

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

| | |
|---------------------|--------------|
| Complaint no. | 3313 of 2023 |
| Complaint filed on | 18.07.2023 |
| Order pronounced on | 08.05.2024 |

Harjeet Kaur Sood**R/o:** - H. No. A-48, 39 A, DLF Phase- I, Garden Estate &
Silver Oaxe, Sikanderpur Ghosi, Gurgaon, Haryana**Complainant****Versus****M/s BPTP Limited****Corporate Office:** OT-14, 3rd Floor, Next Door, Sector-76,
Faridabad, Haryana-122004**Respondent****CORAM:**

Shri Vijay Kumar Goyal

Member**APPEARANCE:**

Shri Vinay Shukla (Advocate)

Shri Harshit Batra (Advocate)

**Complainant
Respondent****ORDER**

1. The present complaint has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions to the allottee as per the agreement for sale executed inter-se them.

A. Unit and Project related details:

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

| Sr. No. | Particulars | Details |
|---------|---|--|
| 1. | Name of the project | 'BPTP Terra, Sector 37D, Gurugram, Haryana. |
| 2. | Date of booking application | 12.08.2012 (Page no. 49 of reply) |
| 3. | Date of allotment letter | 29.10.2012 (Page no. 65 of reply) |
| 4. | Date of execution of flat buyer's agreement | 16.01.2013 (Page no. 70 of reply) |
| 5. | Date of execution of Tripartite agreement | 29.03.2013 (Page no. 168 of reply) |
| 6. | Unit no. | T25-1702, 16 th floor, tower-T25 (Page no. 76 of reply) |
| 7. | Unit area admeasuring | 1691 sq. ft. (Page no. 76 of reply) |
| 8. | Possession clause as per BBA | 1.6 <i>xxx.....within a period of 42 months from the date of sanctioned of building plans of the building or the execution of the buyer's agreement.....xxx</i> |
| 9. | Due date of delivery of possession | 16.07.2016 Calculated from the date of buyer's agreement |

| | | |
|-----|--------------------------------------|--|
| 10. | Total consideration | Rs.1,36,43,827/- (As per SOA at page 99 of reply) |
| 11. | Total amount paid by the complainant | Rs.1,05,43,729/- (As per SOA at page 99 of reply) |
| 12. | Occupation certificate | 09.12.2021 (Page no. 97 of reply) |
| 13. | Offer of possession | 11.12.2021 (Page no. 97 of reply) |
| 14. | Reminder/ Demand letters dated | 13.01.2022, 02.02.2022, 15.02.2022 (Documents filed with application dated 10.01.2025 u/s 151 of CPC) |
| 14. | Final Demand Notice | 24.03.2022 (Page no. 164 of reply) |
| 15. | Termination/ cancellation intimation | 09.11.2022 (Page no. 166 of reply) |

B. Facts of the complaint

3. The complainant has made the following submissions: -

- The grievances of the Complainant relate to breach of contract, false promises, breach of trust, gross unfair trade practices and deficiencies in the services committed by the respondent with regard to unit no. T-25-1702 on the 17th floor, tower 25, having an approximate area of 1691 square feet paying hard-earned money, in the project called Terra, situated in Sector 37D, Gurugram, Haryana.
- The present complaint has been made before this Hon'ble Authority by the complainant against the respondent for the default in handing over the possession of the flat as per mutual understanding and in

accordance with the terms and conditions of the flat buyer's agreement executed between the complainant and respondent, violation of terms and conditions of the agreement, breach of trust, arbitrary cancellation of flat, delay possession charges on account of non-delivery of the flat within the scheduled timeline, arbitrary cancellation of flat as per whims and wishes of respondent without giving any notice of any nature to the complainant.

- c. The respondent is a public limited company, engaged in the business of Real Estate. The respondent made wide publicity in the print and electronic media for its project named "TERRA by BPTP", promising an expanse of abundant greenery, a secured gated community dotted with the choicest leisure and entertainment choices with breathtaking amenities.
- d. The complainant, believing the statements made in the brochures, information materials, and media as true, decided to visit the project site to know more about the respondent company and its project. The complainants were only allowed to meet with the sales team of the respondent, who claimed that the project would be having world-class facilities. Further, the sales team of the respondent stated that the project is spread over 19 acres approximately and the complete area would be developed by the respondent and its associates only, to provide world-class habitation to the complainant, and categorically informed and confirmed the complainant that the flat would be delivered on the due date and that the project is escalation free.
- e. Among other representations made by the sales team of the respondent, the sales team of respondent emphasized that the units under the project have been sold under a subvention scheme wherein the buyers are only required to pay the application and allotment

money and all the Pre-EMI's till the date of handing over the possession of the unit will be borne by respondent where the buyers avail loan facility to finance the unit.

- f. Lured by the subvention scheme and believing the statement and claims made by the sales team of respondent to be true and relying on the assurances and promises of the respondent regarding the development of the project and representation of the respondent to develop the project as per the representation made to the complainant, and within stipulated time as mentioned in the buyer agreement, the complainant on 22.08.2012 has made an allotment application and resultantly a flat bearing No. T-25-1702 in Floor No 17, Tower 25 at Terra situated in Sector 37D Gurugram, Haryana admeasuring 1691 sq. ft approx. at a basic sale price of Rs. 88,77,750/-.
- g. On 27.11.2012, the complainant entered into buyer agreement with the respondent. to reap the benefits of the subvention scheme floated by the respondent and respondent in order to fulfill its claim, jointly with the petitioner approached the Housing Development Finance Corporation Ltd (HDFC) for availing home loan facility of Rs. 82,00,000/- towards payment of the sale/purchase consideration of the aforementioned flat, accordingly, on 29.03.2013, a tripartite agreement was executed between the complainant, respondent, and HDFC. During the time of the execution of the aforesaid agreement, authorized representatives of respondent again assured complainant that the possession of the unit will be delivered before the time mentioned in the BBA and till the date of handing over the possession of the flat, all the Pre-EMI's will be borne by the respondent.

- h. The complainant and respondent informed HDFC of the arrangement entered into between respondent and complainant in terms of the subvention scheme whereof respondent has assumed the liability of payments of Pre-EMI's under the loan agreement as payable by the complainant till the date of handing over the possession of the aforesaid flat to complainant. accordingly, the loan was scheduled to be sanctioned in a manner and the terms and conditions of the Loan were made in such a manner that the complainant would not have to pay anything except for the EMI's which will start from the date of handing over the possession of the flat to the complainant by the respondent and all the Pre-EMI's till such date will be borne by the respondent.
- i. The complainant has already paid a total sum of Rs. 1,05,43,729/- on or before 29.07.2016 i.e. more than 100% of the basic sale price of the flat as mentioned in the buyer's agreement. Clause No. 1.6 of the buyer agreement states that the possession of the allotted floor/apartment was to be given within 42 months of the date of execution of the buyers agreement (27.11.2012) or date of sanction of business plan(21.09.2012), whichever is later, accordingly, the possession of the flat was supposed to be given on or before 31.05.2016, thus respondent was required to deliver the possession of the flat by 31.05.2016 ("Maximum delivery period"). However, the respondent failed to offer possession within the due timeline.
- j. Complainant consistently suffered at the hand of respondent as since July 2015, till march 2022 complainant has paid all the pre-emi which was supposed to be paid by the respondent. Had the respondent offered and given possession of the flat on time all the Pre-EMIs would

have stopped back in May 2016 and payment of EMIs would have started.

- k. Due to no fault of the complainant, the complainant was made and forced to pay all the Pre-EMIs since July 2015 and the complainant has made a total payment of INR 41,80,859/- by March 2022, towards the Pre-EMI's. The respondent has been grossly deficient, defective, negligent in providing its services and discharging its duties under the agreement, and the conduct of respondent has been dishonest, fraudulent, wrongful and mala-fide. Also, the respondent's acts have been unfair, and detrimental to the complainant. Due to the fault of the respondent, complainant was forced to pay Pre-EMIs.
- l. In the month of November 2016, just before the agreed date of delivery of possession, when the complainants visited the project site, the complainant was shocked and surprised that the respondent has hardly developed any portion of the project as per the agreement, however, was very regular and consistent in extorting money from the naive complainant. Respondent was supposed to hand over the possession to complainants in the month of May 2016.
- m. The complainant, after rigorous follow ups, got to meet the team of respondent to know the actual status, and in case of delay beyond the maximum delivery period, to take refund of their money.
- n. It is noteworthy that complainant has already paid Rs. 1,05,43,729/- as and when demanded by respondent and since year 2017 complainant has been chasing respondent for the delivery of the flat and after chasing respondent for all these years for the delivery of the flat, the dream of complainant of having her own house in her own name shattered into pieces when she got to know that the flat has been cancelled due to no fault of complainant.

- o. That the documents that have been received by complainant from respondent on 14.02.2023 *inter alia* contained a letter dated 11.12.2021 wherein respondent had offered to take possession of the flat subject to deposit of an exorbitant amount of INR 37,07,098/- on account of various unreasonable charges such as cost escalation charges of Rs. 8,00,584/-, development charges of Rs. 7,81,242/-, VAT Rs. 57,277/-, service tax 4,28,565/-, GST Rs. 359164/- and others. The respondent has from the very beginning resorted to unfair trade practices and on one occasion or the other has tried to extort money from the complainant.
- p. The cost escalation charges to the tune of Rs. 8,00,584/- cannot be imposed by respondent on complainant as such charges have been incurred by respondent due to its own fault and the burden of the respondent's fault cannot be shifted on complainant. Cost escalation charges would not have been incurred in the first place if respondent had completed the project within the due timeline, accordingly, respondent is solely liable for its own fault.
- q. That respondent has included interest on delayed payment in the aforesaid amount of Rs. 37,07,098/- but has deliberated not deducted the delayed possession charges of Rs. 7,05,320/- (as calculated from the agreed date of delivery till the date of filing this complaint) from the aforesaid sum.
- r. The complainant had no option but to approach this authority as the former failed to provide habitable place and further demanded more money vide offer of possession.

C. Relief sought by the complainant:

4. The complainant has sought following relief:
- a. Direct the respondent to handover the physical possession of the Flat.



- b. Direct the respondent to pay delayed possession charges along with interest.
 - c. Direct the respondent restraining from raising the demand for development charges, cost escalation charges, V.A.T, Service Tax and GST Charges.
5. On the date of hearing, the authority explained to the respondent/promoter about the contraventions as alleged to have been committed in relation to section 11(4)(a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent

6. The respondent has contested the complaint on the following grounds:
- a. The complainant being interested in the real estate development of the respondent under the name and style of "Park Terra" tentatively applied for the provisional allotment of the unit vide application form dated 12.08.2012 and were consequently allotted unit no. T-25-1702 on the 17th floor in tower 25, tentatively admeasuring 1691 sq. ft. and finally noted to be admeasuring 1,832.00 sq. ft. vide the provisional allotment letter dated 29.10.2012.
 - b. The provisional allotment of the unit, the buyer's agreement was executed between the parties on 27.11.2012.
 - c. The delivery of possession of the unit as per clause 5.1 read with clause 1.6 was within 42 months from the sanction of building plans or the execution of the FBA, whichever is later and an additional grace period of 180 days. Since the building plans were sanctioned on 21.09.2012, hence the tentative due date, as computed from date of execution of FBA as it later comes out to be 21.09.2016. However, the said period was subject to *force majeure* circumstances, as noted in

clause 10 and 1.6 of the agreement. What computes to be *force majeure* is noted in the clause 1.17 of the agreement.

- d. The respondent was adversely affected by various construction bans, lack of availability of building material, regulation of the construction and development activities by the judicial authorities including NGT in NCR on account of the environmental conditions, restrictions on usage of ground water by the High Court of Punjab & Haryana, demonetization etc. and other force majeure circumstances, yet, the respondent completed the construction of the project diligently and timely, without imposing any cost implications of the aforementioned circumstances on the complainant and demanding the prices only as and when the construction was being done.
- e. A period of 467 days was consumed on account of circumstances beyond the power and control of the respondent, owing to the passing of orders of various statutory authorities and the Covid-19 Pandemic, as noted above. It is well recognized that one day of hindrance in the construction industry leads to a gigantic delay and has a cascading effect on the overall construction process of a real estate project. All these circumstances come within the purview of the force majeure clause and hence allow a reasonable time to the Respondent. That as per *clause 10*, in such circumstances, the Respondent will not be held responsible or liable for not performing any of its obligations or undertakings. However, despite all odds, the Respondent was able to carry out construction/development at the project site and obtain the necessary approvals and sanctions and has ensured compliance under the Agreement, laws, and, rules and regulations.
- f. The due date of delivery in possession was further subject to the material obligation of the complainant of making the due payments

and the breach of this material obligation by the complainant and other allottees has gravely affected the development of the project. That it was the complainant's obligation to make the timely payment against the unit as per the payment plan, however, the complainant miserably failed in living up to her obligations and *malafidely* did not make the payment as per demand on 11.12.2021 against the unit.

- g. The respondent raised demands upon reaching respective milestones but complainant the unlawfully and *malafidely* failed in making the complete payments. That in such a circumstance, a number of reminders were issued to the complainant, however, the complainant has been a chronic defaulter and miserably defaulted in adhering to her obligation of making the due payment. As is widely known and understood that the continuous flow of funds is pertinent to the real estate industry, it is submitted that upon the failure of the complainant in making due payments as per the schedule agreed upon, it has a cascading effect on the operations and the cost for proper execution of the project increases exponentially and further causes enormous business losses to the respondent. As per clause 10, in such circumstances, the respondent will not be held responsible or liable for not performing any of its obligations or undertakings.
- h. the respondent has complied with all of its obligations, not only with respect to the buyer's agreement with the complainant but also as per the concerned laws, rules and regulations thereunder and the local authorities. That despite innumerable hardships being faced by the respondent, the respondent completed the construction of the project and applied for the occupation before the concerned authority and successfully attained the occupation certificate dated 09.12.2021. It is respectfully submitted that once an application for grant of



occupation certificate is submitted to the concerned statutory authority to respondent ceases to have any control over the same. The grant of occupation certificate is the prerogative of the concerned statutory authority and the respondent does not exercise any influence in any manner whatsoever over the same. Therefore, it is respectfully submitted that the time period utilised by the concerned statutory authority for granting the occupation certificate is liable to be excluded from the time period utilised for implementation of the project.

- i. However, the complainant never turned up to take the possession of the unit. Multiple reminders dated 02.02.2022 and 15.02.2022 were given to the complainant, despite which the complainant failed to take possession of the unit and make the outstanding payment. Thereafter, one last and final opportunity was given by the respondent on 24.03.2022 wherein it was categorically noted that in case of failure to make the due payment, the complainant will have automatically relinquished/waived her rights over the unit.
- j. Upon the non-payment by the complainants, the complainant was considered under default under clause 5 and clause 7, and upon the failure of the complainant to rectify their default, the respondent had the complete right to terminate the unit of the complainant in accordance with clause 5.3, clause 7.1 and 7.4.
- k. The complainant stood in the event of default for not making payment, not taking possession of the unit, non-execution of conveyance deed, and non-payment of statutory dues. accordingly, the respondent had a right to terminate the unit as per the agreed terms and conditions under the agreement. That after having sufficiently waited for the complainant to fulfil her responsibilities, and to rectify her default, the

complainant willingly and voluntarily chose to not rectify the same, and consequently, the respondent terminated the unit by issuing the termination letter on 09.11.2022.

- l. In a very recent case titled as Nick Mehta v Haamid Real Estates Pvt. Ltd. 1662 of 2022, dated 03.03.2023, the Ld. Authority has allowed the deduction of VAT, statutory dues and 0.5% brokerage. That similarly, the termination / cancellation of the unit in the present case is valid and is bound to be upheld.
 - m. The complainant had also sought a loan from Housing Development Finance Corporation Limited against the subject unit and accordingly, a Tri-Partite Agreement was executed on 29.03.2013. As per the clause 3 of the Tri-Partite Agreement, the obligation to make the payment of Pre-EMI of the respondent was restricted till June 2015. The respondent has duly fulfilled its obligations under the said tri partite agreement made the payment of Pre-EMI of Rs. 13,99,152/-.
 - n. The complainant in her complaint alleges that the payment of Pre-EMI post June 2015 had to be made by the respondent, however, has failed to support her allegations with any documentary evidence, and hence the same cannot be allowed. It is a matter of fact and record that the respondent has fulfilled all of its responsibility where, on the other hand, the complainant has failed to do the same. The facts and circumstances of the present case reveal that the respondent has no right or lien over the unit in question. Accordingly, the present complaint should be dismissed.
7. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority

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

E.I Territorial jurisdiction

9. 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

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

Section 11(4)(a)

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

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

11. So, in view of the provisions of the Act of 2016 quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving

aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the objections raised by the respondent:

F.1 Objections regarding force majeure.

12. The respondents-promoter has raised the contention that the construction of the tower in which the unit of the complainant is situated, has been delayed due to force majeure circumstances such as orders passed by National Green Tribunal to stop construction, EPCA banning construction activities, Hon'ble Supreme Court banning construction activities in *M.C. Mehta vs Union of India*, Covid-19 etc. The plea of the respondent regarding various orders of the NGT and demonetisation and all the pleas advanced in this regard are devoid of merit. The orders passed by NGT banning construction in the NCR region was for a very short period of time and thus, cannot be said to impact the respondent-builder leading to such a delay in the completion. Hon'ble Delhi High Court in case titled as *M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr. bearing no. O.M.P (1) (Comm.) no. 88/2020 and LAS 3696-3697/2020* dated 29.05.2020 has observed as under:

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

13. In the present case also, the respondents were liable to complete the construction of the project and handover the possession of the said unit by 16.07.2016. It is claiming benefit of lockdown which came into



effect on 23.03.2020 whereas the due date of handing over of possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself and for the said reason, the said time period cannot be excluded while calculating the delay in handing over possession. The plea regarding EPCA is also devoid of merit. Further, also there may be cases where allottee has not paid instalments regularly but all the allottee cannot be expected to suffer because of few allottee. Thus, the promoter respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong. Hence, the plea advanced by the respondent stands rejected.

G. Findings regarding relief sought by the complainant.

G.I Direct the respondent to respondent to handover the physical possession of the Flat.

G.II Direct the respondent to to pay delayed possession charges along with interest.

14. The above-mentioned relief sought by the complainant are being taken together as the findings in one relief will definitely affect the result of the other relief and the same being interconnected.
15. The complainant was allotted a unit bearing no. T-25-1702, vide allotment letter dated 25.09.2014 under construction linked payment plan. However, a buyer agreement was executed between the parties on 16.01.2013 for total sale consideration of Rs.1,05,43,729/-and the complainant has paid an amount of Rs.1,36,43,827/-. As per clause 1.6 of the agreement, the respondent was required to hand over possession of the unit with 42 months from the date of execution of

agreement i.e., till 16.07.2016 (as building plan was sanctioned on 21.09.2012 as the date mentioned at page 03 of reply and buyer's agreement was executed on 16.01.2013, so due date is calculate from 42 months from the date of buyer's agreement being later.

16. That the respondent has obtained the occupation certificate in respect of the allotted unit of the complainant on 09.12.2021 and thereafter, has offered the possession of the unit on 11.12.2021. Thereafter, the respondent has issued various reminder cum demand letters to the complainant and requested to pay the outstanding dues but the complainant has failed to pay the same. Due to non-payment of the outstanding dues, the respondent has cancelled the unit vide cancellation letter dated 09.11.2022 vide which the respondent mentioned to forfeit the entire amount paid by him.
17. The respondent submitted that the complainant is a defaulter and has failed to make payment as per the agreed payment plan. Various reminders and final opportunities were given to the complainant and thereafter the unit was cancelled vide letter dated 09.11.2022. Accordingly, the complainants failed to abide by the terms of the agreement to sell executed inter-se parties by defaulting in making payments in a time bound manner as per payment schedule.

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

18. It is matter of record that the complainant booked the aforesaid unit under the above-mentioned payment plan and paid an amount of Rs.1,05,43,729/- towards total consideration of Rs.1,36,43,827/- which constitutes 77% of the total sale consideration.

19. It is pertinent to mention here that as per section 19(6) & 19(7) of Act of 2016, the allottee is under obligation to make payments towards consideration of allotted unit. The respondent after giving reminders dated 13.01.2022, 02.02.2022, 15.02.2022 for making payment for outstanding dues as per payment plan and then has cancelled the subject unit. Despite issuance of aforesaid numerous reminders, the complainant has failed to clearing the outstanding dues. The respondent has given sufficient opportunity to the complainant before proceeding with termination of allotted unit. Thereafter, the respondent issued final notice dated 24.03.2022, and the relevant proportion of the said notice is reproduce as under:-

"Your failure to deposit the above-mentioned overdue amount is in complete breach of the terms and conditions of the Agreements, wherein it was a specifically agreed and accepted by you that timely payment is of essence to the Agreement/allotment and any default in payment or non-payment shall constitute a fundamental breach thereof. Further, as previously notified to you in the Agreements and reiterated herein, your continued failure to adhere to the payment schedule and failure to make full and timely payment impacts our ability to fulfill our obligations to you and other customers and consequently prejudicially affects as well as results in the waiver of your rights under the Agreements, including but not limited to the right to claim any compensation for delay in handing over possession of the unit and the cancellation of your allotment amongst other rights. Accordingly in the event that you fail to strictly adhere to the complete terms of this Final Demand Notice and the Agreements, such action on your part shall amount to a voluntary, conscious and intentional waiver and relinquishment by you of all rights and privileges under the terms of the Agreements and this letter shall, in exercise of our rights under the terms of the Agreement, be treated as termination/ cancellation of allotment of unit and you shall cease to have any right or interest whatsoever in the said unit or under the agreements and shall be liable to forfeiture of earnest money deposit, accumulated interest and brokerage paid (if any). Further we shall deal with the said unit in any manner as we may deem fit."

20. As per clause 8 of the floor buyer's agreement, the respondent/promoter has a right to cancel the unit in case the allottee has breached the agreement to sell executed between both the parties. Clause 7.5 of the agreement to sell is reproduced as under for a ready reference:

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

21. That the above-mentioned clause provides that the promoter has right to terminate the allotment in respect of the unit upon default under the said agreement. Despite the issuance of several demand notices cum reminders the complainant has failed to clear the outstanding dues. Thus, the cancellation in respect of the subject unit is valid and the relief sought by the complainant is hereby declined as the complainant-allottee has violated the provision of section 19(6) & (7) of Act of 2016 by defaulting in making payments as per the agreed payment plan. In view of the aforesaid circumstances, only refund can be granted to the complainant after certain deductions as prescribed under law.
22. Now, another question arises before the authority that whether the authority can direct the respondent to refund the balance amount as per the provisions laid down under the Act of 2016, when the complainant has not sought the relief of the refund of the entire paid-up amount while filing of the instant complaint or during proceeding. It is pertinent to note here that there is nothing on record to show

that the balance amount after deduction as per relevant clause of agreement has been refunded back to the complainant. The authority observed that rule 28(2) of the rules provides that the authority shall follow summary procedure for the purpose of deciding any complaint. However, while exercising discretion judiciously for the advancement of the cause of justice for the reasons to be recorded, the authority can always work out its own modality depending upon peculiar facts of each case without causing prejudice to the rights of the parties to meet the ends of justice and not to give the handle to either of the parties to protract litigation. The authority will not go into these technicalities as the authority follows the summary procedure and principle of natural justice as provided under section 38 of the Act of 2016, therefore the rules of evidence are not followed in letter and spirit. Further, it would be appropriate to consider the objects and reasons of the Act which have been enumerated in the preamble of the Act and the same is reproduced as under: -

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

23. From the above, the intention of the legislature is quite clear that the Act of 2016 has been enacted to protect the interests of the consumer in real estate sector and to provide a mechanism for a speedy dispute redressal system. It is also pertinent to note that the present Act is in addition to another law in force and not in derogation. In view of the

A

same, the authority has power to issue direction as per documents and submissions made by both the parties.

24. The issue with regard to deduction of earnest money on cancellation of a contract arose in cases of ***Maula Bux VS. Union of India, (1970) 1 SCR 928 and Sirdar K.B. Ram Chandra Raj Ors. VS. Sarah C. Urs., (2015) 4 SCC 136***, and wherein it was held that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in the nature of penalty, then provisions of section 74 of Contract Act, 1872 are attached and the party so forfeiting must prove actual damages. After cancellation of allotment, the flat remains with the builder as such there is hardly any actual damage. National Consumer Disputes Redressal Commissions in CC/435/2019 ***Ramesh Malhotra VS. Emaar MGF Land Limited (decided on 29.06.2020)*** and ***Mr. Saurav Sanyal VS. M/s IREO Private Limited (decided on 12.04.2022)*** and followed in CC/2766/2017 in case titled as ***Jayant Singhal and Anr. VS. M3M India Limited decided on 26.07.2022***, held that 10% of basic sale price is reasonable amount to be forfeited in the name of "earnest money". Keeping in view the principles laid down in the first two cases, a regulation known as the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, was 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."

25. So, keeping in view the law laid down by the Hon'ble Apex court and provisions of regulation 11 of 2018 framed by the Haryana Real Estate Regulatory Authority, Gurugram, and the respondent/builder can't retain more than 10% of sale consideration as earnest money on cancellation but that was not done. So, the respondent/builder is shall refund the amount received from the complainant after deducting 10% of the sale consideration and return the reaming 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 termination/cancellation 19.11.2022 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.
26. However, on perusal of document placed on record it is evident that the counsel for the respondent has filed an application dated 07.10.2024 for placing additional documents on record contending that complainant had taken financial assistance of Rs. 37,00,000/- from HDFC Bank and Tri Partite agreement dated 29.03.2013 was also executed with HDFC Bank. under the said arrangement of having taken financial assistance, the following payments were made:
- Rs. 28,96,536: paid by the complainant
 - Rs. 76,47,193: paid by the Bank (including subvention)

Thereafter the termination of the unit by the respondent, the HDFC Bank has also terminated the arrangement with the customer due to non-payment of the dues to the bank, vide letter dated 06.03.2023. As per clause 8 of the Tri Partite Agreement in cases of cancellation of the unit, the entire amount paid by the Bank was to be returned to the Bank. However, no payment was made by the complainant to the Bank and on 07.09.2024, the HDFC Bank approached the respondent for the re-payment to be made to the Bank. It was made clear by the HDFC Bank that in case the compliance is not ensured by the Respondent, adverse actions will be taken by the said Bank against the respondent, including declaration of the Company's account as NPA. In order to comply with the same, and in light of the termination by the financier, the amount of Rs. 83,05,761/- was repaid to the HDFC bank, consequently, a NOC has been issued by the HDFC bank. Also an amount of Rs. 12,89,265/- is also paid by the respondent towards Pre-Emi. Hence, in total Rs.95,95,026/- has been paid to the Bank by the respondent.

27. In light of the foregoing facts and circumstances, the Authority holds that the respondent is liable to pay the balance amount to the complainant, after adjusting the sums already paid by the respondent to the bank. Interest at the rate of 11.10% per annum shall be applicable on the said balance amount.

G.III Direct the respondent restraining from raising the demand for development charges, cost escalation charges, V.A.T, Service Tax and GST Charges.

28. As the Authority is allowing the refund of the balance amount along with interest as mentioned in para 27, all above sought reliefs by the complainant becomes redundant.


I. Directions of the Authority

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

- a. The respondent is directed to refund the balance amount [remaining amount after adjusting the amount paid to the Bank out of total amount paid by the complainant (Rs. 1,05,43,729/-)] after deducting 10% of the sale consideration of Rs.1,36,43,827/- being earnest money along with interest at the rate of 11.10% as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017, from the date of termination/cancellation 09.11.2022 till its realization.
- b. 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.

30. Complaint stands disposed of.

31. File be consigned to registry.


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 15.05.2025