BEFORE THE HARYANA REAL ESTATE APPELLATE TRIBUNAL

Date of Decision: 18.08.2021

Appeal No.279 of 2019

Shakti Singh S/o Sh. Avtar Singh, R/o B-4/132-A, Block-B4, Keshav Puram, Delhi

...Appellant

Versus

M/s Bestech India Ltd., 124, Sector-44, Gurugram 122001

...Respondent

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

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Argued by: Ms. Mun Mun Goyal, Advocate, Ld. counsel for the appellant.

Shri Aashish Chopra, Ld. Senior Advocate with Ms. Sugandha Kundu, Advocate, Ld. counsel for the respondent-promoter.

O R D E R

ANIL KUMAR GUPTA, MEMBER (TECHNICAL)

The present appeal has been preferred by the appellant under Section 44 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter called, 'the Act') against the Order dated 19.03.2019 passed by the Haryana Real Estate Regulatory Authority, Gurugram (hereinafter called, 'the Authority') vide which Complaint No.224 of 2018 filed by the appellant/allottee was disposed of with the following directions:

"i. The complainant is given an option to pay the balance amount due towards the respondent and the respondent shall withdraw the

cancellation letter dated 01.07.2016 issued to the complainant and offer possession without charging any interest on delay payment to be made by the complainant during the period of cancellation of unit.

ii. Alternatively, option may be given to the complainant, in case refund is to be given, then respondent shall be allowed to retain 10% of the total sales consideration as earnest money, along with processing fees, delayed payment charges, brokerage charges and other taxes paid to the government. The balance amount remained, if any after deducting the above mentioned amount and other statutory dues, be refunded to the complainant as per terms and conditions of the builder buyer's agreement.

iii. The project is registerable but the respondent has failed to get the project registered which is in violation of section 3(1) of the Real Estate (Regulation and Development) Act, 2016. Hence, the authority has decided to take suo moto cognizance for initiating penal proceedings under section 59 of the Act ibid against the respondent."

2. As per averments in the complaint, the appellant had booked a Flat bearing No.1004, Tower B at 10th Floor (measuring 2120 sq. ft.) in the residential project of the respondent-promoter namely 'Parkview Sanskruti' situated in Sector 92, Gurugram on 27.11.2012. An Apartment Buyer's Agreement (Annexure R-1) (for short, 'the Agreement') was executed between the parties on 10.10.2013.

3. The appellant-allottee submitted before the Ld. Authority that the respondent advertised itself as a very ethical business group that lives onto its commitments in delivering its housing projects as per promised quality, standards and agreed timelines. The respondent while launching and advertising any new housing project always commits and promises to the targeted consumers that their dream homes will be completed and delivered to them within the time agreed initially in the agreement while selling the dwelling apartments to them. He further submitted that the respondent and its representatives promised and represented to him that its project will be completed and delivered to the

end user within the timeline to be agreed in the Agreement executed by the respondent with the allottee. He further submitted that relying upon the representations made by the respondent and believing those to be true, he was very much induced to buy the said dwelling apartment consisting of three bedrooms and paid an amount of Rs.10,00,000/- vide cheque dated 27.11.2012 as the booking amount. The total sale consideration amount of the flat was Rs.1,41,11,080/-out of which the appellant-allottee has paid total amount of Rs.39,51,638/- to the respondent-promoter.

4. The appellant-allottee further submitted before the Ld. Authority that he was duly assured, represented and promised by the respondent that the said apartment and Real Estate Project will be ready to be occupied by the appellant within a period of three years from the date of start of foundation of a particular tower, in which the apartment is located, with a grace period of six months. He further submitted that at the instance and motivation of the respondent-promoter, at the time of booking of the said apartment that the construction of the project will start soon, the complainant booked the flat. He also submitted that he had been visiting at the so-called proposed site, but found that the progress of the development was very slow and was not as per terms and conditions of the Agreement to sell and as such, all claims made by the respondent came out to be untrue and false. He further submitted that the respondent had issued letter for cancellation to the complainant on account of non-payment of the demanded amount by the complainant. However, the demands made by the respondent were illegal and unlawful as the same were not in consonance with the development work. Therefore, the complainant requested the respondent-promoter for refund of the entire amount paid by him.

5. By making above averments before the Ld. Authority, the appellant claimed the relief of refund of amount of Rs.39,51,638/- along

with interest @18% per annum from the date of payment till its actual realization along with compensation of Rs.10,00,000/- towards mental trauma, agony and harassment and to pay Rs.5/- per sq. ft. as penalty for delaying in delivery of possession to him.

6. The respondent-promoter contested the complaint by raising preliminary objections, inter-alia, that the project of the respondent is not an on-going project as per Rule 2(o) and in the present case, the respondent had applied for Occupation Certificate for the said project on 30.06.2017 which is prior to the date of publication of the Rules. Secondly, the respondent-promoter also contested the complaint alleging that the said complaint is for the compensation and interest under Section 12, 14, 18 and 19 of the Act which is maintainable only before the Adjudicating Officer.

7. The respondent-promoter submitted that the complainant had booked the apartment in question of his own without any influence from the respondent. The complainant himself had approached the respondent after making enquiries. The complainant was given the application form containing all terms and conditions to familiarize him and as per Clause 11 of the terms of the Agreement, the complainant was bound to make the timely payment of instalments and the same was essence of the contract. The terms of Apartment Buyer's Agreement are binding on both the parties. The complainant has opted for Construction Linked Payment Plan and all demands raised by the respondent-promoter are strictly in accordance with the Agreement.

8. The respondent-promoter further submitted that as per Clause 1.2(k) of the Agreement, in case, the allottee failed or delayed in making payment, the allottee shall be liable to pay interest @18% per annum to be compounded quarterly and in the event of delay in making the payment of outstanding amount along with interest, the allotment shall be liable to be cancelled and earnest money was liable to be

forfeited. Therefore, the interest charged on delayed payments is totally justified in terms of the Agreement. The respondent raised numerous demands, but the complainant ignored all the demand notices and reminders. Eventually, after affording numerous opportunities to the complainant to pay the outstanding dues, the respondent cancelled the allotment vide letter dated 01.07.2016.

9. The appellant was informed that the amount paid by the appellant stood forfeited as per terms of the Agreement and an amount of Rs.15,73,378/- had accrued towards interest on delayed payments. Despite the aforesaid cancellation notice, the appellant did not bother to get in touch with the respondent and after an unexplained delay of almost two years, the appellant has proceeded to file the present complaint. Also, the conduct of complainant shows that he never had sufficient funds to pay the amount demanded by the respondent. The respondent further contended that there has been no delay insofar as the construction of the project is concerned. The respondent has applied for Occupation Certificate to the competent authority.

10. After hearing Ld. counsel for the parties appreciating the documents placed on record, the Ld. Authority has disposed of the complaint filed by the complainant vide Impugned Order dated 19.03.2019 with decision and directions, which have been reproduced above.

11. The claim of refund of entire money paid by the complainant was declined on the ground that Occupation Certificate has been obtained on 19.06.2018 and the project is complete and fit for occupation. Therefore, the respondent was directed to withdraw the cancellation letter dated 01.07.2016 issued to the complainant and complainant was asked to pay the balance amount due towards the respondent. The respondent was further directed not to levy any interest

on delayed payment to be made by the complainant and offer the possession of the said unit.

12. Aggrieved with the aforesaid order, the present appeal has been preferred.

13. We have heard Ms. Mun Mun Goyal, Advocate, Ld. counsel for the appellant and Shri Aashish Chopra, Ld. Senior Advocate with Ms. Sugandha Kundu, Advocate, Ld. counsel for the respondent. We have also meticulously examined the record of the case.

14. Initiating the arguments, Ld. counsel for the appellant contended that the appellant had booked a Flat measuring 2120 sq. ft. bearing No.1004, Tower B at 10th Floor in the project namely 'Parkview Sanskruti' situated in Sector 92, Gurugram with the respondent-promoter on 27.11.2012. The total cost of the flat was Rs.1,41,11,080/- out of which the appellant has paid an amount of Rs.39,51,638/- to the respondent-promoter. Initially, the appellant paid an amount of Rs.10,00,000/- vide cheque dated 27.11.2012 as booking amount and another amount of Rs.10,00,000/- vide cheque dated 23.02.2013. Further, the appellant made a payment of Rs.19,51,638/- vide cheque dated 14.06.2013. Thus, the appellant has paid a total amount of Rs.39,51,638/- against the total cost of the flat of Rs.1,41,11,080/- to the respondent-promoter. The Agreement was executed on 10.10.2013.

15. Ld. counsel for the appellant further contended that as per Clause 3(a)(c)(iii) of the Agreement, in case, the Developer fails to complete the construction within the agreed period of 36 months including six months' period as hereinabove mentioned, the Developer would pay to the buyer compensation @Rs.5/- sq. ft. of a super area of the apartment per month for the period of delay. The respondent had not refunded the above-said entire amount along with interest as demanded by the appellant and the appellant is suffering from economic loss as well as mental agony, pain and harassment by the act and

conduct of the respondent and thus, the appellant is entitled to the tune of Rs.10,00,000/- as compensation. The respondent had delayed in delivering the possession of the said dwelling unit and had no intention to deliver the same in time as agreed. The respondent has also not adhered to the promises made by it at the time of sale of the above-said dwelling unit, though the appellant paid a sum of Rs.39,51,638/- against the total sale consideration of Rs.1,41,11,080/-.The appellant has undergone severe mental harassment due to the negligence on part of respondent to deliver the said apartment/unit on time and he was compelled to pay inflated amounts. The respondent has violated the terms and conditions of the BBA.

16. Ld. counsel for the appellant contended that the appellant/complainant made the statement when the matter came up before the Ld. Authority on 12.07.2018 that he is not appearing before the Ld. Authority for the compensation but for fulfilment of the obligations by the promoter as per the Act. She also contended that the project requires registration but the respondent has still not got the project registered which is violation of Section 3(1) of the Act.

17. Ld. counsel for the appellant further contended that the respondent has sent a cheque No.009672 dated 29.04.2019 for refund of the amount of Rs.1,39,382/- of HDFC Bank. This act of respondent is illegal and not sustainable in the eyes of law. The copy of the e-mail dated 30.04.2019 regarding the refund of the cheque is attached as Annexure A-4 with this appeal.

18. Ld. counsel for the appellant further contended that the Ld. Authority has erroneously observed that the appellant intended to wriggle out of the project. The Ld. Authority has failed to take note that the appellant initially never wanted to get refund of the amount paid by him but rather, he wanted to get the possession of the flat in agreed time and the refund is being demanded on account of delay in not handing

over the possession within time. The appellant has submitted the counter-affidavit dated 26.07.2021, to the affidavit dated 09.07.2021 of the respondent, stating that the respondent has provided brokerage amount and mode of payment only. However, the respondent failed to provide other details like “how much actual amount had become due as on the date of cancellation?” The respondent has also not provided the information “as to what was the stage of the construction when the cancellation was ordered and the demand letters were issued.” It is also stated in the counter-affidavit that the respondent has only mentioned about the demand letters issued by it but has failed to provide the details of actual amount due. The payment plan was linked to the actual level of construction raised at site, but the respondent has failed to mention the construction raised at site at the time of raising the demand. It is also stated that the respondent was raising demand unnecessarily without having completed the construction upto the extent, as mentioned in the demand letter sent by the respondent. There was no consistency between the demand raised and the construction raised. The e-mails dated 23.12.2013 and 08.09.2014 were also annexed with the counter-affidavit showing the ambiguity.

19. Ld. counsel for the appellant, during arguments, contended that in the affidavit dated 09.07.2021 submitted by the respondent, compound interest @18% per annum calculated on account of delay in payment has been wrongly charged on all the instalments which has been raised by the respondent upto the date of cancellation i.e. 01.07.2016. In fact, even if the delay payment charges were to be calculated as per the terms of the Agreement, the same were required to be calculated on the instalments which have become due only upto 75 days from the date of first instalment which remained unpaid by the appellant. She further contended that the terms and conditions such as the terms 1.2(g), 1.2(k), 1.2(*l*) and 3(c)(vi) etc. of the Agreement providing

for earnest money, 18% compound interest and cancellation on account of failure to pay any instalment(s) with interest within 75 days, from the due date, along with the deduction of earnest money, interest accrued on delay payments, processing fees, brokerage, if any, etc. are coercive in nature, one sided and are as such not enforceable.

20. Ld. counsel for the appellant also contended that since the respondent-promoter has failed to deliver the unit within the time as prescribed in the Agreement, therefore, the appellant-allottee is entitled for refund of the total amount paid i.e. Rs.39,51,638/- along with interest @18% per annum from the date of payment till its actual realization, as per Section 18 of the Act.

21. Per contra, Shri Aashish Chopra, Ld. Senior Advocate, counsel for the respondent-promoter contended that the project of the respondent is not an on-going project. As per Rule 2(o) of the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter called as the Rules), the respondent had applied for Occupation Certificate for the said project on 30.06.2017 which is prior to the date of publication of the Rules. Further, the complaint for compensation and interest under Section 12, 14, 18 and 19 of the Act is maintainable only before the Adjudicating Officer and not before the Ld. Authority. He further contended that the appellant took an independent and informed decision, uninfluenced in any manner by the respondent to book the said apartment. The appellant himself had approached the respondent after making independent enquiries.

22. Ld. counsel for the respondent further contended that as per the Agreement, the appellant was bound to make timely payment of instalment and the same was essence of the contract. As per clause 1.2 (k) of the BBA, in case, the allottee fails/delays in making payment, the allottee is liable to pay interest @18% per annum to be compounded quarterly and as per Clause 1.2(*l*), in the event of delay in payment of

outstanding amount along with interest, the allotment shall be liable to be cancelled and earnest money was liable to be forfeited. The amount paid, over and above the Registration/Earnest Money, if any, shall be refunded by the Developer without interest after adjustment of interest accrued on delayed payment(s), processing fees, brokerage, if any, and/or any other charges, due from the allottee under this Agreement. He also contended that the respondent raised numerous demands but the appellant chose to ignore all the said demand notices and reminders. Eventually, after affording innumerable opportunities to the appellant to pay his outstanding dues, the respondent cancelled the allotment vide letter dated 01.07.2016.

23. Ld. counsel for the respondent further contended that there has been no delay insofar as the construction of the project is concerned. The Occupation Certificate was applied by the respondent on 30.06.2017 and the same was obtained on 19.06.2018. Ld. counsel for the respondent stated that statement reflecting the breakup of the amount deducted in terms of the impugned order dated 19.03.2019 in the affidavit dated 06.01.2020 supplied by the appellant, is correct and is in accordance with the said order of the Ld. Authority. He further contended that in the affidavit dated 09.07.2021, the delayed payment interest calculated @18% compounded quarterly is upto 01.07.2016 i.e. the date of cancellation which is as per the Agreement executed between the parties.

24. Ld. counsel for the respondent also contended that the plea raised by the appellant that the terms of the Agreement particularly, the terms 1.2(g), 1.2(k), 1.2(*l*) & 3(c)(vi) are coercive in nature, is not tenable, as this plea is not taken by the appellant in the grounds of appeal. These pleadings are beyond the pleadings taken in its appeal. The charging of the interest @18% per annum to be compounded quarterly is as per terms of the Agreement. Moreover, coerciveness of the terms of the

Agreement can only be challenged before the Civil Court and cannot be challenged under the Act. He also contended that the respondent is entitled to interest on all the demands raised by him upto the date of cancellation i.e. 01.07.2017 as the discretion to cancel the allotment lies with the respondent as per terms of the Agreement.

25. Ld. counsel for the respondent also contended that the impugned order of the Ld. Authority is just and fair and there is no illegality in the order and prayed for dismissal of the appeal.

26. We have duly considered the aforesaid contentions. The admitted facts are that the appellant booked a Flat bearing No.1004, Tower B, 10th Floor at Parkview Sanskruti situated in Sector 92, Gurugram measuring 2120 sq. ft. on 27.11.2012.The appellant booked the apartment by paying a booking amount of Rs.20,000,00/- (Rs.10,000,00/- vide cheque dated 27.11.2012 and Rs.10,000,00/- vide cheque dated 23.02.2013). The appellant further paid a sum of Rs.19,51,638/- vide cheque dated 24.06.2013. Thus, the appellant paid the total amount of Rs.39,51,638/- to the respondent out of the total sale consideration of Rs.1,41,11,080/-.The Basic sale price of the apartment is Rs 1,37,99,080/-. The Agreement was executed on 10.10.2013 by the parties. As per Clause 3(a) of the Agreement, the possession of the apartment was to be given within thirty six months plus six months grace period from the date of execution of the Agreement or from the date of approval of the Building Plans, whichever is later. Therefore, the schedule date of delivery of the possession as per the above-said Clause comes to 10.04.2017 as the approval of Building Plans is earlier than the date of execution of the agreement. The occupation certificate was applied by the respondent on 30.06.2017 and the same was obtained on 19.06.2018. The appellant filed the complaint with the Ld. Authority for refund of the amount paid by him along with interest @ 18% per annum on 03.05.2018.

27. The Ld. Authority in the impugned order has directed the respondent to withdraw the cancellation letter dated 01.07.2016 issued to the complainant and ordered to offer the possession without charging any interest on delay payment to be made by the complainant during the period of cancellation of the unit. The appellant-allottee wants to discontinue with the project on account of the delay in handing over the possession in time, therefore, cannot be forced to continue with the project. The appellant is seeking refund of the amount along with interest @18% per annum on the ground that the respondent has not completed the project within the stipulated period.

28. As brought out above, the appellant has paid a total sum of Rs.39,51,638/- to the respondent upto 24.06.2013. The agreement was executed on 10.10.2013. The respondent has supplied various demand letters and notices issued to the respondent for payment of through its application dated 10.06.2021.The respondent in the affidavit dated 09.07.2021 of its duly authorized signatory submitted copy of the agreement dated 10.10.2013 and the copy of the demand letters issued to the appellant from time to time till the date of cancellation of the allotment and also provide chart reflecting the dates of the demand letters, due dates of payment and stage of construction in a tabular form as below:

Sr. No.	**Demand Letter Date**	**Due date of payment of demand letter**	**Stage of Construction**
1.	01.06.2013	14.06.2013	Time Based
2.	19.08.2014	20.09.2014	On casting of basement floor roof slab
3.	16.12.2014	20.01.2015	On casting of 2nd floor roof slab
4.	19.03.2015	21.04.2015	On casting of 6th floor roof slab
5.	17.06.2015	18.07.2015	On casting of 10th floor roof slab
6.	19.09.2015	20.10.2015	On casting of 14th floor roof slab
7.	03.02.2016	02.03.2016	On casting of top floor roof slab
8.	20.04.2016	20.05.2016	On completion of brickwork of apartment

9.	01.07.2017	On the date of cancellation the superstructure of tower and brickwork in Apartment was complete

29. The respondent through its application dated 05.08.2021submitted the copy of the letters dated 20.10.2014, 16.12.2014 and cancellation letter dated 01.07.2016 in compliance of our order dated 01.08.2021.

30. Thus, from the above correspondence, it is established that the appellant himself is at default and he has paid a total sum of Rs.39,51,638/- upto 26.03.2013 and thereafter despite number of demands and notices by the respondent, the appellant did not make any payment.

31. In ***IREO GRACE REAL TECH PVT. LTD. Versus ABHISHEK KHANNA & OTHERS***, ***Civil Appeal No.5785 of 2019 decided on January 11, 2021***, the Hon'ble Apex Court held as under:-

> *"21. Whether the Apartment Buyers are entitled to terminate the Agreement, or refund of the amount deposited with Delay Compensation.*
>
> *21.1 The issue which now arises is whether the apartment buyers are bound to accept the offer of possession made by the Developer where the Occupation Certificate has been issued, along with the payment of Delay Compensation, or are entitled to terminate the Agreement.*
>
> *The factum of delay in completing the construction and making the offer of possession is an undisputed fact in this case.*
>
> *21.2 In the present case, the allottees before this Court in the present batch of appeals, can be categorised into two categories:-*
>
> *i) Apartment Buyers whose allotments fall in Phase 1 of the project comprised in Towers A6 to A10, B1 to B4, and C3 to C7, where the Developer has been granted occupation certificate, and offer of possession has been made, are enlisted in Chart A;*
>
> *ii) Apartment Buyers whose allotments fall in Phase 2 of the project, where the allotments are in Towers A1 to A5, B5 to B8, C8 to C11, where*

the Occupation Certificate has not been granted so far, are set out in Chart B below.

CHART A

……x xxxxxxxxxxxx x………

CHART B

……..x xxxxxxxxxxxx x……….

Chart A allottees

(i) We are of the view that allottees at Serial Nos. 1 and 2 in Chart A are obligated to take possession of the apartments, since the construction was completed, and possession offered on 28.06.2019, after the issuance of Occupation Certificate on 31.05.2019. The Developer is however obligated to pay Delay Compensation for the period of delay which has occurred from 27.11.2018 till the date of offer of possession was made to the allottees."

32. In the aforesaid latest judgment the Hon'ble Apex Court has held that where the construction was complete and possession was offered after issuance of the Occupation Certificate, the allottee is obliged to take possession. This authority is fully applicable to the facts of the case in hand. The Occupation Certificate stands issued on 30.06.2017 and, therefore, the relief of refund is declined.

33. Let us now examine as to whether the respondent is entitled to forfeit an amount of Rs.38,12,256/- from the appellant out of the total amount of Rs.39,51,638/- paid by him.

34. The respondent vide our order dated 15.11.2019 was directed to supply the details of deductions of processing fee, delayed payment charges, brokerage charges and other taxes paid to the Govt., in terms of the impugned order. The respondent supplied the above details during hearing on 07.01.2020, which are as follows:

10% of Total Sale Consideration (A)	Rs.14,11,108/-
Brokerage Paid (B)	Rs.3,07,400/-
Service Tax (C)	Rs.4,79,428/-

VAT Applicable (D)	Rs.40,972/-
Delayed payment charges (E)	Rs.15,73,348/-
A+B+C+D+E	Rs.38,12,256/-

35. The relevant Clause 1.2(*l*) of the Agreement dated 10.10.2013 according to which the respondent claims to have made deductions from the amount paid by the appellant is reproduced below:

> *"In the event the APARTMENT ALLOTTEE(s) fails to pay any instalment(s) with interest within 75 days, from the due date, the Developer shall have the right to forfeit the entire amount of earnest/registration money paid by the APARTMENT ALLOTTEE(s) and in such an event the allotment of the Said Apartment shall stand cancelled and the APARTMENT ALLOTTEE(s) shall left with no right, claim or lien on the said apartment and the Developer at its sole discretion would be free to allot the Apartment to a third party. The amount paid, over and above the Registration/Earnest Money, if any, shall be refunded by the Developer without interest after adjustment of interest accrued on the delayed payment(s), processing fees, brokerage, if any, and/or any other charges, due from the APARTMENT ALLOTTEE(s) under this Agreement. However, the Developer may in its sole discretion, waive its right to terminate this Agreement, and enforce all the payments and seek specific performance of this Agreement. In such a case, the Parties agree that the possession of the APARTMENT will be handed over to the APARTMENT ALLOTTEE(S) only upon the payment of all out-standing dues, penalties, interest, litigation costs etc., along with interest by the APARTMENT ALLOTTEE(S) to the satisfaction of the Developer."*

36. In compliance to our order dated 15.06.2021, the respondent through affidavit dated 09.07.2021 of its duly authorized signatory submitted copy of Agreement dated 10.10.2013 executed between the parties and details of breakup of delayed payment charges as calculated by the respondent, which are reproduced as follows:

Sr. No.	Due date of instalment	Amount Due (In INR)	Date of Payment	Amount paid (In INR)	Delay (in days)	Interest @18% compounded
1.	10.05.2013	20,00,000	10.05.2013	20,00,000	0	0
2.	01.07.2013	19,94,211	24.06.2013	19,51,638	-7	0
-	-	42,573	01.07.2016	0	1096	29,270
3.	20.09.2014	12,76,293	01.07.2016	0	650	4,70,466
4.	20.01.2015	12,76,293	01.07.2016	0	528	3,70,514
5.	21.04.2015	12,76,293	01.07.2016	0	437	2,99,780
6.	18.07.2015	10,33,904	01.07.2016	0	349	1,89,750
7.	20.10.2015	10,33,904	01.07.2016	0	255	1,35,523
8.	02.03.2016	9,63,145	01.07.2016	0	121	58,126
9.	20.05.2016	9,63,145	01.07.2016	0	42	19,949
	-	1,18,17,188	-	39,51,638	-	15,73,378/-

37. The clause 1.2(g) of the Agreement dated 10.10.2013 stipulates that out of the amount(s) paid/payable towards the sale consideration, the developer shall treat 20% of the sale consideration as earnest money to ensure fulfilment, by the allottee of the terms and conditions of agreement. The appellant has paid Rs.10,000,00/- on 27.11.2012 and Rs.10,000,00/- on 23.02.2013 and the last payment of Rs.19,51,638/- was made by him on 24.06.2013. The agreement was executed 10.10.2013. Thus the appellant has not made any amount after signing of the agreement. The total sale consideration is Rs.1,41,11,080/-. The respondent has forfeited an amount of Rs.38,12,256/- from the appellant out of the total amount of Rs.39,51,638/- paid by him. Thus, the respondent has forfeited approximately 27.01% of the total sale consideration. During the hearing on 19.02.2020, the Ld. counsel for the respondent informed that the respondent-promoter is ready to waive the service tax amounting to Rs.4,79,428/-. If it is considered that the respondent will not forfeit this amount of Rs.4,79,428/-, even then the respondent would forfeit about 23.61% of the total sale consideration.

38. The legal position with regard to the earnest money has been dealt in detail by Hon'ble Supreme Court in citations **Maula Bux case v. Union of India – 1969 (2) SCC 522 and Satish Batra case -1969 (2) SCC 554** 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."*

39. In the case of **M/s DLF V/s Bhagwanti Narula decided on 06.01.2015by the Hon'ble National Consumer Disputes Redressel Commission in Revision Petition No.3860 of 2014,** 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 person 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. In the para 13 of the said order of the Hon'ble National Consumer Disputes Redressal Commission, it is held that an amount exceeding 10% of total sale price cannot be forfeited by seller, since forfeiture beyond 10% of the sale price would be unreasonable and only the amount which is paid at the time of concluding the contract can be said to the earnest money.

40. In the instant case, there is a breach of contract on the part of the appellant/allottee as he has not adhered to the payment schedule as per the agreement in spite of repeated demands/reminders. The total sale price of the apartment was Rs.1,41,11,080/-, out of that the appellant/allottee has only paid Rs.39,51,638/-. The respondent/ promoter has cancelled the allotment vide letter dated 01.07.2016 and invoked Clause 1.2(*l*) of the Agreement and forfeited an amount of Rs.38,12,256/- obviously as liquidated damages.

41. The claim for damages for breach of contract is governed by the provisions of Section 74 of the Indian Contract Act, 1872 (hereinafter called 'the Contract Act') as liquidated damages. The forfeiture of the earnest money along with brokerage paid, service tax, applicable delayed payment charges etc. as per clause 1.2 (l) of the agreement, 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**.

42. 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."*

43. In view of the 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 respondent has not adduced any evidence to establish the actual damage/loss but at the same time it cannot be stated that the respondent has not suffered any loss as the construction stands completed by the respondent from its own sources. However, the respondent is entitled only to a reasonable compensation.

44. Thus, in view of the aforesaid legal position, The forfeiture by respondent of the amount of Rs.38,12,256/- (27% of the total sale consideration of 1,41,11,080/-) out of the payment of Rs.39,51,638/ made by the appellant and that too after the use of the said amount for approximately eight years is unjust, unconscionable and unreasonable. The respondent is only entitled to a reasonable compensation and an amount of Rs.14,11,108/- (i.e.@10% of the total sale consideration of

Rs.1,41,11,108/-) is considered as reasonable and, therefore, is liable to be forfeited by the respondent.

45. No other claim was pressed by the appellant during arguments.

46. Consequently, the impugned order passed by the Ld. Authority is modified to the extent that the respondent-promoter shall be allowed to forfeit an amount of Rs.14,11,108/- i.e. 10% of the total sale consideration of Rs.1,41,11,108/- out of the total amount of Rs.39,51,638/- deposited by the appellant. The respondent has already sent a cheque dated 29.04.2019 amounting to Rs.1,39,382/- for refund to the appellant. The respondent shall return the balance amount of (Rs.39,51,638/- minus 10% of the total sale consideration i.e.Rs.14,11,108/- minus the amount of Rs.1,39,382/- already paid to the appellant) i.e. Rs.24,01,148/- to the appellant with interest as per Rule 15 of the Rules i.e. at SBI highest marginal cost lending rate plus two per cent i.e. 9.3% per annum from the date of this order till realization.

47. Resultantly, the present appeal stands partly allowed accordingly.

48. No order to costs.

49. Copy of this detailed order be conveyed to the parties/Ld. counsel for both the parties and Ld. Haryana Real Estate Regulatory Authority, Gurugram for information.

50. File be consigned to the record.

Justice Darshan Singh (Retd.)
Chairman
Haryana Real Estate Appellate Tribunal
Chandigarh

Inderjeet Mehta
Member (Judicial)

Anil Kumar Gupta
Member (Technical)

18.08.2021/Gaurav

Shakti Singh
Vs.
M/s Bestech India Pvt. Ltd.
Appeal No.279 of 2019

Present: None

Vide our separate detailed judgment of the even date, the appeal is partly allowed and the impugned order dated 19.03.2019 passed by learned Authority is modified.

The respondent shall return an amount of Rs.24,01,148/- to the appellant with interest @ 9.3% per annum from the date of this order till realization.

Copy of this order be communicated to the parties/learned counsel for the parties and the learned Haryana Real Estate Regulatory Authority, Gurugram.

File be consigned to the record.

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

Inderjeet Mehta
Member (Judicial)

Anil Kumar Gupta
Member (Technical)

18.08.2021
Gaurav