

Real Estate (Regulation and Development) Act, 2016 (RERA)

Case law study

Amit Agarwal V/s Godrej Properties Limited

This article attempts to discuss the issues in respect of forfeiture clause in the agreement to sale and to decide whether such clauses are considered as unreasonable.

Issues:

Whether a forfeiture of amount clause in the agreement on allottees default on account in making payment of instalments of consideration as per time line is unfair and not enforceable on account of parties' unequal power of bargaining.?

Whether clauses in agreement which are inconsistent with the model agreement under MOFA are reasonable and fair.?

Whether the allottee developer is liable to refund the amount?

Provisions:

As per Section 7 (1) The Authority may, on receipt of a 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 that—

- (a) the promoter makes default
- (b) the promoter violates;
- (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) the promoter....;

(d) the promoter indulges in any fraudulent practice

Clause 7 of model form of agreement under MOFA provide as under:

“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 taxes levied by concerned local authority and other outgoing) 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 his agreement:

Provided always that the power of termination hereinbefore contained shall not be exercised by the promoter, unless and until the promoter shall have given to the Flat Purchaser fifteen days (15) prior notice in writing of his intention to terminate this agreement and of the specific breach or breaches of terms and conditions in respect of which it is intended to terminate the agreement and default shall have been made by the Flat Purchaser in remedying such breach or breaches within a reasonable time after the giving of such notice:

Provided further that upon termination of this agreement as aforesaid, the promoter shall refund to 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 to the Flat Purchaser any interest on the amount so 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 such price as the Promoter may in his absolute discretion think fit.

Fact of the Case:

In the present case the complaint was filed to challenge the one sided clause of agreement for sale wherein it is stated that upon termination of the agreement , the developer shall be entitled to forfeit 20% of the consideration together with the amount of interest payable by the purchaser in the terms of agreement from the dates of default in payment till the date of termination and refund the balance amount, if any to the purchaser without any interest/compensation or claim for any damage or cost, charges or expenses whatsoever.

The allottees has relied on the judgement of Pioneer Urban Land and Infrastructure Limited V/s Govindan Raghvan it was held by the Hon'ble Supreme Court that unfair clause in a contract where bargaining power of the parties is unequal are not enforceable.

Further it is stated by the allottee that stipulation regarding forfeiture of amount is unreasonable and unfair and the same is unfair trade practice as per Section 7 of RERA.

Further allottee has placed the reliance on judgment of Central Inland water transport Corporation Limited V/s Brojo nath Ganguly (1986) 3 Supreme Court wherein it was observed that the constitution was enacted to ensure to all the citizen of this country social and economic justice.

The hon'ble member-MahaRERA observed that clause to forfeit 20% of the amount of total consideration plus interest on delay payment is one sided and therefore it is unreasonable, unfair. further it is observed that allottee is entitled to get the refund of consideration after deducting tax amount and brokerage charges.

Conclusion:

The promoter shall refund the balance amount with Rs. 20,000/- towards the cost of complaint. However, there was no direction as to interest on forfeiture amount retained by developer.

The charges of the amount shall be on the booked flat till satisfaction of the allottees claim.

The payment shall be subject to the period of moratorium specified by the authority from time to time.