IN THE ODISHA REAL ESTATE APPELLATE TRIBUNAL AT BHUBANESWAR

OREAT Appeal No. 185/2024

(Arising out of C.C. No. 42 of 2020)

Shri Shyam Kayal **...Appellant**

-Versus-

1)Smt. Madhushree Kejriwal

2)Secretary, Odisha Real Estate Regulatory Authority, Bhubaneswar. **...Respondents.**

For the appellant	:	Mr. S.S.Mohanty, Advocate
For respondent no.1	:	Mr. P.P.Mohanty, Advocate
For respondent no.2	:	Mr. B.Nayak, Advocate

CORAM :

Shri S.K.Rajguru, Judicial Member

Dr. B.K.Das, Tech./Admn. Member

O R D E R

27. 07.2026

The appeal is taken up for final order.

2) Order dated 17.10.2024 passed by the Odisha Real Estate Regulatory Authority (hereinafter referred to as learned ORERA) in Complaint Case No.42 of 2020 is under challenge in this appeal. The appellant was the only respondent in the said complaint case and the present respondent no.1 was the complainant therein. The respondent no.2 of this appeal is the learned ORERA. Prayer has been made in this appeal to set aside the impugned order dated 17.10.2024 passed in CC No.42 of 2020 and to pass any other order as deemed fit by this Tribunal.

3) Facts and circumstances leading to the filing of this appeal are as follows :

In the aforesaid complaint case the present respondent no.1 being the complainant had challenged the letter dtd. 7.1.2020 issued by the respondent-promoter whereby the allotment of Flat no.3-A in the third floor of the project "SOLITARE", a residential apartment at Rourkela, Odisha, was unilaterally cancelled by the respondent-promoter. The complainant alleged that the cancellation of the flat allotted to her was made even though there was no clause in the sale agreement dtd. 19.2.2019 providing for such cancellation. The complainant further alleged that the respondent-promoter had developed the project having more than eight flats on a land of more than 500 square meters area. The complainant claimed that on the date of commencement of the R.E. (R&D) Act, 2016 the project had neither been completed nor the promoter had obtained the completion certificate. Agreement for sale relating to the flat in question was signed by the complainant and the respondent-promoter on 19.2.2019. Consideration price for the flat measuring 2396 square feet was agreed to at Rs.77,27,100/- besides the GST and registration charges. The complainant paid an amount of Rs.15,48,000/- towards part payment for the flat and agreed to pay the balance sum of Rs.61,79,100/- with GST and registration charges. The respondent-promoter undertook to complete the construction of the project building and make it ready to move within five months from the date of sale agreement and on the receipt of the full and final consideration amount from all the intending purchasers. It was agreed between the parties that in the event of delay in payment by any of the purchasers, the time period of completion of construction the project shall be extended for a reasonable period like 30 to 45 days. It is further agreed that in the event of failure of the deal from the side of the respondent-promoter the complainant shall be at liberty to take refund of the money given by her in advance with an interest of 18% per annum or claim compensation and in the event of delay in payment of the consideration amount by the complainant, the respondent-promoter shall be entitled to realize the defaulted amount along with same rate of interest i.e. 18% per annum. The complainant claimed that, as on 31.5.2019, on availing housing loan from the SBI, Rourkela, she had paid a total amount of Rs.82,28,334/- to the respondent-promoter out of the agreed consideration amount and GST charges. The complainant further alleged that on her request the SBI, Rourkela had granted her an amount of Rs.40,00,000/- towards housing loan, but inspite of the said amount being credited to the account of respondent-promoter, he did not issue the 'No Objection Certificate'. Even when the SBI, Rourkela wrote a letter to the respondent-promoter on 19.6.2019 to complete the mortgage related formalities within 15 days by obtaining the required NOC from his financer, no response was received from the respondent-promoter. On 21.8.2019 the SBI, Rourkela again wrote a letter to the respondent-promoter stating that inspite of the lapse of a period of more than four months he had neither closed his cash credit account nor submitted any NOC from his banker for creation of mortgage within the stipulated period and issued a warning to close the account of housing loan sanctioned in favour of the complainant. The complainant further alleged that at the time of execution of agreement for sale dtd. 19.2.2019 the respondent had not disclosed about his availing loan from SBI, Rourkela or any other bank or financial institution on mortgaging the project land. Rather in his letter dtd. 31.3.2019 he had assured the complainant and the SBI, Rourkela to complete the formalities relating to the mortgage of the property for a loan of Rs.4.50 crores within a period 30-45 days. On 21.11.2019 the complainant wrote a letter to the respondent requesting him for completion of the work and settlement of dispute with the bank to get the NOC so that she can pay the balance amount for registration of the flat allotted to her. On 18.12.2019 the complainant wrote a letter to the SBI, Rourkela requesting to take necessary steps for registration of the property and not to charge interest/penalty till handing over of the property. On 23.12.2019 the complainant again wrote a letter to the respondent to get the NOC from the bank and intimate her so that she can pay the balance amount as per the agreement for sale to get the flat registered in her name without further delay. On 30.12.2019 the SBI, Rourkela intimated the complainant through a letter that the respondent had closed the cash credit limit of Rs.4.50 crore on 17.12.2019 and advised her to contact the respondent for registration of the property. Subsequently on 7.1.2020 the respondent wrote a letter to the complainant cancelling the allotment of the flat in question and requested her to collect the money paid by her from his office within 7 days. Again on 27.1.2020 the respondent intimated the complainant that he had refunded an amount of Rs.82,60,308/- through RTGS as she maintained a complete silence in the matter. In response to the said correspondence the complainant wrote a letter to the respondent on 1.2.2020 denying all the allegations made against her and alleging that the cancellation of flat allotted to her was malafide, illegal and arbitrary. Alleging that the respondent's signing the agreement for sale with her on 19.2.2019 inspite of mortgaging the project land to the SBI, Rourkela for a loan of Rs.4.50 crores is an act of intentional cheating, the complainant lamented that apart from availing a housing loan of Rs.40,00,000/- from the SBI, she had also to take loan from her friends which she has been paying till now with huge interest. The complainant further alleged that the project has not yet been registered under the R.E. (R&D) Act, 2016 inspite of the fact that the area of the project land exceeds 500 square meters and sale of apartments in the project had already begun. Rejecting the allegation made by the respondent-promoter that there was delay on her part to make payment of consideration money, as baseless, the complainant alleged that inspite of there being no clause in the agreement for sale regarding cancellation of the flat allotted to her and she was liable to pay only the balance 5% of the cost of the project at the time of registration of sale deed, the respondent illegally and arbitrarily cancelled the allotment of the flat in question in her favour and also refunded the amount paid by her to her bank account through RTGS. With the aforesaid claims and allegations, the complainant prayed to set aside the cancellation of the flat allotted in her favour vide the letter dtd. 7.1.2020 and to direct the respondent to register the sale deed in respect of the flat in her favour with delivery of its possession.

As notice issued to the respondent was found to be served on him in his email address and he was found absent, the learned ORERA set him exparte vide order dtd. 31.3.2021, but on the very date the respondent emailed the learned ORERA praying for 2 to 3 months time for hearing on the ground that he was suffering from Corona. Thereafter, the case was adjourned from time to time on account of the COVID-19 situation. The respondent entered his appearance through his counsel on 13.9.2021 and prayed for time. After three adjournments, the complaint case was heard from both the sides on 22.12.2021 when show cause was still not filed by the respondent. The learned ORERA allowed the complaint case vide order dtd. 21.1.2022 declaring the cancellation of allotment of the flat at the instance of the respondent as illegal with a direction to the respondent to execute a sale deed in respect of the allotted flat in favour of the complainant on receiving the consideration amount as stated in the agreement. Direction was also made to the complainant to pay the entire consideration amount payable to the respondent as per the terms of the agreement so as to enable the respondent to execute a sale deed in her favour in respect of the allotted flat. Both the parties were directed to comply with the aforesaid order within a period of two months and it was made clear that in the event of failure on the part of the parties to comply with the order the same shall be enforced as per law.

The respondent-promoter being aggrieved with the order dtd. 21.1.2022 preferred Oreat Appeal No.47 of 2022 before this Tribunal wherein he contended inter alia that he could not file relevant documents in support of his plea that the project in question had not more than eight flats and therefore the R.E. (R&D) Act was not applicable to it in view of Sec. 3 (2) (a) of it. The respondent no.1-allottee contested that appeal with the contentions that the appellant had not taken the plea of non-applicability of the R.E. (R&D) Act to the project because of its not having more than eight flats in the show cause to the complaint and had failed to file any document in support of his case inspite of repeated opportunities. This Tribunal vide order dtd. 3.5.2023 on finding that the respondent had not filed any document in support of his case set aside the order dtd. 21.1.2022 of the learned ORERA and remitted the complaint case back to it to consider it afresh after giving opportunity of hearing to both the parties. Liberty was given to the parties to file further documents in support of their respective cases with a direction to the learned ORERA to consider the same as per their own merit in accordance with law.

Pursuant to the order dtd. 3.5.2023 of this Tribunal in Oreat Appeal No.47 of 2022 as aforesaid, the respondent through his counsel filed his written objection to the complaint denying the allegations made by the complainant against him. The respondent claimed that the complaint case is prima facie not maintainable before the learned ORERA in view of the fact that the project consisted of only eight flats and therefore was not required to be registered with the ORERA u/sec. 3 (1) of the R.E. (R&D) Act in view of its specific provision u/sec. 3 (2) (a). The respondent further claimed that section 11 (5) of the Act does not apply to him as he is not a promoter. The respondent pointed out that the complainant had not paid an outstanding of Rs.4,26,018/- and so he was at liberty to cancel the allotment. The respondent claimed that, though vide letter dtd. 7.1.2020 he had given reasonable opportunity to the complainant, but she did not respond and accordingly the amount paid by the complainant along with interest (Rs.82,60,308/- in total) was refunded back to her without any cancellation charge. The respondent claimed that even in absence of a clause in the agreement for sale relating to cancellation of the flat in question the allotment can be cancelled without assigning any reason in case of a private commercial transaction and this has found support from the decision of Hon'ble Delhi High Court in the case of Rajasthan Breweries Ltd. Vrs. The Stroh Brewery Company reported in 2000 SCC Online Del-481. The respondent further claimed that the complainant had no right to demand for the specific performance of agreement for sale dtd. 19.2.2019 as she had received the entire amount deposited by her with interest without any deduction and so far neither claimed any compensation nor entitled to it. The respondent further claimed that as the agreement for sale dtd. 19.2.2019 did not put an obligation on him to provide any NOC he was not under a contractual or legal obligation to provide the same. The respondent further claimed that as the complainant was given a reasonable time in the notice dtd. 7.1.2020 and had responded only after the amount was refunded to her, the cancellation of the allotment of the flat in question was neither malafide nor arbitrary. The respondent further contended that he having taken a cash credit from the bank for construction of the project as a standard marketing practice and having refunded back the entire amount paid by the complainant with interest, is no way liable for the loans incurred by the complainant either from the bank or from her friends. Justifying his receiving part payments from the complainant in respect of the flat in question the respondent contended that the same were necessary for a security towards allotment of the flat. The respondent claimed that after the project was completed the complainant not only defaulted in payment but also actively spread rumours about the project and instigated other purchasers to commit default and due to this disturbance created by the complainant, it was necessary on the part of the respondent to cancel the allotment of the flat in question in her favour. Inspite of being informed by the respondent about his intention to cancel the allotment of the flat in question through letter dtd. 7.1.2020 the complainant did not give any reply to it and responded only after the amount of Rs.82,60,308/- was refunded back to her through RTGS. With the aforesaid submissions, the respondent prayed to dismiss the complaint case.

The learned ORERA after taking into consideration the pleadings of the parties and the documents filed by them in support of their respective pleas and also on hearing the parties passed the impugned order dtd. 17.10.2024 directing the respondent to demolish the illegal construction made on the terrace of the fourth floor of the project which violated the agreement for sale between the parties, to hand over the physical possession of the flat in question i.e. Flat No.3-A in the third floor of the project, measuring 2396 square feet, to the complainant on receiving the consideration amount of Rs.82,28,334/-. The learned ORERA also directed the complainant to pay the aforesaid amount to the respondent within two months of the order. It was further directed that on payment of the said amount by the complainant the respondent shall execute the registered conveyance deed in favour of the complainant. Both the parties were directed to comply with the directions within a period of two months from the date of the order and it was made clear that, in the event of their failure, the same shall be enforced as per law.

4) In the hearing of the appeal, the learned counsel for the appellant submitted that, though the learned ORERA in the impugned order dtd. 17.10.2024 has mentioned that there are eight flats in total in the project and the same does not require any registration u/sec. 3 (1) of the Act, still direction to the appellant to execute the registered conveyance deed in respect of the flat in question together with handing over of its physical possession on receipt of consideration amount of Rs. 82,28,334/- from the respondent no.1 has been made and therefore the impugned order suffers from great illegality. It is further contended that though the agreement for sale between the appellant and the respondent no.1 did not contain a cancellation clause, but the transaction being a private commercial one and the respondent no.1 having failed to pay the balance amount of Rs.4,26,018/- the appellant was entitled to cancel the agreement after the respondent no.1 did not respond to the reasonable notice issued by the appellant on 7.1.2020. The learned counsel for the appellant has accordingly made the prayer as mentioned earlier in paragraph-2.

5) On the other hand, the learned counsel for the respondent no.1 has stuck to the claims and allegations made by the respondent no.1 in her complaint before the learned ORERA. Emphasizing on the fact that the respondent no.1 had already paid a total amount of Rs. 82,28,334/- as against the agreed consideration price of Rs.77,27,100/- plus GST charge and that the appellant had suppressed the fact of his taking a loan of Rs. 4.50 crores from the banker i.e. S.B.I.,Rourkela on mortgaging the project land, the learned counsel for the respondent no.1 has submitted that the respondent no.1 having never defaulted in payment of the consideration amount in respect of the flat in question and also having incurred a loan liability of more than Rs.40,00,000/- has suffered a lot due to the illegal and unilateral cancellation of the flat allotted to her. Disputing the appellant's contention that the project is having only eight flats the learned counsel for the respondent no.1 has asserted that the illegal structure on the terrace of the fourth floor of the building which has been ordered to be demolished by the learned ORERA clearly shows that the number of the proposed flats in the project was more than eight and therefore the project was under the fold of the R.E. (R&D) Act. Reiterating the claim that, the cancellation of the allotment of the flat allotted to the respondent no.1 is illegal for being not in accordance with the agreement for sale dated 19.2.2019 and terming the impugned order dtd. 17.10.2024 of the learned ORERA passed in C.C. No. 42 of 2020 to be correct as per law and facts on record,

the learned counsel for the respondent no.1 has prayed for dismissal of the appeal for being without any merit.

6) Anneuxre-1 of the complaint case shows that permission u/sec. 16 (3) of the Odisha Development Authorities Act, 1982 for construction of the S+4 storied project in question was granted by the Rourkela Development Authority in favour of the appellant vide No.3302/RDA dated 2.11.2016. The permission was valid for a period of three years with effect from the date of issue i.e. till 1.11.2019. Annexure 'A' series relied on by the appellant and filed along with his written show cause to the complaint comprises two documents i.e. copy of the completion certificate in respect of the project in question and the approved building plan. Completion certificate issued by Architect Arijit Sarkar on 18.7.2019 shows that the project in question was completed under his supervision on 29.6.2019 in respect of all the eight (8) flats as per the aforesaid Building Approval No.3302 dtd. 2.11.2016. However, the Building Approval under Annexure-1 though shows the area of the project plot to be 5400 square feet which is more than 500 square meters, but the number of dwelling units in the S+4 storied project building has not been mentioned therein. The specified tabular column for the number of dwelling units under Sl.no. 1 (parameters) is found to be blank in respect of all the four floors. So the copy of the completion certificate filed by the appellant showing a total of eight flats in the project finds no support from the copy of the building approval. In this context, the report

dated 4.1.2024 of Sri D.K.Satpathy, Enforcement Officer of the ORERA on his physical inspection of the project on 29.12.2023, made in pursuance of the order dtd. 9.10.2023 of the learned ORERA in the complaint case, is significant. In this report, the Enforcement Officer has categorically mentioned that, there are 8 flats in total in the S+4 apartment building (2 flats in each of the four floors) and all were found to be occupied by the flat owners since long. The ground floor had been furnished well with sufficient space for parking of vehicles. There was a lift, a staircase and an office room in the ground floor. DG set, STP and fire safety equipments had been installed in the apartment building. The report of the Enforcement Officer further reveals that he observed an under construction house of approximately 1500 square feet on the terrace of the building. The report of the Enforcement Officer further reveals that, the promoter, present at the time of his physical inspection of the project, had explained him that, he had started the said construction on the terrace as per request of flat owners who had also paid additional cost for the same after taking possession of their flats. The promoter further stated that the construction was however had been stopped since long and the remaining work would be completed after obtaining the revised approved plan from the competent authority. With regard to the partially constructed structure on the terrace, the Enforcement Officer has categorically mentioned that, construction of a flat on the terrace could not be decided at that stage of construction as that can be known only after viewing the finished house.

The above mentioned report dtd.4.1.2024 of the Enforcement Officer, which is not disputed by either of the parties, supports the certification of the Architect in the completion certificate dated 18.7.2019 that he had supervised the development of 8 flats in total on the project land that the same were completed on 29.6.2019. The contents of the completion certificate dated 18.7.2019 are found to be in accordance with those of the prescribed format i.e. FORM-XIV (Completion Certificate to be issued by Accredited person) under the Odisha Development Authorities (Common Application Form) Rules, 2016 which came into force from the date of their publication in the Odisha Gazette i.e. 4.10.2016, which was in force on the date of completion of the project i.e. 29.6.2019 as per the completion certificate. It is notable that the completion of the project after the commencement of the R.E. (R&D) Act is a fact admitted by the appellant which is evident from the copy of the completion certificate relied on by him. So, even if the building approval dtd 2.11.2016 issued by the Rourkela Development Authority in respect of the project did not mention about the number of dwelling units, but the completion certificate dtd. 18.7.2019 in respect of the project which certifies the development and completion of a total of 8 flats therein, certainly finds support from an independent piece of evidence in the form of inspection report dtd. 4.1.2024 of the Enforcement Officer of the

ORERA and hence accepted as reliable. Since the project approved by the Rourkela Development Authority is a S+4 one and it is found by the Enforcement Officer on physical inspection that there were eight flats in total with two flats in each of the four floors, the partially constructed structure on the terrace of the fourth floor is certainly not an additional proposed flat in the project.

The main plea of the appellant in assailing the impugned order dtd. 17.10.2024 is that, the project having only 8 flats is not under the fold of the R.E. (R&D) Act in view of Sec. 3 (2) (a) of it. This provision says as follows :

> Sec. 3(2) -: Notwithstanding anything contained in sub-section (1), no registration of the real estate project shall be required—
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> (a) where the area of land proposed to be developed does not exceed five hundred square meters or the number of apartments proposed to be developed does not exceed eight inclusive of all phases:
>
> Provided that, if the appropriate Government considers it necessary, it may, reduce the threshold below five hundred square meters or eight apartments, as the case may be, inclusive of all phases, for exemption from registration under this Act;

A plain reading of the above mentioned statutory provision makes it clear that, a real estate project with not more than 500 square meters land area or not more than 8 apartments including all its phases will not require registration u/sec. 3 (1). This further means, a real estate project with more than 500 square meters land area but not more than 8 apartments will not require registration with the ORERA. Similarly, a real estate project with more than 8 apartments but having not more than 500 square meters land area will not require registration with the ORERA. Therefore, the project in question though has been developed on a land area of 5400 square feet, which is more than 500 square meters, but having been found to contain eight completed flats, all occupied by their respective owners, certainly does not require registration u/sec. 3 (1) of the R.E. (R&D) Act in view of Sec. 3 (2) (a). The Act is therefore not applicable to the project.

The learned ORERA in the impugned order dtd. 17.10.2024 has though taken note of the report dtd. 4.1.2024 of the Enforcement Officer, wherein it has been mentioned that there are 8 flats in the project and the same does not require registration u/sec. 3 of the Act, but has not made any discussion on the said fact of the report and has also not arrived at any finding as to whether the project inspite of having eight flats in total will come under the fold of the Act or not. After remand of the complaint case for fresh hearing, it was the main plea of the appellant that the project having eight flats in total, the complaint case filed before the ORERA was not maintainable in view of Sec. 3 (2) (a), but surprisingly the learned ORERA has not dealt with this very important issue at all instead went on to pass the impugned order.

7) The project having been held to be not under the fold of the R.E. (R&D) Act, the complaint case no.42 of 2020 filed by the respondent no.1 before the learned ORERA u/Sec. 31 (1) of the Act, is not maintainable. In view of this, the prayer of the respondent no.1 to set aside the appellant's cancelling the allotment of the flat in

question to her being a relief under the proviso to Sec. 11 (5) of the Act and other consequential reliefs, could not have been granted by the learned ORERA. The impugned order dtd. 17.10.2024 passed in Complaint Case No.42 of 2020 is therefore set aside. Resultantly, the appeal is allowed on contest against the respondents.

Send a copy of this order together with the record of Complaint Case no.42 of 2020 to the learned ORERA for information and necessary action. Also provide a copy of the order, each to the appellant and the respondent no.1.

Shri S.K.Rajguru
(Judicial Member)

(Dr. B.K.Das)
(Tech./Admn. Member)

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