

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

Complaint No. 90 of 2018
Date of First Hearing 19.04.2018
Date of Decision 31.10.2018

Mr. SK Sharma,
R/o House No-601, Sector 21, Gurgaon,
Haryana-122015

...Complainant

Versus

M/s IREO Grace Realtech Pvt Ltd and its
directors
Office at : Oreo Campus, sector- 59, near
Behrampur, Gurgaon.

...Respondent

CORAM:

Dr. K.K. Khandelwal
Shri Samir Kumar
Shri Subhash Chander Kush

Chairman
Member
Member

APPEARANCE:

Shri Sukhbir Yadav Advocate for complainant

Shri Garvit Gupta Advocate for the respondent



ORDER

1. A complaint dated 12.03.2018 was filed under section 31 of the Real Estate (Regulation & Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 by the complainant Mr. SK Sharma, against the promoter M/s IREO Grace Realtech Pvt Ltd on account of violation of clause 13.3 of Apartment Buyer



Agreement dated 14.04.2019 for not giving possession on the due date which is an obligation of the promoter under section 11 (4) (a) of the Act ibid.

2. The particulars of the complaint are as under: -

1.	Name and location of the project	The Corridor, sector 67-A, Gurgaon,, Haryana
2.	Area of the project	37.5125 Acres
3.	Registered/not registered	Registered (Phase 1, Phase 2 and Phase 3)
4.	RERA registration no	377 of 2017 (Phase 1) 378 of 2017 (Phase 2) 379 of 2017 (Phase 3)
5.	Completion date as per RERA registration certificate	30.06.2020
6.	Nature of the Project	Residential group housing colony
7.	Date of booking	28.02.2013
8.	Date of Agreement	14.04.2014
9.	Unit No.	CD-C6-03-301
10.	Area of unit	1483.28 sq. ft
11.	Total Consideration	Rs 1,63,79,053.22/-
12.	Total amount paid by the complainant	Rs. 28,13,570/-
13.	Payment Plan	Instalment payment plan/Construction linked plan
14.	Status of the project	80 % constructed
15.	Possession	As per clause 13.3 - 42 months from date of approval of building plans- (No approved building plan attached therefore date of





		possession cannot be ascertained)
16.	Delay	Cannot be ascertained
17.	Penalty Clause	As per clause 13.4 of Apartment Buyer Agreement, Rs 7.50 per sq. ft of Super Area for every month of delay

3. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. Accordingly, the respondent appeared on 19.04.2018. The case came up for hearing on 19.04.2018, 08.05.2018, 23.05.2018, 10.07.2018, 25.07.2018 and 16.08.2018, 12.09.2018, 03.10.2018 and 31.10.2018. The reply has been filed by the respondent on 03.05.2018.

FACTS OF THE CASE

4. The complainant submitted that the respondent is a developer of a residential project known as "The Corridors" at Sector 67A, Gurgaon, Haryana hereinafter referred to as the said project. That in December, 2012, being persuaded by the various advertisements issued in print and electronic media the complainant visited the office of the respondent No.1 where he was given a rosy picture about the project of the respondent no.1. It is also told at that time that the payments





would be in easy instalments and in case, the complainant is not able to pay any instalments, he can get his booking cancelled without any charges; and in such a scenario respondent would also pay interest for the period, money remains with the Respondent.

5. That in January, 2013 believing upon the representations of the respondent, its employees, officers, directors etc., the complainant booked residential flat bearing No CD-C6-03-301 at 'The Corridor' at Sector 67A, Gurgaon, having area of 1483.28 sq. ft hereinafter to be referred to as the said flat and paid a sum of Rs.12,00,00. The total price of the flat was Rs 1,63,79,053.22/- ✓
6. That vide its letter dated 07.08.2013, the respondent issued allotment letter to the Complainant in respect of the flat in question.
7. That the respondent and the complainant entered into apartment buyer's agreement with the respondent on 14.04.2014
8. Son of the complainant is suffering from permanent medical disability and during the period 2014-2015, his condition deteriorated as a result of which the Complainant could not





pay any further payments and requested to the Respondent for return his money.

9. That the respondent issued a cancellation letter dated 01.09.2016, thereby illegally cancelling the said flat allotted to the complainant and it has been alleged therein that the amount deposited by the complainant has been forfeited by the respondent.

10. The respondent has no right to forfeit any amount deposited by the complainant inasmuch as it has been held in various judgments passed by Hon'ble Supreme Court and Hon'ble High Courts that in case of breach of contract of an immoveable property only a nominal amount can be forfeited and in case the seller intends to forfeit any higher amount he is required to prove actual loss has been incurred by him as a result of breach. It is relevant to mention that in the present case, no loss has been incurred by the respondent as property prices have increased from 2011 to 2018.



ISSUES RAISED BY THE COMPLAINANT

11. The issues raised by the complainant are as follows :-

- i. Whether or not the respondent can terminate the apartment buyer agreement dated 14.04.2014?



- ii. Whether or not the respondent has a right to forfeit the amount of Rs. 28,13,570/- paid by the complainant?
- iii. Whether the entire amount of Rs. 28,13,570/- paid by the complainant can be termed as earnest money?

RELIEF SOUGHT

12. The reliefs sought by the complainant are as follows :-

- i. The respondent be directed to refund the amount of Rs. 28,13,570/- along with interest at the rate of 18% p.a. from the date of payment till it is refunded.
- ii. To direct the respondent to pay an amount of Rs 5,00,000 as damages for mental harassment, mental trauma and inconvenience caused to the complainant.

REPLY BY THE RESPONDENT

13. It is submitted that the respondent has the right in accordance with clause 21.3 of the apartment buyers agreement read with clause 7 of the booking application form dated 28.02.2013 to terminate the agreement dated 14.04.2014 on account of continuous defaults of the complainant. The complainant has made false and frivolous averments in order to mislead this Hon'ble Authority.





14. It is submitted that all demands were raised by respondent no.1 in accordance with the agreed payment plan. The complainant is a defaulter from the initial stage of booking and has defaulted in various payments despite of reminders and follow-ups. It is submitted that the complainant had only paid an amount of Rs. 28,13,570/- out of the total amount of Rs 1,63,79,053.22/-

15. It is submitted that the complainant is a real estate investor who had booked the apartment in question with a view to earn quick profit in a short period. However, his calculations went wrong on account of slump in the real estate market and the complainant was not possessed with sufficient funds to honour his commitments. The complainant is making baseless excuse to avoid his contractual obligations. Respondent has always acted in accordance with their terms and conditions of the booking application form and the apartment buyer's agreement.

16. It is submitted that the earnest money paid by the complainant towards making the payment for allotted units was rightly forfeited in accordance with clause 21.3 of the apartment buyer's agreement and the complainant cannot now claim





premium of his own defaults, laches, delays, misdeeds and illegalities.

17. The Complainant is neither maintainable nor tenable and is liable to be out-rightly dismissed. It is pertinent to mention there that the unit was cancelled prior to the enactment of the RERA Act, 2016. This Hon'ble authority does not have the jurisdiction to entertain the present false and frivolous complaint filed by the compliant.
18. It is pertinent to mention that the complaint is not maintainable for the reason that the agreement contains an Arbitration Clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute i.e. Clause 35 of the Apartment Buyer's Agreement.

DETERMINATION OF ISSUES :

19. With regard to **issue no 1 and 2:**
20. As per clause 21.1 builder buyers agreement time is the essence of the agreement for the payment of sale consideration, maintenance charges and other deposits and amounts, including any interest. If the allottee fails in timely performance of its obligations agreed to pay in time any of the instalments to the company, the company shall be entitled to cancel the allotment and terminate the agreement. There have





been letters issued by the respondent to the complainant demanding the payment of due instalments. Thus the respondent has abided by the agreement and has cancelled the allotment of the unit vide letter dated 1.09.2016

21. In the case of *DLF Ltd. v. Bhagwati Narula*,¹ revision petition no. 3860 of 2014 it was held by the National Consumer Dispute Redressal Commission, New Delhi that agreement for forfeiting more than 10% of sale price would be invalid and 20% of the sale price cannot be said to be a reasonable amount which the petitioner company could have forfeited on account of default on the part of the complainant unless it can show that it had only suffered loss to the extent the amount was forfeited by it. Earnest money is said to be the only amount that is paid at the time of concluding the contract. Thus, amount beyond 10% cannot be forfeited and if done so that would be unreasonable
22. It is a well settled principle that any clause in derogation to the said law shall not be valid in law. Thus, it has to be noted that **the respondent cannot forfeit more than 10% of the earnest money.**



¹ 1(2015) CPJ 319 (NC)



23. However the builder is liable to deduct only 10% of the consideration amount and refund the balance amount after forfeiting 10% of the total consideration paid by the complainants.

24. With regard to **issue no 3:**

25. The definition given as per clause 6 of the builder buyers agreement is "the company and the allottee hereby agree that 20% of the sale consideration of the apartment shall be deemed to constitute the earnest money"

26. The total apartment cost as per the payment plan annexed with the builder buyer agreement is Rs ~~1,63,79,053.22~~ ^{1,63,79,053.22} - } ~~1,63,79,053.22~~ Thus the 20% of this amount is Rs ~~32,75,810.6441~~ ^{32,75,810.6441} - } ~~32,75,810.6441~~ The amount paid by the complainant is Rs ~~3,46,484~~ ^{28,13,570} - } ~~3,46,484~~ which is less than 20% of the of the total consideration. Hence this amount can be treated as the earnest money by the respondent.



Findings of the Authority

27. Jurisdiction of the authority-

Subject Matter Jurisdiction

The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the



promoter as held in *Simmi Sikka v/s M/s EMAAR MGF Land Ltd.* leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

Territorial Jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2018 issued by Town & 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.

Decision and directions of the authority


28. After taking into consideration all the material facts as adduced and produced by both the parties, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issues the following directions to the respondent in the interest of justice and fair play :





- i. As per section 13 of the Real Estate (Regulation & Development) Act, 2016, the booking/earnest amount is only 10% of the agreement sale consideration. Keeping in view the reasonability criteria, the builder is directed to


Samir Kumar)
Member


(Subhash Chander Kush)
Member

deduct only 10% of the consideration amount and refund the balance amount after forfeiting 10% of the total consideration within 90 days as per rule 16 of the Act *ibid*.

Dated : 31.10.2018

Corrected judgement uploaded on 31.12.2019



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would be in easy instalments and in case, the complainant is not able to pay any instalments, he can get his booking cancelled without any charges; and in such a scenario respondent would also pay interest for the period, money remains with the Respondent.

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6. That vide its letter dated 07.08.2013, the respondent issued allotment letter to the Complainant in respect of the flat in question.
7. That the respondent and the complainant entered into apartment buyer's agreement with the respondent on 14.04.2014
8. Son of the complainant is suffering from permanent medical disability and during the period 2014-2015, his condition deteriorated as a result of which the Complainant could not



pay any further payments and requested to the Respondent for return his money.

9. That the respondent issued a cancellation letter dated 01.09.2016, thereby illegally cancelling the said flat allotted to the complainant and it has been alleged therein that the amount deposited by the complainant has been forfeited by the respondent.
10. The respondent has no right to forfeit any amount deposited by the complainant inasmuch as it has been held in various judgments passed by Hon'ble Supreme Court and Hon'ble High Courts that in case of breach of contract of an immoveable property only a nominal amount can be forfeited and in case the seller intends to forfeit any higher amount he is required to prove actual loss has been incurred by him as a result of breach. It is relevant to mention that in the present case, no loss has been incurred by the respondent as property prices have increased from 2011 to 2018.



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REPLY BY THE RESPONDENT

13. It is submitted that the respondent has the right in accordance with clause 21.3 of the apartment buyers agreement read with clause 7 of the booking application form dated 28.02.2013 to terminate the agreement dated 14.04.2014 on account of continuous defaults of the complainant. The complainant has made false and frivolous averments in order to mislead this Hon'ble Authority.



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15. It is submitted that the complainant is a real estate investor who had booked the apartment in question with a view to earn quick profit in a short period. However, his calculations went wrong on account of slump in the real estate market and the complainant was not possessed with sufficient funds to honour his commitments. The complainant is making baseless excuse to avoid his contractual obligations. Respondent has always acted in accordance with their terms and conditions of the booking application form and the apartment buyer's agreement.

16. It is submitted that the earnest money paid by the complainant towards making the payment for allotted units was rightly forfeited in accordance with clause 21.3 of the apartment buyer's agreement and the complainant cannot now claim



premium of his own defaults, laches, delays, misdeeds and illegalities.

17. The Complainant is neither maintainable nor tenable and is liable to be out-rightly dismissed. It is pertinent to mention there that the unit was cancelled prior to the enactment of the RERA Act, 2016. This Hon'ble authority does not have the jurisdiction to entertain the present false and frivolous complaint filed by the compliant.

18. It is pertinent to mention that the complaint is not maintainable for the reason that the agreement contains an Arbitration Clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute i.e. Clause 35 of the Apartment Buyer's Agreement.

DETERMINATION OF ISSUES :

19. With regard to **issue no 1 and 2:**

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been letters issued by the respondent to the complainant demanding the payment of due instalments. Thus the respondent has abided by the agreement and has cancelled the allotment of the unit vide letter dated 1.09.2016

21. In the case of ***DLF Ltd. v. Bhagwati Narula***,¹ revision petition no. 3860 of 2014 it was held by the National Consumer Dispute Redressal Commission, New Delhi that agreement for forfeiting more than 10% of sale price would be invalid and 20% of the sale price cannot be said to be a reasonable amount which the petitioner company could have forfeited on account of default on the part of the complainant unless it can show that it had only suffered loss to the extent the amount was forfeited by it. Earnest money is said to be the only amount that is paid at the time of concluding the contract. Thus, amount beyond 10% cannot be forfeited and if done so that would be unreasonable

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23. However the builder is liable to deduct only 10% of the consideration amount and refund the balance amount after forfeiting 10% of the total consideration paid by the complainants.

24. With regard to **issue no 3:**

25. The definition given as per clause 6 of the builder buyers agreement is “the company and the allottee hereby agree that 20% of the sale consideration of the apartment shall be deemed to constitute the earnest money”

26. The total apartment cost as per the payment plan annexed with the builder buyer agreement is Rs 1,84,42,250.44. Thus the 20% of this amount is Rs 36,88,450/-. The amount paid by the complainant is Rs 33,46,484 which is less than 20% of the of the total consideration. Hence this amount can be treated as the earnest money by the respondent.



Findings of the Authority

27. Jurisdiction of the authority-

Subject Matter Jurisdiction

The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the

promoter as held in *Simmi Sikka v/s M/s EMAAR MGF Land Ltd.* leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

Territorial Jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2018 issued by Town & 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.

Decision and directions of the authority

28. After taking into consideration all the material facts as adduced and produced by both the parties, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issues the following directions to the respondent in the interest of justice and fair play :



- i. As per section 13 of the Real Estate (Regulation & Development) Act, 2016, the booking/earnest amount is only 10% of the agreement sale consideration. Keeping in view the reasonability criteria, the builder is directed to deduct only 10% of the consideration amount and refund the balance amount after forfeiting 10% of the total consideration within 90 days as per rule 16 of the Act *ibid*.

Samir Kumar)
Member

(Subhash Chander Kush)
Member

Dated : 31.10.2018

HARERA
GURUGRAM



PROCEEDINGS OF THE DAY

Day and Date	Wednesday and 31.10.2018
Complaint No.	90/2018 case titled as S.K Sharma V/s Ireo Grace Realtech Pvt. Ltd.
Complainant	S.K Sharma
Represented through	Complainant in person with Shri Sukhbir Yadav, Advocate.
Respondent	Ireo Grace Realtech Pvt. Ltd.
Respondent Represented through	S/Shri Manmohan Dang and Garvit Gupta Advocates for the respondent.
Last date of hearing	3.10.2018
Proceeding Recorded by	Naresh Kumari & S.L.Chanana

Proceedings

Arguments heard.

It has been alleged by the complainant that builder has forfeited his earnest money @ 20% of the total consideration amount which is too high and is not reasonable. Respondent has reiterated that they have deducted/forfeited the earnest money as per clause 6 of the Builder Buyer Agreement. However, authority is of the considered opinion that as per section 13 of the Real Estate (Regulation & Development) Act, 2016 the booking/earnest amount is only 10% of the agreement sale consideration. Keeping in view the reasonability criteria, it will be appropriate if the builder deduct only 10% of the consideration amount and refund the balance amount

after forfeiting 10% of the total consideration within 90 days as per rule 16 of the Act ibid.

Complaint is disposed of accordingly. Detailed order will follow.

File be consigned to the registry.

Samir Kumar
(Member)

Subhash Chander Kush
(Member)