BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.: 1870 of 2022
Order reserved on: 21.03.2024
Order pronounced on: 23.05.2024

Mr. Ajay Jain
R/o: - House No. GF-30, Indraprakash Building, 21-Barakhamba Road, New Delhi — **Complainant**

Versus

M/s BPTP Limited
Regd. office: M-11, Middle Circle, Connaught Circus, New Delhi-110001
Corporate Office: Next Door, Sector-76, Faridabad, Haryana-122004 — **Respondent**

CORAM:
Shri Vijay Kumar Goyal — **Member**

APPEARANCE:
Shri Manmohan Krishan Dang (Advocate) — **Complainant**
Shri Siddhant Yadav (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:

Sr. No.	Particulars	Details
1.	Name of the project	'Amstoria', Sector 102 & 102A, Gurugram, Haryana.
2.	Nature of the project	Residential
3.	Project area	Cannot be ascertained
4.	DTCP license no. and validity status	58 of 2010 issued on 03.08.10 and valid upto 02.08.2025
5.	Name of the license holder	Shivanand Real Estate Pvt. Ltd.
6.	RERA registration number	Not registered
7.	Date of allotment letter in favour of original allottee	06.04.2011 (Page no. 69 of reply)
8	Date of booking application from in favour of original allottee	18.11.2010 (Page no. 30 of reply)
8.	Date of endorsement letter	01.08.2014 (Page no. 71 of reply)
9.	Date of acknowledge of ownership transfer letter in favour of complainant	22.09.2014 (Page no. 51 of complaint)
10.	Date of execution of flat buyer's agreement	Annexed but not executed
11.	Unit no.	A-160-GF (As per page no. 29 of complaint)
12.	Unit area admeasuring	1999 sq. ft.
13.	Total consideration	Rs.75,53,308/- (As alleged by the complainant at page no. 27 of the complaint)
14.	Total amount paid by the complainant	Rs.32,00,447/- (as alleged by the complainant at page no. 27 of the complaint)

15.	Possession clause as per booking application form	**19.** Subject to Force Majeure conditions, as defined herein in Clause 46 and further subject to the Applicant(s) having complied with all his obligations under the terms and conditions stated herein as well as in the Floor/Villa Buyers Agreement and the Applicant(s) not being in default under any part of this agreement including but not limited to the timely payment of each and every instalment of the total sale consideration including DC, Stamp Duty and other Charges and also subject to the Applicants) having compels within all formalities and documentations as prescribed by the Company, ***the Company proposes to handover the physical possession of the Floor/ Villa to the Applicant(s) within a period of Thirty (30) months from the date of sanction of the building plans or execution of the Floor/Villa/Villa Buyer's Agreements, whichever is later("Commitment Period").*** The Applicant(s) further agrees and understands that the Company shall additionally be entitled to a period of One Eighty (180) days ("Grace Period") after the expiry of the said Commitment Period to allow for obtaining the Occupancy Certificate etc. from DTCP under the Act in respect of Project "Amstoria".
16.	Due date of delivery of possession	05.04.2015 (calculated as per building plan sanctioned, mentioned on page 10 of reply)
17.	Offer of possession	Not offered

	Demand cum reminder letters	11.05.2018, 04.07.2018, 09.07.2018 21.08.2018, 06.10.2018, 19.11.2018
18.	Termination/ cancellation intimation	13.08.2021 (page no. 85 of reply)

B. Facts of the complaint

3. The complainant has made the following submissions: -

I. That present complaint has been filed by the complainant under Section 31 of Real Estate (Regulation and Development) Act, 2016 and Rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 seeking relief in respect of the lapses, defaults and unjust and unfair trade practices on the part of the respondent.

II. That the respondent planned and decided to develop a residential colony namely Amstoria, Gurugram on the land measuring 126.67 acres situated in Sectors-102 and 102A in the real estate of Kherki Majra and Dhankot, Tehsil and District, Gurugram, Haryana and had accordingly obtained licenses bearing Nos.58 of 2010 dated 03.08.2010 and 45 of 2011 dated 17.05.2011. The respondent claimed that the said residential colony would comprise of residential plots, Villas, Shopping Centre, Community Centre, School etc.

III. That the original allottees i.e. Gagan Joshi and Lata Joshi received a marketing call from the office of respondent in the month of December, 2010 for making a booking in its upcoming project under the name and style of 'Amstoria'. The said original allottees were attracted towards the aforesaid project on account of publicity given by the respondent through various means like publishing various brochures, posters, advertisements etc.

IV. That original allottees induced by the assurances and representations made by the respondent decided to book a 3 BHK floor in the project of the respondent as they required the same in a time bound manner for their use and occupation for their family members. The original allottees signed

several blank and printed papers at the instance of the respondent on the ground that the same were required for completing the booking formalities.

V. That original allottees were not given a chance to read or understand the said documents and signed the same and completed the formalities as desired by the respondent. On the basis of the said application by the original allottees, the respondent allotted a 3 BHK floor bearing No. A-160-GF Ground Floor having tentative built-up area of 1999 sq. ft.

VI. That the the original allottees and the complainant thereafter requested the respondent to transfer the said unit in question in the name of the complainant and accordingly signed and submitted several documents for transfer/assignment/nomination of the registration/booking from the name of the original allottees to the complainant. The original allottees and the complainant also submitted joint request form for transfer of the unit in the name of the complainant along with several letters and documents which were demanded by the respondent for the said purpose. The respondent after the receipt of the documents as per the check list given by it issued an acknowledgment of ownership transfer dated 22.09.2014 towards change of ownership in respect of the said unit. It is pertinent to mention herein that the transfer fees of Rs.1,54,558/- and verification charges of Rs.2,600/- were paid by the complainant to the respondent.

VII. That the respondent after scrutiny of the documents submitted by the original allottees and the complainant vide its letter dated 25.09.2014 assigned all the rights of the original allottees to the complainant.

VIII. That it is pertinent to mention herein that while in the case of complainant making delay in the payment of instalments, the respondent company was shown to be entitled to be charge 18% per annum on the other hand, the complainant is shown to be only entitled to merger amount of Rs.10/- per sq. ft. per month of the built up area of the floor/villa for first six months of

delay, Rs.20/- per sq. ft. per month for the next six months of delay and Rs.30/- per sq. ft. per month for the built up area for any delay thereafter.

IX. That That the complainant made vocal his objections to the arbitrary and unilaterally clauses of the application form to the respondent. The complainant repeatedly requested the respondent for execution of an application form with balanced terms. During such discussions, the respondent assured the complainant that the terms of the application form are tentative in nature and that the terms of the agreement which would be sent by it in due course of time would be more balanced. The respondent/promoter refused to amend or change any term of the pre-printed application form and further threatened the complainant to forfeit the previous amount paid towards the unit if the application form is not signed and submitted. It is pertinent to mention herein that Rs. 32,00,447/- had already been paid towards the unit in question before signing the Application form. The complainant was left with no other option but to sign the one-sided application form.

X. That the respondent vide its letter dated 29.07.2015 sent copies of the Buyer's Agreement to the complainant for signing. The complainant on the receipt of the said draft agreement was astonished to note that the respondent had not taken any step for making the agreement balanced. Most of the terms of the Buyer's Agreement were identical to the terms of the application form which was got signed by the respondent from the complainant with repeated assurances that the terms of the agreement would be more balanced and would not be unilateral in nature. Rather, instead of doing the needful, the respondent brushed aside all the requisite norms and unilaterally amended the terms of the allotment. It is pertinent to mention herein that the respondent changed the commitment period. Earlier in the application form, the commitment period mentioned was 30

months from the date of signing of the agreement or from the date of building plans, whichever is later. However, in the agreement sent to the complainant for signing the commitment period was unilaterally increased to 36 months from the date of signing of the agreement or from the date of building plans, whichever is later. Moreover, the respondent malafidely inserted the preferential location charges of Rs.3,31,933.95/- which were not a part of the total sale consideration at the time of the booking of the unit in the project of the respondent.

XI. On other hand, Clause 19 of the Booking Application Form which provides for the time period to hand over the possession of the floor/villa to the applicant(s) within a period of thirty days (30) months from the date of sanctions of the building plans or execution of the floor/villa/Buyer's Agreement, whichever is later (commitment period).

XII. As per Clause 19 of the application form, the respondent was to hand over the physical possession of the unit to the complainant within a period of 30 months from the date of sanction of building plans. It was further agreed that the respondent would be entitled to a period of 180 days after the expiry of the commitment period to allow for obtaining occupancy certificate etc. from DTCP. As per the submission made by the respondent before this Hon'ble Authority in another case titled 'Sandhya Sharma Vs. BPTP', the sanction date of the building plan was 19.09.2012. Thus, the due date to hand over the possession of the unit as per the terms of the application form was 19.09.2015 including the grace period which was provided to the respondent for obtaining the necessary approvals from the concerned authorities. The respondent has accumulated huge amount of hard-earned money of various buyers in the project including the complainant and is unconcerned about the delivery of the possession as per the terms of the Application form even after almost 7 years of delay. The

respondent has deliberately, mischievously, fraudulently and malafidely cheated the complainant.

XIII. That it is pertinent to mention herein that the first payment demand after signing the application form was sent by the respondent only on 11.05.2018 against the construction milestone of 'on casting of grounds floor roof slab to on casting of first floor roof slab'. The said demand was sent three years after the due date to offer the possession. There has been an inordinate delay in developing the project well beyond what was promised and shared to the complainant at the time of booking. As per the construction linked payment plan which was a part of the application form, the aforesaid demand which was raised in May, 2018 was supposed to be raised by the respondent after the start of construction.

XIV. That the complainant on the receipt of the aforesaid demand again contacted the representatives of the respondent and made it clear them to that since there is an inordinate delay on the part of the respondent in completion and handing over the possession to the complainant, he will not make payments until the delayed possession charges are adjusted and an agreement with balanced terms and conditions is shared with the complainant. The respondent yet again, with mala fide motives, gave an assurance that it would adjust the delayed possession charges in the subsequent demand letters and that the complainant should make the payment towards the due amount. Although the complainant was reluctant to believe the representations made by the respondent, he contacted his vendee Mr. Vidyut Taneja who was to receive some balance payment from the respondent. Accordingly, Mr. Vidyut Taneja vide his email dated 11.03.2021 requested the respondent to transfer/adjust the payment due to him from the respondent towards the sale consideration of the complainant's unit. Even the complainant vide his email dated 11.03.2021

gave no objection in getting the amount of Rs.32,78,157/- transferred against his booking in the project of the respondent.

XV. That the respondent vide its letter dated 12.08.2021 sent a statement of account to the complainant against the unit in question. The fact that the respondent has throughout acted in totally illegal and unprofessional manner is evident from a bare perusal of the said letter dated 12.08.2021 wherein the respondent has unilaterally increased the basic sale price without any intimation and without seeking any consent/objection from the complainant. It is submitted that the basic sale price of the unit at the time of the booking with the respondent was Rs.66,38,758.96 which vide letter dated 12.08.2021 has been increased to Rs.74,02,598.16. Moreover, the respondent has also unilaterally imposed cost escalation charges of Rs.6,84,102.39 on the complainant which is absolutely contrary to the agreed terms of the allotment. The total sale consideration of the unit which was Rs. 75,53,308/- at the time of application has been unilaterally increased to Rs. 1,32,92,510.94. The respondent has been working with malafide motives in order to somehow harass, pressurize and blackmail the complainant to submit to his unreasonable and untenable demands.

XVI. That after the receipt of the letter dated 12.8.2021, a meeting was held between the complainant and the respondent. On that date, the respondent again gave assurance that it would amend the terms of the agreement in question and would hand over the possession to the complainant within a period of six months provided the complainant agrees to waive off the delayed interest charges that have been accrued due to the failure of the respondent in handing over of the possession as per the terms of the application form. The complainant accepted the said proposal of the respondent and intimated that it would waive his right to receive delayed possession charges if the agreement with balanced terms is shared with the

complainant and if the possession of the unit is handed over to him by the respondent within the period of next six months as was assured by the respondent. However, the respondent deliberately, mischievously, fraudulently and with malafide motives cheated the complainant by not doing the needful and instead sent a termination/ cancellation intimation dated 13.08.2021 to the complainant. The said cancellation is wholly unilateral, arbitrary and is not in accordance with the application form and without any sufficient cause.

XVII. That the photographs showing the current stage of construction of the project. It is pertinent to mention herein that even on the website of the project, the stage of construction of the unit in question is that the facade/MEP work is in progress It is astonishing that even after 11 years from the date of booking, the respondent is still not in a position to even complete the construction of the unit in question

XVIII. That it is a settled law that allottee cannot be forced to execute an agreement containing unilateral, unfair, one sided and arbitrary terms and the said agreement if executed due to coercion could not be enforced against the allottee by the developer. The project in question is an 'ongoing project' and hence falls under the first proviso to Section 3 (1) of RERA Act, 2016. The complainant even believes that no occupation certificate has been issued by the concerned authorities for the project in question till date as the same has not even been applied by the respondent despite the lapse of the due date.

C. Relief sought by the complainant:

4. The complainant has sought following relief:

I. Direct the respondent to withdraw the termination letter dated 13.08.2021 and restore the allotment in the name of the complainant.

II. Direct the respondent to revoke the illegal charges mentioned in para no.24 above imposed vide demand letter 12.08.2021.

III. Direct the respondent to handover the possession of the unit to the complainant along with all the amenities as promised and to make payment of delayed possession charges on the amount paid by the complainant for the unit in question at the interest as prescribed under the RERA Act, 2016

IV. Pass an order imposing penalty upon the respondent for its failure act as per law.

V. Referring the present complaint after adjudication to the Hon'ble Adjudicating officer for deciding on the issue of compensation amount of Rs.10 lacs on account of mental harassment suffered by the complainant.

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. That at the outset, it is most respectfully submitted that the complaint filed by the Complainant is grossly misconceived, erroneous, wrong, unjustified and untenable in law besides being clearly extraneous and irrelevant having regard to facts and circumstances of this case.

II. That agreements that were executed prior to implementation of RERA Act, 2016 and Rules shall be binding on the parties and cannot be reopened. Thus, both the parties being a signatory to a duly documented Application Form and Buyer's Agreement are bound by the terms and conditions so agreed between them.

III. It is clarified in the Rules published by the state of Haryana, the explanation given at the end of the prescribed agreement for sale in Annexure A of the Rules, it has been clarified that the developer shall disclose the existing agreement for sale in respect of ongoing project and further that such disclosure shall not affect the validity of such existing agreement executed with its customers.

IV. That Relief(s) sought by the Complainant is unjustified, baseless and beyond the scope/ambit of the Agreement duly executed between the parties, which forms a basis for the subsisting relationship between the parties. The Complainant entered into the said Agreement with the Respondent with open eyes and is bound by the same. That the relief(s) sought by the Complainant travel way beyond the four walls of the Agreement duly executed between the parties. The Complainant while entering into the Agreement have accepted and are bound by each and every clause of the said Agreement. The detailed relief claimed by the Complainant goes beyond the jurisdiction of this Hon'ble Authority under the Real Estate (Regulation and Development) Act, 2016 and therefore the present Complaint is not maintainable qua the reliefs claimed by the Complainants. That having agreed to the above, at the stage of entering into the Agreement, and raising vague allegations and seeking baseless reliefs beyond the ambit of the Agreement, the Complainant are blowing hot and cold at the same time which is not permissible under law as the same is in violation of the "*Doctrine of Aprobate & Reprobate*". In this regard, the Respondent reserves his right to refer to and rely upon decisions of the Hon'ble Supreme Court at the time of arguments, if required. Therefore, in light of the settled law, the reliefs sought by the Complainant in the Complaint under reply cannot be granted by this Hon'ble Authority.

V. The parties had agreed under Clause-33 of the Floor Buyer Agreement (FBA) to attempt to amicably settle the matter and if the matter is not settled amicably, to refer the matter for arbitration. Admittedly, the Complainant has raised a dispute but did not take any steps to invoke arbitration.

VI. That Complainant is defaulter under Section 19 (6) of the Real Estate (Regulation and Development) Act, 2016. It is humbly submitted that the Complainant failed to make timely payments according to the payment plan opted by them. It is submitted that the Complainant failed to make timely payment for the demand raised on 09.07.2018 and 11.05.2018, therefore, the Respondent was constrained to issue reminder letters dated 04.07.2018,

21.08.2018 and 06.10.2018. The Complainant still did not remit their outstanding dues. Therefore, the Respondent had to issue last and final opportunity letter dated 19.11.2018. Thereafter, constrained by this errant attitude of the Complainants, the Respondent was constrained to issue Termination Letter dated 13.08.202.

VII. That vide Clause-6 of the FBA it was further duly agreed upon between the parties that subject to the conditions mentioned therein, in case the Respondent failed to hand over possession within 24 months from the date of sanction of building plan or execution of FBA, whichever is later along with 180 days as grace period, the Respondent shall be liable to pay to the Complainant, compensation calculated @ Rs. 10/- per sq. ft. for every month of delay for the first six months of delay, Rs. 20/- per sq. ft. for every month of delay for the next six months of delay and Rs. 30/- per sq. ft. for the built-up area of the floor per month for any delay.

VIII. That vide clause 5.6 of the FBA, the parties had further agreed that if the Respondent fail to complete the construction of the unit due to force majeure circumstances or circumstances beyond the control of the Respondents, then the Respondent shall be entitled to reasonable extension of time for completion of construction.

IX. That it is pertinent to mention that on 16.03.2010, DTCP, Haryana (the statutory body for approval of real estate projects) issued Self-Certification policy vide Notification dated 16.03.2010. Respondent in accordance with the policy and other prevailing laws submitted detailed drawings and designs plans for relevant buildings along with requisite charges and fees. In terms of the said Policy, any person could construct building in licensed colony by applying for approval of building plans to the Director or officers of the department delegated with the powers for approval of building plans and in case of non-receipt of any objection within the stipulated time, the construction could be started. The building plans were withheld by the DTCP, Haryana despite the fact that these building plans

were well within the ambit of building norms and policies. That the Respondent applied for approval of building plans under the Self Certification Scheme. Although the department did not object to the building plans however, to ensure that there are no legal issues/ complications at a later date, the Respondent also applied for approval of building plans under the regular scheme, which were subsequently approved.

X. It is however pertinent to point out that while the Respondent were granted license bearing no. 58/2010 for setting up a residential plotted colony on land admeasuring 108.068 acres at Village Kherki Majra and Dhankot, Sector 102, 102 A, Tehsil and District, Gurgaon for which the layout was also approved, subsequently additional license bearing no. 45/2011 was issued by DTCP for setting up plotted colony on land admeasuring 18.606 acres and at the stage of grant of additional license bearing no. 45/ 2011 for Amstoria, layout for the entire colony was also revised vide Drg. No. DTCP-5618 dated 16.09.2016, by DTCP. The revised planning of the entire colony submitted to the DTCP has affected the infrastructure development of the entire colony including 'Amstoria Floors'. The said revision in demarcation was necessary considering the safety of the allottees and to meet the area requirement for community facilities in the area. Therefore, it is submitted that due to reasons beyond the control of the Respondents, the said possession timelines stands diluted.

XI. It is further submitted that the construction was also affected on account of the NGT order prohibiting construction (structural) activity of any kind in the entire NCR by any person, private or government authority. It is submitted that vide its order NGT placed sudden ban on the entry of diesel trucks more than ten years old and said that no vehicle from outside or within Delhi will be permitted to transport any construction material. Since the construction activity was suddenly stopped, after the lifting of the ban it took some time for mobilization of the work by various agencies employed with the Respondent.

XII. Further, the Environment Pollution (Prevention and Control) Authority, EPCA, expressing alarm on severe air pollution level in Delhi-NCR issued press note vide which the construction activities were banned within the Delhi-NCR region. The ban was commenced from 31/10/2018 and was initially subsisted till 10/11/2018 whereas the same was further extended till 12/11/2018.

XIII. Thereafter, in 2019, the Hon'ble Supreme Court of India on 04/11/2019, in M.C. Mehta v. Union of India banned all the construction activities. The said ban was partially lifted by the Hon'ble Supreme Court on 09/12/2019 whereby relaxation was accorded to the builders for continuing the construction activities from 6:00 am to 6:00 pm. Whereas the complete ban was lifted by the Hon'ble Apex Court on 14/02/2020.It is imperative to mention herein that the construction of the project was going on in full swing, however, the changed norms for water usage, not permitting construction after sunset, not allowing sand quarrying in Faridabad area, shortage of labour and construction material, liquidity crunch and non-funding of real estate projects and delay in payment of installments by customers etc. were the reasons for delay in construction and after that Government took long time in granting necessary approvals owing to its cumbersome process. Furthermore, the construction of the unit was going on in full swing and the Respondent was confident to handover possession of the units in question.

XIV. However, it be noted that due to the sudden outbreak of the coronavirus (COVID 19), from past 2 years construction came to a halt and it took some time to get the labour mobilized at the site. It was communicated to the Complainant vide email dated 26.02.2020 that the construction was nearing completion and the Respondent was confident to handover possession of the unit in question by March 2020. However, it be noted that due to the sudden outbreak of the coronavirus (COVID 19), construction came to a halt and it took some time to get the labour mobilized at the site.

XV. Hence, delay if any, in completing the construction of the unit and offering possession to the various allottees is due to factors beyond the control of the Respondents.

XVI. 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, EPCA banning construction activities, Hon'ble Supreme Court banning construction activities in M.C. Mehta vs Union of India, Covid-19 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. Hon'ble Delhi High Court in case titled as ***M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr. bearing no. O.M.P (1) (Comm.) no. 88/2020 and LAS 3696-3697/2020*** dated 29.05.2020 has observed as under:

> *69. The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself."*

11. In the present case also, the respondents were liable to complete the construction of the project and handover the possession of the said unit by 05.04.2015. It is claiming benefit of lockdown which came into effect on 23.03.2020 whereas the due date of handing over of possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself and for the said reason, the said time period cannot be excluded

while calculating the delay in handing over possession.The plea regarding EPCA 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 withdraw the termination letter dated 13.08.2021 and restore the allotment of unit.

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.

12. The complainant was allotted a unit bearing no. A-160-GF, vide endorsement letter dated 25.09.2014 under construction linked payment plan. However, a buyer agreement is annexed but not executed the parties, vide which a unit bearing no. A-160-GF, ground floor admeasuring 1,999 sq. ft. was allotted to the complainant. Complainant has paid an amount of Rs.32,00,447/- against the total sale consideration of Rs.75,53,308/-. As per clause 19 of the agreement, the respondent was required to hand over possession of the unit till 05.04.2015 as per building plan was sanctioned on 05.10.2012 as the date mentioned at page 10 of reply.

13. That the respondent has not obtained the occupation certificate in respect of the allotted unit of the complainant till date and thereafter, has not offered the possession. 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 13.08.2021 vide which the respondent threatened the complainant to forfeit the entire amount paid by him.

14. 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 13.08.2021. 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?

15. It is matter of record that the complainant booked the aforesaid unit under the above-mentioned payment plan and paid an amount of Rs.32,00,447/- towards total consideration of Rs.75,53,308/- which constitutes 42% of the total sale consideration and the complainant has paid the last payment only in the year 22.09.2014.

16. 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 04.07.2018, 21.08.2018, 06.10.2018 and final reminder on 19.11.2018 for making payment for outstanding dues as per payment plan and then has cancelled the subject unit. Despite issuance of aforesaid numerous reminders, the complainant has failed to 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 19.11.2018, and the relevant proportion of the said notice is reproduce as under:-

> *"Your failure to deposit the above-mentioned overdue amount is in complete breach of the terms and conditions of the Agreements, wherein it was a specifically agreed and accepted by you that timely payment is of essence to the Agreement/allotment and any default in payment or non-payment shall constitute a fundamental breach thereof. Further, as previously notified to you in the Agreements and reiterated herein, your continued failure to adhere to the payment schedule and failure to make full and timely payment impacts our ability to fulfill our obligations to you and other customers and consequently prejudicially affects as well as results in the waiver of your rights under the Agreements, including but not limited to the right to claim any compensation for delay in handing over possession of the unit and the cancellation of your*

allotment amongst other rights. Accordingly in the event that you fail to strictly adhere to the complete terms of this Final Demand Notice and the Agreements, such action on your part shall amount to a voluntary, conscious and intentional waiver and relinquishment by you of all rights and privileges under the terms of the Agreements and this letter shall , in exercise of our rights under the terms of the Agreement, be treated as termination/ cancellation of allotment of unit and you shall cease to have any right or interest whatsoever in the said unit or under the agreements and shall be liable to forfeiture of earnest money deposit, accumulated interest and brokerage paid (if any)."

17. As per clause 8 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 8.5 of the agreement to sell is reproduced as under for a ready reference:

> *8.5." Considering that the Seller/Confirming Party's ability to fulfil its obligation is dependent on the Purchaser(s) adherence to timely compliance and fulfilment of its obligations in entirely in every case of delayed payment and irrespective of the type of Payment Plan, acceptance of such delayed instalment(s)/ payments along with interest beyond period from the due date, shall always be without prejudice to the rights of the Seller/Confirming Party at its sole discretion Party at its sole discretion to terminate this Agreement and exercise the consequent rights under this Agreement."*

18. 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. Despite the issuance of several demand notices cum reminders the complainant has failed to clear the outstanding dues.

19. On 19.10.2023, the complainant filed an application to take on record documents vide which complainant submitted that "Taneja Vidyut Control Pvt Ltd through its authorized representative namely Mr. Vidyut Taneja was doing electrical works for the respondent and the respondent owed money to the said Taneja Vidyut Control Pvt. Ltd. Mr. Vidyut Taneja was well known to the complainant. The respondent had suggested to the said Vidyut Taneja to get the amount payable by the respondent adjusted in the instalments of the unit of the complainant and the complainant as well as Vidyut Taneja agreed to the said proposal and sent email dated 11.03.2021 requesting the respondent to transfer/adjust the payment due to him towards the cost of the complainant's unit".

20. During proceeding on 21.03.2024, the counsel for the respondent stated that the amount requested by M/s Taneja Vidyut Control Pvt Ltd was not adjusted against the above unit of the complainant as there was no such contractual obligation on the part of the complainant as there was no such contractual obligation on the part of the respondent. 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.

21. 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."*

22. 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.

23. 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."*

24. 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 of Rs. 10 lacs.

25. 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.

I. Directions of the Authority

26. 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.32,00,447/- after deducting 10% of the sale consideration of Rs.75,53,308/- being earnest money along with interest at the rate of 10.85% as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017, from the date of termination/cancellation 13.08.2021 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.

27. Complaint stands disposed of.

28. File be consigned to registry.

Dated: 23.05.2024

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