BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.: **7807 of 2022**
Order reserved on: **28.03.2024**
Order pronounced on: **16.05.2024**

Mr. Amarjit Singh Batra & Harveen Batra
R/o: - A-8/4 SF Vasant Vihar, Sector-61, Gurugram **Complainant**

Versus

M/s Anjali Promoters and Developers Private Limited
Regd. office: 7, Barakhamba Road, New Delhi-110001
Corporate Office: Next Door, Sector-76, Faridabad, Haryana-122004 **Respondent**

CORAM:
Shri Vijay Kumar Goyal **Member**

APPEARANCE:
Ms. Sambhavi Mehtanis (Advocate) **Complainant**
Shri Harshit Batra (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 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions to the allottee as per the agreement for sale executed inter-se them.

A. Unit and Project related details:

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

S. No.	Heads	Information

1.	Name and location of the project	Centra One, Sector- 61, Gurugram.
2.	Nature of the project	Commercial complex
3.	DTCP license no.	277 of 2007 dated 17.12.2007
	Valid up to	16.12.2019
4.	RERA registered/ not registered	Registered 28 of 2023 dated 30.01.2023 for 3.675 acres
	RERA registration valid up to	31.10.2023
5.	Allotment letter	20.08.2010 [Page 34 of complainant]
6.	Date of execution of Space buyer's agreement	Annexed but not executed
7.	Unit no.	G-022, Ground Floor [Page 34 of complainant]
8.	Unit measuring	816 sq. ft. (Super area) [Page 34 of complainant]
9.	Revised super area	939 sq. ft. (Page no. 66 of the complaint)
10.	Total consideration	Rs.77,30,155/- (As per SOA at page 68 of the complaint)
11.	Total amount paid by the complainant	Rs.32,51,472/- (As per SOA at page 68 of the complaint)
12.	Possession clause	*"2. Possession* *2.2 The Intending Purchaser shall only be entitled to the possession of the said Premises after making the full payment of the Consideration and other charges due and payable. Under no circumstances shall the possession of the said Premises be given to the Intending Purchaser unless all the payments in full, along with interest due, if any, have been made by the Intending Purchaser to the Intending Seller. However, subject to full payment of consideration along with interest by the Intending Purchaser, if the Intending Seller fails to*

		deliver the possession of the said Premises to the Intending Purchaser ***by 30th June 2012****, however, subject to clause 9 herein and adherence to the terms and conditions of this agreement by the Intending Purchaser, then the Intending Seller shall be liable to pay penalty to the Intending Purchaser @ Rs. 15/- (Rupees Fifteen Only) per sq. ft. per month up till the date of handing over of the said Premises by giving appropriate notice to the Intending Purchaser in this regard. If the Intending Seller has applied to DTCP/any other competent authority for issuance of Occupation and/or Completion Certificate by 30th April 2012 and the delay, if any, in making offer of possession by 30th June 2012 is attributable to any delay on part of DTCP/ competent authority, then the Intending Seller shall not be required to pay any penalty under this clause.* [Page 46 of complaint]
13.	Due date of delivery of possession	30.06.2012 (as mentioned in the space buyer's agreement)
14.	Occupation certificate	09.10.2018 (Page no. 67 of reply)
15.	Offer of possession	28.12.2018 [Page no. 69 of reply)
16.	Possession reminder letters of possession	06.05.2020, 15.072020, 14.09.2020 (Page no. 87-93 of reply)
17.	Pre-Cancellation letter dated	28.10.2020 [Page no. 94 to 96 of reply]
18.	Termination letter dated	11.12.2022 [Page no. 97 to 98 of reply]

B. Facts of the complaint

3. The complainant has made the following submissions: -

I. That respondent company through its wholly owned subsidiary Saiexpo Overseas Private Limited, is the owner, in possession of land measuring 3.675 acres situated at Sector 61, District Gurugram, Haryana ("Said Land")

II. That respondent company through its wholly owned subsidiary Saiexpo Overseas Private Limited, is the owner, in possession of land measuring 3.675 acres situated at Sector 61, District Gurugram, Haryana ("Said Land").

III. A multistorey commercial complex was intended to be developed and constructed at the said land in the name and style of 'Centra One' comprising of retail cum office space, to be used for commercial/ office purposes ("Said Project").

IV. That Respondent Company gave various advertisements in several leading newspapers about their forthcoming project named "Centra One". Relying on the assurances, promises and undertakings given by the respondent company in the aforementioned advertisements, the complainants had approached the respondent company for the purposes of purchasing a commercial unit in the said project and had applied for the registration/provisional allotment of a unit by way of an application.

V. That to the receipt of the application and upon completion of all procedural formalities, the complaints were allotted a commercial/ office number G-22, Ground Floor measuring about 816 sq. ft (75.808 sq. m) in the said project ("said unit").

VI. The total sale consideration payable by the complainant to the respondent for the allotted unit included the basic sale price of INR 61,03,500/- then costs towards covered car park equivalent to a sum of INR 3,00,000/- development charges of INR 2,45,616.

VII. The complainants made a payment of INR 32,51,472 towards the sale consideration of the said unit.

VIII. Thereafter a space buyer's agreement ("SBA") was issued by the respondent company wherein it was stated at clause 2.1 that the said unit shall be constructed and delivered to the complainants by 31.12.2011.

IX. That is pertinent to mention that the aforesaid space buyer's agreement was not executed by the respondent company, despite the complainants executing their set of the said document. Moreover, the said unit was not constructed and delivered by 31.12.2011.

X. It is pertinent to mention that the complainants had received an email dated 18.06.2018 from the respondent company, whereunder the respondent company had requested the complaints to deposit a sum of ₹ 34,356/- towards the value added tax ["VAT"] liability of the complainants under the SBA.

XI. That complainants responded to the aforesaid email dt. 18.06.2018 of the respondent company vide a reply email dated 18.06.2018 informing the respondent company that the complainants had already made the payment of ₹ 34,355.62/- on 20.10.2017 against the VAT liability of the complainant under the SBA.

XII. Thereafter the complainants received a letter dated 28.12.2018 from the respondent company vide which the respondent company offered possession of unit no GF-22 of ground floor admeasuring approximately 939 sq. ft (87.24 sq. m) in the said project. It appears that the area of the said unit was increased from 816 sq. ft (75.808 sq. m) to 939 sq. ft (87.24 sq. m) at the time of offering possession as mentioned above.

XIII. That respondent company has informed the complainant vide letter dated 28.12.2018 ("letter of possession") that the respondent company had received the occupancy certificate dated 9.10.2018 from the Director, Town and Country Planning, Chandigarh for the said project. It was further stated in the letter of possession that the said unit was ready for possession.

XIV. That is respectfully stated that the super area of the said unit had been increased from the super area of the unit that was purported to be allotted under the allotment letter dated 20.08.2010. The super area of the said unit had been increased to 939 sq. ft, 87.24 sq. m.

XV. As per the statement of accounts annexed with the letter of possession dated 28.12.2018, it was stated that a sum of INR 26,13,439.90/- was payable by the complainants after adjusting the assured return including TDS (C) equivalent to INR 18,65,243/-.

XVI. In the statement of accounts attached at annexure A, at serial number H, an interest of INR 3,01,785/- had been charged to the complainants. Further, an amount of INR 34,355.62/- had been charged as Value Added Tax at serial number.

XVII. It is respectfully submitted that the complainants had made a payment of INR 34,355.62/- towards vat on 20.10.2017, and hence the said amount was wrongly charged to the complainants.

XVIII. It is pertinent to mention that in the letter of possession dated 28.12.2018. It was specifically stated that the respondent company had no right to terminate the allotment of the said unit in favour of the complainants. The relevant portion of the letter of possession dated 28.12.2018 is reproduced hereunder-

> *"Please note that in case you fail ignore or neglect to strictly and completely comply with the terms of this letter including making the payment for additional documents and executing the necessary documents as demanded herein, the Company will treat the 91st day from the date of this letter as the date on which the actual possession of the Unit is deemed delivered to you and that you shall be liable to pay holding charges (in terms of the Buyer Agreement) from the 91st day onwards, in addition to the monthly common area maintenance charges."*

XIX. It is reiterated that the Said Unit was to be constructed and delivered by 31.12.2011. However, the said unit on 29.03.2019 vide letter of possession dated 28.12.2018. Hence there had been a delay of more than 7 years in delivering the said unit to the complainants.

XX. The complainants issued a notice dated 3.12.2021 through their lawyers expressly stating that the respondent company had no right to charge intertest to the complainants for the period between 31.12.2011 and 28.12.2018 amounting to INR 3,01,785/- as mentioned at serial no. H in annexure A to the letter of possession dated 28.12.2018.

XXI. The complainants have vide notice dated 3.12.2021 had sought for reconciliation of the accounts as the respondent company has failed to take into account the compensation payable by it for the delay in offering possession of the said unit to the complainants.

XXII. It is pertinent to mention that the Said Unit was to be delivered on 31.12.2011. However, the said unit was offered for possession on 29.03.2019 (91st day from 28.12.2018) vide letter of possession dated 28.12.2018. Hence, there was a delay of more than seven years.

XXIII. As per Section 18(1) of the Real Estate (Regulation and Development) Act, 2016, read with Rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017, the respondent company is liable to pay interest on delayed offer of possession at the prescribed rate of interest in the said Act and Rules.

XXIV. The complainants had categorically stated in the notice dated 3.12.2021 that the complainants were liable to pay a sum of INR 2,04,234/- towards all outstanding liabilities applicable under the space buyer's agreement and allotment concerning the said unit for the purpose of taking possession and seeking transfer of ownership of the said unit in favour of the complainants, as per the statement of accounts in the said notice. However, the respondent company failed to respond to the legal notice dated 3.12.2021 of the complainants.

XXV. Thereafter, the respondent company issued a dishonest and malicious letter dated 111.11.2022 vide which they sought to terminate the allotment of the

said unit in favour of the complainants.

XXVI. Thereafter, the respondent company issued a dishonest and malicious letter dated 11.11.2022 vide which they sought to terminate the allotment of the said unit in favour of the complainants.

XXVII. It is respectfully submitted that the Respondent company is liable to pay compensation for delay in delivering possession under the RERA and Rules made thereunder @ 10.35% (State Bank of India highest marginal cost of lending rate + 2%) per annum. The delayed compensation amount till the date of filing the present complaint.

XXVIII. The respondent company seeks to illegally retain the sale consideration paid by the complainants without executing the sale/ transfer/ conveyance deed concerning the said unit in favour of the complainants, thereby making illegal and unlawful wrongful gains to the detriment of the complainants.

XXIX. it is relevant to mention that the complainants have always been ready and willing to perform their duties and obligations under the allotment letter and SBA by offering to pay the balance sale consideration of the said unit after adjusting the compensation payable by the respondent company for the delay in offering possession of the said unit. The complainants are aggrieved by the dishonest, malicious, illegal and unlawful action of the respondent company.

C. Relief sought by the complainant:

4. The complainant has sought following relief:

I. Direct the respondent to handover the physical possession of the allotted unit, complete in all respects.

II. Direct the respondent to pay delayed possession charges at rate equivalent to SBI MCLR plus 2% p.a. w.e.f. 31.12.2011 till 29.03.2019.

III. Pass an order setting aside letter of termination dated 11.11.2022.

IV. Direct the respondent to execute conveyance deed in favour of complainant.

V. Direct the respondent to pay legal expenditure to the complainant towards cost of litigation.

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

D. Reply by the respondent

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

I. The complainant being interested in the real estate development of the respondent under the name and style of "centra one" ("project") tentatively applied for the provisional allotment of the unit vide application form and were consequently allotted unit no. G-22, ground floor, tentatively admeasuring 816 sq. ft. (finally admeasuring 939 sq. ft.) ("unit") vide the provisional allotment letter dated 20.10.2010.

II. That the complainants have had *malafide* conduct from the very beginning. They have been engaged in delaying tactics. That after the provisional allotment of the unit, the complainants were required to execute the space buyer's agreement (the "agreement"), copies of which were given to them, however, for reasons best known to the complainants, they did not deliver the signed copies to the respondent. That even the copy of the agreement annexed by the complainant is unexecuted showing complete default on their part.

III. That in case of non-execution of the Buyer's Agreement, the due date of possession has to be considered as 3 years from the date of allotment as has been noted by the Hon'ble Supreme Court in Fortune Infrastructure Vs. Travor Dlima MANU/SC/0253/2018: (2018) 5 S.C.C. 442 and Maharashtra Appellate Tribunal in Rohit Chawla and Ors. Vs. Bombay Dyeing & Mfg. Co. Ltd. MAHAREAT Appeal Nos. AT006000000011016, hence, computing the due date from the date of allotment letter (20.08.2010), the due date for

handover of possession comes out to be 20.08.2013, which is further subject to *force majeure* circumstances, as noted in clause 9 the Agreement and compliance of all the terms and conditions by the allottees including but not limited to the timely payment of the Total Price payable in accordance with the payment plan. That Clause 9 of the Buyer's Agreement provides that subject to force majeure conditions and delay caused on account of reasons beyond the control of Respondent Company, and subject to the Complainants not being in default in any of the terms and conditions of the same.

IV. The respondent was adversely affected by various construction bans, lack of availability of building material, regulation of the construction and development activities by the judicial authorities including NGT in NCR on account of the environmental conditions, restrictions on usage of ground water by the High Court of Punjab & Haryana, demonetization etc. and other force majeure circumstances, yet, the respondent completed the construction of the project diligently and timely, without imposing any cost implications of the aforementioned circumstances on the complainants and demanding the prices only as and when the construction was being done.

V. That it is pertinent to note that the complainants have gravely defaulted in timely remittance of instalments against their unit. It is an undisputed fact, as is a part of the agreement that time is of essence under clause 10 and 11 of the agreement. As is widely known and understood that the continuous flow of funds is pertinent to the real estate industry, it is submitted that upon the failure of the complainants in making due payments as per the schedule agreed upon, it has a cascading effect on the operations and the cost for proper execution of the project increases exponentially and further causes enormous business losses to the respondent. That upon delay being caused

by the complainants on payment of different instalments, they were served with various payment reminders.

VI. That all these circumstances come within the purview of the force majeure clause and hence allow a reasonable time to the respondent. That as per clause 9, in such circumstances, the due date for offer of possession was bound to extend automatically.

VII. That the respondent, despite defaults on part of the complainants, earnestly fulfilled its obligation under the buyer's agreement and completed the project as expeditiously as possible in the facts and circumstances of the case. The default committed by the complainants along with various allottees and due to various factors beyond the control of the respondent are the factors responsible for delayed implementation of the project. The respondent cannot be penalised and held responsible for the default of its customers or due to force majeure circumstances. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.

VIII. That the respondent has complied with all of its obligations, not only with respect to the buyer's agreement with the complainants but also as per the concerned laws, rules and regulations thereunder and the local authorities. That despite innumerable hardships being faced by the respondent, the respondent completed the construction of the project and applied for the occupation application before the concerned authority and successfully attained the occupation certificate dated 09.08.2018.

IX. It is respectfully submitted that once an application for the grant of occupation certificate is submitted to the concerned statutory authority to respondent ceases to have any control over the same. The grant of occupation certificate is the prerogative of the concerned statutory authority and the respondent does not exercise any influence in any manner

whatsoever over the same. Therefore, it is respectfully submitted that the time period utilised by the concerned statutory authority for granting the occupation certificate is liable to be excluded from the time period utilised for implementation of the project.

X. That legally offered the possession of the unit to the complainants on 28.12.2018. At this stage, it is pertinent to note that the tentative area of the unit was finalised and it was duly communicated to the complainants that the area had increased from 816 sq. ft to 939 sq. ft., which was within the agreed terms and conditions of the sale of the unit. That moreover, the same has been noted by the complainant in the complaint and the payment in lieu of the same has also not been challenged.

XI. That is pertinent to mention that vide letter dated 28.12.2018 regarding offer of possession, the complainants were asked to make the requisite payment based on the statement of final dues and complete the documentation required to enable the respondent to initiate the process of handover of unit, however, the complainants never turned up to take the possession of the unit. Multiple reminders were sent to the complainant in this regard. That even after the letters dated 06.05.2020, 15.07.2020 and 14.09.2020, the complainants willingly and voluntarily did not take possession of the unit.

XII. That, the complainant has wrongly challenged the demand for vat and interest only. The due and accurate calculation was provided with the offer of possession dated 28.10.2018. It is provided in clause 6 of the agreement that the complainant is liable to pay statutory taxes, maintenance and other dues and in case of default of payment, the complainants are liable to make the payment of interest, as is also noted by the section 19(7) of the act.

XIII. That the Respondent is entitled to claim statutory dues from the complainant including VAT. It is pertinent to mention here that the demand

for VAT was raised by the respondent via letter dated 24.11.2016 (annexure R-3) and not at the time of offer of possession, as is evident from the list of called demands along with offer of possession. It was finally adjusted in demand along with the offer of possession which the complainant has defaulted.

XIV. Further it is pertinent to note that the complainant has challenged the demands of vat and interest, however, failed to make the payment of the remaining amounts as are expressly agreed by them. This shows prima facie default on part of the complainants.

XV. That in not making the due payments and taking possession, not only have the complainants violated the agreement but also the Real Estate (Regulation and Development) Act, 2016, under which, the complainants were obligated to make payment by 27.01.2019, further submitted executed documents and take possession of the unit, which the complainants miserably failed to do. Accordingly, the complainants stood in fundamental breach of the agreement. The Hon'ble Supreme Court noted in case Saradmani Kandappan and Ors Vs S. Rajalakshmi and Ors, decided on 04.07.2011, MANU/SC/0717/2011: (2011) 12 SCC 18 held that the payments are to be paid by the purchaser in a time bound manner as per the agreed payment plan and he fails to do so then the seller shall not be obligated to perform its reciprocal obligations and the contract shall be voidable at the option of the seller alone and not the purchaser.

XVI. That upon the non-payment by the complainants, the complainants were considered under default under clause 10.1 and 11, and upon the failure of the complainants to rectify their default, the respondent had the complete right to terminate the unit of the complainant in accordance with clause 10.1 and 11.

XVII. That it is evident that the complainants stood in the event of default since

28.12.2018 for not making payment, not taking possession of the unit, non-execution of conveyance deed, and non-payment of statutory dues. Accordingly, the respondent had a right to terminate the unit as per the agreed terms and conditions under the agreement. That after having waited for almost 4 years, a final opportunity was given to the complainants to rectify their default through the pre-cancellation letter dated 28.10.2020, however, the complainants again willingly and voluntarily chose to not rectify the same, and consequently, the respondent terminated the unit by issuing the cancellation letter on 11.11.2022.

XVIII. That accordingly, after cancellation of the unit, the respondent has a right to forfeit the earnest amount along with delayed interest and total tax against the unit. That after the cancellation of the unit solely due to the fault of the complainants, the respondent was entitled for a forfeiture of the non-refundable charges including earnest money, GST and delay interest.

XIX. That the right of the respondent to validly cancel / terminate the unit arises not only from the agreement but also from the model RERA agreement which also recognizes the default of the allottee and the forfeiture of the interest on the delayed payments upon cancellation of the unit in case of default of the allottee.

XX. Moreover, the Hon'ble Haryana Real Estate Appellate Tribunal in Ravinder Pal Singh v Emaar MGF land Ltd. Appeal No.255 of 2019 allowed the forfeiture of earnest money along with "the statutory dues already deposited with the government". Accordingly, the cancellation has been validly made and now, the complainants have no right or lien over the unit and hence, the present complaint is bound to be dismissed.

XXI. That this Hon'ble Authority has adjudicated similar issues of termination / cancellation and has upheld the same noting the default on part of the complainant. For instance, this Authority in Rahul Sharma Vs Roshni Builders

Private Limited MANU/RR/0975/2022 noted that the respondent had issued reminders, pre-cancellation letter, the last and final opportunity letter to the complainant. The OC for the project of the allotted unit was granted on 13.12.2021 and the respondent cancelled the unit of the complainant with adequate notices. Thus, the cancellation is valid.

XXII. That in a very recent case titled as Nick Mehta v Haamid Real Estates Pvt. Ltd. 1662 of 2022, dated 03.03.2023, the Ld. Authority has allowed the deduction of VAT, statutory dues and 0.5% brokerage. That similarly, the termination / cancellation of the unit in the present case is valid and is bound to be upheld.

XXIII. That additionally, it is pertinent to note that the respondent had rightly paid assured returns to the complainants, total amounting to Rs.24,90,329/-. That the complainants have taken undue advantage of the company and have enjoyed the payment of assured returns while have miserably failed in living up to their obligations. The amount of assured returns paid have to be adjusted from the refund amount, if any.

XXIV. That the facts and circumstances of the present case reveal that the respondent has no right or lien over the unit in question. That after the termination of the unit, the complainants are not allottees and have no right to the unit in question. The ownership as well as the physical possession of the unit in question is enjoyed by a third party and hence, the present claim against the respondent company is infructuous. Accordingly, the present complaint should be dismissed.

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

E. Jurisdiction of the authority

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

E. I Territorial jurisdiction

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

E.II Subject matter jurisdiction

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

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

9. So, in view of the provisions of the Act of 2016 quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the objections raised by the respondent:

F.I Objections regarding force majeure.

10. The respondents-promoter has raised the contention that the construction of the tower in which the unit of the complainant is situated, has been delayed due to force majeure circumstances such as orders passed by National Green Tribunal to stop construction, restrictions on usage of ground water by High Court of Punjab and Haryana, demonetization, etc. The plea of the respondent

regarding various orders of the NGT and demonetisation and 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. Further, also there may be cases where allottee has not paid instalments regularly but all the allottee cannot be expected to suffer because of few allottee. 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. Findings regarding relief sought by the complainant.

G.I Direct the respondent to handover the physical possession of the allotted unit complete in all respects.

G.II Direct the respondent to pay delayed possession charges at rate equivalent to SBI MCLR plus 2% p.a. w.e.f. 31.12.2011 till 29.03.2019.

11. The complainant was allotted a unit bearing no. G-022, vide allotment letter dated 20.08.2010 under possession linked payment plan. However, a space buyer agreement is annexed but not executed the parties, vide which a unit bearing no. G-022, ground floor admeasuring 816 sq. ft. was allotted to her. Complainant has paid an amount of Rs.32,51,472/- against the total sale consideration of Rs.77,30,155/-. As per clause 2 of the agreement, the respondent was required to hand over possession of the unit till 30.06.2012.

12. That the respondent has obtained the occupation certificate in respect of the allotted unit of the complainant on 09.10.2018 and thereafter, has offered the possession on 28.12.2018. Thereafter, the respondent has issued various reminder cum demand letters 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 11.11.2022 vide which the respondent threatened the complainant to forfeit the entire amount paid by him.

13. The respondent submitted that 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 11.11.2022. Accordingly, the complainants failed to abide by the terms of the agreement to sell executed inter-se parties by defaulting in making payments in a time bound manner as per payment schedule.

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

14. It is matter of record that the complainant booked the aforesaid unit under the above-mentioned payment plan and paid an amount of Rs.32,51,472/- towards total consideration of Rs.77,30,155/- which constitutes 42% of the total sale consideration and the complainant has paid the last payment only in the year 06.10.2014. The respondent has obtained the occupation certificate in respect of the allotted unit of the complainant on 09.10.2018 and thereafter, the possession of the same was offered on 28.12.2018.

15. It is pertinent to mention here that as per section 19(6) & 19(7) of Act of 2016, the allottee is under obligation to make payments towards consideration of allotted unit. The respondent after giving reminders dated 06.05.2020, 15.07.2020,14.09.2020 and final reminder on 28.10.2020 for making payment for outstanding dues as per payment plan and has cancelled the subject unit. Despite issuance of aforesaid numerous reminders, the complainant has failed to take possession and clearing the outstanding dues. The respondent has given sufficient opportunity to the complainant before proceeding with termination of allotted unit. Thereafter, the respondent issued final notice

dated 11.11.2022, and the relevant proportion of the said notice is reproduce as under:-

> *However, despite receipt of numerous reminders, you have deliberately failed to pay the overdue payments as per the terms of BBA. Thus, your willful failure to comply with the terms of BBA expressly signifies your acceptance and confirmation to termination/cancellation of allotment of the aforesaid Unit as on the date of this letter and,* ***hence, your booking/allotment/Agreements in respect of Unit no. GF-22 stands cancelled/terminated with effect from the date of this letter.*** *Consequently, the earnest money, accumulated interest thereon and brokerage (if any) paid accordingly stands forfeited by the Company and henceforth you do not have any rights and/or interests in the allotment/registration/booking/agreements in respect of the unit and all rights, title and interests in the said unit henceforth vests solely in the Company. Further, by willfully refusing and failing to comply with the reminders and the terms of the agreement you have voluntarily, consciously and intentionally waived and relinquished all your rights and privileges under the terms of the agreements with effect from the date of this letter. Accordingly, the company shall be free to deal with the said allotment or the unit, at its sole discretion."*

16. As per clause 10 of the floor 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 10 of the agreement to sell is reproduced as under for a ready reference:

> *10. It is agreed between the parties that in case the Intending Purchaser commits any breach of its undertakings contained herein for any reason whatsoever,* ***then Intending Seller shall be entitled to terminate this agreement, forfeit the earnest money and interest on unpaid amounts & charges and refund the balancing amounts, if any****, to the Intending Purchase without any interest, after resale of the said premises. Upon such termination, this agreement shall stand cancelled and Intending Purchaser shall be left with no right/title/interest in the said premises and the Intending Seller shall be free to deal with the said premises in any manner, whatsoever, in its sole discretion."*

17. 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. Further, the respondent company has already obtained the

occupation certificate for the project of the allotted unit on 09.10.2018 and offered the possession on 28.12.2018. Despite the issuance of offer of possession after obtaining OC, the complainant has failed to take possession of the subject unit and clear the outstanding dues.

18. During proceeding on 28.03.2024, the counsel for the respondent has brought to the notice of the Authority that demand of the outstanding amount was made after adjustment of assured return as per page 71 and outstanding amount after adjustment of assured return was Rs.26,13,439/-which was not paid despite reminders and pre-termination notice.

19. Further, vide notice dated 03.12.2021, the complainant has requested to the respondent /promoter for waiving off the interest of delay payment. The respondent cancelled the unit of the complainant after giving adequate demands notices. 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. In view of the aforesaid circumstances, only refund can be granted to the complainant after certain deductions as prescribed under law.

20. Now, another question arises before the authority that whether the authority can direct the respondent to refund the balance amount as per the provisions laid down under the Act of 2016, when the complainant has not sought the relief of the refund of the entire paid-up amount while filing of the instant complaint or during proceeding. It is pertinent to note here that 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. The authority observed that rule 28(2) of the rules provides that the authority shall follow summary procedure for the purpose of deciding any complaint. However, while exercising discretion judiciously for the advancement of the

cause of justice for the reasons to be recorded, the authority can always work out its own modality depending upon peculiar facts of each case without causing prejudice to the rights of the parties to meet the ends of justice and not to give the handle to either of the parties to protract litigation. The authority will not go into these technicalities as the authority follows the summary procedure and principal of natural justice as provided under section 38 of the Act of 2016, therefore the rules of evidence are not followed in letter and spirit. Further, it would be appropriate to consider the objects and reasons of the Act which have been enumerated in the preamble of the Act and the same is reproduced as under: -

> *"An Act to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto."*

21. From the above, the intention of the legislature is quite clear that the Act of 2016 has been enacted to protect the interests of the consumer in real estate sector and to provide a mechanism for a speedy dispute redressal system. It is also pertinent to note that the present Act is in addition to another law in force and not in derogation. In view of the same, the authority has power to issue direction as per documents and submissions made by both the parties.

22. 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 Ors. 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."*

23. 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 26.10.2022 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

G.III Direct the respondent to pay litigation expenses to the complainant towards cost of litigation.

24. 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

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

I. The respondent is directed to refund the paid-up amount of Rs.32,51,472/- after deducting 10% of the sale consideration of Rs.77,30,155/- being earnest money and amount of assured return paid, if any. The interest at the rate of 10.85% (the State Bank of India highest marginal cost of lending rate (MCLR)

prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017, from the date of termination/cancellation 26.10.2022 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.

26. Complaint stands disposed of.

27. File be consigned to registry.

Dated: 16.05.2024

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

HARERA
GURUGRAM