BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.: **5508 of 2022**
Order reserved on: **12.10.2023**
Order pronounced on: **14.12.2023**

Mrs. Geeta Shokeen
Mr. Pradeep Sehrawat
Both RR/o: - C-1601, Emaar Palm Drive, Sector- 66, Gurugram – 122018
Both presently residing at: - P-702, Emaar The Encalve, Sector- 66, Gurugram **Complainants**

Versus

M/s Adani Brahma Synergy Private Limited
Regd. office at: Ground Floor, Adani House, Plot No. 83, Sector- 32, Institutional Area, Gurugram- 122001 **Respondent**

CORAM:
Shri Vijay Kumar Goyal **Member**

APPEARANCE:
Shri Gaurav Rawat (Advovate) **Complainants**
Shri Harshit Batra (Advocate) **Respondent**

ORDER

1. The present complaint has been filed by the complainant/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 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 to the allottee as per the agreement for sale executed inter-se 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 tabular form:

S.no	Particulars	Details
1.	Name of the project	"Samsara Vilasa (Part-5)", Sector-63, Gurugram, Haryana
2.	Nature of project	Residential floors
3.	**RERA registered/not registered**	Registered vide registration no. 13 of 2019 dated 26.03.2019
	Validity status	30.09.2023
	Licensed area	144.66875 acres
4.	**DTPC License no.**	64 of 2010 dated 21.08.2010
	Validity status	20.08.2025
	Licensed area	141.66875 acres
	Name of licensee	M/s Brahma City Pvt. Ltd. & others
	Name of developer	M/s Achaleshwar Infrastructure Private Limited
5.	Application form dated	01.04.2019 [As per page no. 23 of complaint]
6.	Allotment letter	08.05.2019 [As per annexure-C1 on page no. 23 of complaint]
7.	Independent floor no.	J112-A (type C2) 1st floor [As per page no. 23 of complaint]
8.	Area admeasuring	2952 sq. ft. [Carpet area] [As per page no. 23 of complaint]
9.	Date of agreement for sale	11.06.2019 [As per page no. 52 of complaint]
10.	Tri-partite agreement	04.08.2020 [As per page no. 34 of reply]
11.	Possession clause	**Clause 7.1** **POSSESSION OF THE APARTMENT:** *Schedule for possession of the Apartment - The Promoter agrees and understands that*

		timely delivery of possession of the Apartment along with parking and right to use of General Common Areas and Limited Common Areas of the Building to the Allottee and the General Common Areas of the Building to the allottees (having apartments in the Building) as provided under Rule 2(1)(A of Rules is the essence of the Agreement. *The Promoter assures to hand over possession of the Apartment for residential usage along with parking and right to use of General Common Areas and Limited Common Areas as per agreed terms and conditions* ***within 27 months from the date of registration of this Agreement unless there is delay due to "force majeure", court orders, government policy****/ guidelines, grant of departmental sanctions decisions affecting the regular development of the Plot. If the completion of the Building is delayed due to the above conditions, then the Allottee agrees that the Promoter shall be entitled to the extension of time for delivery of possession of the Apartment.* *The Allottee agrees and confirms that, in the event it becomes impossible for the Promoter to implement the Building/ Project due to Force Majeure and above mentioned conditions, then this allotment shall stand terminated.....*
12.	Due date of possession	11.09.2021 [Calculated as 27 months from date of agreement i.e. 11.06.2019] (inadvertently mentioned as 11.09.2019 in the proceeding dated 12.10.2023)
13.	Total sale consideration	Rs.3,51,78,242/- (TSC) Rs.3,45,11,686/- (BSP) [As per SOA dated 27.04.2022 on page no. 104 of complaint]

14.	Amount paid by the complainants	Rs.1,44,94,907/- [As per SOA dated 27.04.2022 on page no. 104 of complaint]
15.	**Demand** and final reminder letters dated	**17.03.2021**, 02.08.2021 [As per page no. 32 & 35 of complaint]
16.	Notice for cancellation letter dated	20.01.2022 [As per page no. 37 of complaint]
17.	Cancellation letter dated	25.04.2022 [As per page no. 38 of complaint]
18.	Occupation certificate	Not obtained
19.	Offer of possession	Not offered

B. Facts of the complaint

3. The complainants have made the following submissions: -

I. That in the year 2010, the respondent company issued an advertisement announcing the project namely "Samsara Vilasa (Part-V)" at Sector - 63, Gurugram was launched by respondent, under the license bearing no. 64 of 2010, issued by DTCP, Haryana, Chandigarh and thereby invited applications from prospective buyers for the purchase of unit in the said project. The respondent confirmed that the projects had got building plan approval from the authority and the preprinted rosy picture of the project in its advertisements making tall claims.

II. That the complainants while searching for a unit was lured by such advertisements and calls from the brokers of the respondent company for buying a house in their project. The respondent company told the complainants about the moonshine reputation of the company and the representative of the respondent company made huge presentations about the project mentioned above and also assured that they have

delivered several such projects in the national capital region. The respondent handed over one brochure to the complainants which showed the project like heaven and in every possible way tried to hold the complainants and incited the complainants for payment.

III. That relying on various representations and assurances given by the respondent and on belief of such assurances, the complainants booked a unit in the project by paying an amount of Rs.4,99,999/- towards the booking of the said plot to the respondent on 01.04.2019 and the same was acknowledged by the respondent.

IV. That the respondent sent allotment letter dated 08.05.2019 to the complainants providing the details of the project, confirming the booking of the unit dated 01.04.2019, allotting a unit no. J112-A, in Sector 63, having carpet area measuring 1945.05 sq. ft. in the aforesaid project of the developer for a total sale consideration of the unit i.e. Rs.3,45,11,686/-, other specifications of the allotted unit and providing the time frame within which the next installments was to be paid. That an agreement for sale was executed by respondents after repeated reminders from the complainants and even after delay of more than two months from the date of booking. Thereafter, agreement to sell was executed between the parties on 11.06.2019.

V. That as per clause 7.1 of the agreement respondent was under obligation to complete the construction of the project within 27 months from the date of the agreement i.e. 11.06.2019. Therefore, the due date of possession comes out to be 11.09.2021. Further, the complainants having dream of its own unit in NCR signed the agreement in the hope that the unit will be delivered within 27 months from the date of execution of agreement. The complainants were also handed over one detailed

payment plan. It is unfortunate that the dream of owning a unit of the complainants were shattered due to dishonest, unethical attitude of the respondent. That as per the demands raised by the respondent, based on the payment plan, the complainants to buy the captioned unit timely paid a total sum of Rs.1,44,94,907/- towards the said unit against total sale consideration of Rs.3,45,11,686/-.

VI. That the payment plan was designed in such a way to extract maximum payment from the buyers viz a viz or done/completed. They approached the respondent and asked about the status of construction and also raised objections towards non-completion of the project. That such arbitrary and illegal practices have been prevalent amongst builders before the advent of RERA, wherein the demands etc. have not been transparent and demands were being raised without sufficient justifications and maximum payment was extracted just raising structure leaving all amenities and other things promised in the brochure, which counts to almost 50% of the total project work.

VII. That complainants sent an email dated 22.03.2019 to the respondent stating that as we are well aware of the unexpected pandemic situation and how that has impacted the middle class and I am no different. I have lost all my income sources and requested for change in the payment plan from construction linked to newer payment plan i.e. 25% and 75% at the time of possession. The respondent acting arbitrarily instead of replying and changing the payment plan of the complainants kept on raising the demands without reaching the desired milestone. (Note: The date of email is inadvertently mentioned incorrect in their complaint as the pandemic situation aroused on 25.03.2020 i.e., the date on which nationwide lockdown was imposed).

VIII. That vide demand letter dated 17.03.2021 raised the demand of Rs.72,47,455/- from the complainants on account of completion of 4th

floor roof slab. The complainants after receiving the aforesaid demand on account of raised/ challenged the aforesaid letter on account of change in payment plan and raising the concern/objection that on ground reality status of construction of is not the same as the demand of money raised. Furthermore, requested for the inspection of the unit as per the agreement. Thereafter, complainants sent several reminder emails /telephones to the respondents company but they were never able to give any satisfactory response regarding the aforesaid issues raised by them.

IX. That respondent send final reminder letter dated 02.08.2021 to complainants asking to pay the above mentioned illegal demand on account of completion of 4th floor roof slab. Thereafter, notice before cancellation was sent to complainants vide letter dated 20.01.2022. The respondent company instead of responding to aforesaid queries of the complainants and resolving the issues, acting arbitrary sent final cancellation letter dated 25.04.2022, to the complainants stating that the complainants are at default in making the payments to the respondents and non-compliance of other formalities pertaining to provisionally allotted unit.

X. To above said act of the respondent, the complainants raised objection that it was the fault of the respondent. Furthermore, stating that unit till date is not complete, there are no firefighting equipment's, and no power connection till date, etc. therefore, the demand raised is null and void. All such act and omissions on the part of the respondent has caused an immeasurable mental stress and agony to the complainants.

XI. That during the period the complainants went to the office of respondent several times and requested them to allow them to visit the site but it was never allow saying that they do not permit any buyer to visit the site

during construction period, once complainant visited the site but was not allowed to enter the site and even there was no proper approached road. The complainants even after paying amounts still received nothing in return but only loss of the time and money invested by them.

XII. That the complainants contacted the respondent on several occasions and were regularly in touch with the respondent. The respondent was never able to give any satisfactory response to the complainant regarding the status of the construction and were never definite about the delivery of the possession. The complainants kept pursuing the matter with the representatives of the respondent by visiting their office regularly as well as raising the matter to when will they deliver the project and why construction is going on at such a slow pace, but to no avail. Some or the other reason was being given in terms of shortage of labour etc.

XIII. That the respondent has completely failed to honour their promises and have not provided the services as promised and agreed through the brochure, agreement and the different advertisements released from time to time. Further, such acts of the respondent is also illegal and against the spirit of the Act, 2016 and the Rules, of 2017.

XIV. That the respondent has played a fraud upon the complainants and have cheated them fraudulently and dishonestly with a false promise to complete the construction over the project site within stipulated period and paying the monthly assured amount. Hence, the complainants being aggrieved by the offending misconduct, fraudulent activities, deficiency and failure in service of the respondent is filing the present complaint. That as per section 18 of the Act. 2016, the promoter is liable to refund the entire paid by the allottees of a unit along with prescribed rate of

interest, building or project for a delay or failure in handing over of such possession as per the terms and agreement of the sale.

C. Relief sought by the complainants:

4. The complainants have sought following relief:

   I. Direct the respondent to refund the entire amount of Rs.1,44,94,907/- paid by the complainants to the respondent along with interest till the date of its realization.

   II. Restrain the respondent from raising any fresh demand with respect to the project.

   III. Direct the respondent not to create any third party rights in the said unit final realization of the total amount paid along with interest.

5. On the date of hearing, the authority explained to the respondent/ promoter about the contraventions as alleged to have been committed in relation to section 11(4)(a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent

6. The respondent has contested the complaint on the following grounds:-

   I. That present complaint is not maintainable from the bare reading of complaint itself. The complainants have themselves admitted that their unit has been canceled yet in the relief clause they did not sought relief of setting aside cancellation letter, thus by their own omission complainants admitted that cancellation of unit valid and for the same reason present complaint for entire refund is not maintainable. That a cheque/demand draft of balance amount after deduction of earnest money and other charges is attached herein. That a complete detail of cancellation charges is as follow:-

Cancellation charges		
(A)	Basic Sale Price	3,51,78,242/-
(B)	10% Earnest Money	35,17,824.23
(C.)	Paid GST Deducted (Upto 31.03.2021)	10,35,351
(D)	Bank Loan Disburs. with Interest amount (under tripartite agreement)	46,35,765
(E)	Gross Total	98,22,148
(F)	Payment Received From Customer	1,44,94,908
(G)	**Net Payable to Customer**	**46,72,760**

II. That another important aspect concealed by the complainant is that there is duly executed tripartite agreement entered upon between the complainant, respondent and housing development Finance corporation ltd. on 04.08.2020. As per the terms of the said agreement in the event of cancellation of allotment of the said decision residential apartment for any reason whatsoever, the entire amount advanced by HDFC will be refunded by the builder to the HDFC forthwith subjected terms of the agreement to sale. That as per clause 9 of the said agreement in the event of occurrence of default on that the loan agreement which would result in cancellation of the allotment as a consequence thereof and/or for any reason whatsoever if allotment is cancelled, any amount payable to the borrower on account of cancellation shall be directly paid to HDFC.

III. That complainant further agreed that the borrower agrees that it unconditionally and irrevocable subrogates is rights to receive any amount payable by the builder to the borrower in the event of cancellation of allotment of the said residential apartment in favour of HDFC. That in view of our city terms and condition, since the allotment of the complainant was already cancelled, the respondent requested to issue a foreclosure letter to the HDFC Bank. However, as per the tripartite agreement the total balance amount after deduction of earnest money and other charges/taxes can't be paid directly to the complainant and it

is the right of HDFC Bank to clear its loan first and only thereafter balance amount shall be paid to the complainant through said bank.

IV. That the complainants have quite cleverly concealed all the material facts from the authority to attain their ultimate goal of undue benefit which they are trying to derive from the present complaint. Since the allotment of complainants had already been canceled after following due process and after giving sufficient time to complainants to pay the balance amount and when the complainants failed to pay on time their unit was canceled. That even as per provisions of the Act of 2016, in case of default of payment builder has every right to cancel the allotment, thus present complaint is not maintainable in any form and complainants have no right to seek any relief from the authority.

V. That the respondent launched a residential project under the name and style of "Samsara Vilasa" in Sector 63, Tehsil Wazirabaad, District Gurugram, Haryana, wherein the complainants in the year 2019 through broker namely Elite Land Base approached the respondent to book a residential floor. Then, the complainants vide an application applied for allotment and paid booking amount of Rs.5,00,000/-.

VI. That thereafter a registered agreement to sale was executed between the parties on 11.06.2019 and vide said agreement, it was specifically agreed upon by the parties that earnest money shall be 10 % of the total sale consideration as duly agreed in definition clause (Q) of the agreement and further, as per clause 9.3, it was further agreed between the parties that the allottee shall be considered under a condition of default, in case the allottee fails to make payments for two consecutive demands made by the promoter as per the payment plan annexed hereto, despite having been issued a notice in that regard the allottee shall be liable to pay

interest to the promoter on the unpaid amount at the rate prescribed in the rules, from the due date mentioned in first such demand. The complainants have specifically agreed upon the conditions, they always knew very well that in case of default their allotment is liable to be cancelled, yet she chosen to make defaults one after another, and consequently after issuance of several reminders and a pre-cancellation notice, the allotment of complainants was terminated by the respondent vide letter dated 25.04.2022.

Sr. No.	Date of demand	Due Date	Amount demanded	Amount paid	DEFAULT IN PAYMENT
a)	08-05-2019	22-06-2019	31,23,728	30,89,216	YES Full amount not paid
b)	16-07-2019	31-07-2019	36,58,239	35,89,215	YES Full amount not paid
c)	12-10-2020	27-10-2020	36,23,726	24,00,000	YES Full amount not paid
d)	24-12-2020	08-01-2021	48,47,453	48,47,454	YES Since paid in delayed manner as follow • 5,00,000 on 23-12-2020 • 7,23,728 on 24-12-2020 • 24,00,000 on 15-01-2021 • 8,00,000 on 01-02-2021 • 4,23,726 on - 1-02-2021
e)	17-03-2021	01-04-2021	72,47,455	NOT PAID	N.A
f)	02-08-2021	ASAP	72,47,454	NOT PAID	N.A
g)	27-12-2021	ASAP	72,47,454	NOT PAID	N.A
h)	20-01-2022 (notice before cancelation)	ASAP	72,47,454	NOT PAID	N.A
i)	25-04-2022 (final cancelation)	N.A	N.A	N.A	N.A

VII. That after receiving above stated demand letters and pre-cancellation letter, as well as final cancellation, the complainants starts sending baseless emails to respondent just in order to create false circumstances, that those emails are annexed by complainants themselves, that from

bare reading of these mails it is quite clear that these mails pertaining to period after final cancelation of allotment and only few e-mail pertains to year 2021 after receiving of demand of Rs.72,47,454/-, wherein complainants forcing the respondent to change their payment plan in 25:75 ratio. That since the payment plan was already agreed upon between the parties, thus said plan was never accepted by respondent and demands were raised as per already agreed payment plan. That from the e-mails of complainants it is quite clear that they wants to change the payment plan unilaterally just because respondent allegedly offered similar plans to some other person. That even in these mails several false pleas were taken by complainants i.e., they were asking change of payment plan since beginning or since the time of making 20% of payment. No such request were ever raised by complainants. That even after cancellation once respondent offered to restore the unit on request of complainants but subjected to complete payment along with interest but complainants never paid said amount and now as already stated above balance amount is already refunded thus unit can't be restored at this stage.

VIII. That it was agreed between the parties that before final cancellation a 30 day prior notice was required to be given and in the present case, the respondent after giving prior notice before cancellation further waited for 94 days months days only in a hope that complainant might able to arrange the fund but complainants kept on delaying payment, thus ultimately vide cancellation letter dated 25.04.2022 allotment was canceled by the respondent. That even after final cancellation letter, option was given to the complainants that they could avoid the cancellation by paying the balance amount within 30 days and in case

they fail to do so their allotment shall stand cancelled without any further notice however even after receiving of said notice complainant never bothered to pay the same thus their allotment shall stand cancelled finally.

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

E. Written submission made by the respondent

8. The respondent has filed the written submission on 07.12.2023, and made the following submissions: -

- That the obligation of payment by the complainant flows from clauses 1.4 and 5 of the agreement and also from section 19(6) and (7) of the Act, 2016. However, the complainants miserably defaulted in making the said payment. That out of the total sale consideration of Rs.3,69,43,675/-, they have only paid Rs.1,44,94,907/-, i.e., only 39%. That the complainants have miserably defaulted in making the due payments.
- The default of the complainants are evident from the following:

Date of demand/Reminder/cancellation	Status of payment
08-05-2019	Incomplete payment received.
16-07-2019	Incomplete payment received.
12-10-2020	Incomplete payment received.
24-12-2020	Delayed payment
17-03-2021	Not Paid
02-08-2021	Not Paid
27-12-2021	Not Paid
20-01-2022 (Notice before cancelation)	Not Paid
25-04-2022 (Final cancelation) Final Cancellation dated	Not Paid
Email dated 11.05.2022 from Respondent: Unit is finally cancelled and if the Complainant seeks to restore the same, complete payment with interest	Complainant did not take any step to restore the unit.

may be made. Documentation for restoration was also provided. (Page 115 – 116 of complaint)	
Email dated 12.05.2022: Unit has been finally cancelled and if the Complainant seeks to restore the same, complete payment with interest may be made. Documentation for restoration was also provided. (page 114 of the complaint)	Complainant did not take any step to restore the unit.

- That after the cancellation of the unit, the amount paid by the HDFC bank had to be returned to it, without any deductions. Hence, post the cancellation of the unit, the respondent sought the foreclosure letter from the Bank, which was provided to the respondent and subsequently, the foreclosure amount of Rs.46,35,765/- was returned to the Bank vide demand draft bearing no. 713474 & 713475 both dated 10.10.2022.
- That thereafter, on 10.02.2023, the respondent shared the remaining calculations on page no. 1 of the reply and called upon the complainants to come forward and take the refund amount, however, the complainants have miserably failed in taking the refund amount.
- That since the respondent has been ever willing to make the payment and fulfil its obligations, no order as to the payment of interests should be made in the present case and the peculiarities of the matter need to be categorically adjudicated by this Authority.

F. Jurisdiction of the authority

9. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint.

F. 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.

F II Subject matter jurisdiction

10. 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)(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 allottee as per the agreement for sale, or to the association of allottee, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottee, or the common areas to the association of allottee or the competent authority, as the case may be;*
> *34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottee and the real estate agents under this Act and the rules and regulations made thereunder.*

11. So, in view of the provisions of the Act of 2016 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.

E. Findings regarding relief sought by the complainant.

F.I Direct the respondent to refund the entire amount of Rs.1,44,94,907/- paid by the complainants to the respondent along with interest till the date of its realization.

12. The complainants were allotted a plot bearing no. J-112, vide allotment letter dated 08.05.2019, under construction linked payment plan. Thereafter, an agreement to sell was executed between the parties on 11.06.2019, vide which a plot bearing no. J-112, in block- J, having

admeasuring 559 sq. yards. was allotted to them. They have paid an amount of Rs.1,44,94,907/- against the basic sale consideration of Rs.3,45,11,686/-. As per clause 7.1 of the agreement, the respondent was required to hand over possession of the unit within a period of 27 months from the date of registration of this agreement, unless there is delay due to "Force Majeure" court orders, government policy/guidelines, grant of departmental sanctions decisions affecting the regular development of the plot. Therefore, the due date of possession comes out to be 11.09.2021. (calculated from date of execution of this agreement i.e., 11.06.2019)

13. That vide letter dated 17.03.2021, the respondent further made a demand of Rs.72,47,455/- from the complainant, but it had failed to respond to the queries pertaining to the change of payment plan i.e., 25% and 75% at the time of possession. Thereafter, the respondent issued a final reminder letter dated 02.08.2021, and send the notice for cancellation letter dated 20.01.2022 and finally cancelled on vide cancellation letter dated 25.04.2022 which it illegally threatened the complainant to forfeit more than 68% of the total consideration of the unit.

14. The respondent has raised a plea in its reply that the complainants have not challenged the cancellation and sought the relief of refund. Further, since loan was taken by the complainants against the unit in view of tri-partite agreement dated 04.08.2020, the respondent was under obligation to disburse the payment made by the bank first and it has paid an amount of Rs.46,35,765/- towards payment to bank and after deduction of earnest

money and GST only Rs.46,72,760/- is payable to the complainants-allottees. The respondent submitted that the complainant is a defaulter and has failed to make payment as per the agreed payment plan. Therefore, various reminders and final opportunities were given to the complainant and thereafter the unit was cancelled vide letter dated 25.04.2022. Accordingly, the complainants failed to abide by the terms of the agreement to sell executed inter-se parties by defaulting in making payments in a time bound manner as per payment schedule. Now, the question before the authority is whether this cancellation is valid or not?

15. The authority has gone through the payment plan, which was duly signed by both the parties. As per payment plan agreed between the parties, the complainant has only paid 41.99% of the basic sale consideration and has paid the last payment on 01.02.2021. Therefore, the authority is of considered view that the respondent is right in raising demands as per payment plan agreed between the parties and the complainant has failed to fulfil the obligations conferred upon them vide section 19(6) & (7) of the Act of 2016, wherein the allottee was under obligation to make payment towards consideration of allotted unit. The respondent after giving reminders dated 17.03.2021, 02.08.2021, 27.12.2021 for making payment for outstanding dues as per payment plan. However, the complainant has failed to take possession and clearing the outstanding dues. Therefore, the respondent issued notice for cancellation letter 20.01.2022 and finally cancelled/terminated the unit of the complainant vide letter dated

25.04.2022. The respondent has given sufficient opportunity to the complainant before proceeding with termination of allotted unit.

16. On 12.10.2023, the counsel for the respondent states that as per clause 7.5 of the buyer's agreement, the booking amount is liable to be forfeited and the booking amount is only five lakhs. The authority observes that clause 7.5 of the buyer's agreement talks about the ***cancellation by the allottee:*** *The Allottee shall have the right to cancel/withdraw his/her/their allotment in the Project as provided in the Act:*

Provided that where ***the Allottee proposes to cancel/withdraw from this Agreement without any fault of the Promoter, the Promoter herein is entitled to forfeit the Booking Amount/Earnest Money paid for the allotment and interest component on delayed payment (payable by the Allottee for breach of this agreement and non-payment*** *of any due payable to the Promoter) brokerage paid by the Promoter, including but not limited to bank charges against return of cheque. The rate of interest payable by the Allottee to the Promoter shall be the State Bank of India highest marginal cost of lending rate plus two percent, or such other rates as may be amended from time to time. The balance amount of money paid by the Allottee shall be returned by the Promoter to the Allottee within ninety (90) days of such cancellation without any interest simultaneous to return of original documents of allotment by the Allottee.....*

17. That the above mentioned clause provides that the promoter is entitled to forfeit the booking amount/earnest money paid for the allotment and interest component on delayed payment (payable by the Allottee for breach of this agreement and non-payment).

18. The authority further observes that the complainant has availed the home loan from the financial institution i.e., Housing Development Finance Corporation Limited and the tripartite agreement was also executed in this regard on 25.11.2020. However, the respondent has placed on record a copy of "No Dues Certificate" dated 07.02.2023, which shows that no

amount is now due from him/her/them towards or in respect of the said loan.

19. Further, as per clause 9.3 of the agreement to sell, the respondent /promoter have right to cancel the unit and forfeit the earnest money in case the allottee breached the terms and conditions of the agreement to sell executed between both the parties. Clause 9.3 of the agreement to sell is reproduced as under for ready reference.

> *9.3 The Allottee shall be considered under a condition of Default, on the occurrence of the following events:*
> *(i) In case the Allottee fails to make payments for two consecutive demands made by the Promoter as per Payment Plan annexed hereto, despite having been issued notice in that regard the Allottee shall be liable to pay interest to the Promoter on the unpaid amount at the rate prescribed in the Rules. from the due date mentioned in first such demand;*
> *(ii) In case of Default by Allottee under the condition listed in clause 9.3(1) above continues for a period beyond ninety (90) days after notice from the Promoter in this regard, the Promoter may at its* ***absolute discretion cancel the allotment of the Apartment along with car parking in favour of the Allottee and refund the money paid to it by the Allottee by forfeiting the Earnest Money paid for the allotment and interest component on delayed payment (payable by the customer for breach of agreement and non-payment of any due payable to the Promoter).*** *The rate of interest payable by the Allottee to the Promoter shall be the State Bank of India highest marginal cost of lending rate plus two percent. The balance amount of money paid by the Allottee shall be returned by the Promoter to the Allottee within ninety (90) days of such cancellation. On such default, this Agreement and any liability of the Promoter arising out of the same shall thereupon, stand terminated.*
> *Provided that, the Promoter shall intimate the Allottee about such termination at least thirty (30) days prior to such termination."*

20. The respondent/promoter issued demands letter and further, issued termination/cancellation letter to the complainant. The respondent cancelled the unit of the complainant after giving adequate demands notices. Thus, the cancellation of unit is valid.

21. The issue with regard to deduction of earnest money on cancellation of a contract arose in cases of ***Maula Bux VS. Union of India, (1970) 1 SCR 928 and Sirdar K.B. Ram Chandra Raj Urs. VS. Sarah C. Urs., (2015) 4 SCC 136,*** and wherein it was held that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in the nature of penalty, then provisions of section 74 of Contract Act, 1872 are attached and the party so forfeiting must prove actual damages. After cancellation of allotment, the flat remains with the builder as such there is hardly any actual damage. National Consumer Disputes Redressal Commissions in CC/435/2019 ***Ramesh Malhotra VS. Emaar MGF Land Limited*** *(decided on 29.06.2020) and* ***Mr. Saurav Sanyal VS. M/s IREO Private Limited*** *(decided on 12.04.2022)* ***and followed in CC/2766/2017 in case titled as Jayant Singhal and Anr. VS. M3M India Limited decided on 26.07.2022,*** held that 10% of basic sale price is reasonable amount to be forfeited in the name of "earnest money". Keeping in view the principles laid down in the first two cases, a regulation known as the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, was farmed 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."

22. So, keeping in view the law laid down by the Hon'ble Apex court and provisions of regulation 11 of 2018 framed by the Haryana Real Estate Regulatory Authority, Gurugram, and the respondent/builder can't retain more than 10% of sale consideration as earnest money on cancellation but that was not done. So, the respondent/builder is directed to refund the amount received from the complainants after deducting 10% of the basic sale consideration and return the remaining amount along with interest at the rate of 10.75% (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 termination/cancellation 25.04.2022 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

E.II Restrain the respondent from raising any fresh demand with respect to the project.

E.II Direct the respondent not to create any third party rights in the said unit final realization of the total amount paid along with interest.

23. The complainants are seeking relief of refund and thus, the aforesaid relief sought becomes redundant.

F. Directions of the Authority

24. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

I. The respondent is directed to refund the paid-up amount of Rs.1,44,94,907/- after deducting 10% of the basic sale consideration of Rs.3,45,11,686/- being earnest money along with interest at the rate of 10.75% (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 termination/cancellation 25.04.2022 till its realization.

II. Out of the total amount so assessed, the amount paid by the respondent/builder to the Bank i.e., Rs.46,35,765/- shall be adjusted in the refundable amount and the balance amount shall be refunded to the complaints.

III. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

25. Complaint stands disposed of.

26. File be consigned to registry.

Dated: 14.12.2023

(Vijay Kumar Goyal)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram