PBEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**3794 of 2019**
Date of filing complaint:	**20.09.2019**
First date of hearing:	**14.11.2019**
Date of decision :	**31.10.2023**

Ashish Sharma R/O: 129, Ground Floor, Navjiwan Co-perative, Housing Society, New Delhi - 110017	**Complainant**
Versus	
M/s Adani M2K Projects Private Limited Regd.office: Adani House, Plot No. 83, Sector 32, Gurgaon-122001	**Respondent**

CORAM:	
Shri Vijay Kumar Goyal	**Member**
Shri Ashok Sangwan	**Member**
Shri Sanjeev Kumar Arora	**Member**
APPEARANCE:	
Sh. Mayank Grover (Advocate)	Complainant
Sh. Prashant Sheoran (Advocate)	Respondent

ORDER

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

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

A. Unit and project related details

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

<table>
<tr><th>S. No.</th><th colspan="5">Particulars</th><th>Details</th></tr>
<tr><td>1.</td><td colspan="5">Name of the project</td><td>Oyster Grande, Sector 102, Gurugram, Haryana</td></tr>
<tr><td>2.</td><td colspan="5">Total area of the project</td><td>19.238 acres</td></tr>
<tr><td>3.</td><td colspan="5">Nature of the project</td><td>Group Housing Colony</td></tr>
<tr><td rowspan="4">4.</td><td colspan="6">DTCP license details:</td></tr>
<tr><td>Sno.</td><td colspan="2">License no.</td><td>Validity</td><td>Licensed area</td><td>Licensee</td></tr>
<tr><td>1.</td><td colspan="2">29 of 2012 dated 10.04.2012</td><td>09.04.2020</td><td>15.72 acres</td><td>M/s Aakarshan Estates Pvt. Ltd. C/O M/s Adani M2K Projects LLP</td></tr>
<tr><td>2.</td><td colspan="2">30 of 2012 dated 10.04.2012</td><td>09.04.2020</td><td>3.52 acres</td><td>M/s Aakarshan Estates Pvt. Ltd. C/O M/s Adani M2K Projects LLP</td></tr>
<tr><td rowspan="4">5.</td><td colspan="5">Registered/not registered</td><td>Registered by Adani M2K Projects LLP</td></tr>
<tr><td colspan="6">Registration details</td></tr>
<tr><td>S.n.</td><td colspan="2">Registration no.</td><td>Validity</td><td colspan="2">Area</td></tr>
<tr><td>1.</td><td colspan="2">37 of 2017 dated 10.08.2017</td><td>30.09.2024</td><td colspan="2">Tower G (15773.477 sq. mtrs.)</td></tr>
</table>

	2.	170 of 2017 dated 29.08.2017	30.09.2019	Tower J Nursery school-1 & 2, Convenient Shopping, Community Block X-1 & X-2 (19056.69 sq. mtrs.)
	3.	171 of 2017 dated 29.08.2017	30.09.2019	Tower H (17229.629 sq. mtrs.)
6.	Application dated		18.10.2012 (As per page no. 29 of complaint)	
7.	Provisional allotment letter		05.01.2013 (As per page no. 29 of complaint)	
8.	Unit no.		B-1403, 14th floor, Tower-B (As per page no. 29 of complaint)	
9.	Revised unit no.		B-803 on 8th floor, Tower-B (As per fresh allotment letter on page no. 59 of reply dated 24.07.2013)	
10.	Area of the unit (super area)		2579 sq. ft. (super area) (As per page no. 29 & 59 of complaint & reply) (Area of unit is same for previous and changed unit)	
11.	Date of execution of buyer's agreement		Not executed	
12.	Possession clause		NA	
13.	**Due date of possession**		**05.01.2016** (Calculated as 3 years from date of allotment (05.01.2013) as decided by Hon'ble Supreme Court	

		in Fortune Infrastructure and Ors. vs. Trevor D'Lima and Ors. (12.03.2018 - SC); MANU/SC/0253/2018)
14.	Basic Sale Consideration	Rs. 1,41,71,605/- (As per fresh allotment letter on page no. 59 of reply)
15.	Total amount paid by the complainant	Rs. 27,00,000/- (As per cancellation letter dated 18.11.2013 at page 40 of complaint.)
Admitted Facts by both the parties		
16.	Notice for cancellation dated (w.r.t unit no. B-803)	18.11.2013 (As per page no. 40 of complaint)
17.	**Cancellation dated**	**31.03.2014** **(As per page no. 41 of complaint)**
18.	**Legal notice dated**	**03.06.2017** **(As per page no. 42 of complaint)**
	Reply by respondent to legal notice dated 03.06.2017	15.06.2017 (As per page no. 46 of complaint)
19.	Occupation certificate	20.12.2017 (As per page no. 19 of reply)
20.	Offer of possession	NA

B. Facts of the complaint:

3. That in 2012, the complainant came to know about the real estate project "Oyster Grande" situated at Sector-102, Gurugram, Haryana (hereinafter referred as "project") through the authorized marketing representatives of the respondent.

4. That the complainant relying on such representations, assurances and brochures agreed to purchase a unit admeasuring super area 2579 sq. ft. for an agreed sale consideration of Rs. 1,41,71,605/- and paid an amount of Rs. 12,00,000/- through cheque bearing no. 424863 dated 10.10.2012, as an initial payment at the time of booking.
5. That the complainant made further payment of Rs. 15,00,000/- through cheque bearing no. 424864 dated 03.12.2012, against agreed Sale Consideration as per payment schedule and demand of the respondent.
6. That the complainant was provisionally allotted unit bearing no. B-1403, 14th Floor, in the project vide provisional allotment letter dated 05.01.2013, subsequent to which the complainant, vide e-mail dated 09.02.2013, raised objections against the wrong unit being allotted to him on the 14th Floor, despite specific requirement by complainant for allotment on a lower floor. Further the super area of the unit allotted was also different from that of the unit booked by the complainant.
7. That the complainant received an e-mail dated 25.04.2013 from the respondent, giving details of the unit suitable to his requirements and requesting for confirmation for acceptance and shifting of the unit. The complainant vide e-mail dated 26.04.2013 gave his consent.
8. That the complainant vide e-mail dated 13.05.2013 and 27.05.2013, requested the respondent for an update regarding status of shifting of the unit. Subsequently, an e-mail dated 26.06.2013 had been received from the respondent stating that the changed apartment documents will be sent post payment of third instalment by the complainant.
9. That the complainant had already paid Rs. 27,00,000/- within two months of the booking of the unit. Then also, the respondent consistently kept on raising the demands for making further payment, instead of executing the builder buyer agreement.

10. That the complainant vide e-mail dated 28.06.2013, stated that he will require a loan to make further payment beyond 20% of the value of the unit. Therefore, he requested to provide a copy builder buyer agreement or any other equivalent document that will enable him to have the loan approval. The official of the respondent acknowledged the request of the complainant and assured to forward the request to the operations of shifting.

11. That the complainant vide e-mail dated 23.07.2013, again enquired about the status of shifting of his unit. He further requested to provide the documents so that he may process the formalities for applying for loan. In response to it, the respondent vide e-mail dated 23.07.2013, informed that his request for shifting of unit is under process and the documentation will be provided to him within 7-8 days.

12. That the complainant vide e-mail dated 08.08.2013, raised objections against the negligent and unfair behaviour of the respondent in causing delay in providing him with the documents after shifting the unit from B-1403 on 14th floor in Tower – B to B- 803 on 8th floor in Tower – B despite repetitive requests by the complainant.

13. That the respondent vide e-mail dated 09.08.2013, stated that the documents pertaining to shifting the unit are ready and the same can be collected from his office.

14. That the complainant received a letter dated 25.10.2013 from the respondent stating that two copies of builder buyer agreement were dispatched on 17.09.2013 and the same have not been received by them after signing of the same. However, no such agreements were received by the complainant. The respondent had not sent a copy of the builder buyer agreement along with the letter intentionally.

15. That the complainant received a letter dated 18.11.2013 from the respondent, stating that the due to default in making timely payment

towards the instalments, final notice is being sent to him, failing which the provisional allotment will stand cancelled. Thereafter, complainant received a letter dated 31.03.2014 from the respondent, arbitrarily cancelling his provisional allotment due to failure in making timely payment, further requesting him to come and collect the balance amount due after forfeiture of the applicable charges.

16. That the complainant came to know from agents of the respondent and some other sources that the project under question was facing many issues including some technical issues and therefore, the progress of the project was substantially delayed. The complainant on telephonic conversation raised his concern before the marketing representative of the respondent, who apprised the complainant that the construction was held up by the respondent.

17. That the complainant visited the project site. There were no signs of construction-in-progress and the project is nowhere near the stage of completion. Thereafter, the complainant tried to contact the office of the respondent to seek clarification regarding the status of the project. However, he never received any positive reply.

18. That the complainant sent legal notice dated 03.06.2017 to the respondent raising objections against the negligent and unfair behaviour of the respondent, mentioning the visit of the complainant to the project site. The complainant further requested the respondent to refund the amount paid by him along with interest @ 18% within a period of one month.

19. That the respondent sent a reply to legal notice dated 03.06.2017 vide notice dated 15.06.2017, stating that there had been no fault on part of the respondent.

20. That the complainant further received a letter dated 15.06.2017, wherein the respondent informed him about Mr. Vivek Mushi (Advocate) being

appointed as the arbitrator for the resolution of the disputes. Further, the complainant vide letter dated 10.07.2017, received the acceptance of Mr. Vivek Munshi, for proposal of his appointment as Arbitrator for adjudication of the matter.

21. That the respondent arbitrarily appointed the arbitrator of their own choice and stated that the alleged dispute is arbitrable in nature vide clause 60 of the salient terms and conditions for provisional allotment of an apartment in "Oyster Grande". However, it is nowhere mentioned in provisional allotment letter. Also, it was never discussed between the complainant and the respondent about the dispute redressal process through arbitration. The complainant showed his disagreement through telephonic conversation and personal visits at their office, however, the respondent was intact with the arbitrator selected by him.

22. That the complainant again issued a legal notice to the respondent on 03.07.2019. However, the respondent did not give heed to such notice.

23. That the respondent has utterly failed to fulfil his obligations to complete the construction in time and has caused huge losses and mental agony to the complainant and thus violated the terms of Section 18 of the Real Estate (Regulation and Development) Act, 2016.

C. Relief sought by the complainant:

24. The complainant has sought following relief(s):

i. Direct the respondent to refund the entire amount paid by the complainant along with interest from the date of respective deposits till its actual realization.

ii. Direct the respondent to pay Rs 2,00,000/- for causing mental agony and harassment and Rs. 1,00,000/- towards litigation cost.

iii. Compensate the complainant for financial loss due loss of appreciation and opportunity that has occurred on account of misrepresentation on the value of the unit.

iv. To conduct such enquiry under section 35 of the Act into the affairs of the respondent.

D. Reply by respondent:

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

25. That the respondent launched a residential project "Oyster Grande" in Sector 102/102A in Gurugram, Haryana, wherein the complainant approached the respondent in the year 2012 in order to book a 3 BHK flat. The complainant vide an application applied for allotment and paid an amount of Rs.12,00,000/- vide cheque bearing no.424863 dated 19.10.2012 which was encashed on 08.11.2012 and in lieu of the same a receipt was issued to the complainant. The complainant vide said application form specifically admits that 15% of the BSP, PLC and parking charges shall be treated as earnest money to ensure terms and conditions contained in this application and buyers agreement and further admits that in case of non-payment allotment shall be cancelled/terminated and said 15% along with brokerage charges and direct expenses, i.e., taxes and any other loss suffered by developer shall be forfeited.

26. That thereafter complainant made another payment for Rs.15,00,000/- vide cheque bearing no. 424864 dated 03.12.2012 which was encashed on 15.12.2012, and in lieu of the same a receipt was issued by the respondent. Both the above payments were given by the complainant as per the payment plan agreed upon by him when he approached the respondent for filing of application. Therefore, a provision allotment

letter was issued in favor of complainant on 05.01.2013, whereby apartment no. B1403 at Floor No.14 was allotted.

27. That after allotting the said floor, a demand notice dated 03.02.2013 was sent to the complainant demanding Rs.16,82,852/- to be paid by 15.02.2013.

28. That on 11.06.2013, the complainant instead of making the payment, requested the respondent to change the allotment of apartment from 14th floor to 8th floor and adjust the payment made against previous allotment in newly allotted flat, i.e., B803 on 8th floor in Tower - B.

29. That the complainant vide another application again specifically admitted that 15% of the BSP, PLC and parking charges shall be treated as earnest money to ensure terms and conditions contained in this application and buyers agreement. He further admitted that in case of non-payment, allotment shall be cancelled/terminated and said 15% along with brokerage charges and direct expenses, i.e., taxes and any other loss suffered by developer shall be forfeited. Same was approved by the respondent on 19.06.2013 and a change of approval form was issued qua change of apartment.

30. That on 24.07.2013, a revised provisional letter was issued by the respondent in favor of complainant, whereby an apartment bearing No.803 in Tower-B at 8th floor was allotted to the complainant. Thereafter, respondent again sent a demand notice on 27.08.2013 to the complainant demanding an amount of Rs.16,82,852/- and requested to pay the same at the earliest.

31. That on 11.09.2013, the respondent sent two copies of apartment buyer agreement and requested the complainant to sign the same and to provide some other documents like photographs etc., and when the complainant did not revert with the signed apartment buyer agreement, the respondent issued a reminder letter for submission of agreement. It

is pertinent to mention that the tower in which allotment was granted is already completed and occupation certificate has already been received by respondent on 20.12.2017, i.e., much prior to filing of present complaint.

32. That even after issuance of reminder letter qua submission of apartment buyer agreement and even after issuance of demand letter several time to the complainant, he failed to come forward for either execution of the apartment buyer agreement or payment as demanded by the respondent. Consequently, the respondent issued a cancellation notice dated 18.11.2013, whereby it was specifically stated that in case the payment was not made before 03.12.2013, the allotment of the unit shall stand cancelled without further notice.

33. That since no efforts had been made on part of the complainant, therefore, on 31.03.2014, the unit had been finally cancelled. A final cancellation notice was issued to the complainant whereby the allotment stood cancelled.

34. That a legal notice from the complainant had been received on 03.06.2017, whereby false and frivolous allegations were levied against the respondent. Against it, the respondent issued a reply dated 15.06.2017had been received, whereby all the allegations were denied and it was specifically stated that complainant is not entitled for any amount, rather, it is the respondent who is further entitled to recover Rs.4,31,334/- from the complainant. It is pertinent to mention here that even the said notice was sent after expiration of period of limitation, i.e., 3 years from the date of cancellation. Thus, the present application is hopelessly barred by law of limitation since the same was filed after expiration of 5 years from the date of cancellation. Therefore, it is liable to be dismissed.

35. That the respondent had not appointed the arbitrator of their own choice as the allotment was made in pursuance of application submitted by

complainant and clause 60 of said application specifically contains arbitration clause.

E. Jurisdiction of the authority:

36. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

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

E. II Subject matter jurisdiction

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

> ***Section 11***
>
> .....
>
> *(4) The promoter shall-*
>
> *(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*
>
> ***Section 34-Functions of the Authority:***
>
> *34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.*

39. 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. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgements passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2020-2021 (1) RCR (c) 357 and*** *reiterated in case of* ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*** wherein it has been laid down as under:

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

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

F. Findings on the objections raised by the respondent:

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

41. The respondent raised an objection that the complainant has not invoked arbitration proceedings as per application form which contains a provision regarding initiation of arbitration proceedings in case of breach

of agreement. The following clause 60 has been incorporated w.r.t arbitration in the application form:

> *60 "All or any grievances, disputes, differences or disagreement arising out of, or in connection with or in relation to the terms of this Application, allotment or for any reason qua the said allotment, including the interpretation and validity thereof, shall be mutually discussed and settled amicably between the parties, failing which the same shall be referred before Consumer Redressal Forum/ Mediation Cell formed by CREDAI-NCR, to arrive at a settlement between the parties and further to this if the parties are unable to arrive at a settlement, the dispute shall be referred for resolution before sole Arbitrator appointed by the President/Chairman of the Developer for which the Applicant/s hereby gives his / their consent and has no objection more particularly on the ground that the sole Arbitrator, being appointed by Chairman/President is likely to be biased in favour of the Developer. The arbitration proceeding shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any statutory amendments, modifications or re-enactment thereof for the time being in force Arbitration as aforesaid shall be domestic arbitration under the applicable laws and the award of the Arbitrator shall be final and binding on the parties. The venue of arbitration shall be Delhi and the Award of the Arbitrator(s) shall be rendered in English. Both the parties will share the fees of the Arbitrator in equal proportion".*

42. The respondent contended that as per the terms and conditions of the application form duly executed between the parties, it was specifically agreed that in the eventuality of any dispute, if any, with respect to the provisional booked unit by the complainant the same shall be adjudicated through arbitration mechanism. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Also, section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy &Anr. (2012) 2 SCC 506*** and followed in case of

Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, Consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause. A similar view was taken by the Hon'ble apex court of the land in case titled as ***M/s Emaar MGF Land Ltd. V. Aftab Singh in revision petition no. 2629-30/2018 in civil appeal no. 23512-23513 of 2017*** **decided on 10.12.2018** and has upheld the aforesaid judgement of NCDRC and as provided in Article 141 of the Constitution of India, that the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view.

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

G. Entitlement of the complainant for refund:

G.I Direct the respondent to refund the entire amount of Rs. 27,00,000/- paid by the complainant along with interest on the paid amount from the date of termination till actualization.

44. The complainant was allotted the said unit vide allotment letter dated 05.01.2013. No agreement was executed inter-se parties, therefore the due date of handing over of possession is calculated as 3 years from date of allotment, i.e., from 05.01.2013. Hence, the due date comes out to be 05.01.2016. As per request of the complainant, the subject unit of the

complainant was revised to B-803 on 8th floor and the same is evident vide allotment letter dated 24.07.2013. Thereafter, demand letters dated 27.08.2013 and 18.11.2013 were sent to complainant demanding to pay the balance amount. On failure to pay the same, the subject unit of the complainant was cancelled vide letter dated 31.03.2014. A legal notice was sent by the complainant dated 03.06.2017(after 3 year and 2 months and 3 days) asking to refund the total amount paid by him, i.e., Rs.27,00,000/- along with interest @ 18%, within a period of one month, failing which complainant would initiate legal proceedings. Thereafter, feeling aggrieved, the complainant approached the Authority in 2019, i.e., again after a delay of five years from the date of cancellation of the unit. Thus, the cancellation of the unit is well within the ambit of law.

45. However, the complainant has admittedly paid a sum of Rs. 27,00,000/- against basic sale consideration of Rs. 1,41,71,605/- constituting 19.06% of consideration and while cancelling the allotment, the respondent forfeited whole of the paid-up amount. The complainant visited the project site wherein he found that there were no signs of construction-in-progress and the project was nowhere near the stage of completion. The complainant even tried to contact the office of the respondent to seek clarification regarding the status of the project. Thereafter, legal notice being sent by the complainant in 2017 and he has approached the Authority in 2019 which make it quite clear that the complainant was not dormant over his rights. As observed in the landmark case of ***B.L. Sreedhar and Ors. V. K.M. Munireddy and Ors. [AIR 2003 SC 578],*** the Hon'ble Supreme Court had held that "*Law assists those who are vigilant and not those who sleep over their rights.*"

46. Also, as per the provisions of regulation 11 of 2018 framed by the Haryana Real Estate Regulatory *Authority*, Gurugram, the respondent builder has to return the remaining amount after deducting earnest

money but there is nothing on record which shows that respondent-builder refunded the balance amount after deducting earnest money, and forfeiture of amount paid by complainant after due cancellation of the subject unit is against the settled principle of law as laid down by the Hon'ble Apex Court of land 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, (2016) 4 SCC 136***, 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 the section 74 of the Contract Act, 1872 are attracted and the party so forfeiting must prove actual damages. A similar view was taken by the ***Hon'ble National Consumer Dispute Redressal Commission in consumer case no. 2766 of 2017 titled as Jayant Singhal & Anr. Vs M/s M3M India Limited decided on 26.07.2022***. Even keeping in view, the principles laid down in the first two cases, the Haryana Real Estate Regulatory Authority Gurugram framed regulation 11(5) known as (Forfeiture of earnest money by the builder) Regulations, 2018, providing as under-

> *"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"*

47. Thus, keeping in view of aforesaid circumstances and the law of the land, though the cancellation of the allotted unit is held to be valid, but the respondent was not justified in retaining whole of the paid-up amount on cancellation. It could have retained 10% of the basic sale consideration of the unit and was required to return the remainder on cancellation. Since

that was not done, so the respondent is directed to refund the paid-up amount after deducting 10% of the basic sale consideration of the unit being earnest money from the date of cancellation i.e., 31.03.2014 within 90 days from the date of this order along with an interest @10.75 % p.a. on the refundable amount, till the date of realization.

48. **Admissibility of refund at prescribed rate of interest:** The complainant is seeking refund amount at the prescribed rate of interest on the amount already paid by him. However, allottee intend to withdraw from the project and is seeking refund of the amount paid by him in respect of the subject unit with interest at prescribed rate as provided under rule 15 of the rules. Rule 15 has been reproduced 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 (MCLR) 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.*

49. The legislature in its wisdom in the subordinate legislation under the provision 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.

50. 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., 31.10.2023 is 8.75%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.75%.

51. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottees by the

promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottees, in case of default. The relevant section is reproduced below:

> *"(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—*
> *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.*
> *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;"*

52. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 10.75% by the respondent/promoter which is the same as is being granted to the complainant in case of delayed possession charges.

53. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such, the complainant is entitled to refund the entire amount paid by him at the prescribed rate of interest i.e., @10.75% p.a. from the date of payment of each sum till its actual realization as per provisions of section 18(1) of the Act read with rule 15 of the rules, 2017.

G.II Direct the respondent to pay compensation of Rs. 2,00,000/- for mental agony and harassment and Rs. 1,00,000/- as litigation expenses.

G.III Compensate the complainant for financial loss due loss of appreciation and opportunity that has occurred on account of misrepresentation on the value of the unit.

54. Both the captioned reliefs are taken up together as both these reliefs pertain to the relief of compensation.

Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as ***M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of***

Up & Ors. 2021-2022 (1) RCR (c) 357, has held that an allottee is entitled to claim compensation and litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation and litigation expense shall be adjudged by the 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.

G.IV To conduct such enquiry under section 35 of the Act into the affairs of the respondent.

55. Section 35 of the Act provides for power of the Authority to call upon promoter or allottee or real estate agent to furnish information, conduct investigations. The complainant is seeking an enquiry under section 35 of the Act, however, nothing is detailed in pleadings of the complainant with respect to this relief. Therefore, nothing can be deliberated upon in this regard.

H. Directions of the Authority:

56. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoters as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

i) The respondent-promoter is directed to refund the amount of Rs.27,00,000/- after deducting 10% of the total sale consideration of the unit being earnest money along with interest @ 10.75% p.a. on the refundable amount, from the date of cancellation, i.e., 31.03.2014 till the actual date of refund of the amount.

ii) 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.

57. Complaint stands disposed of.

58. File be consigned to the registry.

(Sanjeev Kumar Arora)
Member

(Ashok Sangwan)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 30.10.2023