BEFORE THE HARYANA REAL ESTATE APPELLATE TRIBUNAL

Date of Decision: 27.05.2020

Appeal No. 600 of 2019

1. Godrej Project Development Limited, 3rd Floor, UM House, Plot No.35-P, Sector 44, Gurugram 122002

...Appellant

Versus

Ankur Dhanuka, D-2304, Pioneer Park, Golf Course Extension Road, Sector 61, Gurugram 122011

... Respondent

Appeal No.1321 of 2019

2. Ankur Dhanuka, D-2304, Pioneer Park, Golf Course Extension Road, Sector 61, Gurugram 122011

...Appellant

Versus

1. Godrej Project Development Limited, 3rd Floor, UM House, Plot No.35-P, Sector 44, Gurugram 122002
2. Magic Info Solutions Private Limited, D-13, Defence Colony, New Delhi

... Respondents

Coram: Justice Darshan Singh (Retd), Chairman
Shri Inderjeet Mehta, Member (Judicial)
Shri Anil Kumar Gupta, Member (Technical)

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Argued by: Shri Kapil Madan, Advocate, Ld. counsel for the Godrej Project Development Limited.

Shri Nitin Jain, Advocate, Ld. counsel for Ankur Dhanuka.

Service of respondent No.2 in Appeal No.1321 of 2019 stands dispensed with.

O R D E R

Shri Inderjeet Mehta, Member (Judicial)

1. By virtue of the present order handed down in Appeal No.600 of 2019 titled as "Godrej Project Developers Limited versus Ankur Dhanuka", another Appeal bearing No.1321 of 2019 titled as "Ankur Dhanuka versus Godrej Developers Project Limited" shall also be disposed of as both these appeals have been directed against the same impugned order dated 10.04.2019.

2. Feeling aggrieved by the order dated 10.04.2019 handed down by the Haryana Real Estate Regulatory Authority, Gurugram (hereinafter referred as 'the Authority'), in complaint No.1757 of 2018 titled "Shri Ankur Dhanuka versus Godrej Developers Project Limited", vide which the complaint preferred by the respondent/allottee for refund of the amount deposited by him with the appellant/promoter was partly allowed, appellant/promoter has chosen to file the aforesaid Appeal No.600 of 2019.

3. As back as on 04.02.2014, the respondent/allottee had booked a unit in the project named

"Godrej Summit" by paying an amount of ₹10,00,000/- to the appellant/promoter. Thereafter, vide allotment letter dated 28.08.2014, the respondent/allottee was allotted a unit bearing No.K1804, 17th Floor, Tower 'K', Sector 104, Gurugram. Subsequent to the allotment, respondent/allottee deposited a sum of ₹41,88,850/- with the appellant till 10.02.2015. Ultimately, on 19.05.2015, an Apartment Buyer's Agreement was executed between the respondent/allottee and the appellant/promoter. As per Clause 4.2 of the said agreement, the apartment should have been ready for occupation within 33 months from the date of issuance of allotment letter i.e. 28.08.2014 plus (+) six months grace period i.e. by 28.11.2017. All of a sudden, on 30.06.2017, the appellant/promoter issued various invoices to the respondent/allottee as mentioned in para No.11 of the impugned order. The said demand raised by the appellant/promoter was alleged to be premature as no intimation letter of possession was sent to the respondent/allottee by the appellant/promoter. Thereafter, on 06.07.2017, the appellant sent the possession intimation letter to the respondent/allottee. On 05.10.2017, the appellant/ promoter sent an e-mail asking the respondent/allottee to pay a sum of ₹1,26,57,336/-. Subsequently, on 25.11.2017, the appellant/promoter sent

a final opportunity letter by e-mail to the respondent/allottee asking him to pay a sum of ₹1,28,66,209/-. Not satisfied with the same, the respondent/allottee sent an e-mail on 09.12.2017 to the appellant/promoter seeking cancellation of unit and refund of the entire amount deposited by him. On receipt of the same, the appellant/promoter vide e-mail dated 09.12.2017 terminated the booking of the unit in favour of the respondent/allottee and forfeited a sum of ₹38,42,304/- from the amount which the respondent/allottee had paid. Thereafter, on 21.02.2018, the appellant sent an e-mail to the respondent/allottee again intimating that a sum of ₹38,42,304/- towards earnest money had been forfeited and that an amount of ₹3,09,150/- was being refunded to the complainant and cheque of ₹3,09,150/-, which was sent by the appellant/promoter to the respondent/allottee, has not been encashed by the respondent/allottee. By way of presenting a complaint before the Authority, the respondent/allottee requested for return of the entire amount of ₹41,88,850/- which was deposited with the appellant/promoter along with interest at the prescribed rate.

4. Upon notice the appellant/promoter had resisted the complaint preferred by the respondent/allottee on the

grounds of maintainability and suppression of material facts. On merits, it has taken a stand that the allegations as put forward by the respondent/allottee in his complaint do not reveal any deficiency on the part of the appellant/promoter. In fact, as per the allegations in the complaint, the grievance of the respondent/allottee seems to be that he was unable to pay the contractually liable balance consideration and thus he opted to come out of the allotment and alleged that the earnest money should not have been deducted. Further it has been alleged that the relief sought by the respondent/allottee is contradictory as on one hand he is seeking refund of the amount paid and on the other hand he is seeking quashing of the termination letter. In fact, the respondent/allottee had duly executed the agreement in which it was clearly mentioned that upon allotment of the apartment, the respondent/allottee will not be allowed to cancel the transactions and if any eventuality arises on account of the act and conduct of the respondent/allottee, then the appellant/promoter shall be entitled to cancel and forfeit the entire earnest money along with deduction of interest on delayed payment.

5. Further it was alleged that the fact that the failure on the part of the respondent/allottee to pay the outstanding dues has caused loss to the

appellant/promoter, is evident from the fact that a similar apartment has been resold at a sale consideration of ₹1,07,00,000/-, as per the application form, while the apartment in question was sold to the respondent/allottee for ₹1,58,24,240/- and thus, the appellant/promoter has suffered loss of approximate ₹51,24,240/-. Lastly, it has been alleged that the possession was offered to the respondent/allottee on 06.07.2017 i.e. much prior to the date of delivery of possession which was 28.11.2017 and thus, no violation worth the name has been committed by the appellant/promoter of the Apartment Buyer's Agreement executed between the parties. The appellant/promoter also prayed for dismissal of the complaint.

6. After taking into consideration material facts and documents as adduced by both the parties, the Ld. Authority while exercising powers vested in it under Section 37 of the Real Estate (Regulation and Development) Act 2016 (hereinafter called 'the Act') disposed of the complaint preferred by the respondent/allottee with the following directions to the appellant/promoter:

> *"I. The respondent is directed to forfeit 10% of the total sale consideration amount and refund the balance amount deposited by the complainant as per regulation*

> *no.11/RERA GGM dated 5 December 2018 within a period of 90 days from the date of issuance of this order."*

7. Hence, the Appeal No.600 of 2019 titled as "Godrej Project Development Limited versus Ankur Dhanuka" has been preferred by the appellant/promoter.

8. Since the respondent/allottee was not awarded interest at the prescribed rate on the amount, after deduction of 10% of the total sale consideration amount, so he, too, felt aggrieved and preferred the Appeal No.1321 of 2019 titled as "Ankur Dhanuka versus Godrej Project Development Limited".

9. Initiating the arguments, the Ld. counsel for the appellant, while drawing our attention toward Clause 11 of the Application Form (Page 167) and Clause 2.6 of the Builder Buyer Agreement dated 19.05.2015 (Page 259), has submitted that the respondent had duly executed both the aforesaid documents in which it was clearly mentioned that upon allotment of the apartment, the respondent/allottee will not be allowed to cancel the transaction and if any eventually arises on account of the act and conduct of the respondent/allottee, then the appellant/promoter shall be entitled to cancel and forfeit the entire earnest money, and has been stipulated to be 20% of the basic sale price, and is

meant to ensure performance, compliance and fulfilment of obligations and responsibilities of the buyer.

10. Further, it has been submitted that since the respondent/allottee himself vide an e-mail dated 09.12.2017 (Page 332) had sought the cancellation so the appellant was entitled to forfeit the stipulated earnest money and in fact the Ld. Authority fell in error while issuing the direction to forfeit only 10% of the total sale consideration amount. Lastly, it has been submitted that since the respondent/allottee in his e-mail dated 12.09.2017 (Page 322) has admitted that the market price of the unit had crashed down to ₹1 crore and he was likely to suffer loss to the tune of ₹60 lakh, so in these circumstances when there is downward trend of approximately 36%, so forfeiture of 20% earnest money is quite reasonable in the facts and circumstances of the present case. Reliance has been placed upon citations **Maula Bux v. Union of India (1969) (2) SCC 554, Satish Batra v. Sudhir Rawal 2013 (1) SCC 345 and ONGC v. Saw Pipes 2003 (5) SCC 705**.

11. Countering the aforesaid submissions vehemently, the Ld. counsel for the respondent/allottee has submitted that the earnest money is part of the purchase price when the transactions goes forward and as the

respondent/allottee had deposited ₹10 lakh initially for the allotment of the unit, so the said amount of ₹10 lakh in the given facts and circumstances of the present case is the earnest money.

12. Further, it has been submitted that Ld. Authority failed to appreciate this aspect of the case and not only directed to forfeit 10% of the sale consideration amount but also did not grant the interest at the prescribed rate on the deposited amount after deduction of the amount of ₹10 lakh which is earnest money in the present case. Reliance has been placed upon citations **DLF Limited v. Bhagwati Narula 2015 (16) RCR (Civil) 72, HUDA and others v. Kewal Krishan Goel and others 1996 SCC (4) 249 and Pioneer Urban Land and Infrastructure Ltd. v. Govindan Raghavan 2019 (5) SCC 725**.

13. For the proper appreciation of the aforesaid submissions made by the Ld. counsel for the parties, first of all let the admitted facts be taken note off. Admittedly, the respondent/allottee had applied for an apartment in “Godrej Summit” situated at Sector 104, Gurugram and booked an apartment No.K1804 on the 17th Floor in Tower ‘K’, of the said project vide an application form dated 03.02.2014 (Page 162). Pursuant to the same an allotment letter dated

28.08.2014 (Page 239) was issued to the respondent/allottee and thereafter subsequently Builder Buyer Agreement dated 19.05.2015 (Page 259) was executed between the parties. It is also an admitted fact that the respondent/allottee had sent an e-mail on 09.12.2017 (Page 322) to the appellant/promoter seeking cancellation of the unit and refund of the entire amount deposited by him and on receipt of the same the appellant/promoter vide e-mail dated 09.12.2017 (Page 330) terminated the booking of the unit in favour of the respondent/allottee and forfeited a sum of ₹38,42,304/- on account of earnest money from the amount of ₹41,88,550/- deposited by the respondent/allottee. The remaining amount of ₹03,09,150/- was refunded to the respondent/allottee vide a cheque of the same amount, which so far as has not been encashed by the respondent/allottee.

14. The legal position with regard to the earnest money has been dealt in detail by Hon'ble Supreme Court in citations **Maula Bux case (supra) and Satish Batra case (supra)** and the same can be condensed as follows:-

> *"Earnest money is part of the purchase price when the transaction goes forward; it is forfeited when the transaction falls through, by reason of the fault of failure of the*

vendee. Law is, therefore, clear that to justify the forfeiture of advance money being part of earnest money the terms of the contract should be clear and explicit. Earnest money is paid or given at the time when the contract is entered into and, as a pledge for its due performance by the depositor to be forfeited in case of non-performance, by the depositor. There can be converse situation also that if the seller fails to perform the contract the purchaser can also get the double the amount, if it is so stipulated. In other words, earnest money is given to bind the contract, which is a part of the purchase price when the transaction is carried out and it will be forfeited when the transaction falls through by reason of the default or failure of the purchaser."

15. A perusal of the Clause 11 of the Application Form (Page 167) dated 03.02.2014 and Clause 2.6 of Builder Buyer Agreement dated 19.05.2015 (Page 259) shows that it has been stipulated that earnest money would be 20% of the basic sale price which was meant to ensure performance, compliance and fulfilment of obligations and responsibilities of the buyer. Though, the respondent/allottee has taken the stand that the earnest money in the present case is ₹10 lakh which was deposited by him at the time of moving Application Form, but the same cannot be attached any credence because

as is explicit from the perusal of the Application Form (Page 162-163) that this application was only a request for allotment and does not constitute a final allotment or agreement. In fact, after the said application had been moved by the respondent/allottee on 03.02.2014 along with an amount of ₹10 lakh, an allotment letter dated 28.08.2014 (Page 239) was issued in favour of the respondent/allottee and thereafter Builder Buyer Agreement dated 19.05.2015 was executed between the parties. The Clause 2.6 (Page 259) of Builder Buyer Agreement dated 19.05.2015 shows that earnest money has been agreed between the parties to be 20% of the basic sale price.

16. Now the question to be determined is that whether earnest money to the tune of 20% of the basic sale price as stipulated in Builder Buyer Agreement dated 19.05.2015 can be termed as reasonable or not? In citation **Pioneer Urban Land and Infrastructure Ltd. case (supra),** the Hon'ble Supreme Court has laid down that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between the parties, who are not equal in bargaining power. A term of a contract will not be final and binding if it is shows that flat purchaser had no option but to sign on the dotted line, on a contract framed

by a builder. Further, incorporation of one-sided clauses in an agreement constitutes an unfair trade practice since it adopts unfair methods or practices for the purpose of selling the flat by the builder.

17. In citation **DLF Ltd. case (supra),** the Hon'ble National Consumer Disputes Redressal Commission, while discussing the cases of **Maula Bux case (supra), Satish Batra case (supra)** and other cases as mentioned in para No.10 of the said order, has clearly laid down 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 preson forfeiting the said amount had actually suffered loss to the extent of the amount forfeited by him. Further, it was held that 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 it had suffered loss to the extent the amount was forfeited by it. In absence of evidence of actual loss, forfeiture of any amount exceeding 10% of the sale price, cannot be said to be a reasonable amount.

18. Faced with this situation, the Ld. counsel for the appellant has referred to an e-mail dated 09.12.2017 (Page 322) vide which the respondent/allottee had admitted that there is a downward trend in the market and the same unit of ₹1,58,24,240/- was being sold at ₹1 crore and submitted that on account of cancellation of unit due to fault of the respondent/allottee, the appellant/promoter has suffered loss of about ₹60 lakh. Regarding this submission, it is suffice to say that on the basis of this e-mail dated 09.12.2017, by no stretch of imagination it can be construed that the appellant has suffered the loss to the tune of ₹60 lakh on account of the lapse of respondent/allottee. Further, it is also pertinent to mention that though the appellant/promoter has relied upon an Application Form (Page 136) to show that a flat which was sold to the respondent/allottee for an amount of ₹1,58,24,240/- is now valued at ₹1,07,00,000/- but no legal credence can be attached to the same, because in the said Application Form two dates i.e. 20.09.2018/ 20.08.2018 (Page 136 and Page 144) have been mentioned, coupled with the fact that it is only an Application Form and not a concluded binding contract and that, too, of altogether a different flat No.K-0404 whose location is totally different from the unit allotted to the respondent/allottee.

19. In his last desperate attempt the Ld. counsel for the appellant has submitted that since the respondent/allottee had specifically agreed to pay 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 as the same is in consonance with the terms agreed between the parties. He has also submitted that so long as the appellant 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. This aforesaid submission as put forward by the Ld. counsel for the appellant, was also submitted before the Hon'ble National Consumer Disputes Redressal Commission in **DLF case (supra)** and while dealing with the same, it was observed that 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 and if the said contention is accepted then 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 the default on the part of the buyer, he may seek to forfeit 50% sale price as earnest money. It was further observed and held that an agreement for forfeiting more than 10% of the sale price 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. Here it is also pertinent to mention that the deduction of 10% of the total sale consideration of the unit, out of the amount deposited by the complainant, is also inconformity with the Regulations 2018, as notified by the Authority, wherein, it has been stipulated that 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.

20. The citation **ONGC case (supra)** dealing with the scope of Sections 73 and 74 of the Contract Act and lying down that the terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same, is of no help to the appellant in view of our aforesaid discussion regarding the specific damage claimed by the appellant, which it has failed to prove and establish.

21. There is no dispute to the proposition of law as laid down in citation **HUDA and another case (supra)** that the appellant would be entitled to forfeit the earnest money which had been deposited along with the application form and on deducting the said earnest money, the balance of amount may be refunded to the respondent allottee who had made

application for refund in question. However, the same is of no help to the case of the respondent/allottee and is distinguishable because as per the facts and circumstances of the said citation the amount of the earnest money had been specifically mentioned in the application form, whereas contrary to it in the case in hand the deposit of amount of ₹10 lakh along with Application Form was only meant to request for the allotment and the same does not constitute a final allotment or agreement.

22. Thus, as a consequence to the aforesaid discussion, we are of the considered opinion that there is no irregularity or illegality in the findings of the Ld. Authority to direct the appellant to forfeit only 10% of the sale consideration amount (i.e. 10% of ₹1,58,24,240/-= ₹15,82,424/-) and to refund the balance of amount (i.e. ₹41,88,850/- -(Minus) ₹15,82,424/- = ₹26,06,426/-). Since no interest has been granted to the respondent/allottee on the refund amount, so he is entitled for the refund of the said amount i.e. ₹26,06,426/- (Rupees Twenty Six Lakhs, Six Thousands, Four Hundred Twenty Six) along with interest at the rate of 10.20% (maximum SBI MCLR+2%) per annum from the date of institution of the complaint before the Ld. Authority, till the amount deposited with this Tribunal.

23. Resultantly, as a consequence to the aforesaid discussion, we are of the opinion that the Appeal No.600 of 2019 titled as “Godrej Project Development Ltd. v. Ankur Dhanuka” preferred by the appellant/promoter containing no merit deserves dismissal.

24. However, the Appeal No.1321 of 2019 titled as “Ankur Dhanuka v. Godrej Project Development Ltd.” preferred by the respondent/allottee is partly allowed as referred to above.

25. Both the aforesaid appeals stand disposed of accordingly.

Sd/-
Inderjeet Mehta
Member (Judicial)

Sd/-
Anil Kumar Gupta
Member (Technical)

JUSTICE DARSHAN SINGH (Retd.) CHAIRMAN:

26. I respectfully concur with the conclusion arrived at by my learned brothers in the judgment authored by Shri Inderjeet Mehta, Member (Judicial). In order to further strengthen the findings recorded by my learned brothers in the background of the factual position of this case and the legal proposition applicable, I am to add as below: -

27. Clause 11 of the application form (page 167 of the paper book) reads as under: -

> "11. Earnest Money, for the purposes of this Application and the Allotment Letter, shall mean 20% of the Sale Consideration for the sale of Apartment applied for allotment in the Project."

28. The builder buyer agreement was executed between the parties on 19.05.2015. Clause 2.06 of the agreement (page 259 of the paper book) reads as under: -

> "2.6 It has been specifically agreed between the Parties that 20% of the Basic Sale Price, shall be considered and treated as earnest money under this Agreement ("Earnest Money"), to ensure the performance, compliance and fulfilment of the obligations and responsibilities of the Buyer under this Agreement.

29. The forfeiture clause is provided in Clause 8.4 of the builder buyer's agreement which reads as under: -

> "8.4 On and from the date of such termination on account of Buyer's Event of Default as mentioned herein above ("Termination Date"), the Parties mutually agree that-
>
> (i) The Developer shall, out of the entire amounts paid by the Buyer to the Developer till the Termination Date forfeit the entire

Earnest Money and any other dues payable by the Buyer including interest on delayed payments as specified in this Agreement.

(ii) After the said forfeiture, the Developer shall refund the balance amount to the Buyer or to his banker/financial institution, as the case may be, without any interest.

(iii) On and from the Termination Date, the Buyer shall be left with no right, title, interest, claim, lien, authority whatsoever either in respect of the Apartment or under this Agreement and the Developer shall be released and discharged of all its liabilities and obligations under this Agreement.

(iv) On and from the Termination Date, the Developer shall be entitled, without any claim or interference of the Buyer, to convey, sell, transfer and/or assign the Apartment in favour of third party(ies) or otherwise deal with it as the Developer ay deem fit and appropriate, in such a manner that this Agreement was never executed and without any claim of the Buyer to any sale proceeds of such conveyance, sale, transfer and/or assignment of the Apartment in favour of third party(ies)."

30. Clause 11 of the application form and Clause 2.6 of the builder buyer's agreement provide that 20% of the Basic Sale Price, shall be considered and treated as earnest money under this agreement to ensure the due performance,

compliance and fulfilment of the obligations and responsibilities of the Buyer under this agreement.

31. In the instant case, there is a breach of contract on the part of the respondent/allottee as he has not adhered to the payment schedule as per the agreement inspite of repeated demands/reminders. The total sale price of the apartment was Rs.1,58,24,240/-, out of that the respondent/allottee has only paid Rs.41,51,453/- as per statement of account and Rs.41,88,850/- as per complaint.

32. The appellant/promoter has terminated the allotment vide letter dated December 09, 2017 (page 330) and invoked Clause 11 of the application form and Clause 8 of the agreement to forfeit an amount of Rs.38,42,304/- obviously as liquidated damages.

33. The claim for damages for breach of contract is governed by the provisions of Section 73 and 74 of the Indian Contract Act, 1872 (hereinafter called 'the Contract Act'). Section 73 of the Contract Act deals with the unliquidated damages arising out of the breach of contract, whereas the liquidated damages are governed by Section 74 of the Contract Act. The forfeiture of the earnest money is nothing but forfeiture of the liquidated damages which has been clarified by the Hon'ble Apex Court in case **KAILASH NATH**

ASSOCIATES Vs. DELHI DEVELOPMENT AUTHORITY, (2015) 4 SCC 136.

34. The Constitution Bench of the Hon'ble Apex Court in case **FATEH CHAND Vs. BALKISHAN DAS, AIR 1963 SC 1405**, which is the basic authority on this issue, has laid down that in all cases where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the Court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture. It was further clarified that it is not the duty of the Court to enforce the penalty clause but only to award reasonable compensation.

35. In case **Maula Bux v. Union of India** (Supra), the Hon'ble Apex Court has observed that where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of penalty. It was further laid down by the Hon'ble Apex Court in Maula Bux's case (Supra) as under: -

> "Where the Court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre-estimate may be

> taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him."

36. In case **Oil & Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd. (2003)5 SCC 705** also the Hon'ble Apex Court has held that Section 74 emphasis that in case of breach of contract, the party complaining of breach is entitled to receive reasonable compensation whether or not actual damage or loss is proved to have been caused by the breach. Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered.

37. The Hon'ble Apex Court in case **V.K. ASHOKAN vs. ASSTT. EXCISE COMMISSIONER & ORS, (2009)14 SCC 85** has laid down as under: -

> "39. There is another aspect of the matter which cannot be lost sight of. If damages cannot be calculated and the terms of the contract provides therefor only for penalty by way of liquidated damages, having regard to the provisions contained in Section 74 of the Indian Contract Act a reasonable sum only could be recovered which

need not in all situations even be the sum specified in the contract."

38. In view of the consistent rule of law laid down by the Hon'ble Apex court in the cases referred to above, the person complaining the breach of contract is entitled for the liquidated damages mentioned in the contract, if the same is genuine and reasonable. But if the liquidated damages provided in the contract is unreasonable and by way of penalty, the claimant shall only be entitled to a reasonable compensation even if no actual damage is proved to have been caused in consequence of the breach of contract. However, there must be some loss. In the instant case though the appellant/promoter has not adduced any cogent and convincing evidence to establish the actual damage/loss but at the same time it cannot be stated that he has not suffered any loss. It is an admitted fact that he had completed the construction of the apartment in question by spending the funds from his own source and even offered the possession to the respondent/allottee vide letter dated July 06th, 2017 (page 308) and thereafter the respondent/allottee sought cancellation of the allotment vide emails dated 09.12.2017 (page 328-329). Thus, it is not a case where no loss at all has been caused to the appellant/promoter to the breach of contract.

39. Now the question arises as to whether the stipulation mentioned in the agreement regarding earnest money and its forfeiture is unreasonable and by way of penalty or not and whether it is the genuine pre-estimate of the loss.

40. As already mentioned in Clause 11 of the application form and Clause 2.6 of the agreement, it is mentioned that 20% of the basic sale price shall be the earnest money. It is settled proposition of law that the label of the amount is not material but the facts and circumstance of each case with intention of the parties is to be taken into consideration. Merely the amount being described as 'Earnest Money' will not be sufficient to consider the said amount as earnest money. Reference can be made to case **Videocon Properties Ltd. Vs. Dr. Bhalchandra Laboratories and Others (2004) 3 SCC 711**. In **Shri Sunil Sehgal Vs. Shri Chander Batra and Others, CS(OS) No.1250/2006** decided on 23.09.2015 by the Hon'ble Delhi High Court it was observed that by giving a stamp of 'earnest money' to advance price, the latter cannot become the former. What is to be seen is the substance and not the label. Only a nominal amount can be said to be earnest money. It was further laid down by the Hon'ble Delhi High Court in case **Bhuley Singh Vs. Khazan Singh & Ors. RFA No.422/2011**

decided on 09.11.2011 that nomenclature of a payment is not important and what is important is really the quantum of price which is paid. Only a nominal amount can be an earnest money, inasmuch as, the object of such a clause is to allow forfeiture of that amount to a nominal extent as held in case **FATEH CHAND Vs. BALKISHAN DAS (Supra).**

41. In view of the aforesaid legal position, only the nominal amount can be considered to be the earnest money. The earnest money mentioned in clause 11 of the application form and clause 2.6 of the agreement i.e. 20% of the sale price which comes to Rs.31,64,848/- cannot be considered to be the earnest money liable to be forfeited. There is no escape from the conclusion that the earnest money mentioned in the agreement is unreasonable and is by way of penalty to enforce the contract. Once it is found that the stipulation regarding liquidated damages in the contract is unreasonable and is by way of penalty, a person complaining the breach of contract (appellant/promoter in this case) shall only be entitled to a reasonable compensation.

42. The learned Authority has allowed the appellant/promoter to forfeit 10% of the total sale consideration being the reasonable amount. The view taken by the learned Authority seems to be fully justified. Even in

case **Satish Batra Vs. Sudhir Rawal** (Supra) relied upon by learned counsel for the appellant, the amount of Rs.7.00 lacs i.e. 10% of the sale price of Rs.70.00 lacs was allowed to be forfeited. Section 13(1) of the Act also provided that the promoter shall not accept a sum more than 10% of the cost of the apartment as an advance payment, thus even the legislature has restricted the advance money/earnest money to be 10% of the cost of the apartment, presumably considering it to be reasonable. Thus, the liquidated damages awarded by the learned Authority in favour of the appellant/promoter i.e. 10% of the total sale price is totally in consonance with the legal position, fair, just and reasonable.

43. Consequently, I endorse the findings recorded by my learned brothers with respect to the dismissal of Appeal No.600/2019 filed by the promoter and award of interest by partly allowing Appeal No.1321/2019 filed by the allottee.

44. No orders as to costs.

45. The appellant/promoter has deposited a total sum of Rs.26,06,424/- (18,54,597 on 18.10.2019 + (plus) 7,51,827 on 25.10.2019) with this Tribunal to comply with the provisions of proviso to Section 43(5) of the Act, be remitted to the learned Haryana Real Estate Regulatory Authority, Gurugram for disbursement to the

respondent/allottee after the expiry of period of limitation for filing the appeal and in accordance with law.

46. Copy of this judgment be placed on the record of Appeal No.1321 of 2019 titled as 'Ankur Dhanuka v. Godrej Project Development Limited and another'.

47. Copy of this judgment be communicated to the parties/learned counsel for the parties and the learned Authority for compliance.

48. Both the files be consigned to the records.

Announced:
May 27th, 2020

Sd/-
Justice Darshan Singh (Retd.)
Chairman,
Haryana Real Estate Appellate Tribunal,
Chandigarh