BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**1559 of 2019**
Date of filing complaint:		**17.04.2019**
First date of hearing	:	**06.12.2019**
Date of decision	:	**22.10.2021**

Sachin Bajaj **R/o:** T2 5a, Hibiscus Near Nivana Main Gate, Sector 50, South City-Ii, Gurugram-122018	**Complainant**
Versus	
M/s Clarion Properties Limited **Address:** 34, Babar Lane, Bengali Market New Delhi 110001	**Respondent**

CORAM:	
Dr. K.K. Khandelwal	**Chairman**
Shri Samir Kumar	**Member**
Shri Vijay Kumar Goyal	**Member**
APPEARANCE:	
Shri Amarjeet Kumar (Advocate)	Complainant
Ms. Kadambari (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottee in Form CRA 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.

A. Project and unit related details

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

S. No.	Heads	Information
1.	Name and location of the project	"Element One", Sector-47 & 49, Gurugram.
2.	Project area	2.76 acres
3.	Nature of the project	Commercial Project
4.	RERA registered/ not registered	Not registered
5.	i. DTCP license no.	86 of 2011 dated 20.09.2011
	ii. Validity status	19.09.2017
	iii. Name of the licensee	Clarion Properties
6.	Unit no.	G-10, ground floor, block-B (Page no. 41 of complaint)
7.	Unit admeasuring	346 sq. ft.

8.	Date of execution of flat buyer's agreement	11.05.2015 (Page no. 38 of complaint)
9.	Total consideration	Rs.88,43,334/- (As per statement of account dated 07.07.2018 on page no. 77 of complaint)
10.	Total amount paid by the complainant	Rs.46,64,720/- (As per statement of account dated 07.07.2018 on page no. 77 of complaint)
11.	Payment plan	Possession Linked Plan (Page no. 62 of complaint)
12.	Date of start of construction	12.10.2012 (As per para no. 12 (iii) of the reply)
13.	Due date of delivery of possession (As per clause 7.1 within 42 months + 6 months from the date of start of construction of Block/Tower or execution of agreement whichever is later)	11.05.2019
14.	Offer of possession	Cancelled the unit (Termination letter dated 16.04.2018 on page no. 118 of reply)
15.	Occupation certificate	03.11.2017 (Annexure R11 on page no. 109 of reply)
16.	Grace period utilization	Allowed
17.	Delay in handing over possession till date of decision i.e. 22.10.2021	2 years 5 months 12 days

B. Facts of the complaint

3. The complainant and respondent have executed a builder buyer agreement for the unit no. G-10 admeasuring 353 sq. ft. in block–B, ground floor situated at commercial project namely "Element One", sector-47 & 49, Gurugram.

4. That the complainant had opted for the time linked plan for making payment towards sale consideration; however the agreement referred it as possession linked plan. That as per the payment plan the complainant was supposed to make 60 % payment of the BSP within a period of 21 months from the date of registration and rest 40 % of the BSP was to be paid at the time of possession. The respondent has also collected 100% of the EDC/IDC charges levied upon the said unit before the time of the possession. The complainant as on 26.07.2017 paid a total sum of Rs. 46,64,720/- i.e, 60 % of the total BSP and 100 % of the EDC/IDC applicable as agreed upon. That the respondent was supposed to raise the final demand for possession thereafter.

5. That the respondent has raised the final demand letter in the month of November, 2017 and also the termination notice in the month of April, 2018. However, the complainant came to know about the final demand letter or the termination notice

issued, only in the month of June, 2018, when the respondent sent a refund letter with cheque of Rs. 14,77,216/, post cancellation of the unit.

6. That the complainant was surprised to know about the cancellation of unit on account of non-payment. The final demand letter and termination letter dated 16.04.2018 were left uninformed and unattended in the building of the complainant apartment due to which the same were inadvertently missed by and was only brought to notice by the complainant in the month of June 2018 upon receiving the refund letter with cheque. Apart from the aforesaid letters which were left uninformed and unattended in the building of apartment, the complainant did not received any call from the respondent with respect to the payment/reminder of the balance amount and taking undue advantage of the same the respondent terminated the said buyer's agreement. There was a delay from the complainant end, however the respondent's office were continuously following with the complainant to make the payment, which on contrary was not done in the present scenario since already 60 % was lying with the respondent and the intention

of the respondent was just to forfeit the hard earned money deposited by the complainant.

7. That the complainant immediately visited the respondent's office located at sector44, Gurgaon and met with Ms. Komal of the respondent company and apprised her about the situation to restore the allotment. That initially the respondent assured the complainant that the unit will be restored subject to additional charges including the holding charges, which the complainant had even agreed to pay. That the complainant given the understanding that the matter will be resolved and the complainant might only need to pay restoration charges amounting to Rs. 2,08,270/- along with the balance payment in order restore the allotment of the property, to which the complainant agreed even though there was no fault on their part.

8. That upon the assurance that the matter will be resolved amicably, the complainants visited the respondent's corporate office in Gurgaon several times followed-up with numerous phone calls and discussions, however no action has been taken. However rather than restoring the unit, the respondent suddenly decided to stick to the

termination, and it was informed that the respondent cannot restore the unit since the same was allotted to some other person. That such an act clearly amounts to cheating and the respondent had no intentions from the beginning to hand over the possession, rather in order to make more money, the respondent decided to sell the unit to some other person on a higher price, despite agreeing upon the restoration of the unit to the complainant. That by doing so the respondent have caused wrongful loss to the complainant and have wrongfully gained from the said transaction, which could not have been done in terms of the agreement entered between the parties.

9. That the respondent cheated and fraudulently induced the complainant to part with about Rs. 46,64,720/- in the name of giving them a grand office in their building which was supposed to be handed to the complainant. Despite the complainant fulfilled its obligation of making the payments and further willing to pay the additional charges as levied upon by the respondent, to restore the unit, cancelling of allotment and forfeiture of the

amount, clearly shows the malafide intentions of the respondent. That the refund amount cheque as given by the respondent was lying with the complainant and the same has not been en-cashed, shows that the complainant never intended or abandoned the unit, however in order to make more money out of the space actually allotted to the complainants, the respondent might have sold the same to some other consumer.

10. That the final demand letter issued by the respondent, it was categorically mentioned as under "holding charges -the unit has to be taken within a period of 30 days from the due date intimated herein failing with holding charges @ 16 Rs.7.00/- sq. ft. per month for the entire period of delay shall be charged. That from the perusal of the calculation sheet it was evident that the though the unit was cancelled in the month of April, 2018, however it was still active and accordingly as on 07.07.2018 a holding charges of Rs. 14, 826 plus service tax was levied on the said unit i.e. @ Rs. 7/- per sq. ft per month. That the amount reflecting in the sheet handed over to the complainant clearing shows that

the respondent could have charged only the holding charges but could not have terminated the agreement. That even the systems of the respondent reflected that the unit was not cancelled as on 07/07/2018. That despite the above fact, the complainant was asked to pay additional amount over and above this, as restoration charges, though the same being illegal, the complainants even agreed to pay the same, however in vain.

11. That the respondent was only entitled to charge additional holding charges. The respondent informed the complainant that an additional amount of Rs. 2,08,270/- will be charged on account of restoration charges, which the complainant even agreed to pay, however despite all these, the respondent is now shying away from restoring the unit. That complainant apprehends that the same has been done, in order to sell the unit to other prospective buyer at a higher price so as to enrich onself. That such an act clearly falls under the definition of cheating and you are liable for punishment of cheating as provided under IPC. That even otherwise as per the agreement signed between the parties,

cancellation of the unit was not the recourse available to the respondent. That the act also falls under the definition of unfair trade practices and restrictive trade practices, defined under Consumer Protection Act.

12. That post cancellation of the unit the respondent had also issued a cheque of Rs. 14,77,216/- as final settlement of the account on account of cancellation of unit. That the said cheque was not enchased upon and was returned to the respondent. That complainant was willing to pay all the demand as per the buyer agreement and willing to restore the unit. That the amount returned to the complainant was even unreasonable and unprecedented. That the law with respect to the deductions of earnest money upon cancellation for non-payment is well settled as already held by the Hon'ble National Commission in DLF Limited Vs. Bhagwanti Narula, Revision Petition No. 3860 of 2014, decided on 06.01.2015 and the relevant extract of the said Judgment is reproduced herein below:-
It would thus be seen that only a reasonable amount can be forfeited as earnest money in the event of default on the part of the purchaser and it is not permissible in law to forfeit any amount beyond a reasonable amount, unless it is

shown that the person forfeiting the said amount had actually suffered loss to the extent of the amount forfeited by him.

13. That the complainant had specifically agreed to treat 20% of the sale price as earnest money, the forfeiture to the extent of 20% of the sale price cannot be said to be unreasonable, the being inconsonance with the terms agreed between the parties. This was also his contention that so long as the petitioner company was acting as per the terms and conditions agreed between the parties, it cannot be said to be deficient in rendering services to the complainant. We, however, find ourselves unable to accept the aforesaid contention, since, in our view, forfeiture of the amount which cannot be shown to be a reasonable amount would be contrary to the very concept of forfeiture of the earnest money. If we accept the aforesaid contention, an unreasonable person, in a given case may insert a clause in buyers agreement whereby say 50% or even 75% of the sale price is to be treated as earnest money and in the event of default on the part of the buyer; he may seek to forfeit 50% of the sale price as earnest money. An agreement for forfeiting more than 10% of the sale price, in our view, would be invalid since it would be contrary to the established legal

principle that only a reasonable amount can be forfeited in the event of default on the part of the Buyer. For the reasons stated herein above, we hold that (i) an amount exceeding 10% of the total price cannot be forfeited by the seller, since forfeiture beyond 10% of the sale price would be unreasonable and (ii) only the amount, which is paid at the time of concluding the contract can be said to be the earnest money. The petitioner company, therefore, was entitled to forfeit only the sum of Rs.63,469/-, which the complainant had deposited with them at the time of booking of the apartment". That from the perusal of the above it becomes quite evident that even the refund initiated by the respondent on account of cancellation was illegal. That even the respondent had failed to provide the calculations detail as to how the said amount has been arrived. That as per the settled principle of law, the respondent were only entitled to forfeit the booking amount at the time of registration of the unit and complainant was entitled to the whole sum along with prescribed rate interest.

14. As regards interest on the overdue instalments, which the opposite party has charged only at the nominal rate of 2%

per annum, in our opinion, since the complainant committed default for the first time on 01.05.2006, the opposite party had a legal right to cancel the allotment on that date itself. Had the opposite party cancelled the allotment on that very date, no interest on the unpaid instalment would have accrued. Having itself delayed the cancellation of allotment on account of non- payment of the instalments, the opposite party cannot recover interest for the period the cancellation was delayed by it. The opposite party cannot on the one hand can defer the cancellation of allotment despite default by the allottee, and charge interest on the overdue payment on the other hand. It is not allowed to take advantage of its own act, at the cost of the consumer. Had the opposite party cancelled the allotment on 01.05.2006 and sold the flat to some other person, it would have been able to receive the cost of the flat from the new buyer. An identical view was taken by this commission in Revision Petition No. 3861/2014 along with first appeal 574/2014, decided 26.08.2015. Accordingly, we hold that since the opposite party could have cancelled the allotment immediately the fourth instalment falling due on

01.05.2006, it was not entitled to deduct any amount as interest on the overdue instalment number.

15. That the complainant was entitled to get the refund of the entire amount deposited with interest after deduction of the booking amount. That the said contention is without prejudice to rights and contentions since the cancellation itself was illegal ab intio.

C. Relief sought by the complainant

16. The complainant is seeking the following relief(s):

    i. Pass an order declaring the termination to be illegal.

    ii. Direct the respondent to immediately handover the physical possession of the unit, complete in all respects as per the terms and conditions of the buyer's agreement.

    iii. Initiate penal proceedings against the respondent for not registering the project and accepting money from the customers.

17. On the date of hearing, the authority explained to the respondent/promoter about the contravention 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 filed by the respondent

18. The respondent has contested the complaint on the following grounds:

i. That the complaint filed by the complainant is not maintainable and this authority has no jurisdiction whatsoever to entertain the present complaint.

ii. That the authority is empowered to hear and decide only the complaints against the projects which are registered with the authority.

iii. It is submitted that the present complaint is not maintainable as the builder buyer agreement contains arbitration clause that mandates the invoking of arbitration proceedings in the event of a dispute between the parties.

iv. That the statement of objects and reasons as well as the preamble of the said Act dearly state that the RERA is enacted for effective consumer protection and to protect the interest of consumers in the real estate sector. RERA is not enacted to protect the interest of investors. As the said Act has not defined the term consumer, therefore the definition of "consumer" as provided under the Consumer Protection Act, 1986 has to be referred for adjudication of the present complaint.

The complainant is an investor and not consumer and nowhere in the present complaint has the complainant pleaded as to how the complainant is consumer as defined in the consumer protection act, 1986 qua the respondent.

v. That, the respondent has completed the project as per approved plans and has applied for the occupation certificate on 27.03.2017 and duly obtained the same within the reasonable stipulated time on 03.11.2017. It is pertinent to mention it herein that the complainants have blatantly defaulted in making the payments despite several reminders and letters of the respondent company.

vi. That the complainant has defaulted to perform their part of the agreement by not rendering the amounts payable by them under the said agreement for the purchase of the unit. No negligence on part of the respondent has been established; hence it is trite law that the complainant cannot take undue advantage of their own wrong/fault and omissions.

vii. The complainant has failed to abide by the terms of the buyer's agreement entered into between the parties.

The complainant defaulted in payment as prescribed and which forms an integral part of the agreement. Further as per the agreement, the complainant has materially breached the said agreement by non-payment of monies due towards the subject unit. This material breach constrained the respondent to cancel the buyer's agreement and suffered losses due to the blatant failure of the complainant.

viii. That the present complaint comprises of untrue facts, concealment of material facts and documents, misrepresentation and hence on this ground alone the present complaint is liable to be dismissed.

19. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents.

E. Jurisdiction of the authority

20. The authority has territorial as well as subject matter jurisdiction to entertain the present complaint for the following reasons.

E.I Territorial jurisdiction

21. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana 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

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 allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*
>
> *The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA dated..... Accordingly, the promoter is responsible for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.*
>
> ***Section 34-Functions of the Authority:***

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

22. 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 complainants at a later stage.

F. Findings on the objections raised by the respondent

F.I Objection regarding entitlement of DPC on ground of complainant being investor

23. The respondent has taken a stand that the complainant is an investor and not consumer, therefore, he is not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observed that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the

same time preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainant is a buyer and he has paid total price of Rs.46,64,720/- to the promoter towards purchase of an apartment in the project of the promoter. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

> *"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"*

24. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyer's agreement executed between promoter and complainant, it is crystal clear that the complainant is allottee as the subject unit was allotted to him by the promoter. The concept of investor is not defined or referred in the Act. As per the

definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as ***M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr***. has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.

F.II Objection regarding complainant is in breach of agreement for non-invocation of arbitration

25. The respondent submitted 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 and the same is reproduced below for the ready reference:

> *"29.1 All or any dispute arising out of or touching upon or in relation to the terms of this Agreement or its termination, including the interpretation and validity therof and the respective rights and obligations of the parties shall be settled amicably by mutual discussion failing which the same shall be settled through arbitration of a Sole Arbitrator to be appointed by the Chairman of the Company. The Arbitration proceeding shall be governed by the Arbitration & Conciliation Act,*

1996, or any statutory amendments, modifications thereof for the time being in force. The language of Arbitration shall be English. The Arbitration proceeding expenses shall be equally shared between the parties. The venue of Arbitration shall be at New Delhi."

26. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Also, section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause.

27. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017***, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainants and builders could not circumscribe the jurisdiction of a consumer. The relevant paras are reproduced below:

> *"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act"). Section 79 of the said Act reads as follows:-*
>
> > *"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."*
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> *It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellant Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.*
>
> ...
>
> *"56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind of Agreements between the Complainants and the Builder cannot circumscribe the*

jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."

28. While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the builder buyer agreement, the hon'ble Supreme Court **in case titled as M/s Emaar MGF Land Ltd. V. Aftab Singh in revision petition no. 2629-30/2018 in civil appeal no. 23512-23513 of 2017 decided on 10.12.2018** has upheld the aforesaid judgement of NCDRC and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view. The relevant para of the judgement passed by the Supreme Court is reproduced below:

> *"25. This Court in the series of judgments as noticed above considered the provisions of Consumer Protection Act, 1986 as well as Arbitration Act, 1996 and laid down that complaint under Consumer Protection Act being a special remedy, despite there being an arbitration agreement the proceedings before Consumer Forum have to go on and no error committed by Consumer Forum on rejecting the application. There is reason for not interjecting proceedings under Consumer Protection Act on the strength an arbitration agreement by Act, 1996. The remedy under Consumer Protection Act is a remedy provided to a consumer when there is a defect in any goods or services. The complaint means any allegation in writing made by a complainant has also been explained in Section 2(c) of the Act. The remedy under the Consumer Protection Act is confined to complaint by consumer as defined under the Act for defect or*

deficiencies caused by a service provider, the cheap and a quick remedy has been provided to the consumer which is the object and purpose of the Act as noticed above."

29. Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that complainant is well within their rights to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and RERA Act, 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily.

G. Findings of the authority

Relief Sought by the complainant-Pass an order declaring the termination to be illegal

30. As per the counsel for the complainant, it was argued that there is no such provision for cancellation of allotted unit in BBA and therefore, the cancellation of the allotted unit is not as per law and the same is not binding. The complainant deposited a sum of Rs.46,64,720/- against total sale consideration of Rs.88,43,334/-. However, while sending cancellation letter the respondent builder sent a cheque of Rs.14,77,216/- and not deducting 10% of the total sale consideration as per "The Haryana Real Estate Regulatory

Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018. The counsel for the respondent submitted that on failure of the complainant to make payment due on offer of possession of the unit, the cancellation has rightly been ordered and after deduction of earnest money, the cheque of necessary payment has been issued in favour of the complainant.

31. The authority has observed that the respondent has not shown any details as how a cheque of Rs.14,77,216/- has been refunded. If the unit is to be cancelled and refund is to be made only earnest money upto the 10% of the total sale consideration can be deducted. The clause 5.2 of buyer's agreement deals with the earnest money which is reproduced as under:

> *"That the Company and the Allottee(s) hereby agree that the amounts to the extent of 20% of the Basic Sale Price of the said Space shall be treated as the Earnest Money."*

As per clause 5.2 of buyer's agreement, earnest money has been indicated to be 20% of the basic sale price which is unreasonable and as has been held in various judgments of this authority and also by Hon'ble Supreme Court only 10% of the basic sale price is to be treated as earnest money and this can be forfeited in the eventuality of cancellation of unit.

Relief Sought by the complainant- Direct the respondent to immediately handover the physical possession of the unit, complete in all respects as per the terms and conditions of the buyer's agreement.

32. As per clause 7.1 of buyer agreement the possession was to be handed over within a period of 42 months plus 6 months grace period from the date of start of construction of the block/tower in which the said space is located or execution of this agreement, whichever is later. Clause 7.1 of the flat buyer's agreement, provides for handing over possession and the same is reproduced below:

> *"That the Company shall under normal circumstances, complete the construction of Block in which the Said Space is to be located within a period of 42 (forty-two) months of the start of construction of Block/Tower in which the said space is Allotted or execution of this Agreement whichever is later with additional grace period of 6 (six) months and subject to force majeure. In accordance with the Plans and specifications seen and accepted by the Allottee(s) subject to any such additions, deletions, alterations, modifications in the layout plans, change in number, dimensions, height, size, area or change of entire scheme, which the Company may consider or may be required by any competent authority to be made in them or any of them. In case, these changes are required after execution of the Sale/Conveyance Deed, then in order to implement those, any Supplementary Deed/Agreement, if necessary, shall be executed and registered by the Company. In case the same are warranted prior to the execution of the Sale/Conveyance Deed, Company's intimation to the Allottee(s) shall be final & binding upon the Allottee(s)."*

33. The builder buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both

builder/promoter and buyer/allottee are protected candidly. Builder buyer's agreement lays down the terms that govern the sale of different kinds of properties like residentials, commercials etc. between the buyer and builder. It is in the interest of both the parties to have a well-drafted agreement which would thereby protect the rights of both the builder and buyer in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision with regard to stipulated time of delivery of possession of the apartment, plot or building, as the case may be and the right of the buyer/allottee in case of delay in possession of the unit.

34. The authority has gone through the possession clause of the agreement and observed that the possession has been subjected to all kinds of terms and conditions of this agreement. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single situation may make the possession clause irrelevant for the purpose of allottee and the

commitment date for handing over possession loses its meaning. If the said possession clause is read in entirety the time period of handing over possession is only a tentative period for completion of the construction of the flat in question and the promoter is aiming to extend this time period indefinitely on one eventuality or the other. Moreover, the said clause is an inclusive clause wherein the numerous approvals have been mentioned for commencement of construction and the said approvals are sole liability of the promoter for which allottee cannot be allowed to suffer. It is settled proposition of law that one cannot get the advantage of his own fault. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the doted lines.

35. **Admissibility of grace period**: The promoter has proposed to hand over the possession of the said flat within 42 months from the date of start of construction of block/tower in which

the said space allotted or execution of this agreement whichever is later with additional grace period of 6 months. However, the authority allows the grace period keeping in view the fact that this grace period of 6 months is unqualified/ unconditional and is sought for handing over of possession.

Relief Sought by the complainant- Initiate penal proceedings against the respondent for not registering the project and accepting money from the customers.

36. The matter regarding registration in cases where OC has been applied prior to coming into force of RERA is already sub-judice. Accordingly, issue of non-registration will be taken up by the authority once the matter is decided by the Hon'ble Supreme Court of India.

37. On consideration of the documents available on record and submissions made by both the parties, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 7.1 of the flat buyer's agreement dated 11.05.2015, possession of the booked unit was to be delivered within a period of 42 months plus 6 months grace period from the date of start of

construction of the particular tower in which the flat is located or execution of agreement, whichever is later. As far as grace period is concerned, the same is allowed for the reasons quoted above. Therefore, the due date of handing over possession is 11.05.2019. However, the complainant has paid a sum of Rs.46,64,720/- against total sale consideration of Rs.88,43,334/-. Also, while sending cancellation letter the respondent builder sent a cheque of Rs.14,77,216/- and not deducting 10% of the total sale consideration as per "The Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018. The authority has observed that the respondent has not shown any details as how a cheque of Rs.14,77,216/- has been refunded. If the unit is to be cancelled and refund is to be made only earnest money upto the 10% of the total sale consideration can be deducted. Accordingly, the non-compliance of the mandate contained in section 11(4) (a) & (5) of the Act on the part of the respondent is established.

H. Directions of the authority

38. Hence, the authority hereby passes this order and issues 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):

i. The cancellation of the allotted unit by the respondent/builder vides order dated 22.10.2021 is ordered to be set aside. A direction is given to the respondent/builder to receive remaining payment against the unit from the complainant from the date the same became due at the prescribed rate of interest.

ii. The complainant is also directed to make payment of amount due against the allotted unit from the date the same became due along with interest at the prescribed rate of interest and failing which legal consequences would follow.

iii. These directions be complied with by both the parties within a reasonable period.

39. Complaint stands disposed of.

40. File be consigned to registry.

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 22.10.2021