



HARERA
GURUGRAM

HARYANA REAL ESTATE REGULATORY AUTHORITY
GURUGRAM

New PWD Rest House, Civil Lines, Gurugram, Haryana

नया पी.डब्ल्यू.डी. विश्राम गृह, सिविल लाईंस, गुरुग्राम, हरियाणा

**BEFORE S.C. GOYAL, ADJUDICATING OFFICER,
HARYANA REAL ESTATE REGULATORY AUTHORITY
GURUGRAM**

Complaint No. : 6816/2019

Date of Decision : 08.02.2021

**Avenue Promoters & Developers Pvt Ltd.
189, Munirka Enclave, New Delhi-110067**

Complainant

V/s

**M/s Emmar MGF Land Limited
ECE House, 28, Kasturba Gandhi Marg,
New Delhi-110001**

Respondent

**Complaint under section 31
of the Real Estate (Regulation and
Development) Act, 2016**

Argued by:

**For Complainant:
For Respondent:**

**Ms Priyanka Aggarwal, Advocate
Shri Ishaan Dang, Advocate**

ORDER

This is a complaint under section 31 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to Act of 2016) read with rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter referred as the Rules of 2017) filed by M/s Avenue Promoters

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and Developers Pvt L td. seeking refund of Rs.45,78,267/- deposited with the respondent for booking a flat bearing IG-01-0703 in its project known as "Imperial Garden" located in Sector 102, Gurugram for a sum of Rs.1,,46,83,025/- besides taxes etc. on account of violation of obligations of the respondent/promoter under section 11(4) of the Real Estate(Regulation & Development) Act, 2016. Before taking up the case of the complainant, the reproduction of the following details is must and which are as under:

Project related details		
I.	Name of the project	"Imperial Garden" Sector 102, Gurugram
II.	Location of the project	-do-
III.	Nature of the project	Residential

Unit related details		
IV.	Unit No. / Plot No.	IG-01-0703
V.	Tower No. / Block No.	L
VI	Size of the unit (super area)	Measuring 2025 sq ft
VII	Size of the unit (carpet area)	-DO-
VIII	Ratio of carpet area and super area	-DO-
IX	Category of the unit/ plot	Residential
X	Date of booking(original)	01.11.2012
XI	Date of Allotment(original)	28.02.2013
XII	Date of execution of BBA (copy of BBA be enclosed Annexure P/3)	11.04.2013
XIII	Due date of possession as per ABA	11.01.2027

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XIV	Delay in handing over possession till date	More than three years
XV	Penalty to be paid by the respondent in case of delay of handing over possession as per the said BBA	As per clause 4.3 of Apartment Buyer Agreement @ Rs.7.50/- per sq feet.
Payment details		
XVI	Total sale consideration	Rs.1,46, 83,025/
XVII	Total amount paid by the complainant	Rs.45,78,267/-

2. Brief facts of the case can be detailed as under:

A project known by the name of Imperial Garden located in Sector 102, Gurugram was to be developed by the respondent. The complainant coming to know about the same decided to book a flat in it. So, on 01.11.2012, it booked a residential unit as mentioned above in the project of the respondent by paying a sum of Rs.10,00,000/- vide Annexure P/1. In pursuant to its request, the respondent allotted an apartment bearing No.IG-01-0703 in its project 'Imperial Garden' situated in Sector 102, Gurugram vide letter of allotment dated 28.02.2013 as Annexure P/2. A Builder Buyer Agreement was executed between the parties on 11.04.2013 as Annexure P/3. So, in pursuant to that document, the complainant started depositing various amounts towards the allotment of the unit and paid a total sum of 45,78,267/- upto March, 2014. The possession of the allotted was to be offered to the complainant by the respondent by 11.01.2017 i.e. 42 months from the start of construction with a grace period of three months. It is the case of the complainant that respondent persistently raised demand for remaining payments. However, it was unable to arrange the same. So, it requested for refund of the amount already paid. Though there

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was no exit clause in the Builder Buyer Agreement but the respondent unilaterally failed to accede to its request for refund of the amount deposited with it. So, on these broad averments, it filed a complaint seeking refund of the amount deposited with the respondent besides interest and compensation.

3. But the case of the respondent as set up in the written reply is that though the complainant booked an apartment in its project detailed above and deposited a total sum of Rs.45,78,267/- and upto to March 2014 but did not deposit the remaining amount despite issuance of various reminders. The allotment of the apartment was made to the complainant under a construction linked plan. So, it was obligatory for it to pay the various amounts from time to time. Though it failed to pay the remaining amount prior to completion of the project but it was offered possession of the allotted unit vide letter of allotment dated 02.11.2018. Even then, neither it came up with the remaining amount towards the allotted unit nor took its possession. So, in such a situation, when the complainant is at fault and failed to pay the remaining amount due after various reminders, then it is not entitled to seek refund of the amount deposited with it.

4. All other averments made in the complaint were denied in toto.

5. I have heard the learned counsel for both the parties and have also perused the case file.

6. Some of the admitted facts of the case are that vide letter of allotment (P/2), the complainant was allotted the unit in question by the respondent/company for a sum of Rs.1,46,83,025/-. A sum of Rs.10,00,000/- was paid as earnest money at the time of booking as is evident from statement of accounts P/1. After allotment of the unit in question, BBA was

executed between the parties on 11.04.2013. So, in pursuant to that the

complainant started depositing various amounts with the respondent and paid a total sum of Rs.45,78,267/- upto March 2014. It is also a fact that possession of the allotted unit was to be offered to the complainant on or before 11.04.2017 as per clause 14(a) of BBA. It is also a fact that after March 2014, the complainant did not deposit any amount with the respondent against the allotment of the unit in question and committed default. It was issued a number of reminders even after completion of project as is evident from Annexure R/10 to R-14 respectively. It is also a fact that there was no exit clause for the complainant to withdraw from the project and to seek refund. So, whether such type of unilateral agreement are enforceable? the answer is in the negative. In case of **Neel Kamal Suburban Realtors Pvt Ltd. & Anr Vs Union of India & Ors 2018(1) (Civil) 298(DB)**, it was held by the Hon'ble Bombay High Court that provisions of the Act of 2016 are retroactive in operation and the agreement entered into with individual purchasers are invariably one sided, standard format agreements prepared by the builders/developers and which are overwhelmingly in their favour with unjustified clauses on delayed delivery time for convenience to the society/obligations to obtain occupation/completion certificate etc. Individual purchasers had no scope or power to negotiate and had to accept one sided agreements. Then, some of the clauses of BBA i.e. 1.2 (c)(i) and 13 show that these are one sided executed between the parties in dispute and are loaded in favour of the builder. A reference in this regard may be made to these provisions and which provide as under: -

Payment Plan

The allottee agrees and undertakes to pay the balance amount of the total consideration strictly in accordance with the payment plan.

In case of delay in making payment by the allottee to the Company as per the Schedule of Payments, the Company shall have the right to terminate the

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Agreement and forfeit the Earnest Money alongwith the Non-Refundable Amounts. However, the Company may in its sole discretion waive its right to terminate this Agreement and enforce all the payments and seek specific performance of this Agreement. The Company, if it decides to waive its right of termination, shall be entitled to charge delayed payment charges @ 24%p.a. at the time of every succeeding instalment from the due date of instalment, as per the Schedule of Payment, till the date of payment. In such a case, the parties agree that the possession of the unit will be handed over to the Allottee only upon the payment of all outstanding dues, penalties etc. alongwith delayed payment charges by the Allottee to the satisfaction of the Company.

Earnest Money

- (i) The allottee understands and agrees that 15% of the Total Consideration of the Unit shall be treated as Earnest Money by the company to ensure the fulfilment of terms and condition of the Agreement.
- (ii) The allottee hereby agrees that he Company shall have the right to forfeit the earnest money alongwith Non-Refundable Amounts in the event of the failure of the Allottee to perform his obligations or non-fulfilment of all/any of the terms and conditions set out in this Agreement executed by the Allottee or in the event of failure of the allottee to sign and return this Agreement in its original form to the Company within thirty(30)days from the date of its receipt by the Allottee.
- (iii) The allottee agrees that the conditions for forfeiture as stated in sub-clause(ii) hereinabove shall remain valid and effective till the execution and registration of the Sale Deed for the said unit and that the allottee hereby authorises the Company to effect such forfeiture without any notice to the Allottee.

13. Delay in Payments

(i) Notwithstanding anything contained in clause 20, in case of delay in making any payment reserved herein by the Allottee, the Company shall have the right to terminate the Agreement and forfeit the Earnest Money alongwith the Non-Refundable Amounts. However, the company may in its sole discretion, waive its right to terminate this Agreement and enforce all the outstanding payments and seeking specific performance of this Agreement. The company shall be entitled to charge delayed payment charges @25% p.a.at the tune if evert succeeding instalment from the due date of instalment, till the date of payment as per the Scheduled of Payments. In such a case, the Parties agree that the possession of the unit will be handed over to the Allottee

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only upon the payment of all outstanding dues, penalties etc. alongwith interest by the Allottee to the satisfaction of the Company.

*(ii) Without prejudice to the generality of the above, in case of any delay in payment of any other (i.e. other than the instalments due in terms of Annexure-III) amount or charge as reserved in this Agreement including without limitation to enhancements in EDC and IDC in terms of clause 1.2(f) and 1.2(g), payment of charges towards PLC under clause 1.2(c)(ii), electricity or water meter deposits etc, the same shall be paid by the Allottee on demand being raised by the company. On failure of such payment being made by the allottee, the Company shall have the right to terminate the agreement and forfeit the Earnest Money alongwith the Non-Refundable Amounts. Without prejudice to the above, the company shall also be entitled to charge delayed payment charges @24%p.a. the time of every succeeding instalment from the due date of instalment, till the date of payment as per the Schedule of Payments as stated in **Annexure-III**.*

7. It is contended on behalf of the respondent that though the complainant took a plea that it was finding hard and was not in a position to pay the remaining amount due towards the allotment of the unit but neither any document in this regard has been placed on the file nor any other fact is there to prove that such a request was made to it. Moreover, after completion of the project, the respondent offered possession of the allotted unit to the complainant on 02.11.2018. A number of reminders were also sent to the complainant but without any positive response. So, in such a situation, the complainant cannot seek refund of the amount deposited with the respondent. Even in cases of **Navditya Prakash Goyal & Another Vs Ms Godrej Properties Pvt & Anr.** in Complaint Case No. 1495 of 2018 dated 14.02.2019, **Mrs Chitralkha Gupta Vs M/s Ireo Grace Realtech Pvt Ltd.** Complaint Case No. 2045 of 2018 decided on 25.04.2019, **Mr Krishna Kumar Gupta Vs M/s Godrej Properties Ltd.** in complaint case no. 1501 of 2018 decided on 14.02.2019 **Mr Rajesh Kapur & Anr Vs BPTP Ltd. & Anr.** in complaint case No. 1249 of 2018 decided on 23.04.2019, **Ms**

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Sandhya Rajpal Vs M/s Bestech India Ltd. & Ors in complaint case No. 333 of 2018 decided on 22.06.2019, the Hon'ble Authority Gurugram refused refund of the amount sought by the complainants and the developers were directed to pay the delayed possession charges and particularly when the project is complete. There is no dispute about the ratio of law laid down in these cases. But whether the respondent is empowered to forfeit whole of the amount deposited by the complainant and not returning a single penny to it. The answer is no. The project of the respondent was complete in the year 2018 and after March 2014, the complainant did not deposit any amount towards the allotment of the unit. No doubt, some reminders in this regard were sent by the respondent to the complainant but without any positive result. Neither the complainant withdrew from the project nor expressed its inability to pay the remaining amount. But whether in such a situation, the respondent can retain the whole amount without forfeiting the earnest money. To deal with such type of situations, Haryana Real Estate Regularity Authority Gurugram framed Regulations on 05.12.2018 notified by the State of Haryana and which specifically provide regarding forfeiture of earnest money in case of cancellation of the flat/unit/plot. While framing these regulations, a reference was made to the ratio of law laid down in cases of **M/s DLF Vs Bhagwati Narula, Revision Petition No.3860 of 2014** decided on 06.01.2015 and is based on the views taken by the Hon'ble Apex Court of the land in cases of **Maula Bux Vs Union of India & Ors 1970 AIR(SC), 1955 Indian Oil Corporation Limited Vs Nilofer Siddique and & Ors. Civil Appeal No.7266 of 2009** decided on 01.12.2015 and **Balmer Lawrie and Co. and Ors Vs Partha Sarathi Sen Roy & Ors Civil Appeal NO.419-426 of 2004** decided on 20.02.2013. So, the plea

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of the respondent that claimant is not entitled to any amount as refund and is entitled to forfeit whole of the amount deposited with it is untenable.

8. Faced with this situation, it is pleaded on behalf of the respondent that when the project has also been completed and its possession has been offered to the claimant and other allottees, then, it is not entitled to any refund. But again the plea advanced in this regard is devoid of merit. It was specifically pleaded by the complainant that due to financial constraints, it was unable to continue with the project and sought refund of the amount deposited with the respondent. So, in such a situation and taking into consideration the one sided clauses embodied in the BBA, the claimant was left with only option i.e. to approach this forum and seek refund of the deposited amount with the respondent besides interest. So, in view of these facts, the respondent cannot retain the total amount deposited with it by the complainant upto March 2014 and is liable to refund that amount after deducting a reasonable sum i.e. 10% being earnest money of the total sale price of the unit as per Gazette Notification dated 05.12.2018 issued by Government of Haryana on behalf of Haryana Real Estate Regulatory Authority, Gurugram.

9. Thus, in view of the discussion above, the complaint filed by the claimant is hereby ordered to be allowed. Consequently, the respondent is directed to refund the entire amount of Rs.45,78,267/- after deducting 10% of the total sale consideration of the allotted unit towards earnest money to the complainant.


10. This order be complied with by the respondent within a period of 90 days and failing which legal consequences would follow.

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11. Hence, in view of my discussion detailed above, the complaint filed by the complainant against the respondent is ordered to be disposed off accordingly.

12. File be consigned to the Registry.

08.02.2021


(S.C. Goyal)
Adjudicating Officer,
Haryana Real Estate Regulatory
Authority: Gurugram 8/2/2021

Judgement uploaded on 12.02.2021.