BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**348 of 2019**
Date of complaint	**:**	**07.02.2019**
Date of decision	**:**	**31.01.2024**

1. Richa Prabha Sharma,
2. Harish Sharma,
Both R/o: - WW-203, Ireo Grand Arch View Drive, Sector-58, Gurugram-122011. **Complainants**

Versus

Ireo Private Limited
Regd. Office At: Ireo Campus, Archive Drive, Ireo City, GolfCourse Extension Road, Sector-58, Gurugram-122101.
Also at: C-4, 1st Floor, Malviya Nagar, New Delhi-110017. **Respondent**

CORAM:
Ashok Sangwan **Member**

APPEARANCE:
Vinay Shukla (Advocate) **Complainants**
M.K Dang (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 under the provisions of the Act or the

Rules and regulations made there under or to the allottees as per the agreement for sale executed *inter se*.

A. Unit and project related details

2. The particulars of unit details, 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. N.	Particulars	Details
1.	Name and location of the project	"The Grand Arch" at sector 58, Gurgaon, Haryana
2.	Nature of the project	Group Housing Colony
3.	Project area	21.144 acres
4.	DTCP license no.	8 of 2008 dated 17.01.2008 and 57 of 2009 dated 31.08.2009
5.	RERA Registered/ not registered	Not Registered
6.	Unit no.	OC-GA-E-05-01, 5th Floor, Tower-EW (page no. 34 of complaint)
7.	Unit area admeasuring	2437.94 sq. ft. (page no. 34 of complaint)
8.	Date of booking	31.05.2017 (As per clause J of buyer's agreement on page 34 of complaint)
9.	Allotment Letter	02.06.2017 (page no. 65 of reply)
10.	Date of builder buyer agreement	07.06.2017 (page no. 30 of complaint)
11.	Notice of Possession	02.06.2017 (page no. 67 of reply)
12.	Reminders for payment	27.06.2017, 18.07.2017 Final notice: 10.08.2017 (page no. 72-74 of reply)
13.	Termination notice	23.08.2017 (page no. 81 of reply)
14.	Possession clause	**12.2.** Subject to clause 12.1 above, the Company shall notify the Allottee in writing to come and take over of the

		possession of the said apartment by way of a notice of possession within **60 days from the date of execution of this agreement.** **(Emphasis supplied)** (page 48 of complaint)
15.	Due date of possession	07.08.2017 (calculated as per possession clause of the agreement)
16.	Total sale consideration	Rs.2,56,17,799/- [as per payment plan on page no. 65 of complaint]
17.	Amount paid by the complainants	Rs.22,89,282/- [as per statement of account dated 02.06.2017 on page no. 71 of reply]
18.	OC received on	Not on record

B. Facts of the complaint

3. The complainants have made the following submissions in the complaint:

I. That pursuant to the application of the complainants dated 19.11.2009, the respondent allotted them an apartment bearing no. GA-W-02-03, 2nd Floor, 2 BHK in its project named "Grand Arch" at Sector-58, Gurugram, having super area of 2163 sq. ft. and accordingly, an apartment buyer's agreement dated 11.01.2010 was executed between parties. Considering the fact that prompt payments were made by the complainants to the respondent, with respect to apartment no. GA-W-02-03, the respondent through its officials started approaching the complainants, with an offer to sell/allot an apartment bearing no. OC-GA-E-05-01, 5th Floor, in "Grand Arch" at Sector-58, Gurugram, 3 BHK, having an area of 2437.94 sq. ft. and introduced the complainants to sell apartment no. GA-W-02-03 to one Capt. Rupesh Singh and initially, issued a cheque bearing no. 277345 dated 31.03.2017 drawn on State

Bank of India, Swasthya Vihar, 9, Rajdhani Enclave, Delhi-110092 for an amount of Rs.2,00,000/- in favour of the complainants and the balance payments were to the made by the said buyer at the time of execution of transfer documents pertaining to said apartment no.GA-W-02-03.

II. That pursuant to the above inducements and misrepresentations of the respondent through its officials, the complainants booked a flat/apartment vide application dated 31.05.2017, for allotment of apartment/unit bearing no. OC-GA-E-05-01, 5th Floor, in "Grand Arch" at Sector-58, Gurugram, 3 BHK, having an area of 2437.94 sq. ft. Initially, an amount of Rs.11,00,000/- was paid by the complainants to the respondent vide cheque no.001741 dated 30.03.2017, drawn on ICICI Bank Ltd. towards booking of the apartment no. OC-GA-E-05-01. Upon further demand, another amount of Rs.11,89,282/- was paid by the complainants to the respondent, vide cheque no. 001749 dated 30.05.2017, drawn on ICICI Bank Ltd. Later on, the complainants entered into an apartment builder's agreement dated 07.06.2017 with the respondent.

III. That the above-said Capt. Rupesh Singh who was supposed to buy the apartment no. GA-W-02-03 from the complainants, backed out from the deal. The complainants immediately approached the officials of the respondent and informed them about the said fact. The officials of the respondent assured the complainants that the respondent shall cooperate them in this regard and rather would make best endeavours to get a new buyer for the apartment no. GA-W-02-03. Upon such misrepresentations, the complainants believed its commitment. Despite such representations, the respondent kept on sending reminders to the complainants for the outstanding payments of the

apartment no. OC-GA-E-05-01. Although, the complainants reason out from the respondent as to why it has been sending reminders to them to which the officials of the respondent misrepresented to the complainants that sending reminders are the part of administrative work of the respondent and also being matter of formality, and the staff working in the administrative department is not aware of the arrangements between the complainants and the respondent and further misrepresented that they should discard such reminders and as when the new buyer shall be available, the respondent shall be informed, accordingly.

IV. That despite such assurances, a notice of termination dated 23.08.2017 was sent by the respondent to the complainants, where it has been alleged that due to non-payment of the balance sale consideration of apartment no. OC-GA-E-05-01, the respondent cancelled their allotment and has forfeited the sum total of Rs.22,89,282/-. It is submitted that the cancellation of the allotment of the said apartment by the respondent is outrightly unjustified and in violation of terms of the apartment builder's agreement dated 07.06.2017. Under such circumstances, the complainants, in order to sort out the issues and to show their bona fides went to CRM office of the respondent at Gurugram on 31.08.2017, for making the balance payment of the sale consideration of apartment no. OC-GA-E-05-01. However, upon inquires it was informed to the complainants that the respondent has entered into some agreement with one third party, whereby the respondent had agreed to sell the said apartment to the said third party by accepting handsome substantial sale consideration from him.

V. That it is very strange and surprising that on the one hand, the respondent has outrightly violated the terms of apartment builder's agreement by sending a pre-mature notice of termination dated 23.08.2017 and on the other hand, before the expiry of 90 days, the respondent had entered into an agreement with some buyer, with respect to the same property and at the same time illegally forfeited the amount of Rs.22,89,282/- of the complainants.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s).

I. Direct the respondent to refund the entire paid-up amount along with interest @24% per annum.

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 vide its reply dated 02.03.2021 on the following grounds: -

i. That the complaint is neither maintainable nor tenable as the allotment of the unit allotted to the complainants was made prior to the enactment of the Real Estate (Regulation and Development) Act, 2016 and the provisions laid down in the said Act cannot be applied retrospectively.

ii. That the complaint is not maintainable for the reason that the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute.

iii. That the complainants are real estate investors who after checking the veracity of the project namely, 'The Grand Arch', Sector 58, Gurugram had earlier applied for allotment of an apartment vide their booking application form. On the basis of the application for booking, the respondent vide its allotment offer letter dated 10.12.2009, allotted to the complainants apartment bearing no. WW0203 having tentative super area of 2163 sq.ft for a total sale consideration of Rs.1,37,63,169.92. Thereafter, an apartment buyer's agreement for the said apartment was executed between the parties on 11.01.2010.

iv. That the complainants started committing several defaults from the very inception in making timely payments towards the total sale consideration of the unit allotted to them and have not paid the due installments on time. Accordingly, after the complainants made the due payment of the installments, the respondent issued notice of possession dated 23.12.2015 and requested the complainants to make the due payment of Rs.13,34,863/- and to complete the documentation formalities. The complainants made the due payment only after a reminder dated 28.01.2016 was issued by the respondent. It is submitted that there was a slight delay in offering the possession of the unit to the complainants and the delayed compensation amount was accordingly adjusted at the time of notice of possession.

v. That accordingly, as per the terms of the allotment, the respondent issued the possession letter dated 02.05.2017 and a conveyance deed dated 31.05.2017 was executed between the parties to the complaint.

vi. That the complainants again approached the respondent and applied for allotment of another apartment vide their booking application

form and made the payment of the part-earnest money of Rs.22,89,282/-.

vii. That based on the application for booking, the respondent vide its allotment offer letter dated 02.06.2017, allotted to the complainants apartment no. OC-GA-E-05-01 having tentative super area of 2437.94 sq.ft for a total sale consideration of Rs.2,56,17,799. Thereafter, an apartment buyer's agreement was executed between the parties on 07.06.2017.

viii. That since the occupation certificate was already received by the respondent from the concerned authorities, the respondent vide its letter dated 02.06.2017 issued notice of possession and intimated the complainants to make the payment of the due amount of Rs.2,48,75,279/-. However, despite reminders dated 27.06.2017 and 18.07.2017 and final notice dated 10.08.2017, the complainants failed to adhere to their contractual obligations in making payment towards the due amount raised by the respondent.

ix. That on account of non-fulfillment of the contractual obligations by the complainants despite several opportunities extended by the respondent, the allotment of the complainants was cancelled and the earnest money was forfeited vide cancellation letter dated 23.08.2017 in accordance with clause 21.1.2 of the apartment buyer's agreement and the complainants are now left with no right, claim, lien or interest whatsoever in respect of the said booking/allotment.

x. That the complainants had not even made the payment of the complete earnest money as defined in the apartment buyer's agreement. The respondent has completed the construction of the tower in which the unit allotted to the complainants was located.

5. Copies of all the relevant documents have been filed and placed on the record. Their 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

6. The respondent has raised a preliminary submission/objection the authority has no jurisdiction to entertain the present complaint. The objection 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

7. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. 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

8. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottees 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.

9. 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.

F. Findings on the objections raised by the respondent.

F. I Objection regarding jurisdiction of the complaint w.r.t the apartment buyer's agreement executed prior to coming into force of the Act.

10. The respondent submitted that the complaint is neither maintainable nor tenable and is liable to be outrightly dismissed as the buyer's agreement was executed between the parties prior to the enactment of the Act and the provision of the said Act cannot be applied retrospectively.

11. The authority is of the view that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. The Act nowhere provides, nor can be so construed, that all previous agreements would be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation would be dealt with in accordance with the Act and the rules after the date of coming into force

of the Act and the rules. The numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017) decided on 06.12.2017*** which provides as under:

> *"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter...*
>
> *122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."*

12. Further, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya***, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed-

> *"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and <u>will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion</u>. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."*

13. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the

builder-buyer agreements have been executed in the manner that there is no scope left to the allottees to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules and regulations made thereunder and are not unreasonable or exorbitant in nature. Hence, in the light of above-mentioned reasons, the contention of the respondent w.r.t. jurisdiction stands rejected.

F. II Objection regarding complainants are in breach of agreement for non-invocation of arbitration.

14. The respondent submitted that the complaint is not maintainable for the reason that the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute.

15. 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, 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. Therefore, by applying same analogy the presence of arbitration clause could not be construed to take away the jurisdiction of the authority.

16. Further, in **Aftab Singh and ors. v. Emaar MGF Land Ltd and Ors., Consumer case no. 701 of 2015 decided on 13.07.2017**, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainants and builders could not circumscribe the jurisdiction of a consumer. The relevant paras are reproduced below:

> *"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act"). Section 79 of the said Act reads as follows: -*
>
> *"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."*
>
> *It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellant Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.*
>
> *...*
>
> *56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind*

of Agreements between the Complainants and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."

17. While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the builder buyer agreement, the hon'ble Supreme Court **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*** has upheld the aforesaid judgement of NCDRC and as provided in Article 141 of the Constitution of India, 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. The relevant paras are of the judgement passed by the Supreme Court is reproduced below:

"25. This Court in the series of judgments as noticed above considered the provisions of Consumer Protection Act, 1986 as well as Arbitration Act, 1996 and laid down that complaint under Consumer Protection Act being a special remedy, despite there being an arbitration agreement the proceedings before Consumer Forum have to go on and no error committed by Consumer Forum on rejecting the application. There is reason for not interjecting proceedings under Consumer Protection Act on the strength an arbitration agreement by Act, 1996. The remedy under Consumer Protection Act is a remedy provided to a consumer when there is a defect in any goods or services. The complaint means any allegation in writing made by a complainant has also been explained in Section 2(c) of the Act. The remedy under the Consumer Protection Act is confined to complaint by consumer as defined under the Act for defect or deficiencies caused by a service provider, the cheap and a quick remedy has been provided to the consumer which is the object and purpose of the Act as noticed above."

18. Therefore, in view of the above judgements and considering the provision of the Act, the authority is of the view that complainants are well within their rights 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.

F. III Objection regarding the complainant being investor.

19. The respondent has taken a stand that the complainants are investors and not consumer, therefore, they are not entitled to the protection of the Act and entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumer of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims and objects of enacting a statute but at the same time the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if it contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the suites buyer's agreement, it is revealed that the complainants are buyers and paid total price of Rs.22,89,282/- to the promoter towards purchase of a unit in its project. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

> *"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"*

20. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment application for allotment, it is crystal clear that the complainants are allottees as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as ***M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And Anr.*** has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottees being investors are not entitled to protection of this Act also stands rejected.

G. Findings on the relief sought by the complainant.

F.I Direct the respondent to refund the entire paid-up amount along with interest @24% per annum.

21. The complainants submitted that earlier a unit bearing no. GA-W-02-03, having super area of 2163 sq. ft., 2nd Floor, 2 BHK in "Grand Arch" at Sector-58, Gurugram was allotted to them vide apartment buyer's agreement dated 11.01.2010. Thereafter, the officials of the respondent started approaching the complainants, with an offer to sell/allot an apartment/unit bearing no. OC-GA-E-05-01, 5th Floor, in "Grand Arch" at Sector-58, Gurugram, 3 BHK, having an area of 2437.94 sq. ft. and introduced the complainants to sell apartment no. GA-W-02-03 to one Capt. Rupesh Singh. Accordingly, the complainants booked the unit in question i.e., OC-GA-E-05-01 vide application dated 31.05.2017. Initially, an amount of Rs.11,00,000/- was paid by the complainants to the respondent vide cheque no.001741 dated 30.03.2017, drawn on

ICICI Bank Ltd. towards the said booking. Upon further demand, another amount of Rs.11,89,282/- was paid by the complainants to the respondent, vide cheque no. 001749 dated 30.05.2017, drawn on ICICI Bank Ltd. Later on, the complainants entered into an apartment builder's agreement dated 07.06.2017 with the respondent regarding the said allotment. However, the above-said Capt. Rupesh Singh who was supposed to buy the apartment no. GA-W-02-03 from the complainants, backed out from the deal to which the officials of the respondent assured the complainants that the respondent shall cooperate them in this regard and rather would make best endeavours to get a new buyer for the apartment no. GA-W-02-03. Despite such representations, the respondent kept on sending reminders to the complainants for the outstanding payments of the apartment no. OC-GA-E-05-01. Although, the complainants reason out from the respondent as to why it has been sending reminders to them to which the officials of the respondent misrepresented to the complainants that sending reminders are the part of administrative work of the respondent and also being matter of formality, and the staff working in the administrative department is not aware of the arrangements between the complainants and the respondent and further misrepresented that they should discard such reminders and as when the new buyer shall be available, the respondent shall be informed, accordingly.

22. The complainants further submitted that despite such assurances, a notice of termination dated 23.08.2017 was sent by the respondent to the complainants, where it has been alleged that due to non-payment of the balance sale consideration of apartment no. OC-GA-E-05-01, the

respondent cancelled their allotment and has forfeited the sum total of Rs.22,89,282/-. Furthermore, as per the payment plan annexed with the buyer's agreement, the complainants were required to pay the balance amount within 20 days from the date of booking (31.05.2017 as per SOA dated 02.06.2017). Moreover, clause 7.3 of the buyer's agreement stipulated that in case the allottees defaults in making payment of the due installment beyond the period of 90 days from the due date, the company shall be entitled but not obligated to cancel the allotment. However, the respondent terminated the allotment before the said time period of 20 plus 90 days was over. Also, the respondent vide letters dated 27.06.2017 and 18.07.2017, stated that the payment was to be paid by 22.06.2017 which is much before the date of letters. However, after careful perusal of the reminder letters dated 27.06.2017, 18.07.2017, it is determined by this Authority that in the said letters, the respondent has given reference to their earlier communication titled as Notice of Possession dated 02.06.2017, vide which it had requested them for the payment of due amount by 22.06.2017 and the same is not the due date of payment.

23. The respondent has submitted that the complainants started committing several defaults from the very inception in making timely payments towards the total sale consideration of the unit allotted to them and have not paid the due installments on time. Thereafter, the respondent vide letter dated 02.06.2017 offered possession of the unit to the complainants subject to payment of outstanding dues payable as per the statement of account by 22.06.2017. Due to non-payment of the due installment on time, the respondent issued reminder letters dated 27.06.2017, 18.07.2017 requesting the complainants to pay the

outstanding amount before giving a final notice dated 10.08.2017 to the complainants giving a final opportunity to make payment of the due amount and to comply with their obligation. However, on failure of the complainants to act further, their allotment was finally terminated vide letter dated 23.08.2017. Now the question before the authority is whether the cancellation issued vide letter dated 23.08.2017 is valid or not.

24. On consideration of documents available on record and submissions made by both the parties, the authority is of the view that on the basis of provisions of allotment, the complainants had paid a sum of Rs.22,89,282/- against the total sale consideration of Rs. 2,56,17,799/- and the balance amount was to be paid within 20 days of booking i.e., by 20.06.2017 as per the payment plan annexed with the buyer's agreement. Further, clause 7.3 of the buyer's agreement stipulated that if the allottees default in making payment of the due installment beyond the period of 90 days from the due date, the company shall be entitled to cancel the allotment. The respondent/builder vide letter dated 02.06.2017 offered possession of the unit to the complainants subject to payment of outstanding dues payable as per the statement of account by 22.06.2017. Due to non-payment of the outstanding dues on time, the respondent issued reminder letters dated 27.06.2017, 18.07.2017 and a final notice dated 10.08.2017, requesting the complainants to pay the outstanding amount before finally terminating the unit on 23.08.2017. However, it was duly agreed between the parties that the outstanding amount against the said allotment was to be made within 20 days of booking i.e., by 20.06.2017. Thereafter, if allottee defaults in making payments of the outstanding amount, a further period of 90

days was agreed to be given to the complainants from the date of default before finally proceeding to cancellation of the unit. Therefore, in view of the above, the said cancellation cannot be held valid in the eyes of law.

25. As per clause 12.2 of the apartment buyer's agreement executed between the parties on 07.06.2017, the possession of the booked unit was to be delivered within 60 days from the date of execution of buyer's agreement as occupation certificate of the tower in question has already been obtained by the respondent. Therefore, the due date of handing over possession comes out to be 07.08.2017. However, the complainants have surrendered the unit by filing the present complaint on 07.02.2019 after receipt of offer of possession dated 02.06.2017 from the respondent. Keeping in view the aforesaid circumstances, that the respondent-builder has already offered the possession of the allotted unit to the complainants after obtaining occupation certificate from the competent authority. So, they are not entitled to refund of the complete amount but only after certain deductions as prescribed under the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, which provides 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."

26. Keeping in view the aforesaid factual and legal provisions, the respondent can deduct the amount paid by the complainants against the allotted unit as the as it is both the earnest money and 10% of the consideration amount. So, the same was liable to be forfeited in terms Regulations 11(5) of 2018. However, the amount paid by the complainant i.e., Rs.22,89,282/- constitutes to only 8.93% of the sale consideration of Rs.2,56,17,799/-. Thus, no direction to this effect.

H. Directions of the Authority:

27. Hence, in view of the findings recorded by the authority on the aforesaid issues, no case of refund of the paid-up amount with interest is made out. Hence, the complainant is dismissed being devoid of merits.

28. Complaint stands disposed of.

29. File be consigned to the registry.

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 31.01.2024