BEFORE THE HARYANA REAL ESTATE APPELLATE TRIBUNAL

Appeal Nos.375 & 392 of 2019

Date of Decision: 09.01.2023

Appeal No.375/2019

Godrej Projects Development Limited, 3rd Floor, UM House, Tower-A, Plot No.35-P, Gate No.1, Sector-44, Gurugram-122002, Haryana, India.

Appellant

Versus

1. Mrs. Vimla Vishwanath Saw
2. Mr. Vishwanath Saw

   Flat no.C/501, Alica Nagar, Lokhandwala Complex, Kandivali (East) Mumbai-400101.

Respondents

Appeal No.392/2019

1. Mrs. Vimla Vishwanath Saw
2. Mr. Vishwanath Saw

   Flat no.C/501, Alica Nagar, Lokhandwala Complex, Kandivali (East) Mumbai-400101.

Appellants

Versus

1. Godrej Premium Builders Private Limited, Godrej Bhavan, 4th Floor, 4A Home Street, Fort, Mumbai-400001.
2. Godrej Projects Development Limited, 3rd Floor, UM House, Tower-A, Plot No.35-P, Gate No.1, Sector-44, Gurugram-122002, Haryana, India.

   And registered office at:

Godrej One, 5th Floor, Pirojshnagar, Eastern Express Highway, Vikhroli (East), Mumbai-400079.

3. Mr. Pirojsha Godrej,
The Managing Director,
5th Floor, Godrej One, Pirojshnagar, Eastern Express Highway, Vikhroli (East), Mumbai-400079.

4. Mr. Adi Godrej
Chairman-Godrej Group,
5th Floor, Godrej One, Pirojshnagar, Eastern Express Highway, Vikhroli (East), Mumbai-400079.

Respondents

CORAM:

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

Argued by: Shri Kapil Madan, Advocate, ld. Counsel for promoter. (appellant in appeal no.375/2019 and respondents in appeal no.392/2019).

Shri Ankit Grewal, Advocate, ld. Counsel for the allottees. (respondents in appeal no.375/2019 and appellants in appeal no.392/2019).

O R D E R

INDERJEET MEHTA, MEMBER (JUDICIAL):

By virtue of the present order handed down in appeal No.375/2019, titled "Godrej Projects Development Limited Vs. Vimla Vishwanath Saw & Anr.", another appeal bearing no.392/2019 titled "Vimla Vishwanath Saw & Anr. Vs. Godrej Premium Builders Private Limited & Others", shall also be disposed of as both these appeals have been directed against the same impugned order dated 14.03.2019.

2. In order to avoid the confusion with respect to the identity of the parties, the appellant in appeal no.375/2019 and respondents in appeal no.392/2019, shall be referred as the 'Promoter'. Similarly, the respondents in appeal no.375/2019 and appellants in appeal No.392/2019 shall be referred as the 'Allottees'.

3. Feeling aggrieved by the order dated 14.03.2019, handed down by learned Haryana Real Estate Regulatory Authority, Gurugram, (hereinafter called 'the Authority'), in Complaint No.1901 of 2019, titled "Vimla Vishwanath Saw & Anr. Vs. Godrej Premium Builders Private Limited & Others", vide which the complaint filed by the allottees for refund of the amount deposited by them with the promoter was partly allowed, the promoter has chosen to file the aforesaid appeal no.375/2019.

4. As back as on 25.03.2014, the allottees had booked a unit in the project namely "Godrej Summit" launched by the promoter, by paying an amount of Rs.10,00,000/- to the promoter. Thereafter, vide allotment letter dated 18.10.2014, the allottees were allotted a unit bearing No.C 1603, 15th floor, Tower 'C' Sector-104, Gurugram. Subsequent to the allotment, towards the total sale consideration of the unit i.e. Rs.2,22,73,880/-, the allottees deposited a sum of

Rs.5,22,900/- on 23.03.2014, an amount of Rs.1,65,280/- on 23.07.2014, an amount of Rs.8,97,000/- on 23.07.2014, an amount of Rs.9,01,176/- also on 23.07.2014, an amount of Rs.2,28,820/- on 24.07.2014, an amount of Rs.2,00,000/- on 14.08.2014 and an amount of Rs.18,00,000/- on 28.08.2014 with the promoter, and in this way, the allottees had made the payment of Rs.57,15,176/- which is approximately 26% of the total sale consideration. In the month of September, 2014, an "Apartment Buyer's Agreement" (for brevity 'the Agreement') was executed between the allottees and the promoter. As per the said agreement, the promoter had promised to hand over the possession of the said apartment in 38 months with a further grace period of six months. Since, the allottees had booked the apartment on 25.03.2014, so, the promoter was required to hand over the possession of the apartment on or before 24.05.2017.

5. The allottees further alleged that vide letter dated 28.06.2017, the promoter issued a possession intimation letter to the allottees informing them that the promoter had duly received the 'Occupation Certificate' for Tower 'C' from the office of Director, Town and Country Planning, vide 'Occupation Certificate' dated 20.06.2017 and also informed the allottees that their apartment will be inspected from

31.07.2017. Thereafter, in the month of July, 2017, the allottees enquired about the completion of work in their apartment and they were informed that finishing work was still going on and the apartment was getting ready for possession. Ultimately, vide an email dated 07.09.2017, Mr. Xavier D'Souza, (CRM) requested the allottees to visit the site as per their convenience. However, on 22.09.2017, the allottees terminated the agreement by sending an email and letter to Mr. Lalit Makhijani, an official of the promoter, who responded by an email that the matter would be resolved. Thereafter, on 24.09.2017, the allottees wrote another letter to the promoter stating that the construction of the apartment was substandard and requested for refund of the amount paid by the allottees. As there was no response from the promoter, the allottees sent a reminder letter dated 10.10.2017 with a request to terminate the agreement regarding the said flat and refund the entire amount with 15% interest. Finally, on 31.10.2017, the allottees sent an email to Ms. Tanu Sharma, another official of promoter, once again reiterating that the construction of the unit was not up to the mark and the agreement was terminated. Again, on 06.11.2017, an email was sent to the promoter about the termination of the agreement. The allottees again intimated the promoter on 08.11.2017 that legal action would be initiated against the

promoter for not refunding the amount. However, on 25.11.2017, the allotees received an email from the promoter conveying that balance amount of Rs.1,82,84,346/- be paid within seven days of the receipt of the letter, failing which, the booking of the unit would be cancelled and the deposited amount would be forfeited. The allottees also alleged that thereafter, vide termination letter dated 09.12.2017, the promoter terminated the agreement, which had already been terminated by the allottees.

6. Since, the promoter did not refund the deposited amount to the allottees, so, having no other option, the allottees preferred a complaint before the learned Authority.

7. Upon notice, the promoter had resisted the complaint preferred by the allottees on the ground of maintainability and suppression of the material facts. On merits, it has taken a stand that the allegations as put forward by the allottees in their complaint do not reveal any deficiency on the part of the promoter. In fact, the promoter duly constructed the project and the apartment, and occupation certificate regarding Tower 'C' was issued by DTCP on 20.06.2017. Thereafter, the promoter issued possession intimation letter dated 28.06.2017 to the allottees and raised a demand of Rs.1,78,76,613/- towards balance 75% of the sale

consideration. The promoter has also alleged that it has duly constructed the project without any interim financial contribution by the allottees and about 300 buyers had already taken the possession of their respective apartments in the said project and are enjoying the amenities provided by the promoter. In fact, as per the allegations in the complaint, the grievance of the allottees seems to be that they were unable to pay the contractual balance consideration and thus they opted to come out of the allotment. Further, it has been alleged that the promoter had sent the reminder letters dated 04.09.2017, 05.10.2017 and 24.11.2017, asking the allottees to make the balance payment and to take the possession of the unit. Since, the allotees did not pay the balance amount, as asked for, so, the promoter terminated the agreement vide letter dated 09.12.2017. The promoter has also taken the stand that the allotees sought to exit from the project on account of sharp fall in the market prices, as the same unit is now being sold in the market at a lower price of Rs.1,68,46,576/- and thus there is loss of Rs.54,27,304/- on account of fall in such prices. While denying all other allegations in the complaint, the promoter also prayed for dismissal of the complaint.

8. After taking into consideration the material facts and documents adduced by both the parties, the learned

Authority while exercising the powers vested in it under Section 37 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter called 'the Act'), disposed of the complaint preferred by the allottees with the following directions:-

> *"i. The complainants are under an obligation to take possession of the flat failing which he is liable for all the consequences i.e. to pay 10.75% prescribed rate of interest to the respondent.*
>
> *ii. If the complainants do not come forward to take possession within 30 days, the respondent shall be at liberty to deduct 10% of the total consideration amount and refund the balance amount to the complainants within 90 days from the date of this order.*
>
> *iii. If the complainants intend to take possession of the unit, he shall make balance payment as per provisions of the Act ibid."*

9. Since the allottees were not refunded the entire deposited amount and they were not awarded interest at the prescribed rate on the amount, after deduction of 10% of the total sale consideration amount, so they, too, felt aggrieved and preferred Appeal No.392/2019 titled "Vimla Vishwanath Saw & Anr. Vs. Godrej Premium Builders Private Limited & others".

10. Initiating the arguments, the learned counsel for the promoter, while drawing our attention towards Clause 11 of the Application Form (Page 289) and Clause 2.6 of the Agreement executed in September, 2014, (Page 140), has submitted that the allottees duly executed both the aforesaid documents in which it was clearly mentioned that upon allotment of the apartment, the allottees will not be allowed to cancel the transaction and if any eventuality arises on account of the act and conduct of the allottees, then the promoter shall be entitled to cancel and forfeit the entire earnest money, which has been stipulated to be 20% of the basic sale price, and is meant to ensure performance, compliance and fulfillment of obligations and responsibilities of the buyers.

11. Further, it has been submitted that since the allottees themselves vide email dated 22.09.2017 (Page 196) had sought the cancellation, so, the promoter was entitled to forfeit the stipulated earnest money and in fact, the learned Authority fell in error while issuing the directions to forfeit only 10% of the total sale consideration amount. Lastly, it has been submitted that since the allottees in their email dated 05.09.2017 (Page 372) have admitted that the market price of the unit has crashed down to Rs.5,000/- per sq. ft.

from Rs.7,350/- per sq. ft., when the unit was allotted, so, in these circumstances when there is downward trend of approximately 32%, so forfeiture of 20% earnest money is quite reasonable in the facts and circumstances of the present case. Reliance has been placed upon citations ***Maula Bux v. Union of India (1969)(2) SCC 554, Satish Batra v. Sudhir Rawal 2013 (1) SCC 345 and ONGC v. Saw Pipes 2003 (5) SCC 705***.

12. Countering the aforesaid submissions vehemently, learned counsel for the allottees has submitted that the earnest money is part of the purchase price when the transaction goes forward and as the allottees had deposited Rs.10,00,000/- initially for the allotment of the unit, so the said amount of Rs.10,00,000/- in the given facts and circumstances of the present case is the earnest money.

13. Further, it has been submitted that the learned Authority failed to appreciate this aspect of the case and not only directed to forfeit 10% of the sale consideration amount, but, also did not grant the interest at the prescribed rate on the deposited amount after deduction of the amount of Rs.10,00,000/- which is earnest money in the present case. Reliance has been placed upon citations ***DLF Limited v. Bhagwati Narula 2015 (16) RCR (Civil) 72,***

HUDA and others v. Kewal Krishan Goel and others 1996 SCC (4) 249 and Pioneer Urban Land and Infrastructure Ltd. v. Govindan Raghavan 2019 (5) SCC 725.

14. For the proper appreciation of the aforesaid submissions made by learned counsel for the parties, first of all, let the admitted facts be taken note of. Admittedly, the allottees had applied for an apartment in "Godrej Summit" situated at Sector 104, Gurugram and booked an apartment No.C1603 on the 15th Floor in Tower 'C' of the said project vide an application form dated 25.03.2014. Pursuant to the same, an allotment letter dated 18.10.2014 (Page 294) was issued to the allottees and thereafter, subsequently, Agreement in September, 2014 (Page 126) was executed between the parties. It is also an admitted fact that the allottees had sent an email on 22.09.2017 (Page 196) to the promoter seeking cancellation of the unit and refund of the entire amount deposited by them. Later on, vide email dated 09.12.2017 (Page 220), the promoter terminated the booking of the unit in favour of the allottees. It is also an admitted fact that the allottees have deposited an amount of Rs.57,62,716/- out of the total sale consideration of Rs.2,22,73,880/- of the allotted unit.

15. The legal position with regard to the earnest money has been dealt in detail by Hon'ble Supreme Court in citations ***Maula Bux's*** *case (supra) and* ***Satish Batra's*** case (supra) and the same can be condensed as follows:-

> *"Earnest money is part of the purchase price when the transaction goes forward; it is forfeited when the transaction falls through, by reason of the fault of failure of the vendee. Law is, therefore, clear that to justify the forfeiture of advance money being part of earnest money the terms of the contract should be clear and explicit. Earnest money is paid or given at the time when the contract is entered into and, as a pledge for its due performance by the depositor to be forfeited in case of non-performance, by the depositor. There can be converse situation also that if the seller fails to perform the contract the purchaser can also get the double the amount, if it is so stipulated. In other words, earnest money is given to bind the contract, which is a part of the purchase price when the transaction is carried out and it will be forfeited when the transaction falls through by reason of the default or failure of the purchaser."*

16. A perusal of Clause 11 of the Application Form (Page 289) dated 30.03.2014 and Clause 2.6 of the Agreement executed in September, 2014 (Page 140) shows that it has

been stipulated that earnest money would be 20% of the basic sale price which was meant to ensure performance, compliance and fulfillment of obligations and responsibilities of the buyer. Though, the allottees have taken the stand that the earnest money in the present case is Rs.10,00,000/- which was deposited by them at the time of moving 'Application Form' but the same cannot be attached any credence because as is explicit from the perusal of the Application Form (Page 280) that this application was only a request for allotment and does not constitute a final allotment or agreement. In fact, after the said application had been submitted by the allottees on 25.03.2014 along with an amount of Rs.10,00,000/-, an allotment letter dated 18.10.2014 (Page 294) was issued in favour of the allottees and thereafter the Agreement in September, 2014, was executed between the parties. Clause 2.6 (Page 316) of the Agreement shows that earnest money has been agreed between the parties to be 20% of the basic sale price.

17. Now, the question to be determined is that whether the earnest money to the tune of 20% of the basic sale price, as stipulated in the Agreement of September, 2014 can be termed as reasonable or not? In citation ***Pioneer Urban Land and Infrastructure Ltd.'s*** case (supra), the Hon'ble

Supreme Court has laid down that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between the parties, who are not equal in bargaining power. A term of a contract will not be final and binding if it is shows that flat purchaser had no option but to sign on the dotted line, on a contract framed by a builder. Further, incorporation of one-sided clauses in an agreement constitutes an unfair trade practice since it adopts unfair methods or practices for the purpose of selling the flat by the builder.

18. In citation ***DLF Ltd.'s*** case (supra), the Hon'ble National Consumer Disputes Redressal Commission, while discussing the cases of ***Maula Bux's*** case (supra), ***Satish Batra's*** case (supra) and other cases as mentioned in para No.10 of the said order, has clearly laid down that only a reasonable amount can be forfeited as earnest 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. Further, it was held that 20 % of the sale price cannot be said to be a reasonable amount which the

petitioner company could have forfeited on account of default on the part of the complainant unless it can show it had suffered loss to the extent the amount was forfeited by it. 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.

19. Faced with this situation, learned counsel for the promoter has referred to an e-mail dated 05.09.2017 (Page 372), vide which the allottees had admitted that there is downward trend in the market and the same unit which was earlier allotted @ Rs.7,350/- per sq. ft., was being available @ Rs.5,000/- per sq. ft. and submitted that on account of cancellation of the unit, due to fault of the allottees, the promoter has suffered loss to the tune of Rs.63,26,200/-. Regarding this submission, it is suffice to say that on the basis of this e-mail dated 05.09.2017, by no stretch of imagination, it can be construed that the promoter has suffered the loss to the tune of Rs. 63,26,200/- on account of the lapse on the part of the allottees. It is also pertinent to mention that in this email dated 05.09.2017, simply the allottees have mentioned that the present market rate is Rs.5,000/- per sq. ft. and the same has been compared with the unit of DLF Promoter. The comparison of the present

unit with some unit of other promoter namely DLF, is of no help to the promoter because the market rates of the unit, in fact, are dependent upon the location of the project, the facilities being provided in the said project and other relevant factors, coupled with the fact that mere mentioning the present market rates to be Rs.5,000/- per sq. ft. by the allottees, cannot be considered as a gospel truth.

20. In his last desperate attempt, learned counsel for the promoter has submitted that since the allottees had specifically agreed to pay 20% of the sale price as earnest money, the forfeiture to the extent of 20% of the sale price cannot be said to be unreasonable as the same is in consonance with the terms agreed between the parties. He has also submitted that so long as the promoter was acting as per the terms and conditions agreed between the parties, it cannot be said to be deficient in rendering services to the allottees. This aforesaid submission as put forward by the learned counsel for the promoter, was also submitted before the Hon'ble National Consumer Disputes Redressal Commission, New Delhi in *DLF's* case (supra) and while dealing with the same, it was observed that forfeiture of the amount which cannot be shown to be a reasonable amount, would be contrary to the very concept of forfeiture of the

earnest money and if the said contention is accepted, then, an unreasonable person in a given case may insert a clause in Buyer's Agreement whereby say 50% or even 75% of the sale price is to be treated as earnest money and in the event of the default on the part of the buyer, he may seek to forfeit 50% sale price as earnest money. It was further observed and held that an agreement for forfeiting more than 10% of the sale price would be invalid since it would be contrary to the established legal principle that only a reasonable amount can be forfeited in the event of default on the part of the buyer. Here, it is also pertinent to mention that the deduction of 10% of the total sale consideration of the unit, out of the amount deposited by the allottees, is also inconformity with the Regulations 2018, as notified by the Authority, wherein, it has been stipulated that 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.

21. The citation ***ONGC's*** case (supra) dealing with the scope of Sections 73 and 74 of the Contract Act and lying down that the terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same, is of no

help to the promoter in view of our aforesaid discussion regarding the specific damage claimed by the promoter, which it has failed to prove and establish.

22. There is no dispute to the proposition of law as laid down in citation ***HUDA and another's*** case (supra) that the promoter would be entitled to forfeit the earnest money which had been deposited along with the application form and on deducting the said earnest money, the balance of the amount may be refunded to the allottees who had made application for refund in question. However, the same is of no help to the case of the allottees and is distinguishable because as per the facts and circumstances of the said citation, the amount of earnest money had been specifically mentioned in the application form, whereas contrary to it, in the case in hand, the deposit of amount of Rs.10,00,000/- along with Application Form was only meant to request for the allotment and the same does not constitute a final allotment or agreement.

23. Thus, as a consequence to the aforesaid discussion, we are of the considered opinion that there is no irregularity or illegality in the findings of the learned Authority to direct the promoter to forfeit only 10% of the sale consideration amount (i.e. 10% of Rs.2,22,73,880=

Rs.22,27,388/-) and to refund the balance of amount (i.e. 57,62,716 - Rs.22,27,388) Rs.35,35,328/-. Since, no interest has been granted to the allottees on the refund amount, so, they are entitled for the refund of the said amount i.e. Rs.35,35,328/- (Rupees Thirty Five Lacs, Thirty Five Thousands, Three Hundred and Twenty Eight) along with interest at the rate of 10.6% (maximum SBI MCLR+2%) per annum from the date of institution of the complaint before the learned Authority, till the amount is deposited with this Tribunal.

24. Resultantly, as a consequence to the aforesaid discussion, we are of the opinion that the Appeal No.375 of 2019 titled as "Godrej Projects Development Limited Vs. Vimla Vishwanath Saw & Anr.", preferred by the promoter containing no merit deserves dismissal.

25. However, the Appeal No.392 of 2019 titled as "Vimla Vishwanath Saw & Anr. Vs. Godrej Premium Builders Private Limited & Others", preferred by the allottees is partly allowed as referred to above.

26. The amount of Rs.35,35,328/- deposited by the promoter with this Tribunal to comply with the provisions of proviso to Section 43(5) of the Act, be remitted to the learned Haryana Real Estate Regulatory Authority, Gurugram, for

disbursement to the allottees after the expiry of the period of limitation for filing the appeal and in accordance with law.

27. Copy of this order be placed on the record of Appeal No.392 of 2019 titled "Vimla Vishwanath Saw & Anr. Vs. Godrej Premium Builders Private Limited & Others".

28. Copy of this order be communicated to the parties/learned counsel for the parties and the learned Authority for compliance.

29. Both the files be consigned to the record.

Announced:
January 09, 2023

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

Anil Kumar Gupta
Member (Technical)

CL