BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**2919/2020**
Date of filing complaint:	**01.10.2020**
First date of hearing:	**25.02.2021**
Date of decision :	**29.07.2022**

1. 2.	Rakesh Kumar Lal Veena Lal **Both r/o**: L 20 Ground Floor, NDSE II, New Delhi 110049	**Complainants**
	Versus	
	DLF Limited **Regd. office:**3RDFloor Shopping Mall, Arjun Marg Dlf City, Phase I Gurugram Haryana	**Respondent**

CORAM:	
Dr. KK Khandelwal	**Chairman**
Shri Vijay Kumar Goyal	**Member**
APPEARANCE:	
Sh. N. Chaudhary (Advocate)	Complainants
Sh. J.K. Dang (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainant/allotteesunder section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provisions of the Act or the

rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

2. The particulars of the project, the details of sale consideration, the amount paid by the complainants, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information	
1.	Project name and location	Sky Court, Sector 86, Gurugram	
2.	Project area	12.858 acres	
3.	Nature of the project	Residential Group Housing	
4.	DTCP License	31 of 2010 dated 01.04.2010	44 of 2012 dated 05.05.2012
5.	Valid upto	21.04.2025	04.05.2023
6.	Name of the licensee	Angelina Real Estate Pvt Ltd & 1 other	Dlf New Gurgaon Home Developers
7.	RERA Registered/ not registered	Not Registered	
8.	Unit no.	SCJ 021, 2nd floor, Block –J (Page no. 62 of complaint)	
9.	Unit area admeasuring	1854 sq. Ft (Page no. 62 of complaint)	
10.	Date of apartment buyer agreement	31.01.2014 (Page no. 56of thecomplaint)	
11.	Date of booking	21.12.2012	

		(Page no. 49 of complaint)
12.	Possession clause	**14. DELIVERY OF POSSESSION** If for any reasons other tha those given i clause ``11(b) , 11(c) and clause 46 , the company is unable to or fails **to offer possession of the said apartment to the allottee(s) with forty eight(48) months from the date of application or within any extended period or periods as envisaged under this apartment , then in such case , the allottee(s) shall be entitled to give notice to the company , within ninety(90) days from the expiry of said period of forty eight(48) months or such extended periods** , as the case may be , for terminating this apartment. **(Emphasis supplied)**
13.	Due date of possession	21.12.2016 (Calculated from the date of application)
14.	Total Sale Consideration	Rs. 1,32,56,100/- (Page 10 of amended CRA)
15.	Total amount paid by the complainants	Rs. 1,26,64,531/- (Page 10 of amended CRA)
16.	Occupation Certificate	17.07.2017 (Page no. 117 of reply)
17.	Offer of possession	16.03.2018 9Page no. 121 of reply)

B. Facts of the complaints:

3. A project by the name of The Sky Court in Sector 86, DLF Garden City, Gurugram was being developed by the respondent who approached the complainants and assured them that it would hand over the possession of the flat within 48 months of the date of making of application for the flat by them. The complainants booked a unit in it vide application dated 21.12.2012 for a total sale consideration of Rs. 1,32,56,100/-. A booking amount of Rs.10,31,000.00 was paid by the complainants and a blank printed booking application form was got signed from them and a receipt of payment of the booking amount was provided dated 21.12.2012.

4. That the buyer's agreement was executed on 31.01.2014 which had a number of unfair terms in the said agreement amounted to unfair trade practice and deficiency in service on behalf of the respondent such as payment of maintenance charges , payment of interest bearing maintenance security , entering into a maintenance agreement before taking possession of the allotted unit , having no access to the common amenities in the project, payment of delay possession charges in case of offer of possession being delayed due to non-completion of construction , cancellation of the allotted unit due top non-payment of dues within the stipulated period , charge of interest on delay payments , holding charges besides maintenance security to the tune of Rs. 278100/- etc.

5. That the due date of possession comes out to be 21.12.2016. The complainants in the last week of June 2017 verbally told the officials of respondent that they are not in a position to have the flat as the respondent has delayed the flat even beyond the maximum extendable period leaving no option to them and asked the respondent to refund the amounts paid by them along with interest.

But the respondent told them that they would communicate, the complainants request to higher ups in the respondent.

6. That the respondent sent a letter dated 16.03.2018, wherein while acknowledging that the complainants had paid a huge amount of Rs. 1,26,64,531.16 which was very near the total price of 1,40,18,094/- agreed to in the buyer's agreement to be the total price to be paid by the complainants made an offer of possession which was a fake offer of possession.

7. That it is stated that the above offer of possession was no offer in the eyes of the law as possession of flat was offered by asking the complainants to pay a further amount of Rs. 32,83,911.65 to get possession of the above flat and also as the said amount included the amount of maintenance security which the respondent was not entitled to receive from the complainants being an illegal levy. That the complainants were astonished to see on going to the spot that the flat was incomplete in many respects including fitting and furnishings.

8. That the complainants again contacted the officials of respondent and asked them why they had not processed complainants request for refund and also complained that the amount claimed from them in letter dated 16.03.2018 was exorbitant and contrary to the agreed amount and the respondent's offer of possession vide letter dated 16.03.2018, was no offer under law as it had a made an offer of possession of flat which was a fake offer of possession.

9. That thereafter letters dated 03.07.2018 and 09.10.2018 was received by the complainants wherein again they were asked to

complete the possession formalities and take possession in terms of letter dated 16.03.2018.

10. That after the receipt of the above letters dated 03.07.2018 and 09.10.2018, the complainants again contacted the officials of respondent and asked them why they had not processed their request for refund and also complained that the amount claimed from the complainants in letter dated 16.03.2018, 03.07.2018 and 09.10.2018 was wrong .That thereafter letters dated 04.12.2018 , 03.06.2019 , 22.10.2019 , 27.01.2020 were sent by the respondent wherein again, the complainants were wrongly asked to complete the possession formalities and take possession and holding charges were wrongly sought to be invoked against them .

11. That after the receipts of the above letters the complainants again contacted the officials of respondent and asked them why they had not processed complainants request for refund and also complained that the amount claimed from the complainants in the above letters dated 16.03.2018, were wrong and incorrect.

12. That as no response had come from the respondent, the complainants asked their son Sh. Rajesh Lal to write to it, on their behalf, seeking refund of the amount due to them. The son of the complainants wrote an email to the respondent on their behalf dated 15.06.2020 seeking refund of the amount paid by them to the respondent. But in response to the email of the son of the complainants, Sh. Chander Mohan Sharma, officer of respondent wrote an email dated 16.06.2020, wherein for the first time the respondent falsely claimed that the allotment of the flat, could not be cancelled.

13. That on this the son of the complainants wrote a response email on behalf of the complainants to the officer of respondent asking the officer as to under which provision of the agreement, the agreement was irrevocable. To which, the officer of respondent replied vide email dated 19.06.2020 wrongly stating that the allotment was irrevocable under point 6 of the page No. 5 of the application form. That on this the son of the complainants, wrote an email dated 19.06.2020 to the respondent and asked why they were referring to the application form and not the agreement executed post application.

14. That thereafter the son of the complainants, wrote a reminder email dated 24.06.2020 on their behalf to, the officer of the respondent asking for refund. The official of the respondent wrote a response email to the complainants' son Sh. Rajesh Lal dated 26.06.2020 stating that the respondent's legal position was clear that there was no provision whereby the complainants could ask for refund.

15. Hence the complainants were left with no other option but to file the present complaint as the respondent has illegally contrary to law refused to accede to their request and refund the amount paid with interest.

C. Relief sought by the complainants:

16. The complainants have sought the following relief(s):

i. Direct the respondents to refund the amount of Rs. 1,26,64,531.16/- along with interest.

ii. Direct the respondent not to charge holding charges and interest on unpaid payments as claimed in letters of respondent.

D. Reply by respondent:

The respondent-builder by way of written reply made the following submissions:

17. That the complainants are allottees for the above-mentioned unit in the said project for a total sale consideration of Rs. 1,32,56,100/-. An application for booking the flat was submitted by the complainants with the respondent on 21.12. 2012 with a sum of Rs. 10,31,000/- which has been paid by them to the respondent. A receipt had been issued by the respondent in favour of the complainants pertaining to payment of the aforesaid amount.

18. That after booking of the allotted unit, the allottees were required to execute a buyer's agreement. The same was sent to them by the respondent on 11 .03.2013 and a reminder letter dated 12.12.2013 was sent for execution but the allottees did not execute the same.

19. That clause 11 (a) of the buyer's agreement dated 31st of January 2014 provided that the respondent would complete the construction of the said apartment within a period of 48 months from the date of submission of application for allotment by the allottee. That clause 11 (b) of buyer's agreement dated 31.01.2014 clearly provided that in case delay occurred in the delivery of physical possession of the said apartment due to force majeure conditions, the respondent would be entitled to extension of time for delivery of physical possession of the said apartment.

20. That it is pertinent to mention that clause 56 (i) of buyer's agreement dated 31.01.2014 specifically provided that in case there occurred any failure on the part of the allottee in making payments within time stipulated in the schedule of payments and even failure to pay

the stamp duty, legal, registration and incidental charges, any increase in security including but not limited to interest-bearing maintenance security as demanded by the respondent or any other charges, in that event, the same would be construed as commission of default on the part of the allottee in complying with conditions of the aforesaid agreement.

21. That clause 58 of the buyer's agreement dated 31.01.2014 specifically says about that dispute between the parties arising out of or touching upon or in relation to the terms and conditions of the aforesaid agreement would be subject to adjudication under the Arbitration and Conciliation Act or any statutory amendments/modifications thereof and the disputes would be adjudicated upon by sole arbitrator would be appointed by the respondent.

22. That the parties by mutual consent had decided the disputes arising out of buyer's agreement dated 31.01.2014 and pertaining to said apartment would be resolved by arbitration, the invocation of jurisdiction of the authority by the complainants is barred under law. A separate application under Sections 5 and 8 of The Arbitration and Conciliation Act, 1996 has been preferred by the respondent. The complaint is liable to dismissed on this ground alone. That the application for grant of occupation certificate to Directorate of Town & Country Planning, Haryana, Chandigarh on 17th of February 2017 was submitted by the respondent. The concerned statutory authority had issued the Fire NOC on 28th of June 2017. The occupation certificate was obtained on 17.07.2017.

23. That letter dated 24.04.2017 had been sent by the respondent to the complainants whereby they had been called upon to make payment

of Rs. 9,224/- in respect of the said apartment. A letter was sent by the respondent to the complainants stating that it has received the occupation certificate for the said unit.

24. That letter dated 16.03.2018 had been sent by the respondent to the complainants whereby they had been called upon to obtain physical possession of the said apartment subject to payment of outstanding amount of Rs. 32,83,911.65. It is pertinent to mention that during the course of construction, there had occurred a minor increase in super area of the said apartment. The same had been fairly calculated and had been found to be 1928 square feet. The complete details with regard to payments made as well as quantification of outstanding amount had been provided by the respondent to the complainants in the said letter. That letter dated 3.07.2018 had been sent by the respondent to the complainants whereby it was conveyed to them that the payment of demanded by the respondent vide letter dated 16.03.2018 had not yet been paid. The respondent had called upon the complainants to make payment of the outstanding amount. Despite receiving the said letter, the complainants has not make payment of the demanded amount.

25. That even thereafter letters dated 9.10.2018 ,4.12.2018 ,3.06.2019 and 27.01.2020 had been sent by the respondent to the complainants calling upon them to make payment of the outstanding amount and to obtain physical possession of the said apartment. It had also been conveyed to the complainants by the respondent that in case they failed to obtain possession, they would be liable to make payment of holding charges at the rate of Rs. 15/ per square feet per month. The complainants did not make payment of the outstanding amount and obtain possession of the said apartment.

26. That clause 14 of buyer's agreement dated 31.01.2014 specifically provided that if for any reasons other than those given in clauses 11 (b), 11 (c) and clause 46 of buyer's agreement dated 31.01. 2014, the respondent was unable to deliver physical possession of the said apartment to the complainants within a period of 48 months from the date of submission of application for booking, in that event, they would be entitled to give notice to the respondent within 90 days from the expiry of said period of 48 months for termination of the said agreement. In such event also, the respondent had the discretion to sell the said apartment, to realise the sale consideration amount and to thereafter refund the amount paid by the complainants to them without any interest

27. That in the present case, the complainants have defaulted in making payment of agreed sale consideration amount in respect of the Said Apartment. Thus, there is absolutely no contractual covenant in terms of which complainants can seek refund of the amount paid by them.

28. That email dated 15 .06.2020 had been sent by the complainants to the respondent wherein it had been claimed by them that due to Covid 19 situation, they were doubtful as to whether they would continue with the purchase of said apartment. The respondent had sent email dated 16.06.2020 to the complainants whereby it was intimated to them that the allotment of the said apartment was irrevocable, and the request made for cancellation of allotment could not be acceded to. The complainants had been called upon by the respondent by virtue of the same email to complete the payment formalities as per final statement of account dated 16.03.2018 sent by the respondent to the complainants. But in response to the said

email, the complainants had called upon the respondent vide email dated 16.06.2020 to point out the exact provision in terms of which allotment of said apartment was irrevocable. In response to the aforesaid email, another email dated 19.06.2020 had been sent by the respondent to the complainants whereby they had been informed that in point number 6 on page number 5 of the application form it had been specifically stipulated that the allotment would be irrevocable.

29. That even thereafter emails dated 19.06.2020 and 24.06.2020 had been needlessly sent by the complainants to the respondent to collect false evidence. Eventually email dated 26.06.2020 had been sent by the respondent to the complainants wherein it had been explicitly stated by the respondent that there was absolutely no provision in terms vide which the complainants could insist for cancellation of purchase of the said apartment. The respondent had further conveyed that the complainants were free to sell the said apartment in open market. That there does not exist any provision in buyer's agreement dated 31.01.2014 in terms of which the complainants can unilaterally and arbitrarily seek refund of the amount paid by them in respect of said apartment.

30. Copies of all the relevant do have been filed and placed on record. There authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority:

31. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it

has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram district. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

32. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

> ***Section 11***
>
> .....
>
> *(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;*
>
> ***Section 34-Functions of the Authority:***
>
> *34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.*

33. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

34. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2020-2022(1) RCR (c) 357 and*** *reiterated in case of* ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*** wherein it has been laid down as under:

> *"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. if the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."*

35. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the cases mentioned above, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

F. Findings on the objections raised by the respondent:

F.I Objection regarding complainants is in breach of agreement for non-invocation of arbitration.

36. The respondent has raised an objection that the complainants have not invoked arbitration proceedings as per buyer's agreement which contains a provision regarding initiation of arbitration proceedings in case of breach of agreement. The following clause has been incorporated w.r.t arbitration in the buyer's agreement:

> *All or any disputes arising out or touching upon or in relation to the terms and conditions of the Application/ Agreement, including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties, shall be settled amicably by mutual discussion, failing which the same shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/modifications thereof for the time being in force. The arbitration proceedings shall be held at an appropriate location in DLF City, Gurgaon, Haryana by a sole arbitrator, who shall be appointed by the Company and whose decision shall be final and binding upon the parties. The Allottee(s) hereby confirms that the Allottee(s) shall have no objection to this appointment by the Company even if the person so appointed as the arbitrator is an employee or advocate of the Company or otherwise is connected to the Company and the Allottee(s) confirms that notwithstanding such relationship/connection, the Allottee(s) shall have no doubts as to the independence or impartiality of the sole arbitrator, appointed by the Company. It is understood that no other person or authority shall have the power to appoint the arbitrator. The Courts at Gurgaon alone and the Punjab & Haryana High Court at Chandigarh alone shall have the jurisdiction*

37. The respondent contended that as per the terms & conditions of the application form duly executed between the parties, it was specifically agreed that in the eventuality of any dispute, if any, with respect to the provisional booked unit by the complainants, the same shall be adjudicated through arbitration mechanism. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Also, section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy &Anr. (2012) 2 SCC 506*** and followed in case of ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, Consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause. A similar view was taken by the Hon'ble apex court of the land in case titled as ***M/s Emaar MGF Land Ltd. V. Aftab Singh in revision petition no. 2629-30/2018 in civil appeal no. 23512-23513 of 2017*** **decided on 10.12.2018** and has upheld the aforesaid judgement of NCDRC and as provided in Article 141 of the

Constitution of India, that the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view.

38. Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that complainants are well within the right to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and RERA Act, 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily.

G. Findings regarding relief sought by the complainants.

G.1Direct the respondent to refund the amount of Rs. 1,26,64,531.16/- along with interest.

39. The subject unit was booked on 21.12.2012 by the complainants. They paid a sum of Rs.1,26,64,531.16/- and approached the authority seeking relief of refund of the paid-up amount on the ground that the respondent has delayed the flat even beyond the maximum extendable period. Thus, the complainants many times requested the respondent to refund the money paid by them.

40. It is an admitted fact that buyer's agreement was executed between the parties on 31.01.2014. So the due date for completion of the project and handing over possession of the allotted unit comes to be 21.12. 2016.The complainants took a plea that they wanted to surrender the above-mentioned unit and submitted an application regarding the same. The complainants sent an email on 15.07.2020 stating that they could not continue with the purchase of the said flat

due to covid 19 situations So, it means that the complainants withdrew from the project and are seeking refund of the paid-up amount. The complainants had been verbally telling the respondent for cancellation of the unit and refund of the amount but the same was denied by it on 26.01.2020. It is important to note here that the complainants even filed a letter in the authority itself stating that they want to surrender the unit.

41. The cancellation of any allotted unit by the respondent builder must be as per the provisions of regulation 11 of 2018 framed by the Haryana Real Estate Regulatory Authority, Gurugram providing deduction of 10% of total sale consideration as earnest money and sending the remaining amount to the allottee immediately.

42. It is evident from perusal of the case file that the allotment of the unit was made in favour of the complainants on the basis of booking dated 21.12.2012 for a sum of Rs. 1,32,56,100/-. It led to execution of buyer's agreement between the parties on 31.01.2014. The due date for completion of the project and offer of possession of the allotted unit was agreed upon as 21.12.2016. The complainants paid a sum of Rs.1,26,64,531/- against the allotted unit and were not offered possession by the due date. Though they orally requested for withdrawal from the project in June 2017, but their request was not accepted leading to filing of the present complaint 01.10.2020. Meanwhile the occupation certificate of the project was obtained by the respondent on 17.07.2017 and offered possession of the allotted unit to the complainants on 16.03.2018. There is nothing on the record to show that prior to offer of possession, the complainants send any request to the respondent for withdrawal from the project and seeking refund of the paid-up amount.

43. The section 18(1) is applicable only in the eventuality where the promoter fails to complete or unable to give possession of the unit in accordance with terms of agreement for sale or duly completed by the date specified therein. This is an eventuality where the promoter has offered possession of the unit after obtaining occupation certificate and on demand of due payment at the time of offer of possession, the allottees wish to withdraw from the project and demand return of the amount received by the promoter in respect of the unit with interest at the prescribed rate.

44. The due date of possession as per agreement for sale as mentioned in the table above is 21.12.2016 and there is delay about of 3 years 9 months 10 days on the date of filing of the complaint. The allottees in this case has filed this application/complaint on 1.10.2020 after possession of the unit was offered to them after obtaining occupation certificate by the promoter. The allottees never earlier opted/wished to withdraw from the project even after the due date of possession and only when offer of possession was made to them and demand for due payment was raised, then only filed a complaint before the authority. The occupation certificate /part occupation certificate of the building/tower where allotted unit of the complainants is situated has been received. Section 18(1) gives two options to the allottee if the promoter fails to complete or is unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein:

(i) Allottee wishes to withdraw from the project; or
(ii) Allottee does not intend to withdraw from the project

45. The right under section 18(1)/19(4) accrues to the allottee on failure of the promoter to complete or unable to give possession of

the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein. If allottee has not exercised the right to withdraw from the project after the due date of possession is over till the offer of possession was made to him, it impliedly means that the allottee has tacitly wished to continue with the project. The promoter has already invested in the project to complete it and offered possession of the allotted unit. Although, for delay in handing over the unit by due date in accordance with the terms of the agreement for sale, the consequences provided in proviso to section 18(1) will come in force as the promoter has to pay interest at the prescribed rate of every month of delay till the handing over of possession and allottee's interest for the money he has paid to the promoter are protected accordingly.

46. Now the question before the authority arising for consideration is as to whether after valid offer of possession of the allotted unit has been made by the promoter to the allottees, whether they can be allowed to withdraw from the project and seek refund of the paid-up amount. Though as per the version of the complainants they requested the respondent to refund the paid-up amount in June 2017 but that was oral one. After they were offered possession of the allotted unit, they filed this complaint seeking refund of the paid-up amount. Even during the course of arguments, the complainants filed a request seeking refund of the amount from the respondent. Keeping in view the fact that the complainants do not want to continue with the project and are seeking refund of the paid up amount, clause 1.12 of the buyer's agreement dated 31.01.2014 comes into operation which provides as under :-

1.12 The Allottee(s) agree to pay as and when demanded by the Company/Land Owning Companies all stamp duty, registration charges and all other incidental and legal expenses for execution and registration of Conveyance Deed of the Said Apartment within the stipulated period as mentioned in the demand notices and upon receipt of the Total Price, other dues and charges and expenses as may be payable or demanded from the Allottee(s) in respect of the Said Apartment and Parking Space(s). In case the Allottee(s) fails to deposit the stamp duty, registration charges and all other incidental and legal expenses so demanded within the period mentioned in the demand letter, the Company shall have the right to cancel the allotment and forfeit the Earnest Money and Non-Refundable Amounts, etc. and refund the balance amount to the Allottee(s) without any interest upon realization of money from resale/re-allotment to any other party.

47. No doubt the possession of the allotted unit has been offered to the complainants after receiving of occupation certificate but when they have already expressed a desire to withdraw from the project and unable to continue with the same for whatever maybe the reason, then they can't be forced to pay the remaining dues and take possession of the allotted unit. The buyer's agreement entered between the parties defines the term earnest money means 10% of the total price of the said apartment amounting to Rs. 13,25,610/- payable by the allottee (s) and more clearly set out in schedule of payments annexure III. Even keeping in view sauch type of situations the Hon'ble Apex Court of the land in cases of Maula Bux Vs. Un ion

Of India reported in 1969(2) SCC 554 and followed in cases of Rajbir Singh and anr. Vs. Jaswant Kaur SCC Online Del 9042, Jayant Singal and anr. Vs. M/s M3M India Limited, consumer complaint no. 2766 of 2017 decided on 26.07.2022 observed that only a reasonable amount can be forfeited as earnest money in the event of default on the part of purchaser. It is not permissible in law to forfeit any amount beyond 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 thus deduction of 10% of the sale price of the unit was held to be reasonable on cancellation.

48. Even, the Haryana Real Estate Regulatory Authority Gurugram framed regulation 11 in this regard and the same being called as Forfeiture of earnest money by the builder Regulations, 2018, providing as under :-

> *5. AMOUNT OF EARNEST MONEY*
>
> *Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment/plot/building as the case may be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer"*

49. Thus keeping in view the above-mentioned facts and since the allottees requested for cancellation of the unit while filing the complaint on 01.10.2020 and reiterated on 29.07.2022, so the respondent is bound to act upon the same. Hence, the authority

hereby directs the promoter to return the amount of Rs. received 1,26,64,531/- from complainants after forfeiture of 10% of total sale consideration of Rs. 1,32,56,100/- within 90 days from the date of this order and failing which that amount would be returned with interest at the rate of 9.80% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of application of surrender i.e., 29.07.2022.

G.2 Direct the respondent not to charge holding charges and interest on unpaid payments as claimed in letters of respondent.

50. The authority is of considered view that the holding charges shall not be charged by the promoter at any point of time even after being part of agreement as per law settled by Hon'ble Supreme Court in civil appeal number 3864-3889/2020. The other relief of not charging interest on unpaid amount becomes redundant in view of above order allowing refund of deposited amount to the allottees after 10% deduction as per regulation of the authority.

H. Directions issued the Authority:

51. Hence, the Authority hereby passes this order and issues the following directions under section37 of the Act to ensure compliance of obligations cast upon the promoter as per the functions entrusted to the Authority under section 34(f) of the Act of 2016:

i. The respondent/ promoter is directed to refund the amount of Rs. 1,26,64,531/-to the complainants after deducting 10% of total sale consideration being the earnest money .

ii. A period of 90 days is given to the respondent to comply with the directions given in this regard and failing which the amount to be paid would be recoverable with interest @ 9.80 P.A from that date till the date of actual realization.

52. Complaint stands disposed of.

53. File be consigned to the Registry.

(Vijay Kumar Goyal)
Member

(Dr. KK Khandelwal)
Chairman
Haryana Real Estate Regulatory Authority, Gurugram

Dated: 29.07.2022