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THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Notification

The 5th December, 2018

The Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018.

No. 11 /RERA GGM Regulations 2018.— In exercise of the powers conferred on it under section-85 of the Real Estate (Regulation and Development) Act, 2016 and all others powers enabling it in that behalf, the Haryana Real Estate Regulatory Authority, Gurugram hereby makes the following regulations:

1. Short Title, Object, Commencement and Extent:

- (a) These regulations may be called the Haryana Real Estate Regulatory Authority, Gurugram, (Forfeiture of earnest money by the builder) Regulations, 2018.
- (b) The power to make regulations by the authority has been delegated by the Legislature by virtue of powers conferred upon it by the statute. The regulations are indispensable to the proper functioning of the authority and the objective of framing regulations by the authority is to ensure that the authority works effectively, and in the public interest and therefore these regulations have been framed to contrive the procedures for forfeiture of the 'earnest money' 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.
- (c) These regulations will come into force from the date of their publication in the official gazette.
- (d) These regulations shall apply to all matters falling within the jurisdiction of the Real Estate Regulatory Authority, Gurugram as notified by the State Government of Haryana vide its notification No. 1/92/2017-ITCP dated 14.12.2017 which comprises entire area of Gurugram district in respect of which cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project.

2. Definitions

- a. "Act" means the Real Estate (Regulations and Development) Act, 2016 as amended from time to time;
- b. "Rules" means the Haryana Real Estate Regulatory Authority (Regulation and Development) Rules, 2017 as amended from time to time;

- c. "Regulations" means the Haryana Real Estate Regulatory Authority, Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018 as amended from time to time;
- d. "Authority" means the Haryana Real Estate Regulatory Authority, Gurugram
- e. "Authority Members" means the members of the Authority including the Hon'ble Chairman;
- f. "earnest money" means the money deposited in good faith from buyer to seller representing the desire of buyer to seal the deal for purchase of flat/unit/plot.
- g. "Builder buyer agreement" means a Contract between the Builder to provide services as specified for a consideration and the Buyer for fulfilling his end of the promise to pay for the services rendered by the Builder as promised and accepted by the Buyer.

3. SCENARIO AS PER BUILDER-BUYER AGREEMENT AND THE INTENT OF AUTHORITY

Affordability, transparency and bringing faith of homebuyers and investors into existence is main agenda behind the introduction of the Real Estate (Regulation and Development) Act, 2016 and in this context the authority intends to prescribe these regulations to protect the home buyers from superfluous forfeiture of funds by the builder in the form of earnest money. The deposit of earnest money to the seller by the buyer shows that he/she is a serious contender, and the concerned offer gets the attention it deserves.

This builder-buyer agreement is an unduly significant document as it is a legal contract between builder and buyer and is used in court against builder if he doesn't keep his commitments. This agreement between the buyer and the seller for purchase of flat/unit/plot contains various clauses which define the terms of purchase and in which one of the significant clause is the clause relating to the forfeiture of earnest money in case of cancellation of the flat/unit/plot and the clause in some cases framed as such to deceive the buyers and provides unreasonable forfeiture of funds in the form of earnest money.

4. PROVISIONS OF THE ACT AND RELEVANT JUDGEMENTS

As per provisions contained in section 38 of the Haryana Real Estate (Regulation and Development) Act, 2016 which reads as under:-

"The Authority shall be guided by the principals of natural justice and subject to the other provisions of this Act and the rules made thereunder, the Authority shall have powers to regulate its own procedure."

Further, section 85 of the Haryana Real Estate (Regulation and Development) Act, 2016 states as under:-

"The Authority shall, within a period of three months of its establishment, by notification, make regulations consistent with the Act and the rules made thereunder to carry out the purposes of this Act"

The point is further justified from the case of **M/s DLF V/s Bhagwati Narula dated 6.1.2015 decided by the Hon'ble National Consumer Disputes Redressal Commission in Revision Petition No.3860 of 2014** where it was categorically held

"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."

A similar view has been taken in the following cases which are re-produced below:-

In Maula Bux V/s Union of India, the Hon'ble Supreme Court of India quoted the following observations made by the judicial committee in Kunwar Chiranjit Singh V/s Har Swarup:

"that 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 or failure of the vendee.

Further, contracts with unjust and one sided clauses can also held to be unconscionable contract."

In Indian Oil Corporation Limited V/s Nilofer Siddiqui and Ors. :

"it was held by the Supreme court that, the said condition of the letter of allotment is unconscionable as it gives IOCL an unfettered right to terminate the distributorship without assigning any reason. In the instant case, respondent number 2 is far weaker in economic strength and has no bargaining power with IOCL. At the time when the letter of allotment was issued, respondent number 2 had no other means of livelihood and was dependent on the grant of Indane Gas agency by IOCL for sustenance of

himself and family members. The letter of allotment contains standard terms and respondent number 2 and 3 had no opportunity to vary the same. The said condition of the letter of allotment provides for unilateral termination of distributorship without assigning any reason which is liable to be read down in the light of Article 14 of the Constitution of India as well as observations made by this court in Central Inland Water Corporation Limited's case (1986 AUR 1571)."

In the instance case of Shakti Singh Versus M/s Bestech India Pvt. Limited

the complainant had paid a booking amount of Rs.20,00,000 vide 2 cheques dated 27.11.2012 and 23.2.2013 in lieu of apartment bearing number 1004. Therefore the booking amount would constitute as the earnest money. The total sale price of the apartment was Rs.1,41,11,80. Hence the earnest money constitutes 14.173% of the total sale price. Whereas, as per the builder buyer agreement dated 10.10.2013, the developer shall treat 20% of the sale price as earnest money alongwith processing fee, brokerage and interest due.

A similar view has been upheld in case of **Balmer Lawrie and Co. Limited and Ors. V/s Partha Sarathi Sen Roy and Ors.** by the Supreme Court of India.

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.

6. MISCELLANEOUS

The authority may take contrary view in case the facts otherwise justify.

DR. K. K. KHANDELWAL,
Chairman,
Haryana Real Estate Regulatory Authority, Gurugram.