THE MAHARASHTRA REAL ESTATE REGULATORY AUTHORITY
MUMBAI.

COMPLAINT NO: CC006000000151210.

Mr. Amit Agarwal. ... Complainant.

Versus

M/s. Godrej Properties Limited ...Respondents.

MahaRERA Regn: **P51800000165.**
(The Trees)

Coram: Shri B.D. Kapadnis,
Member-II.

Appearance:
Complainant: Adv. Mr. Tanuj Lodha.
Respondents: Adv. Mr. Abhijit Mangade.

FINAL ORDER
13th August, 2020

Whether a forfeiture of amount clause in the agreement on allottee's default in making payment of instalments of consideration as per time line is unfair and not enforceable on account of parties' unequal power of bargaining, is the issue involved in this complaint.

2. The complainant contends that he booked flat Nos. 503 and 504 in D wing of residential phase no 1 of the respondents' registered project, 'The Trees' through real estate agent namely-Services for NRI under international payment plan 25%.60%.15% for consideration of Rs. 1,41,67,000/- for each flat. The respondents executed the agreements for sale in October 2016. The complainant paid them Rs. 97,49,343.56/- till the date against the flats. The respondents terminated the agreements by

sending an email on 23.03.2018 contending therein that the complainant delayed the balance payment. They forfeited a sum of Rs. 56,66,800/- but did not refund the balance amount. The complainant contends that the respondents' international sales representatives namely Mr. Karan Arora and Mr. Ankur Sharma promised that after paying 25%, the balance of 60 % would be payable only after June 2018. They also represented that they would help the complainant in obtaining the loan, however, they did not cooperate. The respondents demanded 60% consideration in December 2017 which was six months before promised time line and the complainant could not arrange for the money. He had to approach to U.K. Mortgage which approved and confirmed the loan on 22.03.2018. But on the very next day i.e. on 23.03.2018, the respondents unilaterally terminated the agreements for sale and forfeited Rs. 56,66,800/-. The complainant protested the cancellation by sending e-mail on 24.03.2018. Thereafter the respondents recommended India Bulls for NRI home loan, but did not cooperate for supplying the necessary documents. The respondents by their letter dated 04.04.2018, demanded reinstatement fees Rs. 3,17,340/- along with randomly calculated interest of Rs. 9,00,825/-. Thereafter the legal notices were exchanged.

3. The complainant contends, clause 13(b) of agreement for sale provides,

" upon termination of this agreement by the developer in accordance with the clause 13(a) above , the developer shall be entitled to forfeit 20% of the consideration together with the amount of interest payable by the purchasers in the terms of this agreement from dates of default in payment till the date of termination and refund the balance amount, if any to the purchasers without any interest / compensation or claim for any damage or cost, charges or expenses whatsoever,

simultaneously upon the parties executing and registering deed of cancellation."

The complainant relies upon clause 7 of the model form of the agreement provided under MOFA, it provides,

"on the flat purchaser committing default in payment on due date of any amount due and payable by the flat purchaser to the promoter under this agreement (including his / her proportionate share of the taxes levied by the concerned local authority and either outgoings) and on the flat purchaser committing breach of any of the terms and conditions herein contained, the promoter shall be entitled at his own option to terminate this agreement. Provided always that the power of termination herein before contained shall not be exercised by the promoter ,unless and until the promoter shall have given to the flat purchaser the 15 days prior notice in writing of intention to terminate this agreement and of the specific breach or breaches of the terms and conditions in respect of which it is intended to terminate the agreement and the default shall have been made by the flat purchaser in remedying such breach or breaches within a reasonable time after giving of such notice. Provided further, upon the termination of this agreement as aforesaid, the promoter shall refund to the flat purchasers the instalments of sale price of the flat which may till then have been paid by the flat purchaser to the promoter but the promoter shall not be liable to pay to the flat purchaser any interest on the amount refunded and upon termination of this agreement and refund of aforesaid amount by the promoter, the promoter shall be at liberty to dispose of and sell the flat to such person and at the such price as the promoter may in his absolute discretion feel fit."

4. The complainant therefore relies upon the case of Pioneer Urban Land and Infrastructure Limited v/s. Govindan Raghavan where the Hon'ble Supreme Court of India has held that unfair clauses in a contract where the bargaining power of the parties is unequal are not enforceable. Therefore, the complainant requests to refund his entire amount of Rs. 97,49,343.56/- with interest, however, he does not press for compensation.

5. The respondents have pleaded not guilty; they have filed their reply to deny the prayers of the complainant. The respondents contend that the complainant has presented the facts in distorted manner. According to them, the payment schedule is already provided in application form and the agreements for sale dated 06.10.2018. Since beginning the complainant was not paying the money as per timeline. They have provided the table showing the payments made by the complainant from time to time. It shows that there is delay ranging from 39 days to 149 days in making the payments. The respondents went on informing the complainant regarding the progress of the construction. The respondents by their email dated 24.12.2017 informed the complainant about the final slab of his units and also sent What's App messages. He was requested to make the payment at least of one flat by 24.12.2017, but the complainant did not make it. The respondents asked the complainant by their letter dated 26.02.2018 to make the payment in respect of both the flats within the period of one month and informed him that no further extension would be acceptable. The respondents again sent letter on 06.03.2018, informing the complainant that they will wait till 08.03.2018 and thereafter the termination process would be followed if the amount would not be paid. The respondents further contend that the complainant applied for loan from India Bulls on 24.03.2018 i.e. after termination of the agreements but he did not pay the process fee and that is why loan proposal did not go ahead. The

complainant was required to pay 20% of the total value of the flat before the registration and 5% after the registration of the agreements for sale. 60% of balance with the Infra charges were to be paid after completion of the final slab and remaining 15% with other charges were to be paid on possession. The complainant was informed periodically about the payment time lines and the construction updates. The letter dated 11.01.2018 was issued prior to the termination and thereafter on 23.03.2018 final letter of the termination of the agreements has been sent. Even after the termination they gave the opportunity to the complainant for reinstatement i.e. revival of the agreements but the complainant failed to obtain the loan and disburse 60% of the money.

6. The respondents contend that they received Rs. 37,07,464/- as against the flat no. 503 and Rs. 36,50,514/- as against the flat no. D-504. They had to pay Rs. 13,72,213/- towards service tax and GST and non-refundable brokerage of Rs.3,54,115/-for each flat. So, the actual total value received for flat no. D-503 is Rs. 19,81,136/- and for flat No. D-504 is Rs. 19,24,186/-. The complainant has paid the stamp duty, registration charges and M-VAT. The respondents contend that they had suffered a loss in cancelling the booking / agreements because they had paid Rs. 3,54,175/- for each flat towards the brokerage charges to the channel partners which is not refundable. The interest loss of the delayed payment is Rs. 4,38,811/- for flat no. D-503 and Rs. 4,62,014/- for D-504. Hence, the respondents contend that the complainant is not entitled to get the reliefs prayed by him.

7. I have heard the Ld. Advocates of the parties on virtual platform.

8. After taking into consideration the facts pleaded by both the parties, it becomes clear that the complainant is not interested in protecting the agreements. He wants refund of his money. Therefore, it is not necessary

to decide whether respondents were justified in terminating the agreements or not. The only issue is, whether the respondents are entitled to forfeit the amount deposited by the complainant or not. Therefore, I am restricting this discussion to this issue only.

9. Mr. Lodha for the complainant submits that the stipulation regarding the forfeiture of the amount is unreasonable and unfair. He submits that it is unfair practice u/s 7 of the RERA. He has placed reliance on Central Inland Water Transport Corporation Limited V/s. Brojo Nath Ganguly (1986) 3 Supreme Court 156. In this case, the Hon'ble Supreme Court observed that the constitution was enacted to ensure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons the equality before the law and equal protection of law. This principle is that the courts will not enforce and when will be called upon to strike down an unfair and unreasonable contract or strike down an unfair and unreasonable clause in the contract entered into between the parties who are not equal in bargaining power. The court must judge each case on its own facts and circumstances. By bringing these observations to my notice, Mr. Lodha submits that when there is a forfeiture clause relating to the default of the allottee in making the payment, there is no such clause in agreement about promoter's default and therefore it is one sided agreement. It is just a pre-drafted, pre-printed agreement which the complainant was required to sign. Therefore, the term and condition regarding the forfeiture of the allottee's amount is unreasonable and is not in accordance with the law. This forfeiture clause is illegal.

10. To counter this, learned advocate for the respondents submits that 20% of the total consideration of the flat is nothing but earnest money which can be forfeited and for this purpose he relies upon Satish Batra v/s.

Sudhir Rawal MANU SC / 0887 /2012. In this case, Hon'ble Supreme Court has observed that earnest is given to bind the contract which is part of the purchase price when the transaction is carried out and it will be forfeited when the transaction fails through by reason of default or by failure of the purchaser. The seller shall be entitled to forfeiture of the amount if the purchaser fails to perform as per the terms of the contract. Hon'ble Supreme Court has formulated following principles regarding 'earnest' after taking the review of its previous judgements.

1. It must be given at the moment when the contract is concluded.
2. It represents the guarantee that the contract would be fulfilled or in other words earnest is given to bind the contract.
3. It is part of purchase price when the transaction is carried out.
4. It is forfeited when the transaction fails through the reason of default or by failure of the purchaser.
5. Unless there is anything contrary to the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest.

11. Both the Ld. Advocates have also referred to the orders passed by the Appellate Tribunal to strengthen their points.

12. On this back drop I go to Section 7 of RERA, its subclause (1) provides that the Authority may, on receipt of the complaint or Suo motu in this behalf or on the recommendation of the competent authority, revoke the registration granted under section 5 after being satisfied,

a) ....

b) ....

c) the promoter is involved in any kind of unfair practice or irregularities.

Explanation. —For the purposes of this clause, the term "unfair practice means" a practice which, for the purpose of promoting the sale or development of any real estate project adopts any unfair method or unfair or deceptive practice including any of the following practices, namely,

(A) the practice of making any statement, whether in writing or by visible representation which, —

(i) falsely represents that the services are of a particular standard or grade;

(ii) represents that the promoter has approval or affiliation which such promoter does not have;

(iii) makes a false or misleading representation concerning the services;

(B) .....

(d) the promoter indulges in any fraudulent practices.

13. In Pioneer Urban Land and Infrastructure Limited v/s. Govindan Raghavan Civil Appeal No. 1238 / 2018 decided on 02.04.2019 Hon'ble Supreme Court has observed in respect of section 2 (r) of the Consumer Protection Act 1986, relating to unfair trade practice in following words:

"Unfair trade practice" means a trade practice which for the purpose of promoting sale, use or supply of any goods or for the provision of any service adopts any unfair method or any unfair deceptive practice" and includes any of the practices enumerated therein. The provision is illustrative and not exhaustive. I also record my finding on the basis of this judgement that the three illustrations given in section 7 (1)(A) are simply

illustrative and the list is not the exhaustive. Therefore, this Authority has to decide on the facts and circumstances of each case whether the promoter is really involved in unfair practice or irregularities or not.

14. On this legal back ground, now it is necessary for me to see as to whether the clause in the agreement for sale regarding the forfeiture of the part of the amount paid by the complainant is legal or not. Mr. Lodha brings to my notice that the promoter has incorporated forfeiture clause favourable to him when the allottee makes the default in making the payment. However, no such clause is there in the agreement casting obligation on him for his default, therefore, he submits that this is one sided agreement. In order to give support to his contention he has placed reliance on clause 7 of the model agreement provided under MOFA. Admittedly, the agreements of the parties have been executed under MOFA.

15. I have reproduced the clauses of agreements for sale and model form of agreement in para 3 of this order. After reading clause 13(b) of the agreement for sale entered into by the parties, it becomes clear that the developer has right to forfeit 20% of the consideration. In addition to that, he is also entitled to forfeit the amount of interest payable by the purchaser in terms of agreement from the dates of default in payment till the date of termination and refund the balance, if any. It means that the promoter is entitled under this clause to forfeit 20% of the amount of consideration and in addition, he is also entitled to deduct the amount of interest which he would have charged for delayed payment till refund of the amount. These two amounts are permitted to be forfeited under this clause. The default in paying the amount as per demand note, invites the liability of cancellation of agreement and it also empowers the promoter to recover interest for such delay that too till the balance is paid, it is most unjust condition and it exploits the allottees. Clause 7 of the model agreement

under MOFA also empowers the promoter to terminate the agreement on non-payment of the payments on due date. However, it makes it necessary for the promoter to give prior notice of 15 days before terminating the agreement to enable the allottee to remedying the breaches. It provides that the promoter shall refund the flat purchaser the instalments of sale price of the flat which may till then have been paid by the flat purchaser to the promoter. But the promoter shall not be liable to pay the purchaser any interest on the said amount so refunded. It goes without saying that the terms and conditions of the model agreement can be suitably altered, refined or reformed by the agreeing parties. But the spirit/expectation of law is seen from clause 7 of the model agreement that the allottee is entitled to get back the amount of consideration. It means that the amount of the taxes paid by the promoter out of the payments made by the allottee cannot be refunded and this amount to be refunded is without interest. After noting this position, I have to see whether prior notice of 15 days has been given by the respondents or not.

16. The complainant himself has produced the correspondences exchanged between the parties on which the respondents have also relied upon. After going through the letters / emails addressed by the respondents to the complainant since 06.12.2017 to 23.04.2018, I find that many letters were given by the respondents for giving an opportunity to the complainants for making the payments. The final intimation letter regarding the termination was given on 07.02.2018 and lastly on 22.03.2018 the termination letters have been issued. Therefore, I find that, prior notice of 15 days was given to the complainant before the termination of the agreements. Not only that, even after the termination of agreements, the respondents have also shown their readiness to revive the agreements but

unfortunately, the complainant could not arrange for the money and therefore that issue is closed.

17. After giving thought to the facts of the case as well as the terms and conditions of the agreement for sale, I find that the clause to forfeit 20% of the amount of total consideration plus interest on delayed payment is one sided and therefore it is unreasonable, unfair. Complainant did not have equal bargaining power as he had to simply sign the pre-drafted and printed agreements. When the model agreement under MOFA provides the refund of the consideration amount, I strike down the forfeiture clause in agreements as it amount to unfair practice within section 7 of RERA. Complainant is entitled to get the refund of the consideration amount after deducting tax amount and brokerage charges.

18. The respondents themselves have admitted that for flat no. 503 they have received Rs. 37,07,764/- and Rs. 36,50,514/- for flat no.504, out of it Rs. 13,72,213/- have been paid to the government towards the taxes i.e. the service tax and GST for each flat. It is admitted fact that the complainants have booked the flats through the real estate agents. The respondents have paid non-refundable brokerage charges of Rs. 3,54,175/- for each flat. Therefore, the respondents received Rs. 19,81,136/- for flat no. 503 and received Rs. 19,24,186/- for flat no. 504. The respondents are liable to return them to the complainant with Rs. 20,000/- towards the cost of the complaint. Hence, the following are the orders.

ORDER

A. The respondents shall refund Rs. 19,81,136/-, the balance amount of consideration of flat no. D-503 and Rs. 19,24,186/- the balance amount of consideration of flat no. D-504 with Rs. 20,000/- towards the cost of the complaint.

B. The charge of the aforesaid amount shall be on the booked flats till satisfaction of the complainants' claim.

C. The payment shall be subject to the period of moratorium specified by this Authority from time to time.

13.8.2020

Uploaded at Mumbai.

Date: 13.08.2020.

(B. D. Kapadnis)
Member-II,
MahaRERA, Mumbai.