

PROCEEDINGS OF THE DAY

Day and Date	Wednesday and 31.10.2018
Complaint No.	91/2018 Case titled as Mr. Vinod Sharma V/s Ireo Grace Realtech Pvt. Ltd.
Complainant	Mr. Vinod Sharma
Represented through	Shri Sukhbir Yadav, Advocate for the complainant.
Respondent	Ireo Grace Realtech Pvt. Ltd.
Respondent Represented through	Shri Manmohan Dang, Advocate for the respondent.
Last date of hearing	3.10.2018
Proceeding Recorded by	Naresh Kumari & S.L.Chanana

Proceedings

Arguments heard.

As per record, original complainant/applicant Shri Vinod Sharma has expired on 7.7.2018, the death certificate dated 16.7.2018 is on record supported by an affidavit. As per application, Smt. Meenu Sharma widow of late Shri Vinod Sharma, resident of B-83, DLF City Phase-V, Sector-54, Gurugram alongwith other legal heirs have stepped into the shoes of the deceased. As per para no.1 of the affidavit, there are four class-I legal heirs, namely, Smt. Meenu Sharma, Piyush Sharma son, Yuvraj Sharma son and Vaishnavi minor daughter. Counsel for the respondent has raised objection to this effect. However, all these aspects shall be verified at the time of actual

refund of earnest money. As such, for the purposes of complaint, the LR's are impleaded as party in place of deceased-Vinod Sharma.

It has been alleged by the complainant that the builder has forfeited the earnest money to the tune of 20% of the total consideration, while cancelling the allotment of the said unit. However, as per the provisions of section 13 of the Real Estate (Regulation & Development) Act, 2016 the admissible booking amount is only 10% before signing of the BBA. However, in view the incriminating circumstances in the matter and the plight of the widow and children, one of whom is 100% mental retarded and keeping in view the reasonability criteria and in view of natural justice, the respondent is directed to deduct only 10% of the total consideration and to refund the balance amount to the complainant within 90 days from the issuance of this order.

Complaint is disposed of accordingly. Detailed order will follow.
File be consigned to the registry.

Samir Kumar
(Member)

Subhash Chander Kush
(Member)

Dr. K.K. Khandelwal
(Chairman)
31.10.2018

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

Complaint No. : 91 of 2018
Date of Institution : 12.03.2018
Date of Decision : 31.10.2018

Mr. Vinod Sharma, R/o B-083, the
Summit, DLF City, Phase-V, Golf course
road, Sector-54, Gurugram

...Complainant

Versus

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

...Respondent

CORAM:

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

Chairman
Member
Member

APPEARANCE:

Shri Sukhbir Yadav Complainant in person
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 and Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 by the complainant Mr. Vinod Sharma against the promoter M/s IREO Grace Realtech Pvt Ltd.



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/unregistered	Registered 379 of 2017
4.	Nature of the Project	Residential group housing colony
5.	Date of booking	09.01.2013
6.	Date of agreement	25.03.2014
7.	Unit no.	CD-A3-09-901
8.	Area of unit	1726. 69 sq. ft.
9.	Total consideration	Rs 1,62,30886/-
10.	Total amount paid by the complainant	Rs. 33,46,484/-
11.	Status of the project	80 % constructed
12.	Possession As per clause 13.3- 42 months+ 180 days grace period from date of approval of building plans.	25.03.2018
13.	Delay till the date of decision	7 months 7 days



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. The reply has been filed on behalf of the respondent on 03.05.2018 .

FACTS OF THE CASE

4. The respondent is developer of a residential project known as 'the Corridor' at Sector 67A, Gurgaon, Haryana hereinafter referred to as the said project.
5. That in December 2012, being persuaded by the various advertisements issued in print and electronic media the complainant visited the office of the respondent where he was given a rosy picture about the project of the respondent. 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.
6. That in January 2013 believing upon the representations of the respondent, its employees, officers, directors etc., the complainant booked residential flat bearing No. CD-A3-09-901, 19th Floor, tower A3 'The Corridor' at Sector 67A, Gurgaon, having area of 1726.69 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.1,84,42,250.
7. That on 19.07.2013, the complainant further paid an amount of Rs.21,46,484.00 for purchase of the said flat.



8. That vide its letter dated 12.08.20103, the respondent issued allotment letter to the complainant in respect of the flat in question.
9. That the respondent and the complainant entered into apartment buyer's agreement with the respondent on 25.03.2014.
10. 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 to return his money.
11. 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.
12. The respondent has no right to forfeit any amount deposited by the complainant in as much 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

13. Whether or not the respondent can terminate the agreement/apartment buyer agreement dated 25.03.2014?
14. Whether or not the respondent has a right to forfeit the amount of Rs.33,46,484/- paid by the complainant?
15. Whether the entire amount of Rs.33,46,484.00 paid by the complainant can be termed as earnest money?

RELIEF SOUGHT BY THE COMPLAINANT

16. The respondent be directed to refund the amount of Rs.33,46,484.00 along with interest at the rate of 18% p.a. from the date of payment till it is refunded.
17. 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

18. 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 25.03.2013 to terminate the agreement dated 25.03.2014 on account of continuous defaults of the complainant. The complainant has made false and frivolous averments in order to mislead this hon'ble authority.
19. It is submitted that all demands were raised by respondent 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.33,46,484/- out of the total amount of Rs.1,84,42,250/-
20. 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.
21. 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.
22. The complaint 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.
23. 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:

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

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

Clause 21.3 of the builder buyers agreement states that the in case of any termination, the company shall be under no obligation to refund the amounts already paid by the allottee by the company. The relevant clause has been reproduced

Clause 21.3 "The allottee understands, agrees and consents that upon such termination the company shall be under no obligation save and except to refund the amounts



already paid by the allottee to the company without any interest...”

In addition the above mentioned clause, clause 7 of the booking application form clearly states that booking amount is non-refundable and in case of any failure on the complainants part to pay the instalment then the booking amount shall be forfeited. The relevant clause of the booking application form is reproduced below:

Clause 7 “...booking amount is non-refundable and in the event I/we withdraw our application or if I/we do not accept the allotment made by the company on my/our application or I/we do not execute the apartment buyers agreement within the time stipulated by the company for this purpose or I/we fail to make the payment of the due instalment as per the payment plan, then my/our entire booking amount shall be forfeited to the company.....”

Section 11(5) of the RERA Act, 2016:

“the promoter may cancel the allotment only in terms of the agreement for sale:

Provided that the allottee may approach the authority for relief, if he aggrieved by such cancellation and such cancellation is not in accordance with the terms if the



agreement for sale, unilateral and without any sufficient cause”

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

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*”

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

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



¹ 1(2015) CPJ 319 (NC)

the respondent cannot forfeit more than 10% of the earnest money.

FINDINGS OF THE AUTHORITY:

26. The preliminary objections raised by the respondent regarding jurisdiction of the authority stands rejected. The authority has complete jurisdiction to decide the complaint in regard to 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 complainant at a later stage.
27. The authority is of the view of that the respondent has delayed the possession by approximately 7 months 7 days and thus is liable to hand over possession under section 11(4) of the Act.
28. The complainant made a submission before the authority under section 34(f) to ensure compliance of the obligations cast upon promoter
29. The complainant requested that necessary directions be issued by the authority under section 37 of the Act ibid to the promoter to comply with the provisions and fulfil obligation.



30. As the promoter has failed to fulfil his obligation under section 11, he is liable u/s 18 proviso to pay the complainant interest at the prescribed rate, for every month of delay till the handing over possession.

31. It has been alleged by the complainant that the builder has forfeited the earnest money to the tune of 20% of the total consideration, while cancelling the allotment of the said unit. However, as per the provisions of section 13 of the Real Estate (Regulation & Development) Act, 2016 the admissible booking amount is only 10% before signing of the BBA

DECISION AND DIRECTIONS OF THE AUTHORITY

32. Thus, the authority exercising power under section 37 of Real Estate (Regulation & Development) Act, 2016 issue directions:

- i. In view of the incriminating circumstances in the matter and the plight of the widow and children, one of whom is 100% mental retarded and keeping in view the reasonability criteria and in view of natural justice, the respondent is directed to deduct only 10% of the total



consideration and to refund the balance amount to the complainant within 90 days from the issuance of this Order.

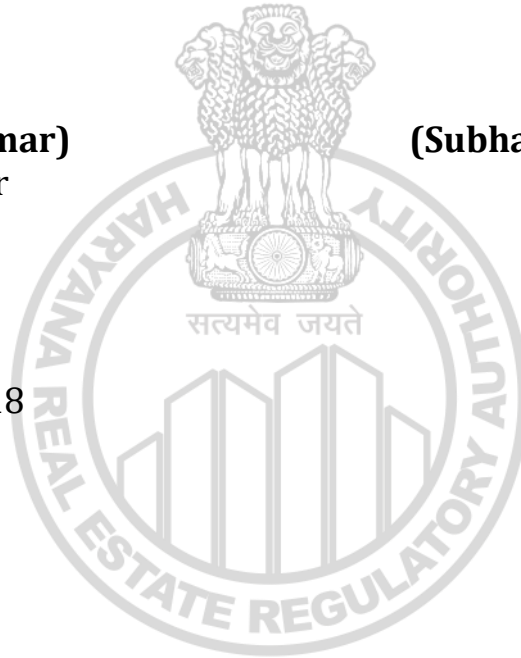
33. The order is pronounced.

34. Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Date: 31.10.2018



HARERA
GURUGRAM

