope. In exercise of the powers under the provision, Regulatory Authority is not empowered to alter or amend the substantive portion of the decree, nor, can it undertake a fresh determination/ hearing of the matter on merits by reappraisal of the evidence. The scope of Section 39 is restricted and expressly precludes any re-adjudication of the case by amending substantive part of the decree. The object of the provision is not to reopen concluded adjudication, on facts, but merely to ensure that inadvertent errors, apparent on the face of the record, do not defeat the true intent of the order. It is well settled that a statutory authority must act within the powers expressly conferred by the statue. While exercising powers under Section 39 of Act, 2016, Regulatory Authority, therefore, must confine to rectify the mistakes apparent on record and cannot

re-open/ review a concluded matter. The remedy available to the aggrieved party was to take recourse by filing appeal, which is continuation of the complaint.

19. In ***Ashok Kumar Maurya Vs. Uttar Pradesh Real Estate Regulatory Authority (2024:AHC:16979-DB) decided on 01.02.2024,*** Hon'ble High Court, while examining the scope of Section 39 of Act, 2016, held that the Authority is empowered to rectify only such mistakes which are apparent on the face of the record within a period of two years from the date of the order and not the substantive part of original order. Para 5 and 8 of the judgement are extracted:

> *5. "The above provision would go to show that within two years from the date of order made under the Act of 2016, the authority can rectify any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties. The substantive clause for rectification is conditioned by the two provisos, second of which, is important. The second proviso restricts the scope of rectification of orders. The second proviso clearly conveys the intent of the powers which could be exercised by the RERA authority while rectifying the orders.* ***The power of rectification does not extend to amendment being incorporated in the substantive part of its order. This clearly conveys that the rectification is not a substantive review."***
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> *8.* ***"Law is otherwise settled that power of review can be vested in an authority only by law. Since the Act of 2016 does not contain any power of review, and the rectification is restricted to errors which do not extend to substantive amendment in the part of the order."***

20. Mistake 'apparent from the record', under Section 39 of Act, 2016, means an obvious, clear, and self-evident error visible from the existing record of the case, which does not require re-appreciation of evidence, re-examination of disputed facts, or a fresh adjudication on merits. The mistake that can be noticed merely by looking at the order, documents, or undisputed facts already available on record.

21. Section 39 of Act, 2016 is akin to the principle embodied **in Section 152 of Code of Civil Procedure, 1908,** which provides correction of clerical arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission. The object of both provisions is to rectify errors 'apparent on the face of the record' and not to alter or modify the substantive part of the original order. 'Substantive part of an order' refers to operative, binding, and enforceable core of a court's decision. It determines the rights, liabilities, reliefs, obligations of the parties. In other words, it is decision of a case and not an incidental observations recorded by the court.

22. The exercise of powers under the provisions is confined to correcting ministerial or clerical mistakes of the Court and does not extend to passing fresh or effective judicial orders after the pronouncement of the judgment, decree, or order. It is well settled that after passing of the judgement, decree or order, court or tribunal, becomes functus officio and thus being not entitled to vary the terms of the judgments, decrees and orders earlier passed. The powers under Section 152 of the Code of Civil Procedure and Section 39 of the Act of 2016, are limited in scope and cannot be equated with the power of review of the principal order on merit upon re-appreciation of evidence. A review is by no means an appeal in disguise whereby erroneous decision is reheard and corrected. **[Refer: Tungabhadra Industries Ltd Vs. Government of Andhra Pradesh, AIR1964SC1372]**

23. In ***Dwaraka Das Vs. State of Madhya Pradesh And Anr, (1999) 3 Supreme Court Cases 500,*** Hon'ble Supreme Court, while examining the scope of Section 152 of the Code of Civil Procedure, held that the provision is limited to correction of clerical or arithmetical mistakes or accidental slips and does not permit alteration of the substantive part of a judgment, decree, or order. It was further held that once a judgment is passed, the Court becomes functus officio and cannot modify its decision under the guise of correction. Any error on merits must be challenged by way of appeal or review if provided by the statute. Para 6 of the judgement is extracted:

> ***"6****. Section 151 C.P.C. provides for correction of clerical arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission. The exercise of this power contemplates the correction of mistakes by the Court of its ministerial actions and does not contemplate of passing effective judicial orders after the judgment, decree or order.* ***The settled position of law is that after the passing of the judgment, decree or order, court or the tribunal becomes functus officio and thus being not entitled to vary the terms of the judgments, decrees and orders earlier passed.*** *The correction contemplated are of correcting only accidental omission or mistakes and not all omissions and mistakes which might have been committed by the Court while passing the judgment, decree or order. The omission sought to be corrected which goes to the merits of the case is beyond the scope of Section 152 for which the proper remedy for the aggrieved party is to file appeal or review application.* ***……No Court can under the cover of the aforesaid sections modify, alter or add to the terms of its original judgment, decree or order."***

24. In the facts of present case, after passing of the decree dated 24.01.2020, respondent promoter filed an application under section 39 of Act, 2016 seeking rectification of the amount deposited by the appellant allottee.

Pursuant thereto, vide order dated 06.01.2021, the amount was rectified and determined at Rs.31,00,000/-. The appellant does not dispute the amount. Subsequently, being aggrieved by the rectified amount, respondent again preferred a second rectification application, which was rightly dismissed vide order dated 19.07.2021 by the learned Regulatory Authority being not maintainable. Thereafter, respondent promoter filed yet another application seeking recall/rectification of the said order. The Regulatory Authority entertained the recall/rectification application, and after hearing the parties, passed the impugned order dated 06.04.2022, whereby, the amount to be refunded by the respondent promoter was altered and reduced at Rs.18,12,000/-The Regulatory Authority committed an error in passing the impugned order, as the same was beyond the scope and ambit of Section 39 of Act, 2016. It was not open to the Regulatory Authority, at the stage of rectification, to re-examine/review the matter on merits and pass an order substantively altering the original order. By virtue of Section 39 of the Act, 2016, Regulatory Authority is empowered only to rectify, "mistakes apparent on the face of the record", including, clerical, arithmetical, or factual errors brought to its notice by the parties. Any alteration in substantive part of the decree, upon contest, and reappraisal of evidence would amount to review or modification of the judgment, which is impermissible in the absence of an express statutory provision conferring such power upon the Regulatory Authority.

25. The impugned order, therefore, having been passed by Regulatory Authority was beyond jurisdiction, authority and powers conferred on the Regulatory Authority under Section 39. The application was not maintainable being in the nature of a review petition. The order, therefore, is unsustainable in the eyes of law. **Question no.1 is accordingly answered.**

Question No. 2

26. It is an admitted fact that the appellant, allottee, had paid Rs.15,00,000/- on 01.05.2012 and Rs. 16,00,000/- on 09.04.2015, to the respondent/promoter towards allotment of a unit in the project of the respondent. However, no unit was allotted to the appellant at that stage. It was only on 08.10.2017 that the respondent, allotted a unit to the appellant in a different project. The said project was to be completed on or before 30.04.2019, however, possession of the unit was not handed over to the appellant/allottee by the said due date. The appellant was entitled to withdraw from the delayed project and demand refund of his/her deposit in terms of Section 18(1) of Act, 2016.

27. **Section 18 (1) of Act, 2016 is extracted-**

Section 18(1):

> *"(1)* ***If the promoter fails to complete or is unable to give possession of an apartment, plot or building,—***
>
> *(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or*
>
> *(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,*
>
> ***he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:***

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

28. Under sub-Section (1) of Section 18, the timeline for the allottee to raise a demand/withdrawal from the project is incorporated under the provision itself. It is mandated that in case the promoter 'fails to complete' or 'is unable to give possession' of an apartment, plot or building, as the case may be, the promoter shall be liable on demand of the allottee, in case the allottee wishes to withdraw from the project, to **return** the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf, including, compensation in the manner as provided under the Act. In the event completion of the project or possession of the unit, being offered to the allottee by the promoter belatedly, proviso to Section 18(1) would become operative i.e. such an allottee, who has continued in the delayed project, would be entitled to interest on his deposit for the period of delay till handing over possession of the unit. The expression '**shall'** makes the proviso to Section 18(1) mandatory.

29. The primary contention made by the learned counsel for the respondent promotor is that the initial amount deposited by the appellant allottee was not towards consideration/allotment of the unit, but was in the nature of capital investment made in the business of the respondent. It is further submitted that only a part of the said amount was subsequently adjusted towards allotment of the unit. In other words, the deposit at Rs. 31,00,000/- is not being disputed by the respondent. It is, however, urged that the deposit was a commercial investment.

30. The submissions made by the learned counsel for the respondent promotor lacks merit. The appellant paid Rs.31,00,000/- towards allotment of a unit in the project titled, "Ram Raghu Ananda." However, no unit was allotted to the appellant in the said project. Subsequently, respondent promotor allotted a unit in a different project by partially adjusting Rs. 18,12,000/- from the total amount paid by the appellant. On query the learned counsel failed to show from the record that the investment was commercial and not for the allotment of an unit. The nature of alleged investment being commercial is a question of fact. The respondent has not laid foundation in the pleadings and failed to substantiate the submission, from the evidence brought on record that the deposit made by the appellant was commercial investment. It is settled principle of law that questions of fact cannot be raised by way of arguments without specifically pleading the facts duly supported by evidence. In the circumstances, the promotor at this stage cannot be allowed to contend that the amount was not paid towards the allotment of the unit.

31. In the present case, it is evident that respondent promoter did not allot any unit to the appellant in the project against which the payments were originally made. Subsequently, respondent promoter allotted a unit in a different project to the appellant/allottee. The said project was to be completed on or before 30.04.2019, however, possession of the unit was not handed over to the appellant/allottee by the said due date. The appellant/allottee cannot be made to wait indefinitely for possession of the allotted unit. The respondent promoter having committed default in not providing a unit in the original project, subsequently, in not handing over possession of the unit allotted in the alternate project, within the stipulated time, is clearly in default. Accordingly, appellant/allottee is entitled to refund of the amount at Rs. 31,00,000/- deposited by him/her, along with, interest thereon at the prescribed rate in terms of Section 18 of Act, 2016.

32. Further, respondent promotor admittedly has not assailed the principal order dated 24.01.2020 (decree), duly rectified on 06.01.2021, passed by the Regulatory Authority, whereby, the rights of the appellant allottee was determined and the liability of the respondent promotor crystallized. The said order (decree) has, therefore, attained finality and remains binding upon the parties. Since the principal order has not been assailed in accordance with the law, the respondent cannot be permitted to re-open the merits of the case by filing repeated recall/rectification applications. The appellant would be entitled to refund of the deposited amount and interest thereon in terms of the decree. **Question no. 2 is accordingly answered.**

33. Having due regard to the facts and circumstances of the case and for the reasons assigned herein above, the appeals are **allowed,** by passing the following orders:

(i) The impugned order dated 06.04.2022, passed in complaint no. LKO118/06/0695/2019; LKO118/06/0625/2019; and LKO118/06/0633/2019 by the Regulatory Authority is set aside and quashed.

(ii) The appellant/complainants shall be entitled to refund of Rs. Rs.31,00,000/-; Rs.55,00,000/-; and Rs.1,15,00,000/-, respectively, along with interest at MCLR+1 percent, pursuant to judgement and order dated 24.01.2020 (decree) rectified vide order dated 06.01.2021, till the date of payment, by the respondent.

(iii) The applications filed by the respondent in the above complainants under Section 39 of Act 2016, is rejected, being not maintainable.

(iv) The amount shall be paid by the respondent within 45 days from the date this order is uploaded on the portal.

(v) No order as to costs.

(Rameshwar Singh) (Sanjai Khare) (Suneet Kumar)

Dated: 12.05.2026
PRADEEP/SANYA