

**REAL ESTATE REGULATORY AUTHORITY
HIMACHAL PRADESH**

Complaint No: HPRERA2024005/C

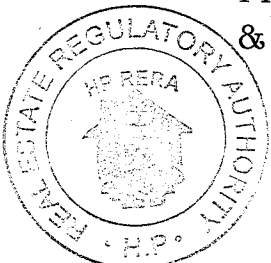
In the matter of:-

- 1 Sh. Anirudh Sood , son of Vijay Sood, resident of Flat No.102, Shimla Royal Residency, Village Dochi, Tehsil & Distt. Shimla, H.P.
- 2 Smt. Anjana Chauhan wife of Narbir Singh Chauhan, resident of Flat No. 202, Shimla Royal Residency, Village Dochi, Tehsil & Distt. Shimla, H.P.
- 3 Smt. Santosh Rana wife of Sh. Jagdish Singh Rana, resident of Flat No.401, Shimla Royal Residency, Village Dochi, Tehsil & Distt. Shimla, H.P.
- 4 Sh. Virender Kumar, resident of Flat No. 103, Shimla Royal Residency, Village Dochi, Tehsil & Distt. Shimla, H.P.
- 5 Smt. Darshana Devi, wife of Sh. Gurmail Singh, resident of Flat No. 303, Shimla Royal Residency, Village Dochi, Tehsil & Distt. Shimla, H.P.
- 6 Shiwani Thakur, wife of Rahul Vij, resident of Flat No.302, Shimla Royal Residency, Village Dochi, Tehsil & Distt. Shimla, H.P.
- 7 Smt. Jyotsna Parmar, wife of Sh. Chandan Parmar, resident of Flat No.104, Shimla Royal Residency, Village Dochi, Tehsil & Distt. Shimla, H.P.

.....**Complainant(s)**

Versus

- 1 Sh. Gurpreet Singh, son of Sh. Jaswant Singh, resident of Flat No.403, Ivory Tower, Sector 70, Mohali, Punjab-140307. Promoter Shimla Royal Residency.
- 2 Promila Bhardwaj, wife of Sh. Bharatindu, resident of Village Joginder Nagar, Distt. Mandi, H.P. presently residing at Ground Floor Flat No.103, Shimla Royal Residency Village Dochi, Tehsil & Distt. Shimla, H.P.



- 3 Department of Town and Country Planning, Himachal Pradesh, through its Director; Yojna Bhawan, Block No.32A, SDA Complex Vikas Nagar, Shimla 171009, Himachal Pradesh
- 4 Sub- Registrar Shimla (Rural), H.P.

.....Respondent(s)

Present: Sh. Abhishek Rana, Ld. Counsel for complainants Sh. Anirudh Sood, Smt. Anjana Chauhan, Smt. Santosh Rana, Sh. Virender Kumar, Smt. Darshana Devi, Shiwani Thakur and Smt. Jyotsna Parmar

Sh. Vikas Rathore, Ld. Counsel for respondent no.1 Sh. Gurpreet Singh

Sh. Abhishek Banta Ld. Counsel for respondent no.2 Smt. Promila Bhardwaj

None for Respondent no. 3 & 4

Date of hearing:15.05.2024

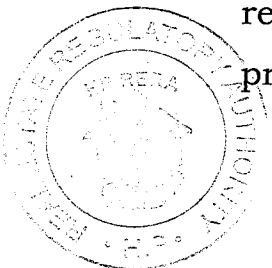
Date of pronouncement of order:19.06.2024

Order

Coram: Chairperson and Member

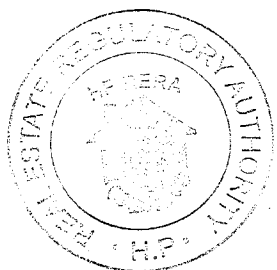
Facts of the Case:-

- 1 Brief facts giving rise to the present complaint are that the complainants are allottees as per section 2(d) of The Real Estate Regulation and Development Act 2016 in the residential project named 'Shimla Royal Residency' situated at Village Dochi, in Khata No.30/15, Khatoni No.69/90, KHASRA No. 131, Tehsil & Distt. Shimla H.P. which is a RERA registered Project bearing registration No. RERAHPSHP08200082. The respondent no 1 is promoter of the project and has sold to respondent no.2, roof



area, terrace along with entire roof rights of the project in question. It was further pleaded that respondent no 3 i.e. The Department of Town and Country Planning is a necessary party for adjudication of the present complaint, as it can provide the details/documents of approvals earlier given to respondent No.1 and subsequent changes in layout plans/approvals, if any allowed by it and the procedure adopted by it for permitting such changes. It was alleged that the respondent No.2 has started unauthorized construction in the common roof of the building referred to as attic by the parties situated above the parking floor of the building and the copy of photographs of the on going unauthorized construction are appended with the complaint. Further it was pleaded that the attic is non saleable, non habitable area as per information obtained by it from the Himachal Pradesh Real Estate Regulatory Authority under Right to Information Act, 2005. It was further alleged that the construction in the attic (above the parking floor of the building) and terrace which were promised as common areas to all the allottees by Respondent no.1 and the real estate agent named Ajay Goel having RERA Registration no. RERAHPSHA10190049 and his employee Vipin Kumar are completely untenable in the eyes of law as no permission of 2/3rd of the allottees or any of the competent authorities has been obtained prior to that.

- 2 It was further pleaded that the respondent no.1 has illegally sold and the respondent No.2 has illegally purchased by way of execution of sale deed No.868, dated 23rd April 2023, an area which is above the parking floor of the building without appreciating its legal status. Further as per the information available on the official website of the Himachal Pradesh Real Estate Regulatory Authority, it has been clearly mentioned that

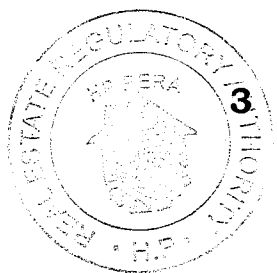


the total number of apartments to be sold are 16 and selling of common roof (attic) area as an extra 17th unit is unlawful and is a violation of the sanctioned map and layout of the said project. It was further pleaded that as per section 14(2)(ii) of The Real Estate (Regulation and Development) Act, 2016 the promoter shall not make any other alterations or additions in the sanctioned plans, layout plans and specifications of the buildings or the common areas within the project without the previous written consent of at least two-thirds of the allottees, other than the promoter who have agreed to take apartments in such building. It was further pleaded that the unauthorized selling and construction inside the attic above the parking floor is a clear violations Section 14(2)(ii) of the Act *ibid*. It was further pleaded that there are also structural and workmanship defects in the building which have resulted in water leakage from the terrace due to the construction going on in the attic which as a consequence has started damaging the roof of the parking floor and despite repeated requests from the allottees no repairs have been done by respondent no.1. The defect liability of the promoter is given under section 14(3) of the RERD Act, 2016. It was further pleaded that the respondent no.1 has violated Section 11(1)(b) of the RERD Act, 2016 which states that the promoter shall enter quarterly up to date list of numbers and types of apartments or plots, as the case may be booked. It was pleaded that the respondent no. 1 has not entered the sale of seventeenth unit on the website of the Himachal Pradesh Real Estate Regulatory Authority. It was further pleaded that the respondent No.1 has failed to perform his duties under Section 11(4)(e) which states that the promoter shall enable the formation of an association of allottees or society or co-operative

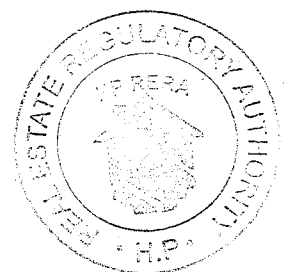


society of the allottees or a federation of the same. It was further pleaded that for failure of respondent no.1 to comply with the provisions of Section 11(l) (b) and Section 14(2)(ii) tantamounts to making a default. Further it was pleaded that false promises were made by the real estate agents Ajay Goel (RERA Registration No.RERAHPSHA10190049) and his employee Vipin which amounts to a clear violation of Section 10(c) of the Act. It was further pleaded that as per the map approved by the competent authority the total constructed area is 1437.42 sq mt out of which approved area is 1275.72 sq mts, which only includes the Ground Floor, First Floor, Second Floor, Third Floor and Fourth Floor which is parking place. This approval area does not include the attic and terrace. It was further pleaded that as per the approved map of the said project the provisions of solar heating system and photovoltaic panels on the roof top have been provided for the allottees. Moreover mummy over lift machine room is also in the attic by which a very clear inference can be drawn that the attic, the roof top and the terrace are common areas for all the allottees and giving exclusive rights to one particular allottee is unjust and unlawful. With these pleadings it was prayed to issue orders to respondent No.2 to stop the on going unauthorized construction in the attic with immediate effect. Further it was prayed that under Section 35 of the Act an inquiry and investigation relating to the matter may be got conducted by the Authority. Further it was prayed that respondent no.1 may be directed to fix all the structural and workmanship defects along with water leakage in the terrace area as soon as possible and to take strict actions against the respondents under the relevant provisions of this Act.

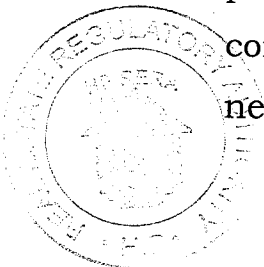
3 Reply by the respondent no.1-



It was pleaded that the present complaint deserves to be dismissed by the Authority as it has no jurisdiction to entertain and adjudicate upon the same as the complaint has been filed by individuals and not by the Association of allottees, as provided in the Act. It was further pleaded that the Authority has no jurisdiction in the present matter as it is a civil dispute. It was pleaded that the complaint also deserves to be dismissed on the ground that as per Town and Country Planning Act amendment, attic has been held to be a habitable area and the promoter has right to sell it as a separate unit. It was further pleaded that as per the notification of the Town and Country Planning Department of the State of H.P. dated 31.5.2023, it has been provided that the promoter can apply for attic as a unit by depositing the requisite fee, which has been mentioned in para 3(a) of the aforesaid notification. It was submitted that the respondent is ready and willing to deposit the fee immediately on the demand of the same by the concerned authority. It was further pleaded that the present complaint also deserves to be dismissed on the ground that the complainants themselves have completely violated the rules and regulation of the Department of Town and Country Planning. Some of the complainants have installed 2000 litres of water tank on the retaining wall replacing the tanks of 1000 litres which has increased load on retaining wall and may result in collapse of retaining wall. The complainants have already made altercation and encroachment in balconies etc. and also compelled the respondent no. 1 to build M.S Fabric platform over retaining wall to create extra parking space which was objected by the Town and Country Planning officials on their visit at the site. It was further pleaded that the present complaint has been filed just to harass and



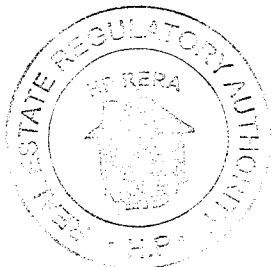
pressurise the respondents. It was further pleaded that the complainant no.3 is also running an unauthorized home stay in Flat No.101 without any authority, hence the requisite action is also required to be taken against her. Further it was pleaded that as per the sale deed executed between the complainants and respondent no. 1 there is no mention of attic to be used as common area. Moreover 'common areas' of the project have been specified in all the sale deeds and there is no mention of attic in the same. It was further pleaded that as per the notification of the Town and Country Planning Department dated 31.5.2023, it has been provided that the promoter can apply for attic as a separate unit by depositing the requisite fee which has been mentioned in para 3(a) of the aforesaid notification, hence it cannot be said that the same is unauthorized construction. It was further pleaded that the respondent no. 1 has already applied for considering the attic as a separate unit as per rules and is also ready and willing to deposit the fee immediately on the demand by the concerned authority as per the rules. It was further pleaded that the construction of the project has been done strictly as per the map approved by the authority concerned, hence it cannot be said that the replying respondent has sold the attic in question in violation of rules. It was further pleaded that the sale deed has rightly been affected by the respondent no. 4. Further it was pleaded that there is no violation of section 14 (2) (ii) of the RERD Act, 2016 as respondent no. 1 has right to alter or construct the attic as per rules / notification of the State Government. It was further pleaded that so far as the question of leakage from the terrace is concerned, the respondent no. 1 to his level best tried to do the needful but the complainants refused for the same, hence it



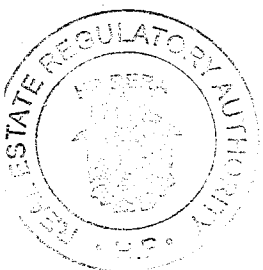
cannot be said that the respondent no. 1 has not taken any steps to stop leakage from the terrace. It was further pleaded that so far as the question of entering of 17 unit(s) is concerned the same has been applied before the authority concerned and same shall be entered on website of HP RERA immediately after approval of the same form the competent authority. It was further submitted that after the completion of building sale agreements were executed between the parties and there after possession was handover to each allottee. The attic was constructed along with the building and there after flats were sold to the complainants/allottees. It was further pleaded that the respondent no. 1 made several repeated requests to the complainants for the formation of association of allottees but no heed was paid by them. Hence respondent no. 1 prayed for dismissal of the complaint.

4 Reply on behalf of Respondent no.2-

It was pleaded that the present complaint deserves to be dismissed on the ground that it is not maintainable against the respondent no 2 as she was not the promoter but a purchaser of one of the flats in the building. It was further pleaded that this Authority has no jurisdiction to try the present matter as a lawful sale deed has been executed in favour of the respondent no. 2 by respondent no. 1 and only civil court has jurisdiction to cancel a sale deed. It was further pleaded that there is no provision under the RERD Act, 2016 to set aside any sale deed in respect of any property. It was pleaded that the plan of the entire building as it exists today is sanctioned from SADA, Shoghi, hence the present complaint is not maintainable. It was further submitted that in the respective sale deeds of the parties it was clearly mentioned that the terrace has not been kept



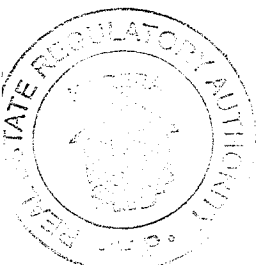
common and the same cannot be treated as common. It was further pleaded that the respondent no. 2 is also one of the allottee in the project as she had purchased a flat i.e. Flat no. 101 in ground floor of building in question. It was further pleaded that the map sanctioning authority is SADA Shoghi and not respondent no.3. It was submitted that the respondent no. 2 has not started unauthorized construction in the attic above the parking floor of the building. The photographs that have been annexed are not of the present time and have been concocted. It was denied that the said floor is non-saleable and non-habitable unit as per information obtained by the complainant from this Authority under RTI. It was further pleaded that the attic floor has always been the part of the building and the lift is up to the roof along with terrace floor. The roof as shown in the sanctioned drawing is also of the same height as it is existing today. The Government of HP has made existing attics as habitable vide notification dated 31.5.23. The replying respondent purchased the same in view of the said decision of the Government of HP. It was further pleaded that the respondent no. 1 had every right to sell the same. It was denied that the attic and terrace above the parking floor were promised to be common areas for all the allottees. The necessity of two-thirds permission of allottees applies only when anything is being constructed, which is not the case with the current structure. It was further pleaded that plan as submitted to this authority has not been in any manner modified and this fact can be verified by checking the sanctioned plan as the height of the building has not been increased. It was submitted that the attic had been existing earlier also as it is today but it has been made habitable and the respondent no. 1 is ready and willing to pay the charges as per rules and



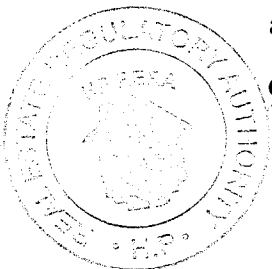
regulations of the same. It was further pleaded that section 14(2) (ii) of Real Estate Regulation and Development Act 2016 has not been violated in any manner. With these pleadings it was prayed that the complaint may be dismissed.

5 Rejoinder by the complainant-

In rejoinder it was pleaded that the complaint was filed by the present complainants seeking interim direction/orders from the Ld. Authority to stop respondent No.2 from carrying out unauthorized construction in the attic and also designate the same to be common area and further to direct the respondent no. 1 to redress all the structural and workmanship defects, water leakage in the terrace area. It was submitted that the Authority is vested with the powers to issue interim orders, directions and even to impose penalty or interest in regard to any contravention of obligations cast upon the promoters or the allottees under The Real Estate (Regulation and Development) Act, 2016. It was further pleaded that the complainants have approached this Authority to restrain respondent no.2 from carrying out unauthorized construction in the attic and restore its status as a common area which is a non saleable and non habitable unit as per the approved sanctioned plans/maps of the said project/building. There is no mention on the part of complainants to set aside the disputed sale deed and no such relief is sought from the Ld. Authority. The primary contention put forth by the complainants is regarding the illegal sale deed and unauthorised construction in the attic above the parking floor of the building and the moot question involved in the present issue is whether the attic is a common area. Furthermore, as per Section 2(n)(ii) of the RERD Act, 2016 the stair cases, lifts and as per Section 2(n)(iii) of the Act ibid



“terraces” are common areas and the attic which is a non saleable and non-habitable unit which also connects internal common staircases and terraces both of which are common areas. It was further submitted that the notification of the State Government dated 31.5.2023 which allows the use of attic for habitable use is not applicable to the concerned project as the said project is registered with the Himachal Pradesh Real Estate Regulatory Authority which make it necessary to be strictly governed by the provisions of Section 14 (2) (ii) of The RERD Act, 2016. Section 14 (2) of the Act imposes a statutory embargo on the respondent No. 1 to make any alterations or additions in contravention to the sanctioned plans in the concerned project without the consent of the 2/3rd of the allottees. It was further pleaded that it is illegal and illogical on the part of respondent no.1 to apply for permission from the concerned authority i.e. The Department of Town and Country Planning H.P. after illegally selling a non-habitable and non-saleable unit since the sale deed was executed on 25th day of April, 2023. It was further pleaded that if any permissions were to be obtained they were supposed to be obtained prior to the execution of the sale deed after obtaining the consent of at least 2/3rd of the flat owners. Therefore, applying for permission after commission of acts which are in contravention of the RERD Act, 2016 is untenable in the eyes of the law. It was submitted that at the time of the sale of the apartments, the terrace and the attic were promised to be common areas to the complainants and all other allottees. Furthermore, it is very clear that the attic in question is not sanctioned in the approved plan of the said building/ project and the sale and construction of the same is a major structural change which has been undertaken without the consent of at



least 2/3rd of the flat owners and thus violative of Section 14 of the Act. It was further pleaded that the unauthorized construction inside the attic and sale of the same by respondent No.1 to respondent No.2 is a flagrant disregard for the law and poses a risk to the safety of the residents of the building by adding extra weight on the building, due to the unauthorised construction. It was pleaded that due to the ignorance of respondent No. 1 and his failure to get the repairs done on time the complainants suffered massive loss since the water kept on continuously leaking from the terrace due to heavy monsoons which resulted in severe damage to the roof of the parking floor accompanied with short circuits in the ceiling lights, the photographs of which have been appended. It was further pleaded that as per the sanctioned plans/map of the said project/building provisions of solar heating system and photovoltaic panels on the roof top have been provided. Moreover the mummy over lift machine room is also in the attic by which a very clear inference can be drawn that the attic, the rooftop and the terrace are common areas for all the allottees and giving exclusive rights to one particular allottee is unjust and unlawful.

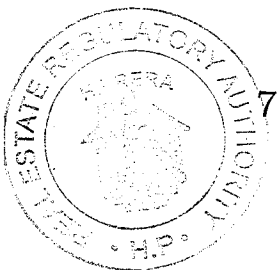
6 Argument on behalf of complainant-

It was argued that a non saleable and non habitable unit has been sold and the number of total saleable units in the project are only 16. Section 4 of the RERA Act, 2016 stipulates that the builder/promoter has to upload the number of saleable unit(s) in the project. As per the information available on the official website of the RERA the number of apartments which were saleable are 16 only. Now an additional unit i.e. the 17th unit has been sold which is illegal and untenable in the eyes of the law.



After the selling of the same, the respondent 2 has started illegal construction on the same. As per the Section 11(4) clause (a) the promoter shall be responsible to perform all the obligations as per the Act. In the present case the conveyance deed of three flats is yet to be done in the project in question. Therefore the obligations of the promoter are still pending. The promoter is in complete violation of Section 14 of the RERD Act which talks about adherence to the sanctioned plans by the promoter. It was further argued that no exclusive area has been dedicated in the roof of the building for the other allottees to use the same. It was further argued that no exclusive terrace has been shown with any of the apartments on the roof of the building. It was further argued that as per the sanctioned plan, it is just a roof and no habitable area has been shown in the sanctioned plan in the roof top of the building. As per the approved map by the competent authority the total constructed area is 1437.42 sq. mtrs out of which habitable area is 1275.72 sq. mtrs. It was argued that the 4th floor is the parking floor of the building. It was further argued that the roof of the building has provision of solar heating system and provision for other common facility as per the sanctioned plan has been provided. The facilities in the roof top are common facilities that are available and exclusive rights of the roof/attic cannot be provided to one person. It was further argued that the lift machinery room is also located in the roof. It was further argued that in future if repair has to be done all the allottees of the building require access to the roof top of the building. It was further requested that the Ld. Authority may designate the roof top, terrace or the attic as the common area of the building.

Arguments on behalf of the respondent no.1-



It was argued on behalf of the respondent no. 1 that the arguments of the complainant are in contradiction to the relief sought by him and the reliefs argued during the course of arguments have not been incorporated in the complaint and therefore they cannot be permitted to argue beyond the pleadings. It was further argued that the sale deed has been lawfully executed and this Hon'ble Court has no jurisdiction to entertain complaint since for cancellation of the sale deed, the complainants have to approach appropriate Id. Civil Court. It was further argued that as per the sale deed executed between the complainant(s) and the promoter, common areas have been specified in all the sale deeds executed between the different allottees and the promoter and there is no mention of the attic in the same. It was further argued that para 7 of the sale deed is very relevant which clearly defines and prescribes the common areas available to the allottees. It was further argued that this attic has been sold to one of the allottees of the building who is having flat no. 101 in the project. It was further argued that so far as the roof top is concerned there is specific access to the roof top from the allottees house and a separate access has also been provided to them to go there. It was further argued that half of the roof top is vacant and nobody is stopping the allottees to go there. It was further argued that since there is an amendment in the TCP Act and as per the same, attic is a separate habitable area and therefore the promoter has right to sell it as a separate unit for this purpose. On the query of the Authority whether the attic area that was sold has been shown in the sanctioned plan as a habitable or not. It was replied on behalf of the respondent no.1 that as per the sanctioned plan attic was not habitable area therefore it was not included but the



height of the building is the same as given in the sanctioned plan and the respondent no.1 has not altered the height of the attic of the building. It was further informed that the sale deed of the attic is of 25.04.2023 and the amendment was notified on 31.05.2023. It was further argued that since there is an amendment in the TCP Act, therefore the sale of attic has been lawfully done to the respondent no.2. It was further argued that respondent no.1 had applied for revised sanctioned plan after the execution of the sale deed which is pending for consideration before the competent Authority.

8 Arguments on behalf of the respondent no.2 -

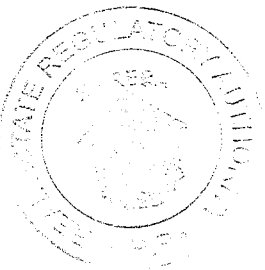
It was argued that as per Annexure-C, page 34 which is a sanctioned plan, the height of the attic is same and the plan of the competent authority has not been altered. It was further argued that the notification was issued by the Government of H.P. making attic habitable and there is no bar in selling the attic as the same is legally permissible. It was further argued that the attic exists in hilly areas of Himachal and the same has been sold legally. It was further argued that the purchase of the attic area is permissible under law and in the present case also no violation of law has been committed by the respondent no.2 by purchasing the attic area. It was admitted fact that the attic area was sold on 25th April, 2023 and the notification came out on 31st May, 2023. It was further argued that the Government of Himachal Pradesh had announced the same in the month of March, 2023 and the notification came out subsequently. It was further argued that the Registrar did not object to the execution of sale deed. This amendment is based on the cabinet decision of 13th April, 2023. It was further argued that a legal and valid sale has taken place between the parties and in case anybody is



having grievance in respect of the same the remedy lies with the Civil Court and this Authority has no jurisdiction qua the same. It was further argued that the arguments made by the Counsel for the complainant are contradictory to the relief sought in the complaint, therefore the relief on the basis of mere arguments cannot be granted.

9 Rebuttal arguments-

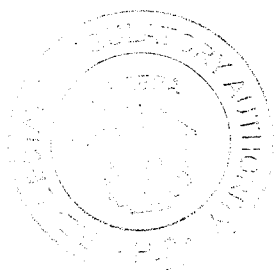
It was argued that in prayer clause, the complainants have prayed for strict actions against the respondents in accordance with law for any violation having caused by them and therefore it cannot be said that the relief being argued has not been included in the complaint. It was further argued that it is settled position of the law that if the contents of the relief have been mentioned in the pleadings but the same has not been sought specifically in the relief clause even then such reliefs having foundation in pleadings can be granted. It was further argued that the complainant is not here before this Authority to get the sale deed set aside though the sale deed is a void instrument because the same is against the sanctioned plan and also in violation of Section 14 of the RERD Act, 2016. It was argued that the complainants are before this Authority to get declared the attic and terrace in the roof top of the building as common area in terms of the Act. It was further argued that the complainants are before this Authority to claim that there is violation of Section 14 of the RERD Act, 2016. It was further argued that the RERD Act, 2016 is a central Act and therefore it has supremacy over all other laws formulated by the State Government. It is settled law that the alteration of sanctioned plan requires prior consent of 2/3rd of allottees, as per the Act. It was further argued that this Authority has jurisdiction to decide the same because of the fact



that the project is registered with the Authority. It was further argued that as per Section 34 of the Act, it is the function of the Authority to ensure compliance of the obligations cast upon the promoters under this Act and the rules and regulations made there under. It was further argued that under Section 35 of the Act, the Authority has suo moto power to conduct investigations for any violation of the Act. As per Section 2(n)(iv) of the Act, the common areas have been defined as the stair cases, lifts, lift lobbies, fire escapes and common entrances. The common basement and terraces are also common area. It was further argued that the attic was held to be a common area in one of the cases decided by this Authority namely Satish Chandra Walia vs. Madhusudan. The Ld. Real Estate Appellate Tribunal, Panchkula exercising appellate jurisdiction under the RERD Act, 2016 for the State of H.P. has also upheld the findings of this Authority and designated attic as a common area. It was further argued that the attic is approachable through terrace only. It was further argued that the permission should have been applied before selling the attic and there is no purpose of applying for the revised sanctioned plan after the attic has been sold. It was further argued that the RERA Act is a Central Act and it overrides the provision of the State Act as well as rules, regulations and notifications made thereunder. It was further argued that the present case is of a RERA registered project and therefore is governed by RERD Act and the promoter is bound to follow the provisions of the Act.

10 Conclusion/ Findings of the Authority:-

We have heard the arguments advanced by all the Ld. Counsels for the complainants & the respondent no. 1 and respondent no. 2 and also perused the record pertaining to the case. We



have duly considered the entire submissions and contentions submitted before us during the course of arguments. This Authority is of the view that the point(s) of determination that requires the consideration and adjudication, namely:-

- a. Whether this Authority has jurisdiction to adjudicate and decide the present complaint?
- b. Whether the roof shown in the sanctioned plan of the building referred to as attic by the parties in the sale deed along with terrace is a 'common area' of the project in question under Section 2 (n) of the RERD Act, 2016 or not and whether it is a non saleable and non habitable area of the project or not?
- c. Whether the builder/ promoter by selling the roof/ attic along with terrace has committed violation of Section 14(2) read with Section 11(4)(a), 11 (4)(f) and Section 17(1), 19(3) of the RERD Act, 2016?

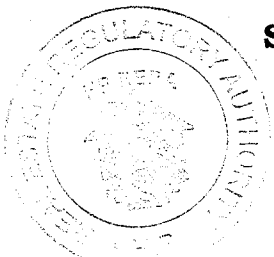
11. Findings of the Authority-

a. Whether this Authority has jurisdiction to adjudicate and decide the present complaint?

To decide about the jurisdiction of the Authority, we would like to discuss the relevant provisions of the Act. Section 31 of the Act prescribes that any aggrieved person can file a complaint before the Authority for any violation of the provisions of the Act. Further **Section 34 (f)** of the Act prescribes that the function of Authority shall include

“ to ensure compliance of the obligation cast upon the promoter, the allottee and the real estate agent under this act and the rules and regulation made their under”.

Section 11(4) of the Act prescribes as follows:



(4) The promoter shall--

(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be:

Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed.

(b) be responsible to obtain the completion certificate or the occupancy certificate, or both, as applicable, from the relevant competent authority as per local laws or other laws for the time being in force and to make it available to the allottees individually or to the association of allottees, as the case may be;

(c) be responsible to obtain the lease certificate, where the real estate project is developed on a leasehold land, specifying the period of lease, and certifying that all dues and charges in regard to the leasehold land has been paid, and to make the lease certificate available to the association of allottees;

(d) be responsible for providing and maintaining the essential services, on reasonable charges, till the taking over of the maintenance of the project by the association of the allottees;

(e) enable the formation of an association or society or co-operative society, as the case may be, of the allottees, or a federation of the same, under the laws applicable:

Provided that in the absence of local laws, the association of allottees, by whatever name called, shall be formed within a period of three months of the majority of allottees having



booked their plot or apartment or building, as the case may be, in the project;

(f) execute a registered conveyance deed of the apartment, plot or building, as the case may be, in favour of the allottee along with the undivided proportionate title in the common areas to the association of allottees or competent authority, as the case may be, as provided under section 17 of this Act;

(g) pay all outgoings until he transfers the physical possession of the real estate project to the allottee or the associations of allottees, as the case may be, which he has collected from the allottees, for the payment of outgoings (including land cost, ground rent, municipal or other local taxes, charges for water or electricity, maintenance charges, including mortgage loan and interest on mortgages or other encumbrances and such other liabilities payable to competent authorities, banks and financial institutions, which are related to the project):

Provided that where any promoter fails to pay all or any of the outgoings collected by him from the allottees or any liability, mortgage loan and interest thereon before transferring the real estate project to such allottees, or the association of the allottees, as the case may be, the promoter shall continue to be liable, even after the transfer of the property, to pay such outgoings and penal charges, if any, to the authority or person to whom they are payable and be liable for the cost of any legal proceedings which may be taken therefor by such authority or person;

(h) after he executes an agreement for sale for any apartment, plot or building, as the case may be, not mortgage or create a charge on such apartment, plot or building, as the case may be, and if any such mortgage or charge is made or created then notwithstanding anything contained in any other law for the time being in force, it shall not affect the right and interest of the allottee who has taken or agreed to take such apartment, plot or building, as the case may be;



Section 14 of the RERD Act, 2016 reads as under

Adherence to sanctioned plans and project specifications by the promoter.

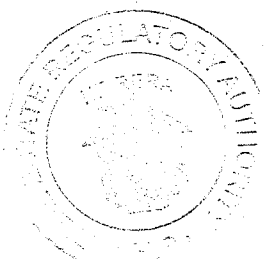
(1) The proposed project shall be developed and completed by the promoter in accordance with the sanctioned plans, layout plans and specifications as approved by the competent authorities.

(2) Notwithstanding anything contained in any law, contract or agreement, after the sanctioned plans, layout plans and specifications and the nature of the fixtures, fittings, amenities and common areas, of the apartment, plot or building, as the case may be, as approved by the competent authority, are disclosed or furnished to the person who agree to take one or more of the said apartment, plot or building, as the case may be, the promoter shall not make—

(i) any additions and alterations in the sanctioned plans, layout plans and specifications and the nature of fixtures, fittings and amenities described therein in respect of the apartment, plot or building, as the case may be, which are agreed to be taken, without the previous consent of that person:

Provided that the promoter may make such minor additions or alterations as may be required by the allottee, or such minor changes or alterations as may be necessary due to architectural and structural reasons duly recommended and verified by an authorised Architect or Engineer after proper declaration and intimation to the allottee.

Explanation.— For the purpose of this clause, minor additions or alterations excludes structural change including an addition to the area or change in height, or the removal of part of a building, or any change to the structure, such as the construction or removal or cutting into of any wall or a part of a wall, partition, column, beam, joist, floor including a mezzanine floor or other support, or a change to or closing of



any required means of access ingress or egress or a change to the fixtures or equipment, etc.

(ii) any other alterations or additions in the sanctioned plans, layout plans and specifications of the buildings or the common areas within the project without the previous written consent of at least two-thirds of the allottees, other than the promoter, who have agreed to take apartments in such building.

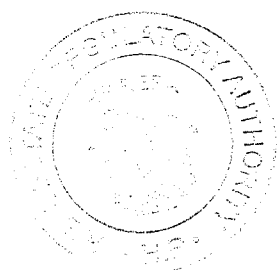
Explanation.— For the purpose of this clause, the allottee, irrespective of the number of apartments or plots, as the case may be, booked by him or booked in the name of his family, or in the case of other persons such as companies or firms or any association of individuals, etc., by whatever name called, booked in its name or booked in the name of its associated entities or related enterprises, shall be considered as one allottee only.

Section **17 of the RERD** reads as under

Transfer of title.

(1) The promoter shall execute a registered conveyance deed in favour of the allottee along with the undivided proportionate title in the common areas to the association of the allottees or the competent authority, as the case may be, and hand over the physical possession of the plot, apartment of building, as the case may be, to the allottees and the common areas to the association of the allottees or the competent authority, as the case may be, in a real estate project, and the other title documents pertaining thereto within specified period as per sanctioned plans as provided under the local laws:

Provided that, in the absence of any local law, conveyance deed in favour of the allottee or the association of the allottees or the competent authority, as the case may be, under this section shall be carried out by the promoter within three months from date of issue of occupancy certificate.



(2) After obtaining the occupancy certificate and handing over physical possession to the allottees in terms of sub-section (1), it shall be the responsibility of the promoter to handover the necessary documents and plans, including common areas, to the association of the allottees or the competent authority, as the case may be, as per the local laws:

Provided that, in the absence of any local law, the promoter shall handover the necessary documents and plans, including common areas, to the association of the allottees or the competent authority, as the case may be, within thirty days after obtaining the 1 [completion] certificate.

Section 19 of the act provides as under:

Rights and duties of allottees.

(1) The allottee shall be entitled to obtain the information relating to sanctioned plans, layout plans along with the specifications, approved by the competent authority and such other information as provided in this Act or the rules and regulations made thereunder or the agreement for sale signed with the promoter.

(2) The allottee shall be entitled to know stage-wise time schedule of completion of the project, including the provisions for water, sanitation, electricity and other amenities and services as agreed to between the promoter and the allottee in accordance with the terms and conditions of the agreement for sale.

(3) The allottee shall be entitled to claim the possession of apartment, plot or building, as the case may be, and the association of allottees shall be entitled to claim the possession of the common areas, as per the declaration given by the promoter under sub-clause (C) of clause (1) of sub-section (2) of section 4.

(4) The allottee shall be entitled to claim the refund of amount paid along with interest at such rate as may be prescribed and compensation in the manner as provided under this Act, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be, in accordance with the terms of



agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of his registration under the provisions of this Act or the rules or regulations made thereunder.

(5) The allottee shall be entitled to have the necessary documents and plans, including that of common areas, after handing over the physical possession of the apartment or plot or building as the case may be, by the promoter.

(6) Every allottee, who has entered into an agreement for sale to take an apartment, plot or building as the case may be, under section 13, shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent, and other charges, if any.

(7) The allottee shall be liable to pay interest, at such rate as may be prescribed, for any delay in payment towards any amount or charges to be paid under sub-section (6).

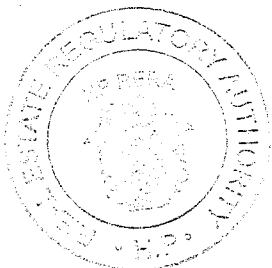
(8) The obligations of the allottee under sub-section (6) and the liability towards interest under sub-section (7) may be reduced when mutually agreed to between the promoter and such allottee.

(9) Every allottee of the apartment, plot or building as the case may be, shall participate towards the formation of an association or society or cooperative society of the allottees, or a federation of the same.

(10) Every allottee shall take physical possession of the apartment, plot or building as the case may be, within a period of two months of the occupancy certificate issued for the said apartment, plot or building, as the case may be.

(11) Every allottee shall participate towards registration of the conveyance deed of the apartment, plot or building, as the case may be, as provided under sub-section (1) of section 17 of this Act.

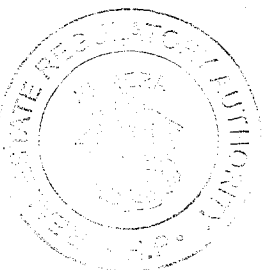
Further **Section 38 (1)** of the Act says



- (1) *“The Authority shall have powers to impose penalty or interest, in regard to any contravention of obligations cast upon the promoters, the allottees and the real estate agents, under this Act or the rules and the regulations made there under.”*

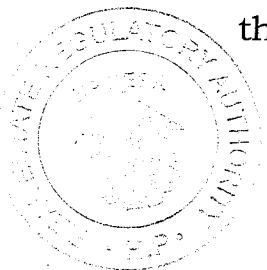
Thus Section 34(f) of the Act empowers the Authority to ensure compliance of any obligation cast upon the promoter. The promoter is under obligation in terms of section 11(4)(a) to perform all obligations, responsibilities and functions under Act rules and regulations made thereunder. He is further under obligation as per section 11(4)(f) read with section 17 of the Act to execute registered conveyance deed and hand over the physical possession of undivided proportionate title of common areas to the association of allottees or the competent authority. Further the Authority is empowered under Section 38 to impose penalty in regard to any contravention of obligations cast upon the promoter. The penalty for such contravention is imposed under section 61 of the Act and if the orders of this Authority are not complied with then further penalty under Section 63 can be imposed.

12. The defence of the respondents is that this Authority has no jurisdiction to hear and decide the present complaint as the sale deed has been executed, and thus it is a civil dispute between the parties because the RERD Act, 2016 makes no provision for setting aside any sale in respect of any property. It is a matter of record that the present project is a RERA registered project. The Hon'ble Supreme Court in **Imperia Structure Ltd. VS Anil Patni 2021 AIR(SC) 70, 2020(10) SCC 783** has held that the remedy available to an allottee under the RERD Act 2016 is "without prejudice to any other remedy available to him." It has also



acknowledged the argument that all issues pertaining to a RERA-registered project should ideally be decided by the RERA authorities given their specialized expertise. Further in **Pioneer Urban Land And Infrastructure Limited V. Union Of India (2019 SCC 8 416)** the Hon'ble Supreme Court emphasized the exclusive nature of the remedies under RERA Act, 2016 and the bar on civil courts' jurisdiction in RERA-related matters.

13. This Authority is conscious of the fact that it has no powers to set aside the sale deed. Even this relief has not been sought as and the complainant(s) are not here before this Authority to get the sale deed set aside. They have prayed before this Authority to get declared the attic and terrace in the roof top of the building as common area in terms of the Act. RERA being an Authority constituted under the RERA Act, 2016 has right to enforce the obligations cast upon a promoter. Further, it is also the duty of the promoter and simultaneously it is the function of this Authority to ensure that promoter complies with and adheres to the sanctioned plan, layout plan and project specifications. Further, if any alterations and additions in the sanctioned plan are to be made, the promoter is required to take prior written consent of at least 2/3rd allottees of the project. It is the duty and function of this Authority to protect the common areas in a real estate project, the possession of which is required to be delivered to the association of allottees, in terms of Section 17, 19(3), 11(4)(f) of the RERA Act, 2016. Therefore, this Authority under the provisions of the RERA Act, 2016 has ample powers to adjudicate and decide the present issues after declaring the violations committed by the promoter and imposing penalties in this regard. The Authority feels that it fails in its duty, if it does

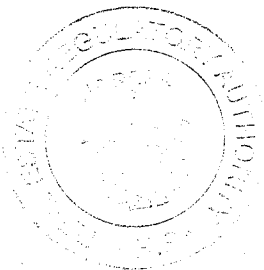


not protect the 'common areas' of the real estate project which is a common property of the association of allottees.

14. Further another argument of the respondent is that the relief claimed for by the complainants during the arguments cannot be granted as they have not specified the same in the relief clause of the complaint. From the perusal of the relief clause in the complaint it is clear that the complainants have sought the directions of the Authority to hold in favour of the rights of allottees of the project in the common areas. The Hon'ble High Court of HP in case titled as **Kamini Sood VS Sapna Puri (2023)0 Supreme (HP)546** held that the court has the discretion to grant relief that is in line with the pleadings, even if a specific prayer was not made as long as the parties were aware of the matter. From the perusal of the complaint the parties were more than clear about the controversy involved in the case therefore this Authority can grant reliefs as claimed for in the pleadings and also has jurisdiction to hear and decide the present complaints.

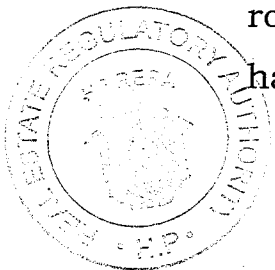
15. Issue no. (b) and (c)

- a. Whether the roof shown in the sanctioned plan of the building referred to as attic by the parties in the sale deed along with terrace is a 'common area' of the project in question under Section 2 (n) of the RERD Act, 2016 or not and whether it is a non saleable and non habitable area of the project or not?**
- c. Whether the builder/ promoter by selling the roof/ attic along with terrace has committed violation of Section 14(2) read with Section 11(4)(a), 11 (4)(f) and Section 17(1), 19(3) of the RERD Act, 2016?**



16. Both the aforesaid issues being interrelated & interconnected are being taken up together to avoid repetition. The facts as they emanate from the record and are also admitted by the parties are that that the respondent no.1 being promoter/builder of the project had only 16 saleable units, had sold the roof area along with terrace as 17th unit in the project by way of execution of sale deed and the respondent No.2 purchased the same by the sale deed No.868, dated 23rd April 2023. The fact of respondent No. 1 selling roof of the building mentioning it as attic as seventeenth unit to respondent no. 2 by way of execution of a sale deed has been admitted by the parties. The defence of the respondents is that this Authority has no jurisdiction to deal with the subject matter as a legal and valid sale deed has taken place and therefore it is civil dispute between the parties as there is no provision under the RERD Act, 2016 to set aside any sale in respect of any property. Further, the defence of the respondents is that the roof area showing it as attic was sold on 25th April, 2023 to respondent no. 2 in view of the notification dated 31st May, 2023 of the Government of HP, whereby attic was permitted to be used for habitable purposes.

17. To address this controversy, we will first examine the sanctioned plan at annexure C-3 in the case file. According to the sanctioned plan, there are total five floors in the building i.e. ground floor plus four floors having total of 16 saleable and habitable units. All the 16 saleable units are located below the parking floor designated as the fourth floor. Over the parking floor, there is a common roof along with common terrace of the building with provisions for common services such as mummy over lift machine room and solar heating systems. In the roof, no dwelling or habitable and saleable unit in the shape of attic was sanctioned

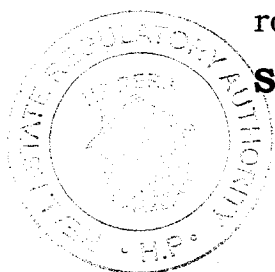


or approved. The common areas of the real estate project have been defined in **Section 2(n) of the RERD** act, 2016.

Section 2 (n) "common areas" mean—

- (i) the entire land for the real estate project or where the project is developed in phases and registration under this Act is sought for a phase, the entire land for that phase;
- (ii) the **stair cases, lifts, staircase and lift lobbies, fire escapes, and common entrances and exits of buildings;**
- (iii) the **common basements, terraces, parks, play areas, open parking areas and common storage spaces;**
- (iv) the premises for the lodging of persons employed for the management of the property including accommodation for watch and ward staffs or for the lodging of community service personnel;
- (v) **installations of central services such as electricity, gas, water and sanitation,** air-conditioning and incinerating, system for water conservation and renewable energy;
- (vi) the water tanks, sumps, motors, fans, compressors, ducts and all apparatus connected with installations for common use;
- (vii) all community and commercial facilities as provided in the real estate project;
- (viii) **all other portion of the project necessary or convenient for its maintenance, safety, etc., and in common use;**

18. In the instant case roof of the building was plain sloping roof without any dormers and no area in the roof was mentioned as attic area by the competent authority while approving the sanctioned plan. The word 'sloping roof' has been used in the Himachal Pradesh Town & Country Planning Act, 1977 particularly Section 18 of the Act *ibid*. Further this word 'sloping roof' has also been used in the judgment passed by the **Hon'ble Supreme Court in the State of Himachal Pradesh & Ors. Versus**

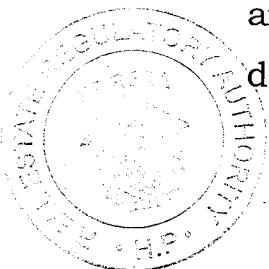


Yogendera Mohan Sengupta & Anr 2024 0 AIR(SC) 859 ; 2024 0 INSC 30 ; 2024 1 KHC(SN) 12 ; 2024 1 KLJ 727 ; 2024 1 SCR 973 in para 40 and 41 which reads as under

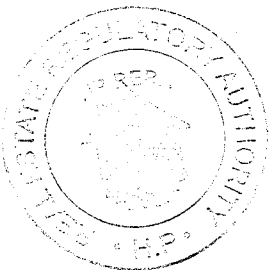
“40. It can thus be seen that the development plan is required to consist of various factors. Clause (b) of Section 18 of the TCP Act provides that it shall allocate broadly areas or sector of land for various purposes including residential, industrial, commercial or agricultural. It shall also provide for open spaces, parks and gardens, green belts, zoological gardens and play-grounds. It is also required to make proposals for general landscaping and preservation of natural areas. It is required to project the requirement of the planning area of such amenities and utilities as water, drainage, electricity and suggest their fulfilment. It is also required to propose broad based regulations for sectoral development, by way of guide lines, within each sector of the location, height, size of buildings and structures, open spaces, court-yards and the use to which such buildings and structures and land may be put including regulations for facade control and **sloping roof** conforming to the hill architecture and environs.

41. It can thus be seen that a special emphasis is placed on regulations for facade control and **sloping roof** conforming to the hill architecture and environs. Clause (j) of Section 18 of the TCP Act, also specifically provides to indicate measures for flood control, protection against land slide, prevention of air and water pollution, disposal of garbage and general environmental control.”

The common internal stair cases leading to the roof are connected from all the floors where 16 habitable units are situated through the parking floor which is above the four floors having 16 habitable units. From the sanctioned plan it is clear that the sloping roof and the terrace are adjacent to each other and are common to all the residents/allottees to access. The definition of common area under Section 2(n)(iii) makes it clear

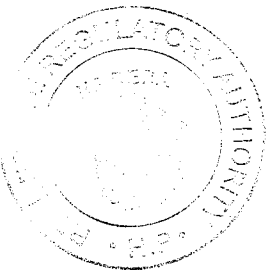


that every place which is common for all is a common area of the project. Terrace has also been held to be a common area of the building/ project in the definition given in Section 2(n) of the Act. Though the respondents are referring to the area below the common sloping roof as attic in the sale deed but this place below the sloping roof is also a common area of the building. Therefore a "common sloping roof" cannot be referred to as a "habitable attic". A habitable attic is a separate and distinct space from the common sloping roof. A "common sloping roof" would generally not be considered a "habitable attic" under the relevant laws and regulations. A 'habitable attic' refers to an attic or upper floor space that is designed and constructed to be suitable for human occupancy or habitation and is to be included in the calculation of the building's total floor area ratio (FAR) and height restrictions as per the judgment of the **Hon'ble Supreme Court in State of Himachal Pradesh VS Yogendera Mohan Sengupta 2024 0 AIR(SC) 859 ; 2024 0 INSC 30 ; 2024 1 KHC(SN) 12 ; 2024 1 KLJ 727 ; 2024 1 SCR 973.** Habitable attic is a liveable, occupable space, not just a storage or utility area. As per the judgment of the Hon'ble **Supreme Court in Vikas Singh VS Govt. Of NCT Of Delhi 2022 293 DLT 11 ; 2022 13 Scale 228** a habitable attic has a minimum ceiling height, to allow for comfortable standing and human dwelling and non habitable attic spaces are typically excluded from the FAR and height calculations for the building. Habitable attic is considered a separate floor or story of the building, not just an open space under the roof in case of non habitable attic. In summary, a 'habitable attic' refers to an upper-level space within a building that is designed and constructed to be suitable for human occupancy with appropriate ceiling height and other



features and may be subject to specific regulatory treatment in terms of construction, FAR, and valuation and shall be **referred to as habitable attic in the sanctioned plan as well**. The key factors appear to be the physical characteristics of the space, such as the height, accessibility, and level of enclosure/completion, rather than simply the presence of a roof structure. Further in the case of **Ruheen Regal Residents Welfare Society versus Ruheen Developers and Properties LLP in complaint No. RAJ-RERA-C-N-2023-6164** was decided on **15.04.2024** by the Rajasthan Real Estate Regulatory Authority, Jaipur

“As per the maps approved by local body, i.e., Jaipur Development Authority, Jaipur vide there letter No. JDA/Zone 9/2021/D-367 dated 03.02.2021, nomenclature as “Private Terrace” has not been depicted. **If the common terrace would have been approved as “Private Terrace” at the time of map approval of the project by the local body, then such nomenclature would have been mentioned in the approved maps, but no such nomenclature as “Private Terrace” exists on approved maps. As per the approved maps, in order to have access on common terrace floor area, a common staircase is designed and is designated/placed in the centre of the floor plan, which shows access to all the residents/occupants of the building to the common terrace. Further, no internal staircase were seen approved for the residents of 06th floor to have and claim access to any so called claimed “Private Terrace” for there own private use. Neither any such title as “Private**



Terrace” is seen on the approved maps available on the RERA web portal presently nor any details with reference to “Private Terrace” had been furnished. Hence, it is clearly established that “Private Terraces” were never a part of the approved maps of the registered project. It is a clear violation of section 14(1) of the Act.”

In the present case from the perusal of the sanctioned plan it is apparently clear that it was open common sloping roof without any dormers and not a ‘habitable attic’ and as per the sanctioned plan this common sloping roof area was not included in the floor area ratio i.e. the ‘FAR’. This area is further connected by a common stair case making it accessible to all the allottees of the building. The Authority also relies upon the clause 2(XII) of form ‘A’ as prescribed under rule 3(2) of the Himachal Pradesh Real Estate (Regulation and Development) Rules, 2017 which makes it mandatory for every promoter to publish details about number, type and carpet area of apartment for sale in the project along with the area of exclusive balcony and verandah areas and the exclusive open terrace areas with the apartment if any. The promoter in the present case has shown only 16 saleable units, therefore, there is no ambiguity in holding that the roof referred to as attic by the parties along with terrace are ‘common areas’ of the project.

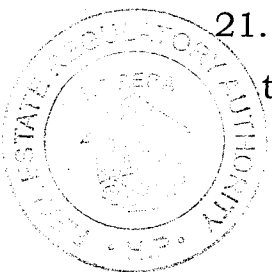
19. Further this Authority in the case of Valley View Flat Owners Association through its president versus Madhusudan Sood Complaint no. HP RERA/OFL/2020-16 dated 16.4.2021 held that common attic and terrace of the building is a ‘common area’ of the project being common storage areas which is approachable to all the allottees of the building being connected



to the common stair case of the building providing access to all the allottees. Further this order of the Authority was upheld by the Haryana Real Estate Appellate Tribunal at Panchkula in appeal no. 33/HP of 2021 decided on 14.9.2022 exercising the powers of Appellate Tribunal under the RERD Act, 2016 for the State of H.P.

20. The defence of the respondents that the attic was permitted by the Government of HP vide notification dated 31st May, 2023 to be used for habitable purposes and therefore could be sold is misconceived, wrong and incorrect for the reason that if the notification of the State Government is seen it permits attics to be used for habitable purpose by paying the requisite fee. Whereas in the present case there is no attic at all and the structure shown in the sanctioned plan is merely a common sloping roof along with common terrace which cannot be termed to be an exclusive private attic in any sense to be permitted for habitable purposes. This is further fortified from the fact that common sloping roof and terrace are not linked or connected to any one of the habitable 16 units of the project and is situated above the parking floor of the building having approach through a common stair case and is accessible to all the allottees. From the perusal of the sale deed it is seen that the respondent no. 1 had sold entire attic with open terrace along with roof rights to respondent no. 2, which in no case can be permitted as it is clear cut encroachment on the rights of the other allottees of the project who have equal rights in the common areas of the building. This Act of the respondent no. 1 is blatant violation of the provisions of Section 11(4)(a), 11(4)(f), 17 and 19 (3) of the RERD Act, 2016.

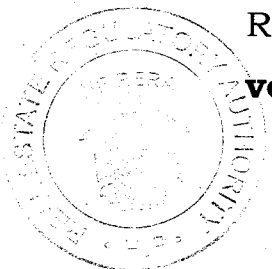
21. Further to answer the other defence of the respondents that the selling of attic was permitted by the State of Government



this Authority is more than clear that first of all it was not a habitable attic and was common roof of the building and therefore could not be sold to any person being 'common area' of the project. Other wise also the sale deed was executed on 25th April, 2023 and the notification came into effect later i.e. on 31st May, 2023. Any notification cannot be permitted to be applied retrospectively. Further one has to obtain specific prior permission of the competent authority in accordance with the notification.

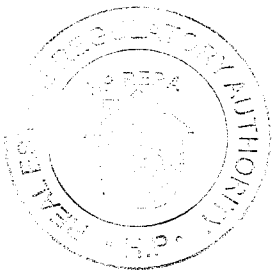
22. Another argument of the respondents is that common areas are defined in the respective sale deeds wherein attic has not been mentioned as common area. With regards to the above, this Authority holds that no sale deed can be executed which is in contravention of the provisions of RERD Act, 2016 as the definition of 'common areas' have been defined in the RERD Act, 2016 and the respondents while executing the sale deed by changing or altering or omitting the important features/components of the definition of 'common areas' given in section 2(n) cannot be permitted to violate the provisions of the RERD Act, 2016. Therefore the definition of 'common area' given in the RERD Act, 2016 takes precedence over any definition of common areas given in the sale deeds.

23. Another defence of the respondents is that since the sale deed has taken place therefore the Authority has no jurisdiction to decide the present case. It is reiterated that it is the duty and function of this Authority to protect the 'common areas' in a real estate project, the possession of which is required to be delivered to the association of allottees in terms of Section 17, 19(3) of the RERD Act, 2016. The Hon'ble Supreme court in **Manish Kumar versus Union of India 2021 225 CompCas 1 ; 2021 1**



**KLT(OnLine) 1049 ; 2021 1 Scale 646 ; 2021 5 SCC 1 ; 2021
3 SCC(Civ) 50 in para 163 has held as under**

“163. As far as allottees are concerned in regard to apartments and plots, Section 11(1) (b) of the RERA makes it mandatory for the promoter to make available information regarding the bookings. We have conflated bookings with allotments. We cannot proceed on the basis of the contention of the petitioners that the impugned provisos are unworkable and arbitrary on the basis that the court must take notice of the reality which is that the promoters do not make available information as required of them. The burden it is well settled to prove all facts to successfully challenge the statute is always on the petitioner. There cannot be a priori reasoning, and there is no burden on the state. If there is defiance of the law by promoters, the allottees are not helpless. They can always seek proper redress in the appropriate forum. No doubt, we also would observe that it becomes the duty of all the authorities to ensure that the promoters will stringently abide by their duties under the act. Section 11(1)(b) of the RERA speaks about information being made available regarding bookings which can be understood as the allotments . The word allottee as defined in Section 2 (d) also takes in a person who subsequently acquires the allotment through sale, transfer or otherwise. In Section 11(1) (b) there is reference to bookings. If the information is to be limited to the original booking then the information about assignment just mentioned may not be made available. In this regard we may notice the Haryana Real Estate Regulatory Authority, Gurugram (Quarterly Progress Report) Regulations 2018. Regulation 4 provides inter alia that the promoter shall upload on the web page which he has to create for the project within 15 days from the expiry of each quarter, namely, the list of number and types of apartments /plots booked. Our attention



has also been drawn to the format for Quarterly Progress Report to be submitted under Haryana Regulations. A perusal of the report would show that the promoter is obliged to submit the names of the allottees . Obviously, if there is change in the allotment the changed name should be reflected in the Report. This must undoubtedly be ensured by the authorities stringently. We also find merit in the contention of the Union that the Association of allottees has to be formed under the mandate of the law it is expected to play an important role. Information will certainly be forthcoming in regard to allotments upon the allottees becoming members of the Association as required. **We cannot ignore the role of the association in the matter of becoming the transferee of the common areas , being clothed with the right of first refusal within the meaning of section 7 of the Act and also the right to complain otherwise under the Act. This aspect of the association of allottees is not a matter of mere trifle. The allottees cannot truly possess and enjoy their properties be it an apartment or building without their having right of common areas . The promoter is bound under Section 17 to transfer title to the common areas to the association . Section 19(9) of RERA makes it a duty on the part of the allottee to participate towards the formation of the association or cooperative society or the federation of the same. The possession of the common areas is also to be handed over to the association of the allottees. The law giver has therefore created a mechanism, namely, the association of allottees through which the allottees are expected to gather information about the status of the allotments including the names and addresses of the allottees....”**

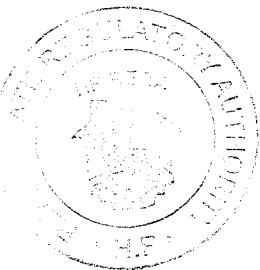
24. The Hon'ble Supreme Court in **Bikram Chatterji and Others v. Union Of India And Others 2019 SCC ONLINE SC**



901 highlights the obligations of promoters towards providing possession of common areas to the association of allottees. Further in **Ireo Grace Realtech Pvt. Ltd. v. Abhishek Khanna and Others 2021 SCC ONLINE SC 14** the Hon'ble Supreme Court of India discussed the entitlement of allottees to the possession of common areas and the association's rights in such matters. Further in **Forum For People's Collective Efforts (Fpce) And Another v. State Of West Bengal And Another 2021 SCC 8 599; 2021 SCC ONLINE SC 361** the Supreme Court Of India, emphasizes the role of the association of allottees in enforcing obligations under RERA, including rights related to common areas. In **Sahara Housing Investors Association v. Bheema Estate and Reality Pvt. Ltd., and Others** the Tamil Nadu RERA in case no. CASE NO 354/2019 decided on 30th January, 2020 has discussed and affirmed the duty of the promoter to transfer common areas to the association of allottees.

25. Since no association of allottees has been formed in the project and as per Section 11(4)(e) it is the duty of the promoter to enable the formation of association of allottees. Therefore a direction is required to be passed in this case to the promoter to enable the formation of association of allottees and thereafter hand over all the common areas of the project to the association in terms of Section 17, 19 (3) of the RERA Act, 2016 in a time bound manner.

26. Further in terms of Section 14 (1) of the Act it is the duty of the promoter to adhere to the sanctioned plans, layout plans and project specifications and simultaneously under Section 34(f) it is the function of the Authority to ensure compliance of obligations by the promoter. As per Section 14 (2) of the RERA



Act, 2016 promoter cannot make any additions and alterations in the sanctioned plans, layout plans and specifications of the building or the common areas without the previous written consent of at least 2/3rd of allottees. In the first place as held in para supra the common sloping roof as mentioned in the sanctioned plan referred to as attic by the parties in the sale deed along with common terrace could not be converted into habitable unit being common area of the project. However, even otherwise also no prior written consent of 2/3rd allottees in the building/project was taken to make any alteration and additions in the sanctioned plan, layout plan and specifications. Therefore, it is held that there is a flagrant violation of Section 14(1) and (2) of the RERD Act, 2016. It is the duty of this Authority to ensure adherence of sanctioned plans, layout plans and project specifications by the promoter.

27. Finally, it can be concluded that there are only 16 saleable and habitable units in the project which are situated in four floors of the building and below the parking floor. The common sloping roof area along with terrace situated above the parking floor as shown in the sanctioned plan is a 'common area' of the project and is connected through a common stair case. Further, it is also clear that common attic of the building referred to as such by the parties in the sale deed is the common sloping roof. Further it is also clear that the common sloping roof of the building along with terrace has provisions for common services such as mummy over lift machine room and solar heating systems etc. Therefore, the entire area of the roof and terrace situated over the parking floor is a common area of the project and all the allottees have the right to access and use the same. It is further held that notification dated 31st May, 2023 of the

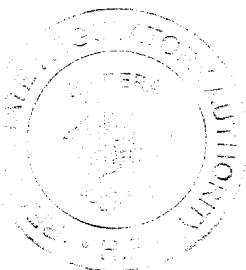


Government of H.P. pertaining to habitable attic is not applicable in this case. It is also evident and clear in terms of discussion made herein above that the promoter respondent no. 1, by selling to respondent no. 2 the entire common roof area referred as attic in the sale deed with open terrace along with roof rights, has committed violation of Section 14(1) &(2) read with Section 11(4)(a), 11 (4)(f), 17(1), 19(3) of the RERD Act, 2016 for which he is liable to be penalised under Section 61 of the RERD Act, 2016.

28. Relief-

Keeping in view the above mentioned facts, this Authority in exercise of powers vested in it under various provisions of the Act rules and regulation made there under issues the following orders/directions:

- I. It is hereby held that the common roof area of the building referred to as attic in the sale deed along with terrace situated above the parking floor is a non habitable and non saleable unit and is held to be a 'common area' of the Real Estate Project in question, as per section 2 (n) of the RERD Act, 2016. It is further held that respondent no. 1 builder/promoter by selling to respondent no. 2, the entire roof area along with open terrace, has committed violations of Section 14(1) & (2) read with Section 11(4)(a), 11(4)(f) and Section 17(1), Section 19(3) of the RERD Act, 2016.
- II. The respondent no. 1 is held liable to pay a penalty of Rs Twenty Lakhs under Section 61 of the Act for selling the common roof and terrace of the project to respondent no. 2, in violation of the provisions of the RERD Act, 2016. The penalty imposed here in above shall be paid by respondent no. 1 in the bank account of this Authority, operative in the name of "Himachal Pradesh Real Estate Regulatory Authority



Fund" bearing account no."39624498226", in State Bank of India, HP Secretariat Branch, Shimla, having IFSC Code SBIN0050204, within a period of two months. The penalty amount shall be deposited in the bank account of HP RERA within sixty days failing which the respondent no. 1 is further liable to an additional penalty of Rs 10,000 per day under Section 63 of the Act *ibid*.

- III. The respondent no. 1 as per Section 11(4)(e) shall enable formation of association of allottees at the earliest.
- IV. Complainants are also advised to get the association of allottees registered, after coordinating with all other allottees.
- V. The respondent no. 1 is directed to hand over the possession of the common areas of the building to association of allottees in terms of Section 17 and Section 19(3) of the RERD Act, 2016, within one month of registration of Association of allottees.

B. Badalia
B.C. Badalia
MEMBER

SKand
Dr. Shrikant Baldi
CHAIRPERSON

