HARYANA REAL ESTATE REGULATORY AUTHORITY PANCHKULA

Website: www.haryanarera.gov.in

Complaint no.:	1572 of 2022
Date of filing:	07.07.2022
Date of first hearing:	22.09.2022
Date of decision:	12.07.2023

Bhoop Singh,

S/o Sh. Rattan Lal,

R/o MIG 29, Complex Air Force STN High grounds, Chandigarh

Permanent resident of Village Tigra, Tehsil and District Gurugram.

Haryana,

....COMPLAINANT

VERSUS

Omaxe Ltd.

Regd Office: Omaxe House, 7, LSC

Kalkaji, New Delhi-110019

....RESPONDENT

CORAM:

	Dr. Geeta Rathee Singh	**Member**
	Nadim Akhtar	**Member**

Rathee

Present: - Mr. Roopak Bansal, ld. counsel for the complainant through video conference.
Mr. Arjun Sharma, ld. counsel for the respondent through video conference.

ORDER (Dr. GEETA RATHEE SINGH - MEMBER)

1. Present complaint dated 07.07.2022 has been filed by complainants under Section 31 of the Real Estate (Regulation & Development) Act, 2016 (for short Act of 2016) read with Rule 28 of the Haryana Real Estate (Regulation & Development) Rules, 2017 for violation or contravention of the provisions of the Act of 2016 or the Rules and Regulations made thereunder, wherein it is inter-alia prescribed that the promoter shall be responsible to fulfil all the obligations, responsibilities and functions towards the allottee as per the terms agreed between them.

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, delay period, if any, have been detailed in the following table:

S.No.	Particulars	Details
1.	Name of the project	Omaxe North Avenue, Bahadurgarh.
2.	RERA registered/not registered	Not registered
3.	Unit no.	802, 8th floor in pacific tower.

 Rathee

4	Unit area	Not mentioned.
5.	Date of provisional allotment	Provisional allotment letter undated.
6.	Date of executing builder buyer agreement	Not executed
7.	Due date of possession	Not mentioned
8.	Total sales consideration	₹ 21,59,070
9.	Amount paid by complainant	₹ 4,53,750/-
10.	Offer of possession	Not made

B. FACTS OF THE COMPLAINT AS STATED IN THE COMPLAINT

3. Facts of complaint are that complainant had booked a residential unit in the project of the respondent namely "Omaxe North Avenue, Bahadurgarh.", Haryana by making a payment of ₹ 4,53,750/- to the respondent. Complainant has annexed payment receipt dated 07.09.2007 in favor of complainant as Annexure C-2 with complaint.

4. That respondent has not executed builder buyer agreement till date. Complainant came to know that the respondent is not going to construct the project and as rather going to construct low rise villas.

5. It is stated that complainant was offered allotment in the new project but the same was refused by him.

6. That builder buyer agreement has not been executed between the parties. Respondent has delayed the project beyond a reasonable period of time and therefore the complainant is entitled to refund and interest as per RERA Act.

C. RELIEF SOUGHT

7. The complainants in their complaint have sought following reliefs:

a. To refund the full deposited money which is withheld with the respondent along with interest @18% p.a. from the date of deposit till realization in accordance with section 18(1), Section 19(4) of the Real Estate (Regulation and Development) Act 2016 and Rule 15 and 16 of Haryana Real Estate (Regulation and Development) Rules 2017.

b. To pay interest @ 18% per annum on the amount paid by the complainant to the respondent from the date of payment to the date of realization.

c. To direct the respondent to pay Rs. 5,00,000 / - to the complainant on account of mental harassment caused for delay in possession of the shop.

d. To direct the opposite party to pay Rs. 5,00,000/- under section 12 of the Real Estate (Regulation and Development Act 2016).

e. To direct the opposite party to handover 10% of the estimated cost of the real estate project to the complaint under section 59 of the Real Estate (Regulation and Development), Act 2016.

f. To direct the opposite party to pay the costs to the complainant equivalent to the cost of similar property in the area at the present prices.

g. To direct the opposite party to reimburse litigation cost of Rs. 1,00,000/- to the complainant.

h. Any other relief which this Hon'ble authority deems fit be passed in favour of complainant.

D. REPLY SUBMITTED ON BEHALF OF RESPONDENT

Learned counsel for the respondent filed detailed reply on 21.09.2012 pleading therein:

8. Facts stated by the complainant with respect to booking that complainant had booked a residential unit in the project of the respondent namely "Omaxe North Avenue, Bahadurgarh.", Haryana by making a payment of ₹ 4,53,750/- to the respondent has been admitted. Receipt of Rs. 4,53,750/- dated 24.03.2006 has been annexed as annexure R/2.

9. That complainant was requested to pay an amount of Rs. 2,19,038/- vide letter dated 27.09.2007, Rs. 4,11,262.50 vide letter dated 27.10.2007, Rs. 6,90,863 vide letter dated 01.12.2007, Rs. 9,22,406 vide letter dated

02.01.2008. Complainant did not pay the afore mentioned instalments so thereafter respondent issued a letter dated 11.02.2008 calling upon the complainant to pay an amount of Rs. 9,22,406 along with interest within 10 days. Complainant again did not pay the said demand. Respondent was left with no other option except cancelling the allotment of the complainant. Respondent cancelled the allotment vide letter dated 14.03.2008. Copies of the aforementioned letters are annexed as Annexure R/3, Annexure R/4, Annexure R/5, Annexure R/6, Annexure R/7 and Annexure R/8.

10. That even after the allotment was already cancelled by the respondent on 14.03.2008 the respondent on 10.10.2008 offered to restore the allotment of the complainant with 12% discount and waiver of interest subject to his paying the balance sales consideration. Complainant did not respond to the said letter. Respondent sent a reminder dated 04.11.2008 and 20.11.2008 and reiterated the same offer but complainant did not reply to any letters of the respondent. Finally, on 11.03.2010, respondent sent a cancellation letter to the complainant stating therein that even though there were continuous breach of terms of the allotment by the complainant, yet the respondent made their best efforts to keep the allotment alive, however, now left with no other option, the respondent is cancelling the allotment rights of the complainant and the complainant has no interest, right of any nature

whatsoever over the unit in question. Copies of the aforementioned letters are annexed as Annexure R/9, Annexure R/10, and Annexure R/11.

11. That after the cancellation dated 11.03.2010, the unit in question has been sold to Mr. Hitender and Mrs. Anita Kumari in November, 2010.

12. That the complaint is barred by limitation. Section 88 of the Act clearly states that the provision of 2016 Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force. Allotment of the complainant stands cancelled vide letter dated 11.03.2010 and present complaint has been filed after a lapse of 12 years. Under the civil law, limitation period to file suit for recovery is 3 years from the date of cause of action and any suit filed thereafter is barred by limitation and, as such, is liable to be dismissed. In the present case cause of action arose on 11.03.2010, when the respondent cancelled the allotment but the complaint is filed after the lapse of 12 years.

E. REJOINDER SUBMITTED ON BEHALF OF COMPLAINANT

13. Complainant has denied the averment of the respondent regarding limitation. It is stated that this Authority in complaint no. 403/2021 and 404/2021 has decided that even in case the allotment is not done still the builder is liable to return the earnest money with interest up to the date of payment by the complainant. Complainant has also referred to complaint no. 168 of 2020 wherein

it was held that even when the allotment is cancelled by the builder for non-payment of any instalment the builder may forfeit amount only as per builder buyer agreement and is liable to refund the amount with interest. Further, complainant stated that in complaint no's 2787 of 2019, 2791 of 2019, 2800 of 2019 and 2805 of 2019 it was observed that claim for seeking allotment may be time barred but still the builder should have returned the earnest money to the complainant because it did not fructify into an allotment.

F. ARGUMENTS OF LEARNED COUNSEL FOR COMPLAINANT AND RESPONDENT

14. During oral arguments, ld. counsel for the complainant reiterated his arguments as stated in para 14 of this order. He contended that reminder letters annexed in reply from annexure R/3 to R/11 were sent to the complainant his temporary address MIG 29, Complex, Air Force Stn, Highgrounds, Chandigarh 160004 whereas his permanent address was always Village-Tighra, Sector 57 Gurgaon.

    Ld. counsel for the respondent also reiterated his submissions as stated in para 9 to 13 of this order. With respect to argument of ld. counsel for the complainant regarding the address, ld. counsel for the respondent referred to memo of parties at page 1 of the complaint where the address of the complainant is MIG 29, Complex, Air Force Stn, Highgrounds, Chandigarh

160004. He submitted that when complainant himself has mentioned his address of Chandigarh in the complaint then he cannot be allowed to say that he has not received the letters on said address. Complainant has received all the letters annexed as annexure R/3 to R/11 and he has chosen not to reply to any of the letters. Unit no. 802, 8th floor in pacific tower has already been sold to third party after cancellation. This complaint is an afterthought after RERA Act, 2016 coming into force as plot was cancelled way back in 2010 and the complainant must be barred by limitation for filing complaint after 12 years of his cause of action.

G. ISSUES FOR ADJUDICATION

15. Whether the complainant is entitled to refund of amount deposited by him along with interest in terms of Section 18 of Act of 2016?

H. OBSERVATIONS AND DECISION OF THE AUTHORITY

16. The Authority has gone through the contentions of both the parties. In light of the background of the matter as raptured in this order and also the arguments submitted by the parties, Authority observes as follows:

(i) Admitted facts of this complaint are that the complainant had booked a residential unit in the project of the respondent namely "Omaxe North Avenue, Bahadurgarh.", Haryana by making a payment of ₹ 4,53,750/- to the respondent. Builder buyer agreement has not been executed till date.

Complainant seeks refund of the entire earnest money along with interest. Case of the respondent is that respondent has cancelled the allotment of the complainant on 11.03.2010 after giving numerous opportunities by way of issuing reminders details of which are mentioned in para no. 10 and 11 of this order, to pay the demands raised by respondent. As of today, respondent has already sold the said plot to a third party. Complainant's version is that reminder letters/demand letters referred by the respondent have not been received by him.

Perusal of record- Application form dated 22.03.2006 annexed as Annexure R/1 of reply bears the address village Tigra, Tehsil and Distt. Gurugram. Acknowledgement letter (receipt of payment) dated 24.03.2006 annexed as Annexure R/2 of reply also bears the Gurugram address. Further, complainant while filing his complaint has relied on a letter dated 07.09.2007 wherein respondent has acknowledged the receipt of amount of Rs. 4, 53,750/-. Said letter bears MIG 29, Complex, Air Force Stn, Highgrounds, Chandigarh 160004 address of the complainant. From the bare perusal of the letter dated 07.09.2007 sent by the respondent to the complainant inference can clearly be drawn that Chandigarh address of the complainant must have been communicated by the complainant only to the respondent. Respondent cannot know complainant's address without any communication to it by the

complainant. Subsequent thereupon all communications were sent at the same address only. Further, during the course of hearing complainant himself admitted that he did resided at MIG 29, Complex, Air Force Stn, Highgrounds, Chandigarh 160004 but it was his temporary address. Complainant has neither pleaded nor placed on record anything which shows that after change of his address from Chandigarh he communicated any other address of correspondence to the respondent. Perusal of letter dated 07.09.2007 annexed as annexure C-2 of the complaint also shows that vide said letter respondent demanded a sum of Rs. 1,81,500/- from the complainant. Complainant has also not placed on record anything which shows that he objected to said demand or paid it which clearly shows that complainant chose to ignore the said letter. Section 19(6) of the act talks about the duties of the allottee. Same is reproduced as under for ready reference:

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

It was the duty of the complainant to make necessary payments but the complainant failed to fulfil his duty. Therefore the complainant cannot be

allowed to take plea that he has not received said letters. Argument of the complainant that he has not received the letters sent to him by respondent from 27.09.2007 to 11.03.2010 stands rejected.

(ii) Moreover, complainant neither made any payment towards demand letters nor responded to said letters by any mode of communication and therefore after affording sufficient opportunity for payment the respondent cancelled the unit vide termination letter dated 11.03.2010 whereby in the last para it is stated that 'you are hereby called upon to collect the amount deposited by yourself upon deduction of earnest money and compliance of necessary formalities in this regard'. The complainant remained silent on this termination letter for around 12 years and filed present complaint for refund in the year 2022. The complainant cannot take advantage of his own wrong and negligence as he himself did not come forward to discharge his part of contract which is making of payment towards total sale consideration of the booked unit. Basic sales consideration was Rs. 18,15,070/- and the complainant has paid an amount of Rs. 4,53,750/-. Authority observes that respondent was justified in terminating the unit of the complainant as complainant failed to make payments. The only obligation which was left on the part of the respondent was to refund the amount paid by the complainant after deducting earnest money which has not been done till date therefore,

cause of action still survives with the complainant. Since no BBA was executed between the parties, it cannot be ascertained what actual amount is liable to be deducted on cancellation. To ascertain what shall be a reasonable earnest amount. Authority has made reference to **Appeal no. 292/2019 titled as Experion Developers Pvt Ltd vs Sanjay Jain & Smt. Kokila Jain** wherein Hon'ble Appellate Tribunal has observed 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. Relevant part of the order is reproduced below for reference:-

> *"17. The legal position with regard to the earnest money has been dealt in detail by Hon'ble Supreme Court in citations Maula Bux v. Union of India (1969)(2) SCC 554, 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 13 Appeal No.292/2019 & 35/2021 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*

Rathee

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."

18. The perusal of Article I Clause 1(xiii) of the agreement dated 11.11.2014 shows that it has been specifically stipulated that earnest money would be 15% 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.11,00,000/- which was deposited by them at the time of booking of the plot, but the same cannot be attached any credence because the booking is only request for allotment and does not constitute a final allotment or agreement.

19. Now, the question to be determined is that whether the earnest money to the tune of 15% of the basic sale price, as stipulated in the Agreement of 11.11.2014 can be termed as reasonable or not? In citation Pioneer Urban Land and 14 Appeal No.292/2019 & 35/2021 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.

20. In citation <u>DLF Ltd.'s case (supra), the Hon'ble National Consumer Disputes Redressal Commission</u>, 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 15 Appeal No.292/2019 & 35/2021 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.

21. In his last desperate attempt, learned counsel for the promoter has submitted that since the allottees had specifically agreed to pay 15% of the sale price as earnest money, the forfeiture to the extent of 15% 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 16 Appeal No.292/2019 & 35/2021 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."

Respondent can be allowed to deduct only 10% of basic sale price as earnest money and return remaining amount to the complainant. In this case agreement has not been executed however as per demand letter dated 07.09.2007 annexed as annexure C-2 of the complainant the total sales price is Rs. 21,59,070/-. Earnest money of 10 % of the total sales price is liable to

be deducted from the amount paid by the complainant which works out to be Rs. 2,15,907/-.

17. In light of aforesaid observations, Authority finds it to be fit case for allowing refund in favor of complainant after deducting earnest money to the tune of 10% of basic sale price. Though the complainant has sought that interest be allowed @18% however same cannot be allowed as interest can only be awarded in terms of RERA Act of 2016 and HRERA Rules of 2017. As per Section 18 of Act, interest shall be awarded at such rate as may be prescribed. Rule 15 of HRERA Rules, 2017 provides for prescribed rate of interest which is as under:

"Rule 15. Prescribed rate of interest- (Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19] (1) For the purpose of proviso to section 12; section 18, and sub. sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of india highest marginal cost of lending rate +2%: Provided that in case the State Bank of India marginal cost of lending rate (NCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public".

18. The legislature in its wisdom in the subordinate legislation under the provisions of Rule 15 of the Rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

19. Consequently, as per website of the state Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short MCLR) as on date i.e. 12.07.2023 is 8.70%. Accordingly, the prescribed rate of interest will be MCLR + 2% i.e., 10.70%.

20. The definition of term 'interest' is defined under Section 2(za) of the Act which is as under:

> (za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.
>
> Explanation.-For the purpose of this clause-
>
> (i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;
>
> (ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;

21. Accordingly, respondent will be liable to pay the complainant interest from the date amount was paid till the actual realization of the amount. Hence, Authority directs respondent to refund to the complainant the paid amount of ₹ 2,37,843/- (4,53,750-2,15,907) along with interest at the rate prescribed in Rule 15 of Haryana Real Estate (Regulation and Development)

Rules, 2017 i.e. at the rate of SBI highest marginal cost of lending rate (MCLR)+ 2 % which as on date works out to 10.70% (8.70% + 2.00%) from the date amounts were paid till the actual realization of the amount after deducting earnest money to the tune of 10%. Total sale price of the unit is Rs 21,59,070/- and 10% of it is Rs 2,15,907/-. Authority has got calculated the interest at the rate of 10.70% till the date of this order and said amount works out to ₹ 4,40,655/-as per detail given in the table below:

Sr. No.	Principal Amount	Date of payment	Interest Accrued till 12.07.2023
1.	₹ 2,37,843/-	24.03.2006 (as per receipt at page 19 of reply)	Rs. 4,40,655/-
2.	Total = 2,37,843/-		= Rs. 6,78,498/-

22. The complainant is seeking compensation on account of mental agony, torture, harassment caused for delay in possession, deficiency in services and cost escalation. It is observed that Hon'ble Supreme Court of India in Civil Appeal Nos. 6745-6749 of 2027 titled as *"M/s Newtech Promoters and Developers PvL Ltd. V/s State of U.P. & ors."* (supra,), has held that an allottee is entitled to claim compensation & litigation charges under Sections 12, 14, 18 and Section 19 which is to be decided by the learned Adjudicating Officer as per section 71 and the

quantum of compensation & litigation expense shall be adjudged by the learned Adjudicating Officer having due regard to the factors mentioned in Section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses. Therefore, the complainants are advised to approach the Adjudicating Officer for seeking the relief of litigation expenses.

23. Ld. counsel for complainant has not pressed upon the relief sought in clause no. e, f, g and h.

I. DIRECTIONS OF THE AUTHORITY

24. Hence, the Authority hereby passes this order and issues following directions under Section 37 of the Act to ensure compliance of obligation cast upon the promoter as per the function entrusted to the Authority under Section 34(f) of the Act of 2016:

    (i) Respondent is directed to refund the entire amount of ₹ 6,78,498/- to the complainant.

    (ii) A period of 90 days is given to the respondent to comply with the directions given in this order as provided in Rule 16 of Haryana Real Estate (Regulation & Development) Rules, 2017 failing which legal consequences would follow.

25. **Disposed of**. File be consigned to record room after uploading on the website of the Authority.

NADIM AKHTAR
[MEMBER]

DR. GEETA RATHEE SINGH
[MEMBER]