

**BEFORE THE HARYANA REAL ESTATE REGULATORY  
AUTHORITY, GURUGRAM**

**Complaint no.:** 1056 of 2022  
**Date of filing complaint:** 15.03.2022  
**Date of Decision:** 03.10.2023

Shri Mansoor Ali Shoket

R/o: - 8-B, 8<sup>th</sup> floor, Louvre- I, Tower, Raisina Residency  
Sector- 59, Gurugram- 122001, Haryana

**Complainant**

Versus

1. M/s BPTP Limited

**Regd. Office at:** 28, ECE House, 1st Floor, K G Marg, New  
Delhi - 110001

2. M/s Native Buildcon Private Limited

**Regd. Office at:** - M-11, Middle Circle, Connaught Circus,  
New Delhi-110001

3. M/s Countrywide Promoter Private Limited

**Regd. Office at:** - BPTP Crest House, Plot No. 15, Udyog  
Vihar, Phase IV, Gurugram, Haryana

**Respondents**

**CORAM:**

Shri Vijay Kumar Goyal  
Shri Sanjeev Kumar Arora

**Member**  
**Member**

**APPEARANCE:**

Shri Nitin Kala Advocate with complainant in person  
Shri Harshit Batra Advocate

Complainant  
Respondents

**ORDER**

1. This 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 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 thereunder or to the allottee 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 complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S. No.	Heads	Information
1.	Name and location of the project	"Pedestal", Sectors 70-70A, Gurugram, Haryana
2.	Nature of the project	Residential plotted colony
3.	Project area	102.2 acres
4.	DTPC License no.	15 of 2011 dated 09.03.2021
	Valid upto	06.03.2024
	Name of licensee	Impartial Builders Developers Pvt. Ltd. and 22 others
5.	RERA registered/not registered	Not registered
6.	Unit no.	D-42-TF, (3 Bed room flat with servant Quarter) (As per annexure P-5, at page no. 52 of complaint)
7.	Unit measuring	2207 sq. ft. (As per annexure P-5, at page no. 52 of complaint)
8.	Date of allotment letter	12.11.2013 (As per annexure P-5, at page no. 52 of complaint)
9.	Date of Builder buyer agreement	20.11.2013 (As per annexure P-7, at page no. 59 of complaint)
10.	Tripartite agreement	22.11.2013 (As per annexure P-8, at page no. 86 of complaint)

11.	Possession clause	<p><b>5. Possession</b></p> <p><b>5.1:</b> The Seller/Confirming Party proposes to offer possession of the Unit to the Purchaser(s) within the Commitment Period. The Seller/Confirming Party shall be additionally entitled to a Grace Period of 180 days after the expiry of the said Commitment Period for making offer of possession to purchaser(s)</p> <p>1.4. Commitment Period shall mean, subject to Force Majeure circumstances, intervention of statutory authorities and Purchaser(s) having timely complied with all its obligations ,formalities and/or documentation, prescribed/requested by Seller/Confirming Party, under this Agreement and not being in default under any part of this Agreement, including but not limited to the timely payment of a installments of the sale consideration as per the payment plan opted, the Seller/Confirming Party, <b><i>offer the possession of the unit to the Purchaser(s) within a period of 36 months from the date of execution of Floor Buyer's Agreement.</i></b></p> <p style="text-align: right;"><b>(Emphasis supplied)</b></p> <p>(As per annexure P-7, at page no. 69 of complaint)</p>
12.	Due date of possession	<p>20.11.2016</p> <p><b>(Note: - 3 years from date of execution of buyer's agreement i.e., 20.11.2013)</b></p>
13.	Grace period	Not allowed
14.	Total consideration	Rs.1,38,18,060/-

		(As per statement of account dated 05.11.2018, at page no. 135 of complaint)
15.	Total amount paid by the complainant	<b>Rs.89,52,958/-</b>
	Amount paid by the complainant	Rs.56,13,531/-
	Amount paid by the bank on behalf of the complainant-allottee	Rs.33,39,427/-
16.	Occupation certificate	18.06.2021
17.	Offer of possession	Not offered
18.	Demand cum payment request letter	23.03.2018, 09.04.2018, 02.02.2018, 06.09.2018, 19.11.2018,
19.	Date of termination of unit	09.02.2022 (Page no. 118 of reply)

### B. Facts of the complaint

3. The complainant has made the following submissions: -

- I. The present complaint is against the illegal and arbitrary cancellation of allotment of unit no. D-42-TF at the project Pedestal at Sector 70A, Gurgaon, (hereinafter 'Pedestal Apartment'), and forfeiture thereof of the entire payment made by the complainant till date vide cancellation letter dated 09.02.2022 issued by respondents.
- II. That in terms of the buyer's agreement, the 'Committed Date of Delivery' of the unit was 20.11.2016. The demands were to be raised at different stages of construction and that too prior to the 'Committed Date of Delivery'. The amounts mentioned in the demands were prescribed in the allotment letter and such amounts could not have been varied under any circumstances.

III. That based on the acknowledgments of BPTP, the complainant has made the following payments to BPTP:

Payments made by allottee/s		
S.N.	Cheque no. & date	Amount (INR)
1.	000254 dated 29.07.2013 drawn on Standard Chartered Bank	9,00,000/-
2.	000269 dated 13.09.2013 drawn on Standard Chartered Bank	11,58,727/-
3.	240288 dated 07.11.2013 drawn on Punjab National Bank	20,58,727/-
4.	30.11.2013	26,98,231/- (Bank has shown disbursement of 33,32,427/-)
5.	000293 dated 30.11.2013	91,785/-
6.	368111 dated 09.03.2015 drawn on J & K Bank.	67,810/-
7.	Standard Chartered Bank Cheque No.000523	55,782/-
Total		7031062/-

The complainant opted for construction linked payment plan and most of payments have been made within 45 days of the time when the buyer's agreement was signed / or immediately after the apartment agreement was executed.

- IV. That the respondent-builder raised the demands beyond the payment schedule. The complainant has made a total payment of Rs. 70,31,062/-. All these payments have been made on-demand before the committed delivery date. These demands and payments have been made are as per the agreed payment schedule.
- V. The details of the demands contrary to the agreed schedule raised by BPTP are as under:



Dates	Demand (In INR)
02.02.2018	Rs.14,96,063/-
07.03.2018	Demand was revised to Rs.15,61,099/-
23.03.2018	Rs.60,49,288/- (This demand included 15,61,099/- raised on 07.03.2018)
09.04.2018	Demand dated 23.03.2018 revised to Rs.60,21,459/-
04.07.2018	Demand dated 09.04.2018 was revised to Rs.60,49,288/-
06.09.2018	Demand dated 07.04.2018 was revised Rs.75,45,351/-
19.11.2018	Demand dated 06.09.2018 was revised Rs.76,01,009/-

- VI. That the demands were not only raised beyond the scheduled date of possession in terms of the buyer's agreement but the quantum of the said demands is also different than the one mentioned in the contract. It is submitted that buyer's agreement particularly, the payment schedule and the timely delivery of the apartment are the substratum of the buyer's agreement. Once these are breached, the very substratum of the agreement vanishes and the buyer's agreement becomes unenforceable.
- VII. That on 22.11.2018 and 22.04.2019, BPTP issued communications showing details of payment purportedly deposited toward Pre-EMI interest till January 2019. It is submitted that various communications seeking complete statement of accounts, from BPTP have remained unanswered. Further, from February 2019 onwards till date, BPTP has not paid any Pre-EMI interest to the complainant and/or to the bank. The complainant has paid an amount of Rs.12,53,550/- as Pre-EMI interest to HDFC Bank. This amount has been calculated from February 2019 till 05.02.2022. It is submitted that since BPTP has been defaulting in depositing the Pre-EMI interest from the very beginning, amount of Pre-EMI interest prior to February 2019, payable by BPTP, to the complainant, is subject to reconciliation. The complainant is entitled

to payment of pre-EMIs along with interest which the BPTP has defaulted.

- VIII. That it is submitted that BPTP failed to deliver the subject unit within the committed period i.e., by 20.11.2016, thereby defaulting in its obligations under the buyer's agreement. The complainant submits that till the committed date of delivery; he has paid in accordance with the payment schedule. Further, the BPTP, since the execution of tripartite agreement dated 22.11.2013, has defaulted/delayed making the Pre-EMI Interest component; and since February 2019 failed to pay Pre-EMI interest which has been eventually borne by the complainant, thereby increasing his financial burden.
- IX. That the subject unit was allotted by BPTP to the complainant by allotment letter dated 12.11.2013. The schedule of payment is given in the said allotment letter. The allotment letter among others also provides "that 15% of the cost of property i.e., of Rs.1,33,57,710/- shall constitute "Earnest Money" i.e., Rs.20,03,656/-."
- X. That subsequently on 22.11.2013, a tripartite agreement between HDFC Ltd., BPTP and the complainant was executed. In terms of the said agreement, BPTP, amongst others, had undertaken and was obligated to pay pre-EMI till delivery of possession.
- XI. That BPTP did not fulfil its obligation to deliver the possession of the subject unit on 20.11.2016 and instead, the BPTP unilaterally kept extending the dates for delivery of possession. It is submitted that no reason whatsoever for the delay in the project has been ever provided by BPTP. It is an admitted fact that all the stages of the construction were to be completed by 20.05.2021. The demand raised on 02.02.2018, was after the expiry of committed date of



delivery shows that BPTP in the year 2018 was at the stage of casting of the first-floor roof slab. It is not clear and/ or no justification has been provided as to why it delayed the project when admittedly, the complainant had made all the payments as per the demand.

- XII. That till the date of purported cancellation of allotment i.e., 09.02.2022, the possession was not offered which clearly establishes that the developer defaulted in timely delivery of the pedestal apartment.
- XIII. That while there was a default in timely delivery of possession of the pedestal apartment, the developer surprisingly on 16.02.2021, offered to give an alternate apartment in some other project or in another ready to move in unit in the same vicinity to the complainant. The complainant, to understand the way forward, on the same day responded and requested BPTP to speak to the complainant. However, there was no response whatsoever till 09.02.2022, when BPTP suddenly issued a one-line communication cancelling the allotment and forfeiting the entire amount paid by the complainant.
- XIV. That in response to the complainant's request for statement of account and other documents made on 14.02.2021, after BPTP's purported cancellation, the developer forwarded a summary of the accounts, where it was shown that the occupation certificate of the pedestal apartment was only obtained on 18.07.2021 which is almost 4 years and 3 months from the original committed date of delivery in the buyer's agreement.
- XV. The above communication clearly establishes inordinate delay in completing the project. There is a delay of more than 4 years from



the committed date of delivery i.e., 20.05.2017 and almost 9 years from the date of buyer's agreement.

- XVI. That for more than 3 years, BPTP has not made any payment towards the Pre-EMI interest which under the subvention scheme was its liability to pay. An amount of Rs.12,53,550/- has been paid by complainant towards Pre-EMI. The developer is in default on that account also. Despite repeated requests to the developer and till date, it has not provided the complete statement of account and hence this complaint as prayed above.

**C. Relief sought by the complainant:**

4. The complainant has sought following relief(s):
- To set aside and quash the communication dated 09.02.2022 issued by BPTP to the complainant cancelling the allotment and forfeiting the amounts.
  - Direct BPTP to make the refund of the following amount to the complainant:
    - An amount of Rs. 70,31,062/- paid by the complainant.
    - An amount of Rs.12,53,550/-, which is the pre-Emi interest paid by the complainant for the period February 2019 to February 2022.
    - Direct the respondent to quash one-year advance maintenance charges of Rs. 71871/-.
  - Direct the respondents to pay compensation in terms of clause 6 of the agreement from 20.05.2017 till 09.02.2022.
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 respondents-**

6. The respondents contested the complaint on the following grounds, in brief is as under: -



- i. It is submitted that the complainant has approached this authority for redressal of the alleged grievances with unclean hands, i.e., by not disclosing material facts pertaining to the case at hand and, by distorting and/or misrepresenting the actual factual situation with regard to several aspects. It is further submitted that the Hon'ble Apex Court in plethora of cases has laid down strictly, that a party approaching the court for any relief, must come with clean hands, without concealment and/or misrepresentation of material facts, as the same amounts to fraud not only against the respondents but also against the court and in such situation, the complaint is liable to be dismissed at the threshold without any further adjudication.
- ii. The complainant is a defaulter and has defaulted in making payment of the outstanding amount even after issuance of various reminders letters. Therefore, due to non-payment, the respondents were constrained to terminate the booking letter dated 09.02.2022.
- iii. From the above, it is very well established, that the complainant has approached this Hon'ble Authority with unclean hands by distorting/concealing/misrepresenting the relevant facts pertaining to the case at hand. It is further submitted that the sole intention of the complainant is to unjustly enrich themselves at the expense of the respondents by filing this frivolous complaint which is nothing but gross abuse of the due process of law. It is further submitted that in light of the law laid down by the Hon'ble Apex Court, the present complaint warrants dismissal without any further adjudication.
- iv. It is submitted before the Hon'ble Authority that the amount paid against the unit has already been returned to the bank as per the tripartite agreement and wherein it was already agreed between the parties that entire amount shall be paid to the HDFC Bank. The same



has already been done by the respondents and the complainant was also intimated about the same vide email date 14.02.2022.

- v. The complainant is alleging that he has paid an amount of Rs.70,31,062/- for the unit. In this regard, it is clarified that the total amount received against the booking of the unit bearing No. D-42-TF is Rs.56,13,531/-. Hence, the complainant has failed to place on record any proof of payment of Rs.20.58 lacs.
- vi. The complainant has failed to clear the outstanding dues despite various reminder letters having been duly served upon him. Thereafter, the respondents were constrained to issue termination dated 09.02.2022 as per clause 3 vide which it is categorically noted that if the complainant defaults in making the payment against the unit within 15 days, it would amount to a voluntary, conscious and intentional waiver and relinquishment by the complainant of all his rights and privileges under the terms of the FBA. In such a case, refund of the amount deposited was to be made after forfeiture of earnest money deposit, accumulated interest and brokerage paid (if any). As the complainant failed to clear the outstanding dues, the respondent was constrained to terminate his booking. After having made the due forfeiture, as per the terms and conditions of the agreement, the balance amount has been refunded back to the HDFC bank and as on date, the respondents do not have any obligation against the complainant.
- vii. That after the termination of the unit of the complainant, the respondents have rightly forfeited the non-refundable amounts, as per the terms and conditions of the agreement and thereafter refunded the amount of Rs. 33,39,427 to the bank. It was only after having paid the said amount to the bank, the bank issued a No dues

certificate against the loan after noting that the entire loan amount has been repaid.

- viii. That the respondents, acting in utmost bonafide, have gone over and above its contractual obligation to make the payment of Pre-EMI, which it is never obligated to do. The respondents are well-known real estate builder who has not only delivered Steller quality projects but ensured ultimate customer satisfaction. The respondents have always made its practice to give the maximum benefits to its buyers. In lieu of the same, the respondents gave pre-EMIs over and above the contractual amount and paid Pre-EMIs till May 2019, total amounting to Rs.18,17,520/-. The entire complaint of the complainant banks upon the alleged non- payment of pre-EMI over and above the contractual obligations. However, what is deliberately hidden from the Hon'ble Authority is the fact that the last payment was made by the complainant in December 2016. The complainant has been in continuous default against the demands dated 02.02.2018, 23.03.2018 and 06.09.2018 respectively, despite of which, the pre-EMI was given by the respondents.
- ix. The complainant, acting in gross malafide, has sought refund at the present instance along with interest. It is reiterated that the 'interest over the loan taken' i.e., PRE-EMI has already been paid by the respondent. This payment of PRE-EMI has been enjoyed by the complainant without any demur. Under no circumstances, refund can be granted to the complainant after having also enjoyed the benefit of payment of Pre-EMI. It is a settled position in law that either party cannot land in a benefiting position, at the cost of the other party and in case the contract falls through.

- x. That it is pertinent to mention herein that the total amount received by respondent no. 2 against the booking of the unit in question was Rs. 56,13,531/- It is further important to point out that out of the total received amount, the customer paid Rs. 22,74,104/- on his own and the respondent has paid Rs. 33,39,427/- towards pre-EMI.
- xi. All other averments made in the complaint were denied in toto.
7. 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 those undisputed documents and submissions oral as well as written made by the parties.

**E. Jurisdiction of the authority**

8. 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:**

9. 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:**

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 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.*

11. 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 complainant at a later stage.
12. 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 judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2021-2022 (1) RCR (Civil), 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."*

13. 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 relief sought by the complainant.**

The complainant has sought following relief:

- (i) Set aside and quash the communication dated 09.02.2022, issued by BPTP to the complainant cancelling the allotment and forfeiting the amount.
  - (ii) Direct BPTP to make the refund of the following amount to the complainant:
    - a). An amount of Rs. 70,31,062/- paid by the Complainant.
    - b). An amount of Rs.12,53,550/-, which is the Pre-EMI interest paid by the Complainant for the period February 2019 to February 2022.
    - C). Direct the respondent to quash one-year advance maintenance charges of Rs.71,871/-.
  - (iii) Direct the respondents to pay compensation in terms of clause 6 of the agreement from 20.05.2017 till 09.02.2022.
14. The complainant has applied for a unit on 02.08.2013 under the subvention scheme and on 12.11.2013, a unit was allotted to him in the project namely 'Pedestal', sector 70-A, Gurugram. The complainant

stated that as per provisions of BBA executed on 20.11.2013, the respondents were required to hand over the possession within 36 months of its execution i.e., 20.11.2016. Further, the complainant has paid an amount of Rs.70,31,062/-. But a pre-termination letter was issued on 19.11.2018 and failing which the unit was liable to be cancelled and final termination email is dated 09.02.2022. The complainant has paid the whatsoever instalments demanded till 20.05.2017. Subsequently, a demand of Rs.14,96,063/- was raised on 06.09.2018 and in response of the same, the complainant-allottee sought the details as well as the likely date of handing over of possession as the due date had already elapsed. But instead of intimating and giving the response to above request, a final demand letter was received on 19.11.2018 for payment of outstanding amount and failing the unit would stand cancelled if amount demanded was not paid within 15 days.

15. The respondents submitted proof showing that they have received only Rs.56,14,531/- from the complainant. The complainant has failed to place on record any document w.r.t. payment of Rs.20,58,727/- which he has pleaded to have paid vide receipt No. 240288 dated 08.11.2013 bearing cheque No.144619 dated 31.03.2015. It further stated that the said cheque was drawn by BPTP Ltd. in favour of Native Buildcon Pvt. Ltd. and not by the complainant. It is further clarified by counsel for the respondents that since the two companies i.e., R1 and R2 are sister concerns, so instead of encashing the said cheque, a fund transfer was initiated by BPTP Ltd. in favour of Native Buildcon Pvt. Ltd. and the said amount of Rs.20,58,727/- was updated in the books of respondent No.2 against the booking of the unit in question. The respondents further stated that they returned the amount of Rs.33,32,427/- to the bank as per tripartite agreement after cancellation of the unit. During proceedings on



11.07.2023, on being asked, the complainant present in person agreed that Rs. 56,14,531/- may be considered as paid-up amount against the subject unit.

16. The respondents submit that the complainant is a defaulter and has failed to pay the payment as per the agreed payment plan. After raising the demand as per the payment plan various reminders and final opportunity was given and after that the unit was finally terminated vide email 09.02.2022. Since there was a tri-partite agreement with the HDFC Bank, the forfeiture calculations were shared and the payment of Rs.33,39,427/- was made as per foreclosure letter dated 28.06.2022. It is further submitted that a total sum of Rs.18,17,520/- has been paid as Pre-EMI and the same is also bound to be adjusted against the payment to be made. The adjustment of Pre-EMI was allowed by the Authority in complaint no. 3968 of 2020, decided on 19.05.2023. He further submits that upon the forfeiture and adjustments being made, there is no outstanding on part of the respondents. Instead, there is recovery from the complainant/allottee.
17. The counsel for the respondents argued that the complainant on one hand kept asking for Pre-EMI and on the other hand, did not make the payment of the outstanding dues as per agreed payment plan. Moreover, there are numerous correspondences on record between both the parties and the complainant never sought refund through any of those correspondences. It was also pointed out that email dated 15.02.2021 at page 143 of the complaint shows the intent of the customer/complainant to continue with the project.
18. Accordingly, the complainant 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. The

reluctant behavior of the complainant led to issuance of notice of termination/cancellation by the respondents on 09.02.2022. Now, the question before the authority is whether this cancellation is valid or not?

19. The authority has gone through the payment plan and which was duly signed by both the parties, being reproduced for a ready reference: -

<b>Payment Plan</b>	
<b>Particulars</b>	<b>Payment</b>
At the time of booking	Rs.9 Lacs/ Rs.9 Lacs/ Rs.12 Lacs
Within 45 days from the booking	To complete 15% BSP + 25% of DC + 25% of CCPC + 15% PLC (Customer)
Start of construction	25% BSP + 25% of DC + 25% of CCPC + 25% PLC (Bank)
On casting of first floor roof slab	10% BSP + 10% of DC + 10% of CCPC + 10% PLC (Bank)
On casting of second floor roof slab	30% BSP + 30% of DC + 30% of CCPC + 30% PLC (Bank)
Completion of external plaster	10% BSP + 10% of DC + 10% of CCPC + 10% PLC (Bank)
On offer of possession	10% BSP + 10% of DC + 10% of CCPC + 10% PLC + CMC+ PBIC + IFMS + SD+ REG. (CUSTOMER)
Note: other charges in terms of the agreement are payable as per the demand raised by the company. Service tax to be charges as applicable.	

20. The authority observes that as per payment plan agreed between the parties, the complainant agreed to the payment of the said amount against the total sale consideration. However, the complainant has only paid 40.62% of sale consideration against payment plan agreed upon between the parties. Therefore, the authority is of considered view that the respondents were right in raising demands as per payment plan agreed upon between the parties and the complainant having failed to fulfil the obligations conferred upon him vide section 19(6) & (7) of the Act of 2016, wherein an allottee is under an obligation to make payment towards consideration of allotted unit. The respondents having after giving reminders dated 02.02.2018, 23.03.2018, 09.04.2018, 06.09.2018, and 19.11.2018 respectively cancelled/terminated the unit of the

complainant vide letter dated 09.02.2022. The respondents have given sufficient opportunity and time to the complainant before proceeding with termination of allotted unit. Thus, the termination of the allotted unit vide letter dated 09.02.2022 is valid in the eyes of law and the same is not liable to be set aside in any manner.

21. The respondent company had obtained the occupation certificate for the project of the allotted unit on 18.06.2021. The respondent/promoter issued demands letter and further, issued termination/cancellation letter to the complainant. The respondent cancelled the unit of the complainant after issuing adequate demands notices. Thus, the cancellation of unit is valid. Further, as per clause 7 of the agreement to sell, the respondent/promoter has right to cancel the unit and forfeit the earnest money in case the allottee breaches the terms and conditions of the agreement to sell executed between both the parties. Clause 7 of the agreement to sell is reproduced as under for a ready reference.

7.1 *"The timely payment of each instalment of the Total Sale Consideration i.e., COP and other charges as stated herein is the essence of this transaction/Agreement. In case the Purchaser(s) neglects, omits, ignores, defaults, delays or fails, for any reason whatsoever, to pay in time any of the instalments or other amounts and charges due and payable by the Purchaser(s) as per the payment schedule opted or if the Purchaser(s) in any other way fails to perform, comply or observe any of the terms and conditions on his/her part under this Agreement or commits any breach of the undertakings and covenants contained herein, the Seller/Confirming Party may at its sole discretion be entitled to terminate this Agreement forthwith and forfeit the amount of Earnest Money and Non-Refundable Amounts and other amounts of such nature. In the event the Seller/Confirming Party exercises its right to terminate the present Agreement, the Purchaser(s)."*

22. Moreover, 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 by the Hon'ble Apex Court 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 attracted 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. Then, 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". So, 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 framed 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."*

23. Thus, 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, the respondent/builder can't retain more than 10% of basic sale consideration as earnest money on cancellation and that was not done. So, the authority observes that since the complainant was not interested to take possession of the allotted unit and further defaulted in making payment towards the outstanding dues as agreed under the payment plan, so in view of the same, the unit has been rightly cancelled by the respondents after issuing proper reminders. Moreover, the respondents have also refunded the amount of Rs.33,39,427/- (page 121 of reply) to the bank. But the respondents contravened the provision of section 11(5) of the Act and illegally held the monies of the complainant beyond the limit prescribed under regulation of the Authority.
24. The next issue for consideration arises as to whether the complainant is entitled to any interest on the paid up amount from the respondent-builder in the face of a tripartite agreement between the parties and the banker of the complainant. The complainant was allotted unit in question vide letter dated 24.12.2013 and he opted for subvention payment plan. A flat buyer agreement dated 07.01.2014 in this regard between the parties. As per the payment plan agreed upon between the parties, the complainant was required to make payments against the allotted unit as per the stage of construction (annexure-C). The total sale consideration of the allotted unit was agreed upon Rs. 1,38,18,060/- to be paid as per the payment plan. Though the complainant paid some amount from his own sources, but he

also got sanctioned a loan of Rs. 10300000/- from HDFC, leading to execution of a tripartite agreement dated 22.11.2013 and disbursement of Rs. 33,39,427/- admittedly being paid to the developer on its agreeing to pay equated monthly installments (EMI) and a reference in this regard to clauses 3 & 4 of tripartite agreement is must which are being reproduced as under:

*3. The housing loan advanced to the Borrower by HDFC shall be repayable by the Borrower by way of Equated Monthly Installments (EMI). The date of commencement of EMI shall be the first day of the month following the month in which the disbursement of the loan will have been completed and consequently the due date of payment of first EMI shall in such a case be the last day of the said following month. Till the commencement of EMI the borrower shall pay Pre-EMI, which is the simple interest on the loan amount disbursed calculated at the rate of interest as mentioned in the respective loan agreement of the Borrower.*

*The Borrower has informed HDFC of the scheme of arrangement between the Borrower and the Builder in terms whereof the Builder hereby assumes the liability of payments under the loan agreement as payable by the Borrower to HDFC from date of first and each subsequent disbursement till 30. NOV. 2015 (the period be referred to as the "Liability Period" and the Liability be referred to as "Assumed Liability"). It is however agreed that during the liability period the repayment liability is joint and several by and between the Borrower and the Builder. The assumption of liability by the Builder in no manner whatsoever releases, relinquishes and/or reduces the liability of the Borrower and that the same shall not be affected in any manner on account of any different and/or dispute between the Borrower and the Builder under the arrangement between them.*

*4. That irrespective of the stage of construction of the Project and irrespective of the date of handing over the possession of the residential apartment/floor to the Borrower by the Builder, the Borrower shall be liable to pay to HDFC regularly each month the EMIs as laid down in the Loan Agreement to be signed by and between HDFC and the Borrower. The Borrower shall execute an indemnity and such other documents as may be required by HDFC in favour of HDFC in this regard.*

25. In pursuant to that understanding, the developer started making payment of EMI's and the same were admittedly paid upto 28.05.2019 to the tune of Rs. 18,17,520/. Though it was agreed upon that the payment of EMI would be till November-2015 but the respondent builder failed to complete the

project and offer possession of the allotted unit to the complainant, so the former continued to make payment of the Emi's to the banker of the later till 28.05.2019. it has come on record that when despite reminders, the complainant failed to make further payments to the developer as per the schedule of construction so the same led to cancellation of his allotment vide letter dated 09.02.2022, forfeiting the amount already paid and making payment of the disbursed amount to his banker. Though the action of the developer in cancellation of the allotment of the unit has been held to be valid due to non-payments despite various reminders but the developer was not right in forfeiting whole of the paid-up amount by the complainant and not paying any amount for use of his money paid by him under the subvention scheme by taking loan from HDFC on the basis of tripartite agreement date 22.11.2013. A pursual of payment plan as agreed upon shows that the complainant was required to make payment in the manner detailed as under:

<b>Payment Plan</b>	
<b>Particulars</b>	<b>Payment</b>
At the time of booking	Rs.9 Lacs/ Rs.9 Lacs/ Rs.12 Lacs
Within 45 days from the booking	To complete 15% BSP + 25% of DC + 25% of CCPC + 15% PLC (Customer)
Start of construction	25% BSP + 25% of DC + 25% of CCPC + 25% PLC (Bank)
On casting of first floor roof slab	10% BSP + 10% of DC + 10% of CCPC + 10% PLC (Bank)
On casting of second floor roof slab	30% BSP + 30% of DC + 30% of CCPC + 30% PLC (Bank)
Completion of external plaster	10% BSP + 10% of DC + 10% of CCPC + 10% PLC (Bank)
On offer of possession	10% BSP + 10% of DC + 10% of CCPC + 10% PLC + CMC+ PBIC + IFMS + SD+ REG. (CUSTOMER)
Note: other charges in terms of the agreement are payable as per the demand raised by the company. Service tax to be charges as applicable.	

A pursual of abovementioned payment tabular shows that the complainant was required to make payment of Rs. 65 lacs upto the stage of casting of first floor and which was done in the year 2018 as evident from letter dated 02.02.2018 and vide which payment request was made to the complainant by the respondent builder on casting of first floor roof slab. The complainant has already made payment of Rs. 48,48,743/- upto 30.11.2013 inclusive of loan amount of Rs. 33,32,427/- taken as loan from HDFC. Thus the money received by the developer from the complainant was not as per payment plan and same was used under subvention scheme. Though after that the complainant made part payments on 09.03.2015 and subsequently to the tune of Rs. 1,23,592/- as the construction was not going as per schedule and the same led to issuance of reminders and ultimately cancellation of allotment vide letter dated 09.02.2022. Thus, in such a situation, though the developer continued to make pre-EMI upto 28.05.2019 but the complainant is certainly entitled to interest at the prescribed rate for use of his money by the developer received from his financier beyond the due amount. Secondly, after 28.05.2019, the developer did not pay any amount towards EMI and the complainant had to pay the same from his own pocket to the tune of Rs. 12,53,550/- till 05.02.2022. Though the amount of Rs. 33,39,427/- taken as loan from HDFC was paid back by the developer but the complainant may take appropriate recourse to recover the amount of Rs. 12,53,550/- paid as installment against loan to HDFC as per the milestone/stage of construction.



26. So, the respondent/builder is directed to refund the amount received from the complaint after deducting 10% of the sale consideration and the amount paid to the bank except for pre-Emi amount paid till 28/05/2019 and to 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 cancellation 09.02.2022 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.
27. It is further clarified that out of amount so assessed, the respondent is entitled to deduct the amount already refunded by the respondent. As far as issue with regards to pre-EMI is concerned, the respondent has initially agreed to make payment of pre-EMI till 30.11.2015 as per clause 2 of tripartite agreement. However, the said liability was extended from time to time vide various letter issued by the respondent-builder. The fact has also been admitted by the respondent that finally, the respondent was under an obligation to make payment of pre-EMI till offer of possession. Further, the scenario also occurred where the respondent promised the complainant vide email dated 05.01.2017, to make payment of pre-EMI from his account and the same would be accordingly credited to his account. But the respondent failed to fulfil his assurance thereafter, which resulted in a situation where the complainant was burdened to make payment of pre-EMI though the same was required to be paid by the respondent-builder. It has come on record that the respondent has paid an amount of Rs.

18,17,520/- on account of pre Emi till May 2019. Since the unit of the complainant has been terminated and such amount of pre EMI has been borne by the respondent on behalf of the complainant as per agreement agreed between the parties vide tri partite agreement dated 22.11.2013 Thus, the Authority is of considered view that out of total refundable amount the respondent is entitled to deduct an amount equivalent to loan amount actually availed and subsequently paid back by it to the bank i.e. Rs. 33,32,427/-.

28. Though while filing the complaint, the complainant did not take any plea w.r.t. registration of the project by the respondent with authority but he filed written submission in this regard and sought an action to be taken against the developer for violation of provision of section 3 & 4 of the Act of 2016. There is nothing on record to show that the project of the respondent is registered with authority. So, taking cognizance of the same, the authority in its order dated 04.04.2019 passed in complaint no. 761 of 2018 observed that 'the project is registerable and has not been registered by the promoters. The authority has decided to take suo moto cognizance for not getting the project registered and for that separate proceedings will be initiated against the respondent' and for which proceedings are admittedly pending before the authority vide complaint no. 5821-2019 So, in view of pendency of suo moto complaint qua non registration of the project, there is no need for any further direction in this complaint

#### **H. Directions of the authority**

29. 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 promoter as per the function entrusted to the authority under section 34(f):

- i. The respondent-promoters are directed to refund the amount paid after deducting 10% of the sale consideration and the amount paid to the bank except for pre-Emi amount paid till 28/05/2019 and to return <sup>to complainant</sup> the remaining amount along with interest at the rate of 10.75% p.a. on the refundable amount from the date of cancellation i.e., 09.02.2022 till the actual date of refund of that amount.
  - ii. A period of 90 days is given to the respondents to comply with the directions given in this order and failing which legal consequences would follow.
30. Complaint stands disposed of.
31. File be consigned to registry.

  
(Sanjeev Kumar Arora)  
Member

  
(Vijay Kumar Goyal)  
Member

Haryana Real Estate Regulatory Authority, Gurugram

03.10.2023