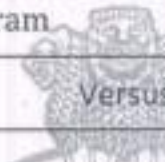


**BEFORE THE HARYANA REAL ESTATE REGULATORY
AUTHORITY, GURUGRAM**

Complaint no.:	2322 of 2023
Date of filing:	07.06.2023
Date of order	24.01.2025

1. 2.	Smt. Mala Rani Sh. Santosh Kumar Sharma R/O: - Chamber No. 64, Saheed Sukhdeo Block, Gate No.1, District Court, Gurugram	Complainants
 Versus		
	M/S Bptp Limited Regd. Office At: M-11, Middle Circle, Connaught Circus, New Delhi-110001 M/S Countrywide Promoters Private Limited Regd. Office At: Landmark Group Landmark House 65 Sector 44 Gurugram Haryana 122002	Respondents

CORAM:	
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Sh. Attar Singh Kharb (Advocate)	Complainants
Sh. Harshit Batra (Advocate)	Respondents

ORDER

- The present complaint dated 07.06.2023 has been filed by the complainants/allottees 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 under the provision of the Act or the Rules and regulations made thereunder or to the allottees as per the agreement for sale executed *inter se*.

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 and delay period, if any, have been detailed in the following tabular form:

S. No.	Particulars	Details
1.	Name of the project	Amstoria, Sector-102, Gurgaon, Haryana
2.	Project area	108.068 acres
3.	Nature of the project	Residential floor
4.	DTCP license no. and validity status	58 of 2010 valid till 02.08.2025 [as per FBA at pg. 29 of complaint]
5.	Name of licensee	Shivanand Real Estate Pvt Ltd And 12 Others
6.	RERA Registered/registered	not registered
7.	Unit no.	D-124, FF, 1 st floor [as per FBA at pg. 38 of complaint]
8.	Tentative Unit area admeasuring	1770 sq. ft. and increased as 1938 sq. ft. [as per FBA at pg. 38 of complaint]
9.	Date of sanction of building plan	N/A [Not on record]
10.	Tripartite agreement	30.08.2010 (Page 64 of complaint)
11.	Date of builder buyer's agreement	07.03.2012 [Pg.28 of complaint]
12.	Possession clause	5.Possession Subject to Force Majeure, as defined in Clause 14 and further subject to the Purchasers) having complied with all its obligations under the terms and conditions of this Agreement and the Purchaser(s) not being in default under any part of this



		<p>Agreement including but not limited to the timely payment of each and every installment of the total sale consideration including DC, Stamp duty and other charges and also subject to the Purchasers) having complied with all formalities or documentation as prescribed by the Seller/Confirming Party, the Seller/Confirming Party proposes to hand over the physical possession of the said unit to the Purchasers) within a period of 24 months from the date of sanctioning of the building plan or execution of Floor Buyers Agreement, whichever is later ("Commitment Period"). The Purchasers) further agrees and understands that the Seller/Confirming Party shall additionally be entitled to a period of 180 days ("Grace Period") after the expiry of the said Commitment Period to allow for filing and pursuing the Occupancy Certificate etc. from DCP under the Act in respect of the entire colony.</p> <p>[Pg.42 of complaint]</p>
13.	Due date of possession	<p>07.09.2014</p> <p>(Calculated from the date of execution of floor buyer agreement in absence of date of approval of sanction of building plans)</p> <p>(Grace period is included)</p> <p>(Inadvertently recorded wrong as 19.09.2014 in the POD dated 24.01.2025)</p>
14.	Basic sale consideration	<p>Rs.90,32,888/-</p> <p>[as per SOA at pg.72 of complaint]</p>
15.	Amount paid by the complainant	<p>Rs.55,52,267/-</p> <p>[as per SOA at pg.72 of complaint]</p>
16.	Occupation certificate /Completion certificate	<p>15.07.2019</p> <p>(At page 87 of reply)</p>

17.	Offer of possession	05.08.2019
18.	Reminder letter	03.04.2012 , 03.07.2012 , 21.4.2012 10.12.2019 , 16.10.2019 , 19.2.2020, 16.4.2020 (Page 121- 126 of reply)
19.	Cancellation Letter	15.02.2022 (Page 137-138 of reply)
20.	Settlement deed	04.11.2022 (Page 101 of complaint)

B. Facts of the complaint:

3. The complainants have made the following submissions:

- I. That the complainants booked a unit in low rise houses being developed by respondent no. 1 Ltd. And Countrywide Promoters Pvt. Ltd. & Others through a broker Space Real Estates, and made a payment of Rs.6,90,000/- as booking amount, vide receipt no. 2011/1400005112 & 113 both dated 24.05.2011, in favour of respondent no. 1 Limited for their unit no. d-124 ff, of project amstoria, Sector-102, Gurugram. Subsequently, floor buyer's agreement was executed between the parties on 17.03.2012 and as per the possession clause the due date comes out to be 06.09.2014 as taken from the date of signing of the builder buyer agreement being later.
- II. That subsequent to signing of floor buyers' agreement dated 07.03.2012, respondent no. 1 demanded Rs.31,68,708/- to be paid by allottee through HDFC Bank. Since the allottee opted for construction link subvention plan and consequent to this, a tripartite loan agreement was signed on 30.08.2010 amongst allottee, HDFC Bank and respondent no. 1 Ltd. for advancing a loan of up to Rs.

44,00,000/- . A statement of account issued by respondent no. 1 dated 24.09.2012 is showing a demand of Rs. 39,44,953/- and received also Rs. 39,44,954/- showing no balance to be paid.

- III. That as per the tripartite agreement, HDFC went on releasing the payment which were due as per the subvention scheme. The statement of account as on 10.03.2018 issued by respondent no. 1 Ltd. is showing that total Rs. 41,81,568/- has been demanded/ called, whereas the statement is showing that respondent no. 1 has already received Rs. 55,52,267/- which is in excess of the demand by Rs. 13,70,699/-
- IV. That on 05.08.2019, respondent no. 1 Ltd. issued offer of possession for subject unit vide Invoice dated 05.08.2019. Annexure A of this invoice is showing a revision in the area of the flat from 1770 sq. ft. to 1938 sq. ft. In addition, the amount against other sub heads had also been increased as shown in Annexure-A of the invoice cited above. In absence of occupation certificate, issuing of offer of possession letter is in contravention of the Act 2016 and rules. Without obtaining occupation certificate the respondents demanded Rs. 60, 59,214/- that too in one go for a flat having basic sale price of Rs. 74, 85,924/- is invalid.
- V. That the respondent no. 1 through Business Park Maintenance Services Pvt. Ltd. had further raised an invoice dated 24.05.2021, demanding payment of Rs. 2, 32,39,272/- towards maintenance charges. The Allottees contested the revision of the area of the flat from 1770 sq. ft. to 1938 sq. ft., and PLC charges and extra ordinary increase in the price of the unit. Without justifying the increase in the revised price of the flat respondent no. 1 issued a termination / cancellation intimation in respect of unit no. D-124-FF in project

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Amstoria, Sector-102, Gurugram dated 15.02.2022 and mailed it to the allottees vide email from customercare@respondent no.1.com on 15.02.2022.

- VI. The allottees vide email dated 23.02.2022 reminded the respondent no. 1 to clarify such extra ordinary revision in the cost of flat as per the terms & conditions laid in the builder buyer agreement. The allottees also met the officials of the respondent no. 1 specifically Miss. Munmun and other officials of customer case and nothing came out from them to answer his queries. Without clarifying anything on the queries raised by allottees, the respondent no. 1 entered into an another tricky document called as settlement deed aiming solely to nullify / mitigate the effects of various judgments pronounced by Hon'ble Supreme Court, NCDRC and HRERA. The context of this instrument of "Settlement Deed" itself is evidential in itself that it was drafted by experts to scare / frighten / coerce the allottees to sign as proposed by respondent no. 1. In addition respondent no. 1 through the settlement deed also made the allottees to pay additional Rs.56,00,000/- over and above Rs. 55,52,493/- Thus making the revised cost of this flat as Rs. 1,11,52,493/-.
- VII. That the allottees got prepared a draft of Rs.56,00,000/- in favour of respondent no. 1 Ltd. and talked to customer care office of respondent no. 1 to know, on which address this draft is to be sent by post. The reply given by various officials of respondent no. 1 Ltd. was to hold it for some more time as Company is to decide / finalize other issues pertaining to the project of Amstoria. Ultimately the allottees had to get it cancelled when no satisfactory reply was received from respondent no. 1. That the counsel from the respondents stated before the Authority during hearing that the respondent no. 1 again

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terminated the unit as the buyer could not make the payment of Rs. 56, 00,000/- which was agreed as per clause 2.4 of the settlement deed (Ref page 102 of complaint). This appears to be false cancellation as the same was never received by the allottees either by post or on email in spite of the fact that there is no change in the postal address or email id. The complainants have affirmed it by way of submitting affidavit and copy of the same is enclosed with the complaint.

VIII. The total delay as occurred up to the filing of this complaint is 7 Years and 8 months and attracts an interest as per the Act. The respondent is to give back to the allottees after adjusting the accrued interest till the legal / as per rule possession is given to the allottees.

IX. Written submissions were filed by the complainants. The same were taken on record and perused further.

C. Relief sought by the complainants:

4. The complainants have sought following relief(s):

- i. Direct the respondents to pay delayed possession charges.
- ii. Direct the respondents to set aside the cancellation letter dated 15.02.2022.
- iii. Direct the respondents to cancel and withdraw the settlement deed dated 04.11.2022.

D. Reply by the respondent:

5. The respondent contested the complaint on the following grounds:

- I. That it is submitted that the name of the respondent no. 2 be deleted from the array of parties as the same is merely a confirming party to the agreement. Moreover, the relief sought by the complainants are only with respect to the respondent no. 1. Hence, the name of respondent no. 2 be deleted from the array of parties.

- II. That the complainants being interested in the residential project of the respondent known under the name and style of "Amstorla" applied for the allotment of a flat vide application form dated 23.05.2011 and was consequently allotted tentative unit bearing no. D-124, 1st floor admeasuring tentative super area of 1770 sq. ft.
- III. That thereafter a bulder buyer agreement dated 07.03.2012 was executed between the complainants and the respondents. It is imperative to mention here that the complainants, after being fully satisfied and agreed with the terms and conditions of the agreement, voluntarily and wilfully entered into the same.
- IV. That a tripartite agreement dated 30.08.2010 was executed between the complainants, respondent no. 1 and the HDFC Bank. As per clause 5.1 of the buyer agreement the due date of offer of possession of the unit was 24 months from the date of sanction of Building Plans or execution of Agreement, whichever is later along with a grace period of 180 days. That the building plans of the project were sanctioned on 28.06.2017 and hence the due date of offer of possession of the unit comes out to be 28.12.2019.
- V. That the construction of the unit was hampered subject to the happening of the force majeure circumstances and other circumstances beyond the control of the company, the benefit of which is bound to be given to the respondent. At this stage, it is categorical to note that the respondent no.1 was faced with certain force majeure events including but not limited to non-availability of raw material due to various orders of Hon'ble Punjab & Haryana High Court and National Green Tribunal thereby regulating the mining activities, brick kilns, regulation of the construction and development activities by the judicial authorities in NCR on account of the

environmental conditions, restrictions on usage of water, etc. It is pertinent to state that the National Green Tribunal in several cases related to Punjab and Haryana had stayed mining operations including in O.A No. 171/2013, wherein vide Order dated 2.11.2015 mining activities by the newly allotted mining contracts by the state of Haryana was stayed on the Yamuna River bed. These orders in fact inter-alia continued till the year 2018. Similar orders staying the mining operations were also passed by the Hon'ble High Court and the National Green Tribunal in Punjab and Uttar Pradesh as well. The stopping of mining activity not only made procurement of material difficult but also raised the prices of sand/gravel exponentially. It was almost 2 years that the scarcity as detailed aforesaid continued, despite which all efforts were made and materials were procured at 3-4 times the rate and the construction continued without shifting any extra burden to the customer. The time taken by the respondent no.1 to develop the project is the usual time taken to develop a project of such a large scale and despite all the force majeure circumstances, the respondent no.1 completed the construction of the project diligently and timely, without imposing any cost implications of the aforementioned circumstances on the complainants and demanding the prices only as and when the construction was being done. It is to be noted that the development and implementation of the said project have been hindered on account of several orders/directions passed by various authorities/forums/courts, before passing of the subjective due date of offer of possession.

VI. That the aforementioned circumstances are in addition to the partial ban on construction. In the recent past the Environmental Pollution (Prevention and Control) Authority, NCR (EPCA) vide its notification

bearing no. EPCA-R/2019/L-49 dated 25.10.2019 banned construction activity in NCR during night hours (6 pm to 6 am) from 26.10.2019 to 30.10.2019 which was later on converted to complete ban from 01.11.2019 to 05.11.2019 by EPCA vide its notification bearing no. R/2019/L-53 dated 01.11.2019.

- VII. That from the facts indicated above and documents appended, it is comprehensively established that a period of 196 days were consumed on account of circumstances beyond the power and control of the respondent no.1, owing to the passing of orders by the statutory authorities. The respondent no.1 has been prevented by circumstances beyond its power and control from undertaking the implementation of the project during the time period indicated above and therefore the same is not to be taken into reckoning while computing the period of completion of construction as has been provided in the agreement.
- VIII. That the respondent no.1 had the right to suspend the construction of the project upon happening of circumstances beyond the control of the complainants as per clause 14 of the agreement, however, despite all the hardships faced by the respondent no.1, the respondents did not suspend the construction and managed to keep the project afloat through all the adversities.
- IX. That in light of the *bona fide* conduct of the respondent, no delay in the construction of the unit, the peaceful possession had already been offered to the complainants, non-existence of cause of action and the frivolous complaint filed by the complainants, this complaint is bound be dismissed with costs in favor of the respondent. Hence, the present complaint is liable to be dismissed.

- X. That the respondent completed to construction of the unit timely and had received the occupation certificate for the unit on 15.07.2019 and offered the possession of the unit to the complainants on 05.08.2019, i.e., before the due date of offer of possession of the unit.
- XI. That as per clause 2.13 of the agreement, the super area of the above-noted unit was tentative in nature and had to be finally determined after the receipt of the occupation certificate. Upon the issuance of the occupation certificate dated 15.07.2019, the final super area of the unit allotted to the complainants was noted to be 1938 sq. ft. which was duly informed to the complainants along with the offer of possession. Moreover, the complainants had also agreed to the tentative nature of the unit and had also executed an undertaking dated 17.02.2012 in lieu of the same. As per the clause 4 of the affidavit of the undertaking dated 17.02.2012, the complainants agreed to the tentative nature of the unit and undertakes to have no objection in case of change of the super area of the said unit.
- XII. That as per clause 7 of the agreement, the timely remittance of due instalments by the complainants was the essence of the agreement and if the complainants fails to abide by the terms and conditions of the agreement and delayed in remitting the due instalment, the respondents have the right to charge interest upon the due instalments.
- XIII. That the complainants delayed in remitting the due instalment on time due to which various demands and reminder letters were also issued in favour of the complainants. The *bonafide* of the respondent is imperative to note that even though the respondent was not under an obligation to remind the complainants regarding the due instalment, the respondent sent various demands and reminder

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letters in order to inform the complainants regarding the due instalments. The various demands and reminder letters issued by the respondent are:

S. No.	Particulars	Date
1.	Receipts 2	24.05.2011
2.	Receipt	21.09.2011
3.	Payment Request(90 days of booking)	03.04.2012
4.	Reminder Notice	21.04.2012
5.	Reminder Notice	31.05.2012
6.	Payment Reminder II	03.07.2012
7.	Receipt	24.09.2012
8.	Receipt	19.12.2012
9.	Reminder II	10.12.2019
10.	Reminder I	16.10.2019
11.	Reminder	19.02.2020
12.	Last and Final Opportunity letter	16.04.2020

XIV. That the complainants failed to fulfil their obligations of payment of the instalments against the total sales consideration of the unit and hence, the complainants cannot be allowed to take benefit of her own wrong and the present complaint is thus liable to be dismissed with costs on this ground alone. Furthermore, it is submitted that all the demand raised by the respondents were as per the agreed terms and conditions of the agreement, executed between the parties.

XV. That, it is evident from the above-mentioned submissions that the complainants stood in the event of default for not making payment, not taking possession of the unit, non- execution of sale deed, and non-payment of statutory dues. Accordingly, the respondents had the right to terminate the unit as per the agreed terms and conditions

under the agreement. That multiple opportunities were given to the complainants to rectify their default through the reminder notices and final demand notice for payment of outstanding amount, however, the complainants again willingly and voluntarily chose to not rectify the same, and consequently, after waiting for more than two years from the offer of possession letter, the respondents were constrained to terminate the allotment of the unit of the complainants by issuing the termination letter on 15.02.2022.

XVI. That accordingly, after termination of the allotment of the unit of the complainants, the complainants were left with no right, titled, interest, charge or lien over the unit. That after the termination of the allotment of the unit of the complainants, solely due to the default of the complainants, the respondents are well within their right to forfeit the earnest amount along the delayed payment interest till the date of termination and other non-refundable amount including brokerage charges, processing fees, any monetary benefit given to the purchaser and the statutory dues paid against the unit.

XVII. That, at this stage, the *bonafide* of the complainants is imperative to note that even after various defaults by the complainants, the respondent once again approached the complainants and offered a settlement in order to resolve the dispute and amicably settle the matter in lieu of which a settlement agreement dated 04.11 2022 was executed between the parties but the complainants till date failed to abide by the terms and conditions of the settlement agreement and failed to provide the due payments in lieu of the above-noted unit.

XVIII. Written submissions have been filed by the respondent. The same have been taken on record and perused further

E. Jurisdiction of the authority:

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

E.I Territorial jurisdiction

7. 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 allottees 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;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoter, 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 quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings on objections raised by the respondent:

- F.I Objection regarding the project being delayed because of force majeure circumstances.**

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10. The respondents raised the contention that the construction of the project was delayed due to force majeure conditions such as the orders of the National Green Tribunal, Hon'ble Environment Pollution (Prevention and Control Authority), Haryana State Pollution control Board, Hon'ble Supreme Court prohibiting construction in and around Delhi and the Covid-19 pandemic among others, but all the pleas advanced in this regard are devoid of merit.
11. A builder buyer's agreement for unit no. D-124, first floor was issued by respondent to complainant and the same was executed on 07.03.2012. The due date of handing over of possession as per the possession clause of the agreement comes out to be 07.09.2014 including the grace period. The events such as the orders of the National Green Tribunal, Hon'ble Environment Pollution (Prevention and Control Authority), and Haryana State Pollution control Board, Hon'ble Supreme Court prohibiting construction in and among others were for a shorter duration of time and were not continuous. Though some allottees may not be regular in paying the amount due but whether the interest of all the stakeholders concerned with the said project cannot be put on hold due to fault of some of the allottees. Thus, the promoter-respondents cannot be granted any leniency for aforesaid reasons. It is well settled principle that a person cannot take benefit of his own wrongs.

G. Findings on relief sought by the complainant:

- G.I Direct the respondents to pay delayed possession charges.
G.II Direct the respondents to set aside the cancellation letter dated 15.02.2022.
G.III Direct the respondents to cancel and withdraw the settlement deed dated 04.11.2022.

12. The above-mentioned reliefs sought by the complainants are taken together being interconnected as the finding of one relief will definitely effect the other one.

13. In the present complaint, the complainants intend to continue with the project and seeks delayed possession charges. The complainants were allotted a unit in the project of the respondent vide application for the allotment. The builder buyer's agreement was executed between the parties on 07.03.2012 and the complainants paid a total sum of Rs. 55, 52,267/-. As per clause 5 of the builder buyer's agreement the developer proposes to handover the physical possession of the said unit to the complainant within a period of 24 months from the date of sanctioning of the building plan or execution of floor buyer agreement whichever is later along with a grace period of 180 days after the expiry of the said commitment period to allow for filing and pursuing the occupancy certificate etc. from DTCP under the Act in respect of the entire colony.
14. The due date of possession is calculated from the date of execution of builder buyer agreement in absence of date of approval of sanction of building plan. Therefore the due date of possession comes out to be 07.03.2014.
15. However as far as the grace period is concerned the same is allowed in terms of order dated 08.05.2023 passed by the Hon'ble Appellate Tribunal in ***Appeal No. 433 of 2022 tilted as Emaar MGF Land Limited Vs Babia Tiwari and Yogesh Tiwari*** wherein it has been held that if the allottee wishes to continue with the project, he accepts the term of the agreement regarding grace period of three months for applying and obtaining the occupation certificate. The relevant portion of the order dated 08.05.2023, is reproduced as under:

"In our opinion if the allottee wishes to continue with the project, he accepts the term of the agreement regarding grace period of three months for applying and obtaining the occupation certificate. So, in view of the above said circumstances, the appellant-promoter is entitled to avail the grace period so provided in the agreement for applying and obtaining the Occupation Certificate. Thus, with inclusion of grace period of 3 months as per the provisions in clause 11 (a) of the agreement, the total completion

period becomes 27 months. Thus, the due date of delivery of possession comes out to 07.06.2014."

16. Therefore, in view of the above judgement and considering the provisions of the Act, the authority is of the view that, the promoter is entitled to avail the grace period so provided in the agreement for applying and obtaining the occupation certificate. Therefore, the due date of handing over of possession is calculated from the date of execution of builder buyer agreement in absence of date of approval of sanction of building plans and the same comes out to be 07.09.2014 including grace period of 180 days.
17. The occupation certificate was obtained by the promoter on 15.07.2019 and the respondent offered the possession to the complainants on 05.08.2019. The respondent vide letters dated 03.04.2012, 21.04.2012, 31.05.2012, 03.07.2012, 05.08.2019, 16.10.2019, 10.12.2019 and 19.02.2020 raised a demand for outstanding balance to be paid by the complainants. Afterwards the respondent issued a final demand notice on 16.04.2020 and finally terminated the allotment of the unit on 15.02.2022 on failure of payment of outstanding instalments as the complainants never paid the said raised demand.

Now, the question before the Authority is whether cancellation vide letter dated 15.02.2022 is valid in the eyes of law or not?

18. On consideration of the circumstances, the documents placed on record and submissions made by the parties, the Authority observes that the complainant was allotted the subject unit vide builder buyers agreement dated 07.03.2012. As per possession clause 5 of BBA dated 07.03.2012, the possession of the unit was to be delivered to the complainant by 07.09.2014 including grace period of 6 months. They have paid an amount of Rs. 55,52,267/- against the sale consideration of Rs. 90,32,888/-.
19. The complainants-allottees was under an obligation to make payment of outstanding dues as agreed between the parties vide agreement dated

07.03.2012. As per section 19(6) of the Act of 2016, every allottees who has entered into an agreement is responsible to make necessary payments in the manner and within the time as specified in the said agreement. In the present case, the complainants-allottees has not obliged with the terms of the agreement, therefore, the cancellation dated 15.02.2022 of the unit stands valid.

20. As per the builder buyer's agreement the earnest money mentioned in clause 1.17 is 25%. The clause 1.17 is reproduced below for the ready reference:

(1.17) EARNEST MONEY

Earnest Money shall mean 25% of the Total sale consideration on the Built up Area of the floor".

21. The issue with regard to deduction of earnest money on cancellation of a contract arose in cases of *Maula Bux VS. Union of India, (1970) 1 SCR 928* and *Sirdar K.B Ram Chandra Raj Urs. VS. Sarah C. Urs., (2015) 4 SCC 136*, and wherein it was held that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in the nature of penalty, then provisions of section 74 of Indian 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 Private Limited* decided on 26.07.2022, held that 10% of basic sale price is a 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 framed 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."*

22. Keeping in view the aforesaid factual and legal provisions, the respondent can retain the earnest money paid by the complainants against the allotted unit and shall not exceed 10% of the consideration amount. So, the same was liable to be forfeited as per Haryana Real Estate Regulatory Authority Regulation 11(5). So, the respondent/builder is directed to refund the amount received from the complainants i.e., Rs.55,52,267/- after deducting 10% of the sale consideration and return the remaining amount along with interest at the rate of 11.10% (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., 15.02.2022 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.
23. However, it is important to mention that after the unit was cancelled by the respondent, both the parties later entered into a settlement agreement, wherein it was stated that as per clause 2.4 the customer agrees to pay Rs.56,00,000/- by 30.10.2022 . The clause is reproduced as under for ready reference:-

24. The customer hereby agrees and undertakes to make payment of an amount of Rs. 56,00,000/- (Rupees Fifty Six Lakhs Only) as full and final amount towards the balance sale consideration payable in respect of the Unit, without any demur or protest by 30.10.2022.

24. As per the settlement agreement the complainant was supposed to pay Rs.56,00,000/- by 30.10.2022. The complainant in its facts have stated that the complainants prepared a draft of Rs.56,00,000/- and asked the respondents on which address this draft is to be sent by post. The reply given by the respondents was to hold it for some time as company is to decide/ finalise other issues pertaining to the project and ultimately the complainants had to get it cancelled when no satisfactory response was received from the respondents. However, it is important to consider the date of the draft cheque that the complainants have attached as an annexure to their complaint. The draft cheque is dated 29.03.2023, which is after the agreed-upon date of 30.10.2022 specified in the settlement agreement.
25. The counsel of the respondent vide proceeding dated 24.01.2025 stated that as per clause 2.4 of the settlement agreement the complainants were obligated to pay Rs.56,00,000/- towards the balance sale consideration by 30.10.2022. However, the complainants failed to adhere to terms of the said settlement deed and thereby the terms of the settlement deed stand null and void.
26. The Authority is of the view that the complainants have failed to pay the agreed amount by the specified date, as outlined in the settlement agreement. It is clearly evident that the fault lies with the complainants for not adhering to the terms and conditions of the settlement agreement. Consequently, the cancellation done by the respondent is valid in the eyes of law.

H. 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 cast upon the promoters as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

- i) The respondent/promoter is directed to refund the paid up amount i.e., Rs.55,52,267/- after deduction of 10% of basic sale consideration of Rs. 90,32,888/- with interest at the prescribed rate i.e., 11.10% p.a. on such balance amount, as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of cancellation i.e., 15.02.2022 till the actual date of refund of the amount.
- ii) A period of 90 days is given to the respondent-builder to comply with the directions given in this order and failing which legal consequences would follow.

28. Complaint stands disposed of.

29. File be consigned to registry.

Dated: 24.01.2025



V.I.
Vijay Kumar Goyal
Member
Haryana Real Estate
Regulatory Authority,
Gurugram

HARERA
GURUGRAM