BEFORE THE HARYANA REAL ESTATE APPELLATE TRIBUNAL

Appeal No.54 of 2021
Date of Decision: 09.08.2022

1. Jaideep Harpalani;
2. Geeta Mohanani, both residents of 862, Sector-A, Pocket B & C, Vasant Kunj, New Delhi 70

Appellants

Versus

1. M/s Mascot Buildcon Pvt. Ltd., 294/1, Vishwakarma Colony, Opposite ICD, MB Road, Lal Kuan, New Delhi
2. M/s Home Town Properties Pvt. Ltd., 294/1, Vishwakarma Colony, Opposite ICD, MB Road, Lal Kuan, New Delhi

Respondents

CORAM:

Shri Inderjeet Mehta **Member (Judicial)**
Shri Anil Kumar Gupta **Member (Technical)**

Argued by: Shri Sumesh Dhanwantri, Advocate,
Ld. counsel for the appellants.

Shri Gulshan Sharma, Advocate,
Ld. counsel for the respondents.

O R D E R:

ANIL KUMAR GUPTA, MEMBER (TECHNICAL):

The present appeal has been preferred under Section 44(2) of the Real Estate (Regulation and Development) Act 2016 (for

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short, 'the Act') by the appellants-allottees against impugned order dated 05.11.2020 passed by the Haryana Real Estate Regulatory Authority, Gurugram (for short, 'the Ld. Authority') whereby the Complaint No.CR/1039/2020 filed by the appellants-allottees was disposed of with the following directions:

> *"As per clause 38 of BBA executed between the parties on 4.4.2016, the respondent has failed to deliver the possession of allotted unit to the complainant within the stipulated period i.e. 36 months + 3 months grace period which comes out to be 4.7.2019. A number of reminders were issued to the complainant (Annexure P1) regarding demand of amount. The complainant adopted recast tent attitude and did not response (respond) [sic] to his earnest request for making payment. After adopting due procedure as per the terms and conditions of SBA, the respondent had hopecen (had no) [sic] choice but to cancel the unit and refund the amount in the name of the complainant after deducting 10% of the earnest money and he (respondent) [sic] had sent the deposited ~~the~~ [sic] amount in his account. As such, there are (is) [sic] no merit in the complaint as the complainant has no locus standi.*

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The complaint stands dismissed. File be consigned to the registry."

2. As per averments in the complaint the appellants booked two shops of approximately 250-300 square feet each on Ground Floor, by paying rupees six lakhs and rupees five lakhs on 24.12.2012 and 15.01.2013 respectively against the basic sale price as agreed to @ Rs.10,999/- per square feet less 3% broker discount in the commercial colony in project land of the promoter of area 6.00 acres in Twin Towers with 26 Floors on each tower. Subsequently, the appellants were coerced into making an application for registration and booking of the unit bearing No.G-87 of area 480 square feet @ Rs.10,999/- per square feet with a discount of 5% i.e. @ Rs.10,449/- per square feet against the above said payment of Rs.11,00,000/- with an assurance that the possession of the unit would be handed over within three years i.e. on or before 2016.

3. The appellants pleaded that the respondents forced them to pay Rs.10,06,000/- in cash under threat and also forced them to sign for the allotment of another shop bearing No.G-93 of area 609.89 square feet on 14.03.2014 at ground floor.

4. The allotment letter was issued in favour of the appellants-allottees by the respondents on 10.08.2014. This allotment letter mentioned Preferential Location Charges of

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Rs.2,500/- per square feet which came to their notice at the time of executing the Space Buyer's Agreement (for short, 'the SBA') which was executed on 04.04.2016 with the handing over/possession date as three years from the date of start of construction. The appellants signed the SBA under threat of the respondents, as the respondents threatened them that if the SBA is not signed then the entire payment paid by them would be forfeited, which amounts to unfair trade practices.

5. The appellants requested the respondents for an update qua the final possession date vide their letter dated 17.06.2017, however, the respondents in its reply vide letter dated 25.07.2017 made vague submissions such as "it is difficult to presume anything during constructions". The respondents raised a demand of Rs.3,00,554.28/- on 27.07.2017 as payable on the milestone of "on casting of the 6th Floor slab". It is astonishing to note that the respondents claimed to be at the 5th floor in its letter dated 25.07.2017 and within the period of 2 days the casting for the 6th floor slab was already complete.

6. It was further pleaded that the complainants wrote various letters/reminders between September 2017 to September 2018 to the respondents asking for a clear date of delivery and the exact dimensions of the unit. It was further mentioned in those letters that the appellants are willing and

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able to pay the demands as raised by the respondents, and the same shall be done only once there is clarity on the above two aspects. However, the respondents did not answer the queries raised by the appellants. That an FIR No.007 dated 06.01.2019 was registered at PS Khedki Daula by one Ved Prakash against the respondents-developers on the grounds that they do not have valid license to further sell the property, change in building plans, advertising of units without any sanction building plans. The appellants also approached the Deputy Commissioner of Police, Gurugram on 12.03.2019 to lodge a complaint against the respondent's illegal and fraudulent acts.

7. It was further pleaded that the respondents issued a cancellation notice to the complainants vide their letter dated 20.04.2019. The respondents transferred a sum of Rs.30,92,143/- on 20.04.2019 after deducting 10% of the basic sale price to the appellants.

8. It was further pleaded that the respondents do not have valid license subsisting in their name and is also not registered developers. In fact, licence of the project in present appeal is in favour of the M/s Hometown Properties Pvt. Ltd. i.e. (respondent no.2) which is at present under suspension after having been lapsed.

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9. It was also pleaded that the project is still far from completion and in defiance of principle of natural justice, the respondents have cancelled the allotment of the appellants illegally.

10. It was further pleaded that the 'Act' is a benevolent legislation in which the rights of the allottees has been considered to be of paramount importance and therefore, the main issue to be adjudicated is the fact that whether the respondent no.1 was having any right to terminate the allotment of the complainant in absence of any permission under the beneficial interest policy of the DTCP.

11. It was further pleaded that when the appellants do not have enough clarity with respect to their booking then how can the appellants pay the further payments until such clarification is given. It was further pleaded that G-93 is at the same location as previously allotted G-87. However, the appellants has wrongly charged Preferential Location Charges for the allotment of G-93. With these pleas, the appellants have sought following reliefs in their complaint:

a. *"To stay and quash the cancellation letter dated 24.04.2019 issued by the Respondent to the complainant.*
b. *Delay penalty as prescribed under RERA w.e.f. from 09.11.2016 upto the date of actual delivery of possession of the shops.*

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> c. *To deliver the possession of the shops complete in all respects.*
> d. *With any other order which this Hon'ble Court may deem fit and proper be also passed in the interest of justice."*

12. Respondents have contested the complaint on the grounds that the appellants have themselves approached between November-December 2012 the respondents-company and applied for registration for provisional allotment of commercial space. The application form specifically provided that it was a provisional allotment and is subject to finalization on approval of the building plans. Subsequently, the SBA was executed between appellants and the respondent company on 04.04.2016. After making some payments, the appellants have not made any payment since 07.07.2016. The appellants, despite repeated notices for payment of due instalments/amounts have not deposited the same with the respondents and have become defaulter and are deliberately putting obstructions to the project so as to avoid penal action against them for defaulting on payments of the due instalments. They have not made payments since 07.07.2016, as per the reminders letter dated 02.11.2018, the total amount due as on that date was Rs.32,10,463.24. It was further pleaded that such defaults of the appellants, constrained the company to cancel

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their allotment vide letter dated 20.04.2019 and refunded their money after necessary deductions as per the terms and conditions of the SBA.

13. It was further pleaded that they have all the necessary approvals and licences etc. to execute the project. The respondents-company was developing a commercial project name and styled as "Oodles Skywalk" at Sector 83, Gurugram. Now the project is being developed by Hometown Properties Pvt. Ltd. (original license holder) as per the order from the DGTCP keeping safe the interest of all the stakeholders in the project. This project is being developed in a land area of approximately 3.0326 acres in the revenue estate of Village Sihi, Tehsil Manesar, District Gurugram. This land is being developed in collaboration with the original owners vide Agreement dated 29.09.2010 and Addendum dated 18.02.2013. Accordingly, on 05.03.2013, the Director General Town and Country Planning Department, Chandigarh had issued a licence bearing no.08 of 2013 vide Memo No.LC-2532-JW (VA)-2012/18755. Therefore, all the necessary permissions, permits etc. are available with the company for the development of the project.

14. It was further pleaded that M/s Mascot Buildcon Pvt. Ltd. was registered with the Registrar of Companies on 12.10.2004. There exists an agreement dated 29.10.2010 between the original land owner Shri Dharam Singh and Home

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Town Project Pvt. Ltd. relating to construction of the said commercial project. Based upon such collaboration dated 29.10.2010, the original landowner along with M/s Home Town Properties Pvt. Ltd. had received a license bearing No.08/2013 from the Director General, Town and Country Planning, Haryana, Chandigarh for constructing the said commercial project on the said land. Since, M/s Home Town Project Pvt. Ltd. has already applied for and done the work with Shri Dharam Singh regarding collaboration, M/s Home Town Project Pvt. Ltd. has informed M/s Mascot Buildcon Pvt. Ltd. to develop the project because in both the companies the directors are common and are sisters concern. Thereafter, M/s Home Town Project Pvt. Ltd. has requested M/s Mascot Buildcon to give publicity about the said project which coming up in near future. Therefore, M/s Mascot Buildcon Pvt. Ltd. has instructed for provisional publicity of above the said project to M/s V. Square Development Pvt. Ltd. (the DMC) as M/s V. Square is already doing the marketing work of some prospective near future projects coming in the NCR Area. The Director General, Town and Country Planning, Haryana, Chandigarh vide their letter dated 17.01.2014 has provisionally accepted the Project Building Plans. The respondent's sister concern M/s Home Town Properties Pvt. Ltd. has entered into an assignment agreement with the respondent company on 09.07.2014. As the plans which were sanctioned by the Director

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General, Town and Country Planning, Haryana, Chandigarh vide their letter dated 17.01.2014 was not feasible as per technical reason by the Engineer, the same was subsequently changed for which the information was duly supplied to the appellants.

15. All other pleas raised by the appellants were controverted and, with these pleas, it has pleaded for dismissal of the complaint being without any merits.

16. We have heard Ld. counsel for both the parties and have carefully examined the record of the case. Both the parties have submitted their written submissions.

17. Initiating the arguments, it was contended by the Ld. counsel for the appellants that the appellants, induced by the broachers and assurance given by the respondent No.1 i.e. M/s Mascot buildcon Pvt. Ltd. misrepresenting itself as licence/developer and falsely assuring that they had all the requisite sanctions, approvals to construct a commercial colony on the land of area 6.00 acres fully developed with world class amenities and comprising of Twin Towers with 26 floors on each tower with Basic sale price @ Rs.10,999/- per sq. ft. less 3% broker discount, booked two shops of approximately 250-300 Sq. feet each on ground floor for ATM purpose and issued two cheques No.000061 and 000062 of Rs.6,00,000/- and Rs.5,00,000/- dated 24.12.2012 and 15.01.2013 respectively in

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favour of respondent No.1 i.e. M/s Mascot Buildcon Pvt. Ltd. That the respondent's builder changed the booked two shops into a single shop bearing No.G-87 and subsequently, changed to shop No.G-93. It was further contended that no licence was granted to the project at the time of the booking of the said shop by the DTCP, Haryana. Respondent No.1 i.e. M/s Mascot Buildcon Pvt. Ltd. misrepresented as licenced developer and also pre-launched the project before proper sanctions and approval, as the licence No.08-2013 was issued on dated 05.03.2013.

18. It was further contended that as per the contract act, the date for the agreement should be considered from the date of proposal/application i.e. December, 2012. The SBA was executed on dated 04.04.2016 after 3 years 3 months from acceptance of the first payment. It was further contended that the due date of delivery of the unit should be considered from December, 2012 and not from the signing of the SBA.

19. It was further contended that the appellants are good paymasters and were paying the installments from December, 2012 whenever demanded by the respondent and timely paid 60 % of the total payment till 26.06.2017. The project was already delayed, therefore, appellants sought information regarding construction status and due date of delivery of the unit through many letters and reminders vide letters dated 16.02.2017, 16.06.2017, 19.08.2017 and 07.09.2017 sent to the address of

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M/s V. Square and M/s Mascot Buildcon Pvt. Ltd. through e-mail. However, letter dated 16.06.2017 was sent through registered post on 17.06.2017. Some other letters dated 22.12.2017, 10.01.2018 and 18.01.2018 to the address of M/s Mascot Buildcon Pvt. Ltd. were sent through registered post. There was no response to any of the letters. Letter dated 16.06.2017 sent through registered post was denied of having received by the respondents in the proceedings before the Authority. However, this letter was replied by the respondents through their letter dated 25.02.2017 in which letter dated 16.06.2017 has been referred to. The appellants have also relied upon some other letters which were not part of the record before the learned Authority in the complaint.

20. It was further contended that the respondents did not have the valid licence, therefore, the appellants approached police commissioner against the respondents and filed a police complaint on 12.03.2019 and in retaliation to the above said police complaint the respondents on 20.04.2019 cancelled the shop/unit of G-93 and transferred a sum of Rs.15,46,071/- and Rs.15,46,072/- to their bank accounts.

21. It was further contended that the appellants stopped paying to the respondents due to non-response from the respondents of their letters and reminders regarding construction status, building plans and licence etc.. Further, it

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was contended that since the due date of possession had elapsed, the appellants were left with no other option, but to hold the further payments till they were satisfied from the response of the respondent No.1.

22. It was contended that the allottee has a right to know about the status of the project, who invested his hard earned money in the project. If the timely payments are the essence of the agreement then the respondents are also duty bound to deliver the project within the time frame as stipulated in the agreement. Thus, it is contended that clause 24 of the SBA vide which the respondents have cancelled their unit is one sided and unilateral. The appellants have just signed the pre-drafted agreement prepared by the respondents and therefore, is not legally enforceable. Therefore, the cancellation of the unit G-93 by the respondents is illegal and without any justification.

23. It was further contended that the impugned order dated 05.11.2022 is a summary order. There was no determination of issues. The order was not detailed and reasoned as envisaged in the Act.

24. With these pleas, the appellants prayed for allowing the appeal and restoring the unit allotted to them for which they are ready to pay the balance amount as per the SBA.

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25. Per contra, ld. counsel for the respondents contended that the appellants had filed the present appeal just to harass the respondents and to gain the unjust enrichment. The unit was tentatively/provisionally allotted to the appellants. The appellants are persistent and prolonged defaulters for three years in not paying the agreed dues even after receiving so many demand notices and reminders issued by the respondent-company. The appellants have not been able to make payment as per the SBA dated 04.04.2016. The respondents have sent repeated reminders to the appellants, however, they had not made payments since 07.07.2016. As per reminder dated 02.11.2018, a total amount due as on that date was Rs.32,10,463.24. On account of such default of the appellants, the respondents were constrained to cancel their provisional allotment on 07.07.2016. After deducting 10 % of the basic sale price, the balance amount of Rs.30,92,143/- was transferred into the bank account of the appellants as per the terms of BBA.

26. It was contended that the project is being developed in a land of approximately 3.0326 acres in the revenue estate of Village Sihi, Tehsil Manesar, District Gurugram. This land is being developed in collaboration with the original owner vide agreement dated 29.09.2010 and addendum dated 18.02.2013. There exists an agreement dated 29.10.2010 between the original land owner Sh. Dharam Singh and M/s Home Town

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Properties Pvt. Ltd. relating to the construction of the said commercial project. Based upon such collaboration, the original landowner along with M/s Home Town Properties Pvt. Ltd. had received a license bearing No.08/2013 from the Director General, Town and Country Planning Haryana, Chandigarh for constructing the said commercial project on the said land. Thereafter, M/s Home Town Properties Pvt. Ltd. has informed M/s Mascot Buildcon Pvt. Ltd. to develop the project because in both the companies, directors are common and both are sisters concern. Thereafter, M/s Home Town Properties Pvt. Ltd. has requested M/s Mascot Buildcon Pvt. Ltd. for publicity of the said project, which was coming up in the near future. Therefore, M/s Mascot Buildcon Pvt. Ltd. issued instructions to M/s V. Square as (the DMC), for publicity of the said project as M/s DMC was doing the marketing work of some other project coming up in the NCR area. The appellants were informed through M/s V. Square, (the DMC), about this project which was to come up in the near future at Gurugram. The appellants then approached M/s V. Square company for the purpose of investing their money and showed their willingness to invest in the said commercial project which was to be launched by M/s Mascot Buildcon Pvt. Ltd. It was only after understanding about the project, the appellants themselves submitted the application form after reading it. The application form specifically provided that it was the provisional

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allotment and is subject to finalization on approval of the building plan.

27. It was further contended that the Director General, Town and country Planning Department, Haryana, Chandigarh vide letter dated 17.01.2014 has already provisionally accepted the project building plans. The respondents' sisters concern M/s Home Town Properties Pvt. Ltd. has entered into an assignment on 09.07.2014 with the respondent-company.

28. It was further contended that since the plan sanctioned by DTCP on 17.01.2014 was not feasible on account of technical reasons, a revised plan was got approved from the DTCP, which was brought to the notice of the appellants.

29. It was contended that the Clause No.24 of the SBA is not one sided as alleged by the appellants, as the allottee's right is also protected and this clause itself provides for the refund of the amount, after deduction of non-refundable expenditure in case is respondent unable to construct the unit.

30. With these contentions, the Ld. counsel for the respondents prayed for dismissal of the appeal being without any merits.

31. We have duly considered the aforesaid contentions of both the parties.

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32. The undisputed facts of the case are that the Space Buyer's Agreement (SBA) dated 04.04.2016 for shop No.G-93, Ground Floor of area (604.890 sq. ft.), Oodles Skywalk, Sector 83, Gurugram for a total sale consideration of Rs.73,00,383/- was executed between the appellants and respondents. As per Clause No.38 of the SBA, the possession of the unit was to be handed over to the appellants by the respondents within 36 months plus 3 months grace period after signing of the SBA. This period of (39 months including the grace period) has expired on 03.07.2019. The appellants have paid a total sum of Rs.36,28,845/- up to 07.07.2016 and thereafter stopped paying the demands of installments raised by the respondents. The respondents cancelled the SBA dated 04.04.2016 and allotment of the unit No.G-93, vide its letter dated 20.04.2019 and forfeited the earnest money i.e. @ 10% of the Basic Sale Price plus service tax and refunded the remaining amount of Rs.30,92,143/- to the appellants through RTGS on 20.04.2019 as per the following details.

Amount deposited	10 % of the basic sale price (amount forfeited)	Service tax (Deduction in nature)	Amount returned
Rs.37,55,143/-	Rs.5,36,703/-	Rs.1,26,297/-	Rs.30,92,143/-

33. As per the appellants, they had booked the unit by making payments of Rs.6,00,000/- and Rs.5,00,000/- on

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24.12.2012 and 15.01.2013, respectively, and therefore, the scheduled period of delivery of possession of three years and three months as mentioned in the SBA should be considered from December, 2012, the date on which the first payment was made by them for booking the unit. The project was being delayed by the respondents and, therefore, they wrote number of letters to the respondents to know as to what is the status of the project i.e. as to when their unit would be ready for possession and what are the dimensions and super area of the unit being built by the respondents. The appellants, when did not get any answer to their letters from the respondents, stopped further payments after 07.07.2016. The appellants have annexed the various letters written by them to the respondents with the Appeal/complaint and have supplied the list of such letters in the written submissions in a tabular form as under:

Sr.No.	Date	Sent to	Medium	Remarks
1	16.02.2017	V-Square & Mascot Buildcon Pvt. Ltd.	e-mail	No response
2	16.06.2017	V-Square & Mascot Buildcon Pvt. Ltd. (Kind atten: Mr. Sahoo) received by Mr. Sahoo	Reg. post dt. 17.06.2017	Reply dt. 25.5.2017 denied at Ld. Lower Authority
3	19.8.2017	V-Square & Mascot Buildcon Pvt. Ltd. (Kind atten: Mr. Sahoo)	e-mail	No response
4	07.09.2017	V-Square & Mascot Buildcon Pvt. Ltd. (Kind atten: Mr. Sahoo) received by Mr. Sahoo	e-mail	No response
5	22.12.2017	Mascot Buildcon Pvt. Ltd.	Reg. post dt. 04.01.2018	No response

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6	10.01.2018	Mascot Buildcon Pvt. Ltd.	Reg. post 12.01.2018	No response
7	18.01.2018	Mascot Buildcon Pvt. Ltd.	Reg. post dt. 18.01.2018	No response

34. The Ld. counsel for the respondents contended that the demand for each installment was being raised as per the actual construction at site. The appellants were informed vide letter dated 25.07.2017, in response to the letter dated 17.06.2017 of the appellants, that appellants can visit the project which is at the 5th floor where construction is in full swing and respondents are trying to complete the project as per the SBA. It was also informed through the above said letter that everything is being done as per the SBA and if there is any change it will be compensated at the time of handing over of physical possession and as of now it is very difficult to presume anything during construction.

35. The Ld. counsel for the respondent has drawn our attention to the various demand letters and reminders dated 11th November, 2017, 20th December, 2017, 20th March, 2018, 28th March, 2018, 25th May, 2018, 30th June, 2018, 4th September, 2018, 22nd October, 2018, 02nd November 2018, 18th March 2019 attached with the appeal vide which demands of the installments was raised by them to the appellants. The counsel of the respondent has also drawn our attention to table given in the demand letter dated 18.03.2019 issued by them, which reads as under:

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Sr No	Installment description	%	Due instalment	GST (SGST 6% & CGST %)	Received Installment	Received Tax	Total Balance	Due Date
1.	On Registration	20	10,73,406.00	39,801.89	10,73,406.0	39,801.89		23-Apr-13
2.	On start of Excavation	10	5,36,703.0	19,900.94	5,36,703.0	19,900.94		21-Mar-14
3.	On Start Of Casting Of	10	5,36,703.0	19,900.95	5,36,703.00	19,900.95		16-Oct-14
4.	On Casting Of 2nd Basement Floor Slab +25% EDC	5	3,70,509.0	11,270.78	3,70,509.00	11,270.78		21-Aug-15
5.	On Casting of 1st Basement Floor Slab +25% EDC	5	3,70,509.0	11,673.31	3,70,509.00	11,673.31		21-Nov-15
6.	On Casting of Ground Floor Roof Slab +25% EDC	5	3,70,509.0	11,673.31	3,70,509.00	11,673.31		10-Mar-16
7.	On Casting Of 3rd Floor Slab + 25% EDC	5	3,70,507.0	12,075.84	3,70,506.96	12,075.84	0.04	07-Jul-16
8.	On Casting Of 6th Floor Slab	5	2,68,352.0	32,202.24	0.00	0.00	3,00,554.24	21-Aug-17
9.	On Casting of 9th Floor Slab + 25% PLC	5	6,49,533.0	77,943.96	0.00	0.00	7,27,476.96	06-Dec-17
10.	On Casting Of 12th Floor Slab + 25% PLC	5	6,49,533.0	77,943.96	0.00	0.00	7,27,476.96	09-Feb-18
11.	On Casting Of 15th Floor Slab + 25% PLC	5	6,49,533.0	77,943.96	0.00	0.00	7,27,476.96	21-Apr-18
12.	On Casting Of 18th Floor Slab + 25% PLC	5	6,49,534.0	77,944.08	0.00	0.00	7,27,478.08	28-Sep-18
	Total		64,95,331.0	4,70,275.22	36,28,845.96	1,26,297.02	32,10,463.24	

36. His contention is that the above table of the demand letter dated 18.03.2019 shows that the appellants did not make any payment after 07.07.2016, though, demand of Rs.3,00,554.24 was raised on 21.08.2017, demand of Rs.7,27,476.96 was raised on 06.12.2017, demand of Rs.7,27,476.96 was raised on 09.02.2018, demand of Rs.7,27,476.96 was raised on 21.04.2018 and demand of Rs.7,27,476.96 was raised on 28.09.2018. As per demand notice

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dated 18th March, 2019 a total balance of Rs.32,10,462.08/- was payable by the appellants to the respondents. Therefore, on nonpayment of demands raised by the respondent, the appellants have become defaulters, the SBA and unit allotted to the appellants was cancelled under Clause 24 of the SBA and Rs.30,92,143/- was returned to them as per the detail brought out above in terms of the provisions in the said Clause 24.

37. We are of the opinion that once the SBA is executed, the events happened before the SBA have merged into SBA. After the execution of SBA, the terms of SBA will supersede the events happened before its execution. Thus, as per SBA, the scheduled period of handing over of the possession of 3 years plus 3 months of grace period i.e. 39 months will be reckoned from the date of its execution i.e. 04.04.2016 and the schedule date for handing over the possession comes out to be 03.07.2019. There is no doubt the project was being delayed. It was admitted by the Ld. counsel for the respondents that they have applied for the occupation certificate, but the same has not been issued by the competent authority as yet. In these circumstances when the project was being delayed, the appellants had two options: i) To seek the refund of the amount paid by them along with interest and compensation ii) To continue with the project and claim delay possession charges and compensation etc. as per the provision in the Act. The appellants chose to continue with the

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project. The appellant through their various letters sought the super area, dimension of the unit and completion date of the unit/project. The respondents did not respond properly the query of the appellants as to when the unit will be ready. The other query of the appellants was with regard to the size of the unit and super area of the unit, they were going to get on completion was replied by the respondents vide letter dated 25.07.2017 that the unit being built by them is as per SBA. The respondents are supposed to raise the construction as per the building plans approved by the competent authority of DTCP. If the appellants were not satisfied with the reply of the respondents or they were not getting any communication from the respondents, the best course for them was to approach the competent court/forum for redressal of their grievance regarding the information they wanted to seek from the respondent. After having the proper information, the appellants should have exercised their option of continuing with the project and claiming compensation for delay or seek refund of the amount paid by them along with interest and compensation as envisaged in the Act. By stopping the payment of various demand of installments raised by the respondents, the appellants have become defaulters and respondents have exercised their right of cancellation of the unit under clause 24 of the SBA.

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38. The other contention of the appellants is that the Clause 24 of the SBA under which the allotment has been cancelled is unilateral and one sided as this does not provide any right to the allottees-appellants in case, the respondents delay the possession of the unit. Clause 24 of the SBA reads as under:

> *"24. That the timely payment of the installment and other charges as stated in schedule of payment (Annexure III) is the essence of this Agreement. It shall be incumbent on the Allottee to comply with the terms of payment and/or other terms and conditions of this agreement failing which he/she shall forfeit to the "Company" the entire of earnest money together with interest on delayed payments and any other amount of non-refundable nature including but not confined to brokerage paid by the "Company" and the allotment/this agreement shall stand cancelled and the allottee shall be left with no lien, right, title, interest or any claim of whatsoever nature in the said unit along with parking space(s). The "Company" shall thereafter, be free to resell and/or deal with the said unit in any manner whatsoever at its sole discretion. The amount(s) if any, paid over and above the earnest money would be refunded to the allottee by the "Company" after making deductions referred to above and only when such amounts are realized by the "Company" from another prospective purchaser on resale of the unit but without any interest or compensation of whatsoever nature. The "Company" shall have the first lien and charge on the said unit(s)*

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for all its dues payable by the allottee to the "Company".

39. The Clause 24 of the SBA is regarding timely payment and further provides that in case the timely payments are not made then the respondents can terminate the contract and allotment of the unit and refund the amount after deduction of 10% of the basic sale price and some other amount of non-refundable nature etc. We are not able to convince ourselves to this argument of the appellant as to how the non-provision in the clause 24 of the right of the Allottees/appellants in case of delay in handing over will make this clause unilateral or one sided. The Allottees/Appellants can take the recourse of filling a complaint before the competent Forum/Court, if there is no provision in the SBA for delay possession charges/compensation in case of delay in handing over the possession as per SBA/Act and rules. The appellant's argument is not sufficient to prove the said clause 24 of the SBA to be unilateral or one sided and has failed to prove the clause to be unilateral/one sided.

40. The appellants are contesting that the impugned order of the learned authority is not a detailed, reasoned and speaking order. Though, the order of the authority is not a detailed order as it does not contain details of pleadings of the parties, but, the learned authority has passed reasoned order based on the relevant facts only. Therefore, this submission of

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the appellant that the order of the authority is not detailed, reasoned and speaking will not have any potential effect on the merits of the case in appeal.

41. The SBA was executed on 04.04.2016. The appellants have paid a total sum of Rs.36,28,845/- up to 07.07.2016 against the basic sale price of Rs.53,67,032/- and total sale consideration of Rs.73,00,383/-. After the execution of SBA on 04.04.2016, only one instalment amounting to Rs.3,70,507/- was paid on 07.07.2016. Thereafter, number of demand notices for payment of instalments were sent by the respondent vide notices dated 21.08.2017, 06.12.2017, 09.02.2018, 21.04.2018 and 28.09.2018 with total demand of Rs.32,10,462.08 which remained unpaid. Thus, it is the appellant who breached the contract first as they have not adhered to payment schedule as per the SBA in spite of repeated reminders.

42. As per Clause 23 of the SBA earnest money is 10% of the basic sale price. The condensed legal position as laid down by Hon'ble Supreme Court of India in **Maula Bux case v. Union of India – 1969 (2) SCC 522 and Satish Batra case -1969 (2) SCC 554** along with **M/s DLF V/s Bhagwanti Narula decided on 06.01.2015 by the Hon'ble National Consumer Disputes Redressal Commission in Revision Petition No.3860 of 2014** is that, only a reasonable amount can be forfeited as earnest

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money in the event of default on the part of the purchaser and it is not permissible in law to forfeit any amount beyond a reasonable amount unless it is shown that the person forfeiting the said amount had actually suffered loss to the extent of the amount forfeited by him. In absence of evidence of actual loss, forfeiture of any amount exceeding 10% of the sale price, cannot be said to be a reasonable amount. In the para 13 of the said order of the Hon'ble National Consumer Disputes Redressal Commission, it is held that an amount exceeding 10% of total sale price cannot be forfeited by seller, since forfeiture beyond 10% of the sale price would be unreasonable.

43. The claim of damages for breach of contract is governed by provisions of section 74 of the Indian contract act, 1872 (hereinafter called 'the contract act') as liquidated damages. The forfeiture of the earnest money along with interest on delayed payments, brokerage and any other amount of nonrefundable nature etc. as per clause 24 of the SBA, is nothing but forfeiture of the liquidity damage which has been clarified in the honorable Apex Court in case of **Kailash Nath Associate Vs. Delhi Development authority, (2015) 4. SCC 136.**

44. In **Maula Bux's** case (supra), the Hon'ble Apex Court has observed that where under the terms of the contract the party in breach has undertaken to pay a sum of money or to

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forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of penalty. It was further laid down by the Hon'ble Apex Court in Maula Bux's case (Supra) as under: -

> *"Where the Court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him."*

45. In view of the rule of law laid down by the Hon'ble Apex court in the cases referred to above, the person complaining the breach of contract is entitled for the liquidated damages mentioned in the contract, if the same is genuine and reasonable. But if the liquidated damages provided in the contract is unreasonable and by way of penalty, the claimant shall only be entitled to a reasonable compensation even if no actual damage is proved to have been caused in consequence of the breach of contract. However, there must be some loss. In the instant case, though the respondent has not adduced any evidence to establish the actual damage/loss but at the same time it cannot be stated that the respondent has not suffered any loss as the respondents are constructing the

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project from their own sources. However, the respondent is entitled only to a reasonable compensation.

46. Thus, in view of the aforesaid legal position, the respondent is only entitled to forfeiture of the earnest money @ 10% of the basic sale price i.e. Rs.5,36,703/- as a reasonable compensation as envisage in section 74 of 'the contract Act'. Respondents have not provided any proof of having suffered losses in excess of the above said amount of Rs.5,36,703/-. Respondents have also not supplied the proof of having deposited, the service tax of Rs.1,26,297/- so deducted from the appellants, with Tax authorities. The taxes can only be deducted if these are actually deposited with the Tax authorities and respondent, have suffered losses. Moreover, Service Tax was not applicable at the time its deduction on 20.04.2019. Thus, the respondents are required to return the above said amount of Rs.1,26,297/- to appellants along with interest as per rule 15 of the rules i.e. Highest SBI, MCLR plus 2% i.e 9.2% per annum from the date of cancellation i.e. 20.04.2019 till realization.

45. Resultantly, the appeal is partly allowed to the extent that the respondents will return an amount of Rs.1,26,297/- to the appellants along with interest @ 9.2% per annum from the date of cancellation i.e. 20.04.2019 till realization.

46. No order to costs.

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47. The copy of this order be communicated to the parties/learned counsel for the parties and the learned Authority for compliance.

48. File be consigned to the record.

Announced:
August 09, 2022

Inderjeet Mehta
Member (Judicial)
Haryana Real Estate Appellate Tribunal
Chandigarh

Anil Kumar Gupta
Member (Technical)

Manoj Rana

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Appeal No.54 of 2021

Jaideep Harpalani and another
Versus
M/s Mascot Buildcon Pvt. Ltd. and another
Appeal No.54 of 2021

Present: None.

Vide our separate detailed order of the even date, the appeal is partly allowed to the extent that the respondents will return an amount of Rs.1,26,297/- to the appellants along with interest @ 9.2% per annum from the date of cancellation i.e. 20.04.2019 till realization.

Copy of the detailed order be communicated to the parties/learned counsel for the parties and the learned Haryana Real Estate Regulatory Authority, Gurugram.

File be consigned to the records.

Inderjeet Mehta
Member (Judicial)
Haryana Real Estate Appellate Tribunal,
Chandigarh

Anil Kumar Gupta
Member (Technical)

09.08.2022
Manoj Rana

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