

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

Date of decision: 12.04.2024

NAME OF THE BUILDER		Emaar India Ltd.	
PROJECT NAME		Emerald Plaza at Emerald Hills	
S. No.	Case No.	Case title	APPEARANCE
1	CR/4517/2022	Emaar India Ltd. V/s Madhukar Sharma & ors.	Shri Harshit Batra Shri Sukhbir Yadav
2	CR/2042/2023	Madhukar Sharma & ors .V/s Emaar India Ltd.	Shri Sukhbir Yadav Shri Harshit Batra

CORAM:

Shri Ashok Sangwan
Shri Sanjeev Kumar Arora

Member
Member

ORDER

1. This order shall dispose of both the complaints titled as above filed before this authority in form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred as "the Act") read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter referred as "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 its obligations, responsibilities and functions to the allottees as per the agreement for sale executed inter se between parties.
2. The core issues emanating from them are similar in nature and the complainant(s) in the above referred matters are allottees of the

project, namely, “**Emerald Plaza at Emerald Hills**” being developed by the same respondent/promoter i.e., **M/s Emaar India Ltd.**

3. The aforesaid complaints were counter filed by the parties against each other on account of violation of the buyer’s agreement executed between the parties in respect of said unit.
4. The facts of both the complaints filed by the complainants are similar. Out of the above-mentioned case, the particulars of lead case **CR/4517/2022 Emaar India Ltd. V/s Madhukar Sharma & ors.** are being taken into consideration for determining the rights of the parties.

A. Unit and project related details

5. Both the cases relate to one allotted unit. One among these is filed by the allottee and the other one is filed by the builder, so far deciding both the cases, the facts of first case are being taken. But before that the particulars of unit details, sale consideration, the amount paid by the complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S. N.	Particulars	Details
1.	Name and location of the project	“Emerald Plaza at Emerald Hills” at sector 65, Urban Estate, Gurgaon, Haryana
2.	Nature of the project	Commercial Complex
3.	Project area	3.963 acres
4.	DTCP license no.	10 of 2012 dated 21.05.2019
5.	RERA Registered/ not registered	Not registered
6.	Unit no.	EPO-05-019 (page 34 of complaint)



7.	Unit area admeasuring	627.16 sq. ft. (page 35 of complaint)
8.	Date of provisional allotment letter	Not placed on record
9.	Date of builder buyer agreement	28.07.2011 (page 34 of complaint)
10.	Possession clause	<p>16. POSSESSION</p> <p>(a) Time of handing over the Possession</p> <p><i>(i) That the possession of the Retail Spaces in the Commercial Complex shall be delivered and handed over to the Allottee(s), within thirty (30) months of the execution hereof, subject however to the Allottee(s) having strictly complied with all the terms and conditions of this Agreement and not being in default under any provisions of this Agreement and all amounts due and payable by the Allottee(s) under this Agreement having been paid in time to the Company. The Company shall give notice to the Allottee(s), offering in writing, to the Allottee to take possession of the Retail Spaces for his occupation and use ("Notice of Possession").</i></p> <p><i>(ii) The Allottee(s) agrees and understands that the Company shall be entitled to a grace period of one hundred and twenty (120) days over and above the period more particularly specified here-in-above in sub-clause (a)(i) of clause 16, for applying and obtaining necessary approvals in respect of the Commercial Complex.</i></p>

		(emphasis supplied) [Page 42 of complaint]
11.	Due date of possession	28.01.2014 [Note: Grace period is not included]
12.	Total sale consideration as per payment plan annexed with the agreement	Rs. 44,74,159/- [page 51 of complaint]
13.	Amount paid by the allottee as per calculation sheet on page 107 of complaint and as per cancellation letter dated 13.02.2014 on page 62 of reply	Rs. 30,04,329/-
14.	Cancellation letter issued by the promoter on	13.02.2014 [Page 62 of reply]
15.	Occupation certificate	08.01.2018
16.	Offer of possession	24.01.2018 (Page 103 of complaint)

B. Facts of the complaint

3. The complainant has pleaded the complaint on the following facts:
- That the complainant is a real estate developer and was formerly known under the name and style of M/s Emaar MGF Land Ltd., however, had changed its name to "EMAAR INDIA LIMITED" w.e.f. 07.10.2020 as is evident from the certificate issued by the Government of India, Ministry of Corporate Affairs, New Delhi and got incorporated under the Companies Act, 1956 (CIN: U45201DL2005PLC133161) having its regd. office at 306-308,

Square One, C-2, District Centre, Saket New Delhi South Delhi DL 110017 and corporate office at Emaar Business Park, Sector 28, Gurgaon 122002. That the present complaint is filed by Mr. Sayantan Mondal, authorized representative of the complainant, who is duly authorized to act on behalf of the complainant vide board resolution dated 10.11.2021.

- b. That licence no. 10 dated 21.05.2009 for development of the project was granted to the complainant by the Director, Town & Country Planning, Govt. of Haryana upon which the complainant devised the development of a multi-storied commercial complex on a residential plotted colony under the name and style "Emerald Plaza Offices at Emerald Hills" at Sector 65, Urban Estate, Haryana (hereinafter referred to as the "Project").
- c. That it is pertinent to highlight that the project has been duly completed after having obtained all the necessary approvals and fulfilling all the requirements as per the existing bye-laws. That at the outset, without prejudice to the contents of this complaint, it must be noted that the complainant holds a good face value in the market and is a renowned real estate developer of international repute.
- d. That the complainant builder has ensured due compliance under the rules, regulations of the concerned laws. That after having completed the construction of the project, the complainant received the occupancy certificate for the project on 08.01.2018.

It is to be noted that almost all units have been handed over to the respective allottees at the time of filing this complaint.

- e. That the respondents approached the complainant expressing an intention of booking a unit in the project and willingness to pay for the same accordingly, executed and an application form dated 18.07.2010, upon which a provisional allotment letter dated 25.08.2010 was made in the name of the respondents.
- f. That it was the obligation of the respondents to execute the buyer's agreement in a timely fashion, however, the same was not done. The complainant had rightly sent the buyer's agreement to the respondent on 15.09.2010, however, the respondent delayed in execution of the agreement, upon which, multiple reminders dated 02.10.2010, 11.01.2011, and 29.01.2011. It was finally after almost a year, on 28.07.2011, that the buyer's agreement (hereinafter referred to as the "agreement") was executed between the complainant and the respondents for unit no. EPO-05-019 in the project for a total sale consideration/demand of ₹48,38,255/-. (hereinafter referred to as the "Unit").
- g. That respondents assented to pay the monies against the Unit through a construction-linked plan. However, respondents had defaulted in the payment against the unit since the very beginning. Upon the default of the respondents, they were served with reminder for payment, as per the terms and conditions of the agreement. It is due to the delay in making the payments

against the unit that the respondent is liable to pay ₹11,31,070/- as per calculation sheet on 7th July, 2022 as delayed payment charges. That the conduct of the complainant must be highlighted here: the complainant issued a number of payment request letters and reminders to ensure timely payments for the timely construction of the project. That the continuous defaults, from the very beginning, on part of the respondent prima facie show the wilfulness in causing the defaults.

- h. That the construction of the project is completed to the extent of being habitable and the occupancy certificate has been received on 08.01.2018 after which, the complainant had lawfully offered the valid legal possession on 24.01.2018, which the respondents have failed to take, till date. That moreover, no delay has been caused by the complainant. That the time for handing of the possession was proposed to be 30 months from the date of execution of the agreement and 120 days grace period, as per clause 16(a) of the agreement, and was "...subject however to the allottee(s) having complied with all the terms and conditions of this agreement and not being in default under any provisions of this agreement and all amounts due and payable by the allottee under this agreement having been paid in time to the company..." It must be brought to light that the complainant 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 groundwater by the High Court of Punjab & Haryana, etc. and other force majeure circumstances, yet, the complainant completed the construction of the project diligently and timely, without imposing any cost implications of the aforementioned circumstances on the respondent and demanding the prices only as and when the construction was being done.

- i. That moreover, vide order dated 13.09.2012, the Hon'ble High Court of Punjab and Haryana in CWP no. 20032 of 2008 titled as Sunil Singh v/s MoEF & others vide orders dated 16.07.2012 directed that no building plans for construction shall be sanctioned unless the applicant assures the authority that carrying out the construction underground water will not be used and also show all the sources from where the water supply will be taken for construction purposes. The period of prohibition was till 12.10.2012. It was due to the ban on the usage of underground water, that the construction activity was brought to a standstill as there were no arrangements by the State government to fulfil the demand of water to be used in construction activity.
- j. That all these circumstances come within the purview of the force majeure clause and hence allow a reasonable time to the complainant builder. That it must also be noted that the complainant had the right to suspend the construction of the project upon happening of circumstances beyond the control of

the complainant as per clause 16(b)(ii), however, despite all the hardships faced by the complainant, the complainant did not suspend the construction and managed to keep the project afloat through all the adversities.

- k. That it needs to be categorically noted that in *Shuchi Sur v Venetian LDF Projects LLP* 3890 of 2021, under similar circumstances beyond the control of the complainant builder, as occurring before the proposed due date of delivery of possession, were noted to be valid grounds to entitle the builder with the grace period and hence, similarly, the same should be done in the present case.
- l. That it is a matter of fact and law that it is the obligation of the respondents under the Act to make the due payments, as agreed, to take possession of the allotment within two months of occupancy certificate and to thereafter execute the conveyance deed. The respondents have a corresponding obligation as per the agreement to make the due payments against the unit, to take possession within 30 days of the letter of offer of possession, and to have the sale deed executed upon full payments being made.
- m. That the defaulting conduct of the respondents is not new and reflects its malafide intentions towards the non-payment of the unit in the project. It must be noted that the respondents are bound by the agreement which has been executed between the complainant and the respondents. The respondents cannot be allowed to wriggle out from its responsibilities due to any reason

whatsoever. It is categorical to note that upon the non-payment of dues by the respondent's allottees, the respondents are liable to pay the delayed payment charges and interests. That the complainant has complied with all of its obligations, not only with respect to the agreement with the complainants but also as per the concerned laws, rules and regulations thereunder and the local authorities. However, the respondent has continued its malafide practices.

- n. That the real estate sector is not merely dependant on the promoters like the complainant for its upliftment - it is the corresponding and equally weighed obligation of the allottees like the respondents to perform their part of timely payment inter alia other responsibilities. That timely payment against the allotment is the essence of a real estate development and cannot be turned a blind eye against.
- o. That the defaulting conduct of the respondents is not new and accounts for their malafide intentions towards the non-payment of the unit in the project. It must be noted that the respondents are bound by the agreement which has been executed between the complainant and the respondents. The respondents cannot be allowed to wriggle out from its responsibilities due to any fluctuations in the market or any other reason whatsoever.
- p. That the complainant has also constantly attempted to communicate with the respondents via email requesting them to fulfil the possession formalities, however, the same have not

been done till date. That despite the issuance of the reminders for taking possession and making payment, the same has not been done by the respondent till date.

- q. The acts and conduct of the respondent allottee are violative of the terms and conditions of the agreement and Act, as noted above; and the respondents allottees are liable to make the payment against the unit and take the possession. That this is in line with the holding of the Hon'ble Supreme Court in Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna and Ors., decided on 11.01.2021 - MANU/SC/0013/2021 where, Phase 1 of the project had been issued the occupancy certificate, consequently, the developer offered the possession to the respective allottees. The Supreme Court directed such allottees to take possession of their respective allotments.
- r. Additionally, in a recent case of Emaar India Limited v Ghyanshyam Bhardwaj 3900 of 2021, Haryana RERA, Gurugram bench, this Hon'ble Authority had directed the allottee to take the possession after making the due payments against the Unit along with prescribed interest @ 9.3% p.a..
- s. That in the interest of equity, justice and fair play, it must be noted that the complainant has always tuned to its obligations and has waited for an inordinate period of time for clearing of dues and taking of possession by the respondents. Hence, the complainant cannot be made to wait for a longer period of time

and the respondents should be bound to adhere as under the law and the contract.

- t. Additionally, at the sake of repetition, it is pointed out that the project has attained the occupancy certificate and is habitable for living thus the respondents should be bound to make the due payments and should, under no circumstances, be allowed to wriggle out of its obligations.
- u. Hence, the Hon'ble Authority is requested to take note of the matter and direct the respondent to comply with its contractual and legal obligations.

C. Relief sought by the complainant:

- 4. The complainant in compliant no. 4517/2022 has sought following reliefs:
 - a. Direct the respondent to pay outstanding dues including administrative charges of ₹18,21,175/-.
 - b. Direct the respondent to pay interest on dues until clearing of all dues w.e.f. the date of default till the date of payment.
 - c. Direct the respondent to take possession of the unit and execute the conveyance deed after paying statutory dues of stamp duty.
 - d. Direct the respondent to actively participate in the execution and registration of conveyance deed.
 - e. Direct the respondent to clear the CAM, CAE charges of ₹3,60,545/-.
- 5. The complainant in compliant no. 2042/2023 has sought following reliefs:



- a. Refund the entire amount paid by the complainant along with the prescribed rate of interest.
6. On the date of hearing, the authority explained to the respondents/promoter about the contravention 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.

7. The respondent has contested the complaint on the following grounds:
 - a. The respondents/allottee seeks to raise the following objections, each of which has been taken in the alternative and is without prejudice to others. Nothing contained in the complaint may, unless otherwise specifically admitted, be deemed to be a direct and tacit denial of any allegation/averments made by the complainant/builder in the complaint.
 - b. The present complaint is not maintainable in law or on facts. It is submitted that the present complaint is not maintainable before the Hon'ble Authority. That complainant has filed the present complaint to direct the respondent to make outstanding dues and to direct the respondent to take possession of the unit, which is not a legal offer of possession.
 - c. That the complainant/builder has approached this Hon'ble Authority without clean hands and concealed the material facts, therefore the present complaint is liable to dismiss on this sole ground.

- d. That the respondents were an allottee/owner of an office space unit no. EPO-05-019, admeasuring 627.16 sq. ft. in project "Emerald Plaza Offices" situated at Sector-65, Gurugram, and have all right and claim on the subject property as per terms and conditions of the buyer's agreement and the Real Estate (Regulation and Development) Act, 2016 and the Haryana Real Estate (Regulation and Development) Rule, 2017 and Regulation thereunder.
- e. That the said office space was booked on 18.07.2010 under the construction link payment plan for a sale consideration of ₹44,74,159/- and a builder buyer agreement was executed on 28.07.2011. As per clause no. 16(a) of the buyer's agreement, the respondent has to give possession of office space "within a period of 30 (Months) from the execution of buyer's agreement, therefore, the due date of possession was 18.01.2013. The buyer further agrees that even after the expiry of the commitment period, the company shall be further entitled to a grace period of a maximum of 120 days for issuing the possession notice (Grace Period), therefore, the due date of possession with grace period was 18.05.2013.
- f. That the respondents/allottee made all the payments as per the agreed payment schedule and demand letters of the complainant/Builder till 22.04.2013 and have paid ₹30,04,329/- i.e. 67.14% of the total consideration amount. Provided that the respondents stopped paying further installments because the

complainant failed to offer possession of the unit as per the due date of possession as mentioned in the builder-buyer agreement i.e., 18.05.2013.

- g. That the complainant has not completed the said project on or before the due date of possession and as per specifications mentioned in the project brochure and builder buyer agreement, therefore, the allottee/respondents stopped making payment and asked for a refund of the paid amount along with interest.
 - h. That on 13.02.2014, the respondent sent a cancelation letter of the unit after deducting the earnest money. It is pertinent to mention here that as per clause no. 1.2(f) of BBA, the earnest money is 10% of the total sale consideration. It is pertinent to mention here that the complainant/builder did not pay the balance amount after the deduction of 10% earnest money.
8. Copies of all the documents have been filed and placed on record. The authenticity is not in dispute. Hence, the complaint can be decided on the basis of theses undisputed documents.
9. The complainant- promoter in complaint bearing no. 4517-2022 has filed the written submissions dated 05.04.2024 which have been taken on record by the Authority.

E. Jurisdiction of the authority

10. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I. Territorial jurisdiction

11. 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

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

Section 11

.....

(4) The promoter shall-

(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

13. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as per provisions of section 11(4)(a) of the Act leaving aside compensation which is to be

decided by the adjudicating officer if pursued by the complainant at a later stage.

14. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors.*** " SCC Online SC 1044 decided on 11.11.2021 wherein it has been laid down as under:

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

15. Furthermore, the said view has been reiterated by the division bench of Hon'ble Punjab and Haryana High Court in ***Ramprastha Promoter and Developers Pvt. Ltd. Vs Union of India and others dated 13.01.2022 in CWP bearing no. 6688 of 2021.*** The relevant paras of the above said judgment reads as under:

"23) The supreme court has already decided on the issue pertaining to the competence/power of the authority to direct refund of the amount, interest on the refund amount and/or directing payment of interest for delayed delivery of possession or penalty and interest thereupon being within the jurisdiction of the authority under Section 31 of the 2016 Act. Hence any provision to the contrary under the Rules would be inconsequential. The Supreme Court having ruled on the competence of the Authority and maintainability of the complaint before the Authority under Section 31 of the Act, there is, thus, no occasion to enter into the scope of submission of the complaint under Rule 28 and/or Rule 29 of the Rules of 2017.

24) The substantive provision of the Act having been interpreted by the Supreme Court; the Rules have to be in tandem with the substantive Act.

25) In light of the pronouncement of the Supreme Court in the matter of *M/s Newtech Promoters (supra)*, the submission of the petitioner to await outcome of the SLP filed against the judgment in CWP No.38144 of 2018, passed by this Court, fails to impress upon us. The counsel representing the parties very fairly concede that the issue in question has already been decided by the Supreme Court. The prayer made in the complaint as extracted in the impugned orders by the Real Estate Regulatory Authority fall within the relief pertaining to refund of the amount; interest on the refund amount or directing payment of interest for delayed delivery of possession. The power of adjudication and determination for the said relief is conferred upon the Regulatory Authority itself and not upon the Adjudicating Officer."

16. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the matter of ***M/s Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra)***, and the division bench of Hon'ble Punjab and Haryana High Court in "***Ramprastha Promoter and Developers Pvt. Ltd. Vs Union of India and others. (supra)***, the authority has the jurisdiction to entertain a complaint seeking refund of the amount paid by allottee along with interest at the prescribed rate.

F. Findings on the relief sought.

17. The foremost question that arises before this authority is as to whether the allottees are entitled for refund of the amount paid along with interest or they be directed to take the possession of the allotted unit after clearing the outstanding dues along with interest.
18. In the present matter vide clause 16 of the BBA, the promoter has proposed to hand over the possession of the subject apartment within a period of 30 months from date of execution of BBA i.e., 28.07.2011. Hence the period of 30 months expires on 28.01.2014. Since in the present matter the BBA incorporates qualified reason for grace period/extended period of 120 days in the possession clause for applying and obtaining necessary approvals in respect of the commercial complex however, the same were not obtained within the above mentioned timeline and accordingly, the grace period of 120 days is not allowed to the promoter. Therefore, the due date of handing over of possession of the subject apartment comes out to be 28.01.2014.
19. The promoter filed a complaint before the authority bearing no. CR/4517/2022 on 14.07.2022 and thereafter the allottee also filed a complaint bearing no. CR/2042/2023 on 05.05.2023. It is necessary to mention here that both the complaints were related to the same apartment and hence, both were clubbed together in order to avoid conflicting orders. Now, the matter before the authority is as to whether the allottee has right to seek refund or not, when the promoter is unable to give possession of unit in accordance with the



terms of agreement for sale. The allottee was allotted unit no. EPO-05-019 having an area of 627.16 sq. ft. vide BBA dated 28.07.2011. It is a matter of record and fact that the subject unit was to be handed over to the complainant-allottee on or before 28.01.2014, the same being the due date of possession vide clause 16 of the BBA. However, when the respondent started raising demands as per the schedule of payment, the complainant started defaulting in making the said payments. Hence, the respondent was compelled to issue various payment request letters, demand notices etc. to pay the demanded amount. As per calculation sheet submitted by the promoter in complaint bearing no. 4517-2022 the complainant has not paid a single penny after 22.04.2013. Accordingly, the respondent issued the cancellation letter dated 13.02.2014 despite issuance of various reminder letters and after giving reasonable time to the complainant for making payment of outstanding dues to the tune of ₹ 6,45,375.39/-.

20. Furthermore, it is pertinent to mention here that the promoter has received the occupation certificate on 08.01.2018 and thereafter, the possession was offered to the allottee on 24.01.2018. To this the counsel on behalf of the promoter during the course of hearing on 05.01.2024 stated that he revive the said unit of the allottee on his personal request whereas, the counsel failed to issue any such communication and the same was also denied by the counsel for the allottee. Also, the counsel for the allottee also denied having received the offer of possession dated 24.01.2018. Since, the promoter

cancelled the said unit way back in the year 2014 and instead of refunding the money back to the allottee, filed the complaint for seeking direction against the allottee to take the possession of the unit after lapse of almost 8 years filed the complaint against. In light of the above mentioned facts, the authority observes that on one hand the promoter had itself cancelled the subject unit way back in the year 2014 vide cancellation letter dated 13.02.2014 and on the other hand the promoter came before this authority praying for such reliefs which is itself in contradiction to his earlier act wherein it cancelled the said unit. Further, this authority holds its opinion that since the respondent failed to show any proof of revival of unit on request of complainant-allottee, therefore the said cancellation is being upheld by the authority and it was an obligation on the part of promoter to refund the balance amount after issuance of the cancellation letter dated 13.02.2014 however, it is a matter of fact that the promoter has not refunded a single penny to the complainant-allottee till date hence it is a recurring obligation of the promoter towards the complainant-allottee to refund the amount paid after forfeiture of earnest money i.e., 10 of the total sale consideration as defined in the agreement dated 28.07.2011 vide clause 1.2 (f)(i).

21. Furthermore, the Hon'ble Apex Court of land in cases ***Maula Bux Vs. Union of India (1973) 1 SCR 928 and Sirdar K.B Ram Chandra Raj Urs Vs. Sarah C. Urs, (2015) 4 SCC 136, and followed by the National Consumer Dispute Redressal Commission, New Delhi in consumer case no. 2766/2017 titled as Jayant Singhal and Anr. Vs. M/s M3M***

India Ltd. decided on 26.07.2022, took a view that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in nature of penalty, then provisions of Section 74 of Contract Act, 1872 are attracted and the party so forfeiting must prove actual damages. After cancellation of allotment, the flat remains with the builder as such there is hardly any actual damage. So, it was held that 10% of the basic sale price is reasonable amount to be forfeited in the name of earnest money.

22. Further, the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, states that:

"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.

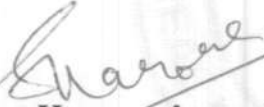
23. It is evident from the above-mentioned facts that the complainant had paid a sum of ₹30,04,329/- against total sale consideration of ₹44,74,159/- of the unit allotted to him on 28.07.2011.

24. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.
25. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., **12.04.2024** is 8.85%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.85%.
26. Thus, keeping in view the aforesaid factual and legal provisions, the respondent cannot retain the amount paid by the complainant against the allotted unit and is directed to refund the amount paid 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 cancellation i.e., 13.02.2014 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid after forfeiting the earnest money which shall not exceed the 10% of the basic sale consideration of the said unit.

G. Directions of the authority

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

- i. The respondent is directed to refund the paid-up amount of ₹30,04,329/- along with the interest at the prescribed rate i.e., 10.85% after deducting earnest money i.e., 10% of the basic sale consideration of unit i.e., ₹43,80,086/- from the date of cancellation i.e., 13.02.2014 till date of actual refund.
 - 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.
28. The complaints stand disposed of. True certified copies of this order be placed on the case file of each matter.
29. File be consigned to registry.


(Sanjeev Kumar Arora)
Member


(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 12.04.2024