BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 2475 of 2022
Order reserved on : 11.01.2024
Order pronounced on: 08.02.2024

Shri Gagan Deep Singh
S/o Sh. Deedar Singh
R/o: - House No. 58, Hemkunt Colony, UGF, Greater Kailash-1, New Delhi- 110048 **Complainant**

Versus

M/s Ireo Grace Realtech Private Limited
Regd. Office: C-4, 1st Floor, Malviya Nagar, New Delhi - 110017 **Respondent**

CORAM:
Shri Vijay Kumar Goyal **Member**

APPEARANCE:
Ms. Sangita Gulati (Advocate) Complainant
Shri M.K. Dang (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 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.	Project name and location	"The Corridors" at sector 67A, Gurgaon, Haryana
2.	Licensed area	37.5125 acres
3.	Nature of the project	Group Housing Colony
4.	DTCP license no.	05 of 2013 dated 21.02.2013
	License valid up to	20.02.2021
	Licensee	M/s Precision Realtors Pvt. Ltd. and 5 others
5.	RERA registered/not registered	**Registered** Registered in 3 phases Vide **378 of 2017** dated 07.12.2017 (Phase 1) Vide **377 of 2017** dated 07.12.2017 (Phase 2) Vide **379 of 2017** dated 07.12.2017 (Phase 3)
	Validity	30.06.2020 (for phase 1 and 2) 31.12.2023 (for phase 3)
6.	Unit no.	903, 9th floor, tower A4 (Page no. 23 of complaint)
7.	Unit measuring	1726.91 sq. ft. (Page no. 23 of complaint)
8.	Date of approval of building plan	23.07.2013 (As per project details)
9.	Date of allotment	07.08.2013 (Page no. 11 of complaint)
10.	Date of environment clearance	12.12.2013 (As per project details)
11.	Date of execution of builder buyer's agreement	03.04.2014 (Page no. 20 of complaint)
12.	Date of fire scheme approval	27.11.2014 (As per project details)

13.	Possession clause	**13. Possession and Holding Charges** *Subject to force majeure, as defined herein and further subject to the Allottee having complied with all its obligations under the terms and conditions of this Agreement and not having default under any provisions of this Agreement but not limited to the timely payment of all dues and charges including the total sale consideration, registration chares, stamp duty and other charges and also subject to the allottee having complied with all the formalities or documentation as prescribed by the company, the company proposes to offer the possession of the said apartment to the allottee* ***within a period of 42 months from the date of approval of building plans and/or fulfilment of the preconditions imposed thereunder*** *(Commitment Period). The Allottee further agrees and understands that the company shall additionally be entitled to a period of 180 days (Grace Period), after the expiry of the said commitment period to allow for unforeseen delays beyond the reasonable control of the Company.* **(Emphasis supplied)**
14.	Due date of delivery of possession	**23.01.2017** (Calculated from the date of approval of building plans) Note: Grace Period is not allowed.
15.	Total consideration	Rs.1,73,08,261/- [As per payment plan on page no. 56 of complaint]
16.	Total amount paid by the complainants	Rs.48,46,910/- (As per cancellation letter on page no. 52 of reply)
17.	Reminders for payment	**For Fourth Instalment:** 29.03.2015, 23.04.2015 **For Fifth Instalment:** 29.06.2016, 22.07.2016

		For Sixth Instalment: 12.08.2016, 28.07.2016 (Final notice)
18.	Cancellation Letter	**01.09.2016** (Page no. 51 of complaint)
19.	Occupation certificate	27.01.2022 [annexure R-23 on page no. 59 of reply]
20.	Offer of possession	Not offered but cancelled

B. Facts of the complaint

3. The complainant has made the following submissions: -

I. That the complainant being persuaded by the advertisements issued by the respondent in the leading newspapers of India regarding a project namely ***"The Corridors"***, situated in sector 67A, in the revenue estate of Village Dhumaspur and Maidwas, Tehsil & District Gurugram, applied for allotment of an apartment vide application dated 22.03.2013. In pursuance of the said application, the respondent allotted an apartment bearing No. 903 on 9th floor, in A4, Tower having a Super Area of 1726.91 sq. ft. to him. Therefore, in respect of the said apartment, both the parties had entered in to a flat buyer agreement on 03.04.2014 for a total consideration of Rs.1,73,08,261/-.

II. That the complainant had opted construction linked payment plan and paid a sum of Rs.48,46,909/- to the respondent as per their demands raised time to time.

III. That as per clause 13.3 of the agreement, the possession of the apartment has been handed over by the respondent to the complainant with in a period of 42 months with a grace period of 180 days which further adds to a total of 48 months or 4 years from the date of execution of the agreement. Therefore, as per the said clause, the respondent have

to offer the possession of the apartment to the complainant on or before 02.04.2018. However, the respondent has failed to comply the said clause of the agreement. The respondent has failed to offer the possession to the complainant till date i.e. after 8 years of agreement executed between the parties.

IV. That since 2018 onwards, the complainant visited several times to office of the respondent for obtaining the possession of the apartment however the respondent has failed to offer the same to the complainant. The respondent has failed to fulfil its contractual obligation i.e., to deliver the possession to the complainant, which is in violation of section 11 of the Act, 2016.

V. That it is an admitted fact that the complainant had approached the respondent for purchasing the unit in the year 2013, and the respondent has failed in complying with its contractual obligations. Therefore, the respondent was deficient in complying with their contractual obligations time and again. Further, the respondent also failed to offer the possession to him as provided under the buyer's agreement. He has already paid a sum of Rs.48,46,909/- to the respondent in the year 2013, and the complainant has not been offered the possession till the filing of this complaint. The said delay is considerable and inordinate in offering the possession, which clearly amounts deficiency of service. In this regard, the complainant through his counsel issued a legal notice dated 23.08.2021 for refunding an amount of Rs.48,46,909/- along with payment of delay compensation. However, the respondent has failed to comply the terms of the said notice after receipt the same. Hence, the complainant is entitled to refund as claimed as per section 18 of the Act of 2016.

C. Relief sought by the complainant:

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

   i. Direct the respondent to refund the amount of Rs.48,46,909/- to the complainant along with interest @24% per annum.

   ii. To pass and award of Rs.50,00,000/- in favour of the complainant against the respondent on account of default in compliance the terms and condition of the agreement, damages on account of struggle, along with interest at the rate of 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 contested the complaint on the following grounds: -

   i. That the complaint is neither maintainable nor tenable and is liable to be outrightly dismissed. The apartment buyer's agreement was executed between the parties prior to the enactment of the Act of 2016, and the provisions of the said Act cannot be enforced 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 i.e., clause 35 of the buyer's agreement.

   iii. That the complainant has not approached this authority with clean hands and has intentionally suppressed and concealed the material facts in the present complaint. The present complaint has been filed by him maliciously with an ulterior motive and it is nothing but a sheer abuse of the process of law. The true and correct facts are as follows:

- That the respondent is a reputed real estate company having immense goodwill, comprised of law abiding and peace-loving persons and has always believed in providing best services to its customers. The respondent and its associate companies have developed and delivered several prestigious projects such as 'Grand Arch', 'Victory Valley', 'Skyon' and 'Uptown' etc. and in most of these projects large number of families have already shifted after having taken possession and resident welfare associations have been formed which are taking care of the day to day needs of the allottees of the respective projects.
- That based on the said application, respondent vide its allotment offer letter dated 07.08.2013 allotted to the complainant an apartment no. CD-A4-09-903 having tentative super area of 1726.91 sq. ft. for a sale consideration of Rs.1,73,08,261/- which was exclusive of applicable taxes, stamp duty, registration charges etc. The apartment buyer's agreement was executed between the parties on 03.04.2014. The complainant agreed to be bound by the terms contained in the apartment buyer's agreement.
- That respondent raised payment demands from the complainant in accordance with the agreed terms and conditions of the allotment as well as of the payment plan. Vide payment request letter dated 14.04.2013, the respondent raised the demand in respect of the second installment for the net payable amount of Rs.16,96,912/-. However, only part-payments were credited after three reminders dated 14.05.2013, 28.05.2013 and 02.09.2013 issued by the respondent.
- That the respondent vide its payment request dated 18.03.2014 raised the third installment demand for Rs.19,97,186./-. However,

only part payments were credited by the complainant after three reminders dated 13.04.2014, 04.05.2014 and 29.08.2014 issued by the respondent. The respondent vide its payment request dated 03.03.2015 raised the fourth installment demand for Rs.19,77,121/- followed by two reminders dated 29.03.2015 and 23.04.2015.

- That the respondent vide its payment request dated 02.06.2016 raised the fifth installment demand for Rs.16,96,343/-. However, the complainant failed to make payment despite reminders dated 29.06.2016 and 22.07.2016.
- That the respondent vide its payment request dated 18.07.2016 raised the sixth installment demand for Rs.16,96,343/- as well as his previous dues. Upon failure of the complainant to make payment, the respondent issued reminder dated 12.08.2016. Yet again, the complainant did not make any payment upon which the respondent issued a final notice dated 28.07.2016. Respondent vide its payment request dated 23.08.2016 raised the seventh installment demand for Rs.16,96,343/- along with previous arrears.
- That on account of non-fulfillment of the contractual obligations by the complainant despite several opportunities extended by respondent, the allotment of the complainant was cancelled and the earnest money deposited by the complainant along with other charges were forfeited vide cancellation letter dated 01.09.2016 in accordance with clause 21 read with clause 21.3 of the apartment buyer's agreement and the complainant is now left with no right, claim, lien or interest whatsoever in respect of the said booking/allotment. Despite failure of the complainant to adhere to his contractual obligations of making payments, the respondent has

completed the construction of the tower in which the unit allotted to the complainant was located.

- That according to agreed clauses of the booking application form and the apartment buyer's agreement, timely payment of installments within the agreed time schedule was the essence of allotment. The complainant is a real estate investor who had booked the unit in question with a view to earn quick profit in a short period. However, his calculations went wrong on account of slump in the real estate market and the complainant did not possess sufficient funds to honour her commitments. The complainant was never ready and willing to abide by his contractual obligations and he also did not have the requisite funds to honour his commitments.
- That even though the complainant has nothing to do with the construction yet that the respondent has already completed the construction of the tower in which the cancelled unit of the complainant was located. The respondent applied for the grant of the Occupation Certificate vide application dated 10.09.2019. The concerned authorities granted the occupation certificate for the tower in question on 27.01.2022
- That the implementation of the said project was hampered due to several force majeure factors like inability to undertake construction for approximately 7-8 months due to Central Government's notification regarding demonetization, orders passed by the National Green Tribunal, non-payment of instalments by allottees such as the complainant, heavy rainfall in Gurgaon in the year 2016 and unfavorable weather conditions, filing of several false and frivolous complaints by the defaulting allottees before the DTCP, Haryana, Chandigarh and outbreak of Covid-19 and its

subsequent waves. The said events and conditions were beyond the control of the respondent and materially affected and construction and progress of the project.

iv. That the complainant now wants to somehow get out of the concluded contract on highly flimsy and baseless grounds. Such malafide tactics of the complainant cannot be allowed to succeed.

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 these undisputed documents and submissions made by the parties.

E. Written submissions by the respondent:-

8. The respondent has filed the written submissions on 15.01.2024, which are taken on record. The additional facts apart from the reply has been stated by the parties in written submissions are mentioned below.

- That the respondent kept on raising payment demands from the complainant in accordance with the agreed terms and conditions of the allotment as well as the payment plan but due to constant defaults committed by the complainant in complying with his obligations, the respondent was constrained to cancel the allotment of the complainant vide its cancellation letter dated 01.09.2016. The complainant committed blatant breaches of the terms and conditions of allotment. That 18 reminders were sent to the complainant to pay the due installments but the complainant intentionally did not do so and the allotment of the unit was rightly cancelled by the respondent. Even despite cancellation of the unit, the complainant did not take any action and the present complaint has been filed on 25.05.2022 as an afterthought much after the expiration of the limitation period. No reason for delay in filing the complaint has been mentioned by the complainant.

- That if the complainant had any grievance, his remedy was to challenge the cancellation within the prescribed period of limitation i.e. three years. The Act, of 2016 was not enacted to give life to dead and stale claims. The limitation to claim refund by the complainant started way back in 2016 when the unit allotted to him was cancelled. It is settled law that once limitation period begins, it does not stop. The complainant deliberately chose to sleep over the matter and the present complaint is time barred on the face of it as the complaint has been filed only on 25.05.2022 i.e. after almost 6 years from the date of cancellation letter.
- That section 3 of the Limitation Act, 1963 mandates that no court shall grant any relief which is barred by limitation even if no defence with regard to the limitation is raised. It has been laid down time and again that even though the law of limitation may harshly affect a party but it has to be applied with all its rigour when the statutes so prescribe and the courts have no power to extend the period of limitation on any ground whatsoever. Therefore, a duty is cast upon the courts/authorities to reject such claims which are time barred on the face of it.

F. Jurisdiction of the authority

9. The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

F. I Territorial jurisdiction

10. 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.

F. II Subject-matter jurisdiction

11. 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.*

12. 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.

G. Findings on the objections raised by the respondent:

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

13. The respondent submitted that the complaint is neither maintainable nor tenable and is liable to be outrightly dismissed as the apartment 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.

14. The authority is of the view that the provisions of the Act are quasi retroactive to some extent in operation and would 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 will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. 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 and 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."*

15. Also, 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 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. 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."*

16. 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 allottee 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.

G. II. Objection regarding complainants is in breach of agreement for non-invocation of arbitration clause.

17. 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 and the same is reproduced below for the ready reference:

> *"**35. Dispute Resolution by Arbitration***
> *All or any disputes arising out or touching upon in relation to the terms of this Agreement or its termination including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussions failing which the same shall be settled through reference to a sole Arbitrator to be appointed by a resolution of the Board of Directors of the Company, whose decision shall be final and binding upon the parties. The allottee hereby confirms that it shall have no objection to the appointment of such sole Arbitrator even if the person so appointed, is an employee or Advocate of the Company or is otherwise connected to the Company and the Allottee hereby accepts and agrees that this alone shall not constitute a ground for challenge to the independence or impartiality of the said sole Arbitrator to conduct the arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/ modifications thereto and shall be held at the Company's offices or at a location designated by the said sole Arbitrator in Gurgaon. The language of the arbitration proceedings and the Award shall be in English. The company and the allottee will share the fees of the Arbitrator in equal proportion".*

18. 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.

G.III Objections regarding force majeure

19. The respondents-promoter has raised the contention that the construction of the tower in which the unit of the complainants is situated, has been delayed due to force majeure circumstances such as orders passed by National Green Tribunal to stop construction during 2015-2016-2017-2018, dispute with contractor, non-payment of instalment by allottees and demonetization. The plea of the respondent regarding various orders of the NGT and demonetisation but all the pleas advanced in this regard are devoid of merit. The orders passed by NGT banning construction in the NCR region was for a very short period of time and thus, cannot be said to impact the respondent-builder leading to such a delay in the completion. The plea regarding demonetisation is also devoid of merit. Also, there may be cases where allottees has not paid instalments regularly but all the allottees cannot be expected to suffer because of few allottees. Thus, the promoter respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

G.IV Objection regarding maintainability of complaint.

20. The counsel for the respondent has raised an objection in its written submission that the complaint is barred by limitation as the complainant has approached the complainant has admittedly filed the complaint in the year 2022 and the cause of action accrue on 01.09.2016, as the allotted unit of the

complainant was cancelled. Therefore, the complaint cannot be filed before this Authority after almost 6 years from the date of cancellation letter as the same is barred by limitation.

21. On consideration of the documents available on record and submissions made by the party, the authority observes that the buyer's agreement w.r.t. the unit was executed with the allottee on 03.04.2014. As per clause 13 of the buyer's agreement, the possession of the subject unit was to be offered with in a period of 42 months from the date of approvals of building plans and/or fulfilment of the preconditions imposed thereunder. The due date of possession can be calculated from the date of approval of building plans i.e., 23.07.2013, which comes out to be 23.01.2017.

22. However, the said project of the allotted unit is an ongoing project, and the respondent/promoter has failed to apply and obtaining the CC/part CC till date. As per proviso to section 3 of Act of 2016, ongoing projects on the date of this Act i.e., 28.07.2017 for which completion certificate has not been issued, the promoter shall make an application to the authority for registration of the said project within a period of three months from the date of commencement of this Act and the relevant part of the Act is reproduced hereunder: -

> *"Provided that projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act."*

23. The legislation is very clear in this aspect that a project shall be regarded as an "ongoing project" until receipt of completion certificate. Since no

completion certificate has yet been obtained by the promoter-builder with regards to the concerned project.

24. Moreover, it is observed that the allotted unit of the complainant was cancelled on 01.09.2016, the respondents have failed to refund the amount to the complainant so far, which clearly shows a subsisting liability. Further, the law of limitation is, as such, not applicable to the proceedings under the Act and has to be seen case to case. Thus, the objection of the respondent w.r.t. the complaint being barred by limitation stands rejected.

H. Entitlement of the complainant:

H. I Direct the respondent to refund the amount of Rs.48,46,909/- to the complainant along with interest @24% per annum.

25. The complainant has booked the residential apartment in the project named as 'The Corridors' situated at sector 67A for a total sale consideration of Rs.1,73,08,261/-. The complainant was allotted the above-mentioned unit vide allotment letter dated 07.08.2013. Thereafter, the apartment buyer agreement was executed between the parties on 03.04.2014. As per clause 13 of the agreement, the respondent was required to hand over possession of the unit within a period of 42 months from the date of approvals of building plans and/or fulfilment of the preconditions imposed thereunder (commitment period) with a grace period of 180 days after the expiry of the said commitment period to allow for unforeseen delays. The due date of possession calculated from the date of approval of building plans i.e., 23.07.2013. Therefore, the due date of possession comes out to be 11.01.2018.

26. The respondent vide letter dated 29.03.2015 & 23.04.2015, 29.06.2016 & 22.07.2016, and 12.08.2016 respectively raised the demand towards fourth, fifth and sixth instalment, and raised demand for making payment from the complainant. Further, the respondent has also sent a final note on 28.07.2016, to the complainant and requested to pay the outstanding dues but the complainant has failed to pay the same. Due to non-payment of the outstanding dues, the respondent has cancelled the unit vide letter dated 01.09.2016 vide which the respondent threatened the complainant to forfeit the entire amount paid by him.

27. That the respondent has obtained the occupation certificate in respect of the allotted unit of the complainant on 27.01.2022. The complainant is a defaulter and has failed to make payment as per the agreed payment plan. Various reminders and final opportunities were given to the complainant and thereafter the unit was cancelled vide letter dated 01.09.2016. 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.

    Now, the question before the authority is whether this cancellation is valid or not?

28. The authority has gone through the payment plan, which was duly signed by both the parties, it is matter of record that the complainant booked the aforesaid unit under the installment payment plan and paid an amount of Rs.48,46,910/- towards total consideration of Rs.1,73,08,261/- which constitutes 28% of the total sale consideration and he has paid the last

payment only on 15.05.2014. The respondent has obtained the occupation certificate in respect of the allotted unit of the complainant on 27.01.2022. As per section 19(6) & 19(7) of Act of 2016, the allottee is under obligation to make payments towards consideration of allotted unit as per agreement to sale dated 03.04.2014. As per the payment plan respondent started raising payments from the complainant. The respondent vide letter dated 03.03.2015 raised the demand towards fourth instalment and due to non-payment from the complainant it sent reminder on 29.03.2015 and 23.04.2015 and thereafter various instalments for payments were raised but the complainant failed to pay the same. Further the respondent sent final notice dated 28.07.2016, and thereafter, the respondent has cancelled the unit vide letter dated 01.09.2016.

29. Further, as per clause 7.4 of the buyer's agreement, the respondent /promoter has a right to cancel the unit in case the allottee has breached the agreement to sell executed between both the parties. Clause 7.4 of the agreement to sell is reproduced as under for a ready reference:

> *7.4. The Allottee shall be liable to pay simple interest on every delayed payment, at the rate* ***of 20% per annum from the date that it is due for payment till the date of actual payment*** *thereof. In case the Allottee defaults in making payment of the due instaliment (including partial default) beyond a period of* ***90 days from the due date, the Company shall be entitled, though not obliged, for cancel the Allotment and terminate this Agreement*** *at any time thereafter in accordance herewith. However, the Company may alternatively, in its sole discretion, instead decide to enforce the payment of all its dues from the Allottee by seeking Specific Performance of this Agreement. Further, in every such case of delayed payment, irrespective of the type of Payment Plan, the subsequent credit of such delayed installment(s)/payments along with delayed interest in the account of the Company shall not however constitute waiver of the right of termination reserved herein and shall always be without prejudice to the rights of the Company to terminate this Agreement in the manner provided herein."*

30. That the above mentioned clause provides that the promoter has right to terminate the allotment in respect of the unit upon default under the said agreement. The respondent/promoter issued demands letter and further, issued final note cum termination letter to the complainant. The respondent cancelled the unit of the complainants after giving adequate demands notices. Further, the respondent company has already obtained the occupation certificate for the project of the allotted unit on 27.01.2022. Thus, the cancellation in respect of the subject unit is valid and the relief sought by the complainant is hereby declined as the complainant-allottee has violated the provision of section 19(6) & (7) of Act of 2016 by defaulting in making payments as per the agreed payment plan. However, there is nothing on record to show that the balance amount after deduction as per relevant clause of agreement has been refunded back to the complainant. In view of the aforesaid circumstances, only refund can be granted to the complainant after certain deductions as prescribed under law.

31. The issue with regard to deduction of earnest money on cancellation of a contract arose in cases of ***Maula Bux VS. Union of India, (1970) 1 SCR 928 and Sirdar K.B. Ram Chandra Raj Urs. VS. Sarah C. Urs., (2015) 4 SCC 136,*** and wherein it was held that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in the nature of penalty, then provisions of section 74 of Contract Act, 1872 are attached and the party so forfeiting must prove actual damages. After cancellation of allotment, the flat remains with the builder as such there is hardly any actual damage. National Consumer Disputes Redressal Commissions in CC/435/2019 ***Ramesh***

Malhotra VS. Emaar MGF Land Limited *(decided on 29.06.2020) and* ***Mr. Saurav Sanyal VS. M/s IREO Private Limited*** *(decided on 12.04.2022)* ***and followed in CC/2766/2017 in case titled as Jayant Singhal and Anr. VS. M3M India Limited decided on 26.07.2022,*** held that 10% of basic sale price is reasonable amount to be forfeited in the name of "earnest money". Keeping in view the principles laid down in the first two cases, a regulation known as the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, was farmed providing as under-

> *"**5. AMOUNT OF EARNEST MONEY***
> *Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money* ***shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment/plot /building as the case may*** *be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer."*

32. So, keeping in view the law laid down by the Hon'ble Apex court and provisions of regulation 11 of 2018 framed by the Haryana Real Estate Regulatory Authority, Gurugram, and the respondent/builder can't retain more than 10% of sale consideration as earnest money on cancellation but that was not done. So, the respondent/builder is directed to refund the amount received from the complainants after deducting 10% of the sale consideration and return the reaming amount along with interest at the rate of 10.85% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the

Haryana Real Estate (Regulation and Development) Rules, 2017, from the date of termination/cancellation 01.09.2016 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

H.II To pass and award of Rs.50,00,000/- in favour of the complainant against the respondent on account of default in compliance the terms and condition of the agreement, damages on account of struggle, along with interest at the rate of 24% per annum.

33. The complainant is seeking relief w.r.t. compensation in the above-mentioned reliefs. ***Hon'ble Supreme Court of India in case 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 & 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 & 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. Therefore, for claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainants may file a separate complaint before Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules

I. Directions of the authority

34. 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 is directed to refund the paid-up amount of Rs.48,46,910/- after deducting 10% of the sale consideration of Rs.1,73,08,261/- being earnest money along with interest at the rate of 10.85% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017, from the date of termination/cancellation 01.09.2016 till its realization.

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.

35. Complaint stands disposed of.

36. File be consigned to registry.

Dated: 08.02.2024

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