BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**5387 of 2022**
Date of complaint	:	**03.08.2022**
Date of order	:	**25.09.2024**

1. Anuj Agarwal,
R/o: UP-13, Maurya Enclave, Pitampura, New Delhi-110034.
2. Saurabh Mittal,
R/o: C-7/181-182, Sector-8, Rohini, New Delhi-110085. **Complainants**

Versus

M/s Ireo Grace Realtech Private Limited
Regd. Office at: - Kanchan House, Karampura, Commercial Complex, New Delhi-110015.
Also at: 5th Floor, Orchid Centre, Golf Course Road, Sector-5, Gurugram-122002. **Respondent**

CORAM:
Ashok Sangwan **Member**

APPEARANCE:
Varun Dev Mishra (Advocate) Complainants
M.K Dang (Advocate) Respondent

ORDER

1. The present complaint has been filed by the complainant/allottees 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 under the

provision of the Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale executed inter se.

A. Unit and project related details

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

S. N.	Particulars	Details
1.	Name and location of the project	"The Corridors" at sector 67A, Gurgaon, Haryana
2.	Nature of the project	Group Housing Colony
3.	Project area	37.5125 acres
4.	DTCP license no.	05 of 2013 dated 21.02.2013 valid upto 20.02.2021
5.	Name of licensee	M/s Precision Realtors Pvt. Ltd. and 5 others
6.	RERA Registered/ not registered	**Registered** Registered in 3 phases Vide 378 of 2017 dated 07.12.2017(Phase 1) Vide 377 of 2017 dated 07.12.2017 (Phase 2) Vide 379 of 2017 dated 07.12.2017 (Phase 3)
	Validity Status	30.06.2020 (for phase 1 and 2) 31.12.2023 (for phase 3)
7.	Apartment no.	804, 8th Floor, Tower C9 (page no. 45 of complaint)
8.	Unit area admeasuring	1300 sq. ft. (page no.45 of complaint)
9.	Date of approval of building plan	23.07.2013 (as per project details)
10.	Date of allotment letter	07.08.2013 (annexure R-2 on page no. 43 of reply)
11.	Date of environment clearance	12.12.2013 (as per project details)

12.	Date of builder buyer agreement	12.05.2014 [page no. 42 of complaint]
13.	Date of fire scheme approval	27.11.2014 (as per project details)
14.	Possession clause	**13. Possession and Holding Charges** Subject to force majeure, as defined herein and further subject to the Allottee having complied with all its obligations under the terms and conditions of this Agreement and not having default under any provisions of this Agreement but not limited to the timely payment of all dues and charges including the total sale consideration, registration chares, stamp duty and other charges and also subject to the allottee having complied with all the formalities or documentation as prescribed by the company, the company proposes to offer **the possession of the said apartment to the allottee within a period of 42 months from the date of approval of building plans and/or fulfillment of the preconditions imposed thereunder(Commitment Period)**. The Allottee further agrees and understands that the company shall additionally be entitled to a period of 180 days (Grace Period), after the expiry of the said commitment period to allow for unforeseen delays beyond the reasonable control of the Company. **(Emphasis supplied)**
15.	Due date of possession	23.01.2017

		(calculated from the date of approval of building plans) Note: Grace Period is not allowed.
16.	Reminders for payment	**For Fourth Instalment:** 05.06.2015, 10.07.2015 **For Fifth Instalment:** 06.04.2016, 04.05.2016 **For Sixth Instalment:** 07.06.2016, 29.06.2016 **For Seventh Instalment:** 09.08.2016, 31.08.2016 **Final notice:** 28.07.2016
17.	Cancellation Letter	01.09.2016 (annexure R-19 on page no. 63 of reply)
18.	Total sale consideration	Rs. 1,28,31,283/- [as per the payment plan on page no. 78 of complaint]
19.	Amount paid by the complainants	Rs. 39,42,088/- [as per the cancellation letter on page no. 67 of reply]
20.	Occupation certificate	27.01.2022 (annexure R-22 on page no. 69 of reply)
21.	Offer of possession	Not offered

B. Facts of the complaint

3. The complainants have made the following submission: -

I. That the complainants were allotted a flat bearing no. 804, Tower C-9, Eight Floor having a super area of 1300 sq. ft. along with one parking in the project of the respondent named "Corridors", Sector 67A, Gurugram vide apartment buyer's agreement dated 12.05.2014 for a total sale consideration of Rs.1,28,31,283/- against which the complainants have paid a sum of Rs.39,42,088/- to the respondent till April 2014.

II. That the complainants regularly inquired about the status/progress of the project, however, were shocked to find out that the construction work had

not even started, and it was clear that the same could not be completed in the stipulated time period. Owing to poor progress of work, the complainants sought refund of the entire amount deposited with the respondent, however, they refused to return the same.

III. That the respondent continued to raise illegitimate demands for further installments without any actual progress of construction work. Eventually, the respondent cancelled the allotment of the complainants vide cancellation letter dated 01.09.2016 and forfeited the entire amount paid by them without any basis whatsoever.

IV. That the complainants are thus seeking refund of the entire amount of money deposited with the respondents along with interest.

C. Relief sought by the complainants:

4. The complainants have sought following relief(s):

   i. Direct the respondent to refund the amount deposited alongwith interest at prescribed rate.

5. On the date of hearing, the authority explained to the respondent/promoter about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent.

6. The respondent has contested the complaint on the following grounds: -

   i. That the apartment buyer's agreement was executed between the parties prior to the enactment of the Act, 2016 and the provisions laid down in the said Act cannot be applied retrospectively.

   ii. 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.

iii. That the complainants, after checking the veracity of the project namely, 'The Corridors', Sector 67-A, Gurgaon had applied for allotment of an apartment vide booking application form dated 23.03.2013. The complainants had agreed to be bound by the terms and conditions contained therein.

iv. That based on the said application, respondent vide its allotment offer letter dated 07.08.2013 allotted to the complainants an apartment no. CD-C9-08-804 having tentative super area of 1300 sq. ft. for a sale consideration of Rs.1,28,31,283/-. The complainants signed and executed the apartment buyer's agreement on 12.05.2014 and agreed to be bound by the terms and conditions contained therein.

v. That the respondent raised payment demands from the complainants in accordance with the mutually agreed terms and conditions of the allotment as well as of the payment plan. However, the complainants failed to make payment despite reminders dated 09.08.2016 and 31.08.2016. Accordingly, the respondent was constrained to issue final notice dated 28.07.2016 calling upon the complainants to pay the outstanding dues within a period of 30 days from the date of letter failing which the allotment stands cancelled and the amount paid by them shall be forfeited in accordance with the terms of the buyer's agreement.

vi. That on account of non-fulfillment of the contractual obligations by complainants despite several opportunities extended by the respondent, the allotment of complainants was cancelled and the earnest money along with other charges was forfeited vide cancellation letter dated 01.09.2016 in accordance with clause 21 read with clause 21.3 of the apartment buyer's agreement and the complainant is now left with no right, claim, lien or interest whatsoever in respect of the said booking/allotment.

vii. That complainants are real estate investors who had booked the unit in question with a view to earn quick profit in a short period. However, their calculations went wrong on account of slump in the real estate market and complainants did not possess sufficient funds to honour their commitments. The complainants were never ready and willing to abide by their contractual obligations and they also did not have the requisite funds to honour their commitments.

viii. That despite failure of the complainants to adhere to his contractual obligations of making payments, the respondent has completed the construction of the tower in which the unit previously allotted to the complainants was located. Moreover, the respondent has also obtained occupation certificate from the competent authorities on 27.01.2022.

ix. That the implementation of the project was hampered due to several factors such as demonetization, orders passed by NGT, non-payment of installments by allottees such as complainants, unfavorable weather conditions and outbreak of Covid-19 etc which were beyond the control of the respondent.

x. The respondent vide proceedings dated 28.08.2024 has submitted that the unit was cancelled after sending 17 reminders to the complainants who failed to make the outstanding payments. He further submitted that the respondent is entitled to forfeit 20% of the sale consideration as per the buyer's agreement and the complaint is barred by limitation.

7. 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 and submission made by the parties.

E. Jurisdiction of the authority

8. The respondent has raised a preliminary submission/objection the authority has no jurisdiction to entertain the present complaint. The objection of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below:

E. I Territorial jurisdiction

9. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District, Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

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

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the 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;

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.

11. 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.

F. Findings on the objections raised by the respondent.

F. I Objection regarding jurisdiction of the complaint w.r.t the apartment buyer's agreement executed prior to coming into force of the Act.

12. The respondent has raised an objection that the authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the buyer's agreement executed between the parties prior to the enactment of the Act and the provision of the said Act cannot be applied retrospectively. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017) decided on 06.12.2017*** which provides as under:

> *"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter...*
>
> *122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the*

Standing Committee and Select Committee, which submitted its detailed reports."

13. Further, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya***, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed-

> *"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."*

14. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules and regulations made thereunder and are not unreasonable or exorbitant in nature. Hence, in the light of above-mentioned reasons, the contention of the respondent w.r.t. jurisdiction stands rejected.

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

15. 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:

*"**35. Dispute Resolution by Arbitration***
"All or any disputes arising out or touching upon in relation to the terms of this Agreement or its termination including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussions failing which the same shall be settled through reference to a sole Arbitrator to be appointed by a resolution of the Board of Directors of the Company, whose decision shall be final and binding upon the parties. The allottee hereby confirms that it shall have no objection to the appointment of such sole Arbitrator even if the person so appointed, is an employee or Advocate of the Company or is otherwise connected to the Company and the Allottee hereby accepts and agrees that this alone shall not constitute a ground for challenge to the independence or impartiality of the said sole Arbitrator to conduct the arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/ modifications thereto and shall be held at the Company's offices or at a location designated by the said sole Arbitrator in Gurgaon. The language of the arbitration proceedings and the Award shall be in English. The company and the allottee will share the fees of the Arbitrator in equal proportion".

16. 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. Therefore, by applying same analogy the presence of arbitration clause could not be construed to take away the jurisdiction of the authority.

17. 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. Further, 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. Therefore, in view of the above judgements and considering the provision of the Act, the authority is of the view that complainant is well within his right 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.

F.III Objections regarding complaint being barred by limitation.

18. The respondent contended that the present complaint is not maintainable and barred by the law of limitation. The Authority observes that the cause of action arose in September 2016, when the cancellation letter was issued to the complainants. However, post cancellation of the unit, the respondent has failed to refund the refundable amount to the complainants so far, which clearly shows a subsisting liability. Moreover, the deductions made from the

paid up amount by the respondent are not as per the law of the land laid down by the Hon'ble apex court of the land in cases of ***Maula Bux vs Union of India 1969(2) SCC 554*** and where in it was held that a reasonable amount by way of earnest money be deducted on cancellation and the amount so deducted should not be by way of damages to attract the provisions of section 74 of the Indian Contract Act,1972. Further, the law of limitation is, as such, not applicable to the proceedings under the Act and has to be seen case to case. Thus, the objection of the respondent w.r.t. the complaint being barred by limitation stands rejected.

F. IV Objection regarding the complainant being investor.

19. The respondent has taken a stand that the complainants are investors and not consumers, therefore, they are not entitled to the protection of the Act and entitled to file the complaint under section 31 of the Act. The Authority observes that any aggrieved person can file a complaint against the promoter if it 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 buyer's agreement, it is revealed that the complainants are buyers and they have paid total price of Rs.39,42,088/- to the promoter towards purchase of a unit in its project. 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;"*

20. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment application for allotment, it is crystal clear that the complainants are allottees as the subject unit was allotted to them

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 allottees being investors are not entitled to protection of this Act also stands rejected.

F. V Objection regarding force majeure circumstances

21. The respondent-promoter has raised the contention that the construction of project was delayed due to force majeure circumstances such as orders passed by National Green Tribunal to stop construction, demonetization, spread of Covid-19 across worldwide etc. However, all the pleas advanced in this regard are devoid of merit. First of all, the possession of the unit in question was to be offered by 23.01.2017. Hence, events alleged by the respondent do not have any impact on the project being developed by the respondent. Moreover, some of the events mentioned above are of routine in nature happening annually and the promoter is required to take the same into consideration while launching the project. Thus, the promoter/respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

G. Findings regarding relief sought by the complainants

G. I Direct the respondent to refund the paid-up amount alongwith interest at prescribed rate.

22. In the present complaint, the complainants intend to withdraw from the project and are seeking return of the amount paid by them in respect of

subject unit along with interest as per section 18(1) of the Act and the same is reproduced below for ready reference:

> "***Section 18: - Return of amount and compensation***
> *18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building.-*
> *(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or*
> *(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,*
> ***he shall be liable on demand to the allottees****, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available,* ***to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed*** *in this behalf including compensation in the manner as provided under this Act:*
> *Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."*
> *(Emphasis supplied)*

23. Clause 13.3 of the apartment buyer's agreement (in short, the agreement) dated 12.05.2014, provides for handing over possession and the same is reproduced below:

> *13.3*
> ***Schedule for possession of the said unit***
> *"Subject to Force Majeure, as defined herein and further subject to the Allottee having complied with all its obligations under the terms and conditions of this Agreement and not having defaulted under any provision(s) of this Agreement including but not limited to the timely payment of all dues and charges including the total Sale Consideration, registration charges, stamp duty and other charges and also subject to the Allottee having complied with all formalities or documentation as prescribed by the Company, the Company proposes to offer the possession of the said Rental Pool Serviced Apartment to the Allottee within a period of 42 months from the date of approval of the Building Plans and/or fulfilment of the preconditions imposed there under ("Commitment Period"). The Allottee further agrees and understands that the Company shall additionally be entitled to a period of 180 days ("Grace Period"), after the expiry of the said Commitment Period to allow for unforeseen delays beyond the reasonable control of the Company."*

24. The respondent promoter has proposed to handover the possession of the subject apartment within a period of 42 months from the date of approval of building plans and/or fulfilment of the preconditions imposed thereunder

plus 180 days grace period for unforeseen delays beyond the reasonable control of the company i.e., the respondent/promoter.

25. On a bare reading of the clause 13.3 of the agreement, it becomes apparently clear that the possession in the present case is linked to the "fulfilment of the preconditions" which is so vague and ambiguous in itself. Nowhere in the agreement it has been defined that fulfilment of which conditions forms a part of the pre-conditions, to which the due date of possession is subjected to in the said possession clause. 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 "fulfilment of the preconditions" has been mentioned for the timely delivery of the subject apartment. It seems to be just a way to evade the liability towards the timely delivery of the subject apartment. According to the established principles of law and the principles of natural justice when a certain glaring illegality or irregularity comes to the notice of the adjudicator, the adjudicator can take cognizance of the same and adjudicate upon it. The inclusion of such vague and ambiguous types of clauses in the agreement which are totally arbitrary, one sided and totally against the interests of the allottees must be ignored and discarded in their totality. In the light of the above-mentioned reasons, the authority is of the view that the date of sanction of building plans i.e., 23.07.2013 ought to be taken as the date for determining the due date of possession of the unit in question to the complainant. Therefore, the due date of possession comes out to be 23.01.2017.

26. The complainant was allotted an apartment bearing no. CD-C9-08-804 admeasuring 1300 sq. ft. in the project of the respondent named "The Corridors" situated at Sector 67A, Gurugram vide apartment buyer's

agreement dated 12.05.2014 for a sale consideration of Rs.1,28,31,283/- against which the complainants have paid a sum of Rs.39,42,088/- to the respondent in all. The complainant has submitted that due to poor progress of work at the project site, the complainants sought refund of the entire amount deposited with the respondent, however, they refused to return the same. However, no document in support of their claim has been placed on record by them.

27. The respondent has submitted that 17 reminders were sent to the complainants to pay the outstanding dues. However, the complainants defaulted in making payments and the respondent was to issue final notice dated 28.07.2016 requesting the complainants to comply with their obligation before finally cancelling the allotment of the unit vide cancellation letter dated 01.09.2016. Now the question before the Authority is whether the cancellation made by the respondent vide letter dated 01.09.2016 is valid or not.

28. On consideration of documents available on record and submissions made by both the parties, the authority is of the view that on the basis of provisions of allotment, the complainants have paid an amount of Rs.39,42,088/- against the total sale consideration of Rs.1,28,31,283/- and no payment was made by the complainant after April 2014. The respondent/builder has sent 17 reminders, before issuing a final notice dated 28.07.2016 asking the allottees to make payment of the amount due, but the same having no positive results and ultimately leading to cancellation of unit vide letter dated 01.09.2016. Further, section 19(6) of the Act of 2016 casts an obligation on the allottees to make necessary payments in a timely manner. Hence, cancellation of the unit in view of the terms and conditions of the payment plan annexed with the buyer's agreement dated 12.05.2014 is held to be valid. But while cancelling the unit, it was an obligation of the respondent to return the paid-

up amount after deducting the amount of earnest money. The respondent has submitted that earnest money is clearly defined in the booking application form and builder buyer's agreement as 20% of the sale consideration of the unit.

29. The Authority after taking into consideration the scenario prior to the enactment of the Act, 2016 as well as the judgements passed by Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, has already prescribed vide Regulations, 11(5) of 2018 that the forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment/plot/building as the case may be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer. Therefore, in view of the above, the contention of the respondent w.r.t forfeiture of 20% of the sale consideration/cost of the property to be considered/treated as earnest money stands rejected.

30. Further, the deductions made from the paid-up amount by the respondent are not as per the law of the land laid down by the Hon'ble apex court of the land in cases of ***Maula Bux VS. Union of India, (1970) 1 SCR 928 and Sirdar K.B. Ram Chandra Raj Urs. VS. Sarah C. Urs., (2015) 4 SCC 136,*** and wherein it was held that *forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in the nature of penalty, then provisions of section 74 of Contract Act, 1872 are attached and the party so forfeiting must prove actual damages. After cancellation of allotment, the flat remains with the builder as such there is hardly any actual damage.* National Consumer Disputes Redressal Commissions in ***CC/435/2019 Ramesh Malhotra VS.***

Emaar MGF Land Limited (decided on 29.06.2020) and ***Mr. Saurav Sanyal VS. M/s IREO Private Limited*** (decided on 12.04.2022) and followed in ***CC/2766/2017*** in case titled as ***Jayant Singhal and Anr. VS. M3M India Limited decided on 26.07.2022,*** *held that 10% of basic sale price is reasonable amount to be forfeited in the name of "earnest money".* Keeping in view the principles laid down in the first two cases, a regulation known as the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, was farmed providing as under-.

> ***"5. AMOUNT OF EARNEST MONEY***
> *Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money* ***shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment /plot /building as the case may*** *be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer."*

31. Keeping in view the aforesaid factual and legal provisions, the respondent is directed to refund the paid-up amount of Rs.39,42,088/- after deducting 10% of the sale consideration of Rs.1,28,31,283/- being earnest money along with an interest @11.10% p.a. (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 on the refundable amount, from the date of cancellation i.e., 01.09.2016 till actual refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

H. Directions of the authority: -

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

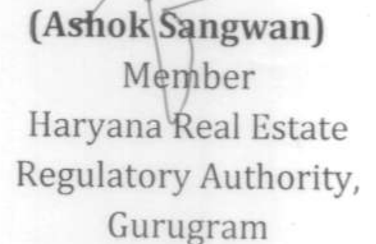
    i. The respondent/promoter is directed to refund the paid-up amount of Rs.39,42,088/- after deducting 10% of the sale consideration of Rs.1,28,31,283/- being earnest money along with an interest @11.10% p.a. (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 on the refundable amount, from the date of cancellation i.e., 01.09.2016 till its realization.

    ii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

33. Complaint stands disposed of.

34. File be consigned to the registry.

Dated: 25.09.2024



(Ashok Sangwan)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram