

**REAL ESTATE REGULATORY AUTHORITY
HIMACHAL PRADESH**

IN THE MATTERS OF:-

1. Lokesh Guptason of Sh. GulabRai Gupta, Resident of Ground Floor, 7/11 Kalkaji extension, Opp. Nehru Place, New Delhi-110019
2. Abha Gupta wife of Lokesh Gupta, Resident of Ground Floor, 7/11 Kalkaji extension, Opp. Nehru Place, New Delhi-110019

.....Complainants

VERSUS

M/s Sushma Leisure Homes Pvt. Ltd. through its M.D. Mr. Bharat Mittal, Resident of Sushma Leisure Homes Pvt. Ltd., Corporate Office: Unit No. B-107, Business Complex at Elante Mall, 1st Floor, Industrial Area, Phase-1 Chandigarh-160001

.....Respondent

Complaint No. HPRERA/OFL/2021-52

Present: Sh. Lokesh Gupta complainant through WebEx
Sh. Vishal Singhal, Advocate for the
respondent/promoter

Final date of hearing (through WebEx): 12.08.2022

Date of pronouncement of orders: 12.09.2022

Order

Coram: - Chairperson and one Member

1. BRIEF FACTS IN THE COMPLAINT

The facts giving rise to the present litigation are that the complainant(s) had booked one flat in the project "JOYNEST MOH 1" in October 2020. It was pleaded that on 19.11.2020 the complainant(s) had made payment of Rs. 2 Lakhs and Rs. 83,381/-

for the purchase of unit no. I-805, 8TH Floor Tower-1 through broker/agent Mint Enterprises Pvt. Ltd. (Vikram Dhawan). It was pleaded that at the time of booking, broker Mint Enterprises Pvt. Ltd. didnot inform the complainant(s)about the fact that Sushma JOYNEST MOH 1, Zirakpur ,does not have RERA registration and in such manner valuable information was withheld from the complainant(s) and they were cheated. It was further pleaded that after booking the apartment the complainant(s) had to apply for loan from the bank for which he required the agreement for sale referred to as builder buyer agreement but despite several requests for supply of agreement for sale, the respondent as well as broker did not adhere to their request.

2. It was further pleaded that after coming to know about the alleged cheating and fraud played by the respondent company upon the complainant(s), he requested the respondent company to return his money invested in the project with interest. It was pleaded that to this request of the complainant(s), the customer care of the respondent Sushma Group told the complainant(s)to get NOC from Broker (Mint Enterprises Pvt. Ltd) and this NOC from the aforesaid broker was provided in March, 2021. It was further pleaded that till date the complainant(s) have not received refund along with interest. It was further pleaded that in March, 2021 the complainant(s) came in contact with agent Bharat Kumar Bansal who was representative of one Shree Leela. It was further pleaded that on being assured of refund of money qua investment in JOYNEST MOH 1 by Shree Leela and the owner of Sushma Group Sh. Prateek Mittal, complainant(s)' cancelled their booking in Joynest MOH-1 without getting any refund and had done second booking in "ELEMENTA SUSHMA" project which also

belongs to the same Sushma Group and is registered with this Authority (here in –after referred to ‘project’).

3. It was further pleaded that Rs. 3,57,641/- was paid online through RTGS/NEFT on 20.04.2021 and 21.06.2021 but till date the complainant(s) have not received the payment receipts and allotment letter in joint name qua the same. It was further pleaded that a lot of efforts were made and only thereafter the agreement for sale was made and agent Shree Leela came to the house of complainant(s) in Delhi for getting it signed. It was further pleaded that complainant(s) were, surprised to know that allotment was made only in favour of one of the complainant(s) Mrs. Abha Gupta and not made jointly in favour of both the complainant(s). It was further pleaded that when this fact was brought to the notice of the officials of respondent company it was assured to the complainant(s) that name of complainant Lokesh Gupta shall be added later on after amending the agreement for sale. It was further pleaded that on this assurance that amendment to add complainant Lokesh Gupta will be done later, Mrs. Abha Gupta signed the agreement for sale and after signing the same it was handed over to one Deepak Rana who misplaced the aforesaid agreement for sale.
4. It was further pleaded that again after one month, the respondent company drafted another agreement for sale but it was pleaded that in the said agreement also only name of Abha Gupta was mentioned and also the address mentioned therein was wrong and incorrect. Thereafter it was pleaded that once again after one month the officials of the respondent company got drafted another agreement for sale which was signed and sent to bank for loan by the respondent company. It was further pleaded that almost one and half month was passed in the entire aforementioned process.

It was further pleaded that the complainants started receiving emails qua making balance payments. It was further pleaded that FORM was sent to the concerned bank for applying loan directly by the respondent company and the copy of the same was not supplied to the complainant(s). On being repeatedly asked by the complainant(s), he received the copy of the aforesaid document and was surprised to know that the loan documents sent to bank were only in the name of Abha Gupta mentioned in Allotment letter. It was further pleaded that the complainant(s) did not receive the Tri-partite agreement even till today. It was further pleaded that on 7.10.2021 the complainant(s) received notice of termination of the booking. On enquiry from the officials of the respondent company they said that notice will be cancelled but it was pleaded that till date notice of termination of allotment has not been cancelled. Thereafter it was pleaded that on 11.10.2021, some bank employees came to Delhi regarding processing of loan, on which complainant(s) asked the officials of the respondent company that when the booking has been cancelled then what is the need for loan and on the same day i.e. 11.10.2021 the complainant(s) requested the respondent company to revoke the termination letter as the complainant(s) are willing to sign the loan documents and are also ready and willing to purchase the apartment. It was further pleaded that on 12.10.2021 at around 11.30 AM the complainants had a conference call with the officials of the respondent company where in they were asked to sign the loan papers on the pretext that termination letter will be cancelled once the loan is processed and balance sale consideration is paid. It was further pleaded that default has been made by the respondent company by issuing incomplete and incorrect documents and thereafter giving notice of termination but despite

its own fault the respondent company insisted the complainant(s) to sign the loan documents and make balance payment. It was further pleaded that despite several requests having been made by complainant(s), they received a show cause notice dated 14.10.2021 from Sushma Leisure Homes Pvt. Ltd. qua termination of allotment. With these pleadings it was prayed that allotment of apartment in their favour should not be terminated and the respondent company be directed to remit the rental loss incurred by the complainants of Rs 5 Lakhs. It was further prayed that Rs 5 Lakhs be awarded as compensation for mental harassment and penalty be also imposed on respondent company for having failed to comply with the mandate of the Real Estate (Regulation and Development) Act, 2016.

5. Reply-

It was pleaded that the present reply is being filed through Sh. Bhupinder Singh, who has been authorized vide annexure R-A by the opposite party and is well aware about the facts and circumstances of the present case and as such is competent to represent the respondent company. It was further pleaded that the complainant(s) have leveled false and baseless allegations against respondent company. It was further pleaded that the complainant(s) have only paid the earnest money at the time of applying for allotment of apartment in question and have failed to pay further the amounts on due dates, as per the agreed payment plan. It was further pleaded that the complainant(s) themselves are defaulters for non-payment of the due installments on time and the respondent company has rightly issued show cause letter for termination of allotment in question and earnest money paid by them has rightly been forfeited.

6. It was further pleaded that the complainants applied for booking of a unit in Project "ELEMENTA SUSHMA" and paid a sum of Rs 24,752/- on 20.04.2021 and application form was signed by them on 30.04.2021. It was further pleaded that further a sum of Rs 3,29,347/- was paid by complainants and receipts were duly issued to them. It was further pleaded that the total price of apartment in question was Rs. 37,89,900/- and basic sale price was Rs 35,41,000/-. It was further pleaded that the complainants out of the total sale consideration paid a sum of Rs 3,54,099/- only. It was further pleaded that the amount paid by complainants is less than 10% of the total price and no further payments have been made till date therefore the respondent company was well within its right to issue show cause of termination and forfeit the earnest amount. It was further pleaded that respondent company has not violated any of the provisions of the RERD Act 2016. It was further pleaded that as the unit of complainant(s) has been cancelled and money has been forfeited therefore it was pleaded that the complainant(s) could have only filed the complaint under Section 11(5) of the RERD Act and the present complaint under Section 31 of the Act *ibid* is not legally maintainable. It was further pleaded that the complainant(s) were themselves not sure of getting allotment of apartment to be made in name of Abha Gupta alone or in name of both Abha Gupta and Lokesh Gupta. It was further pleaded that firstly application form was filled by both complainants however later they wanted allotment and agreement for sale to be executed in the name of Abha Gupta alone. It was further pleaded that even when agreement for sale dated 23.07.2021 was sent to complainant(s), they wanted to add the name of Lokesh Gupta husband of Abha Gupta along with Abha Gupta and on this pretext refused to sign the agreement for sale

dated 23.07.2021. It was further pleaded that the complainants themselves delayed the signing of documents as they claimed that they are suffering from Covid-19 and later in the month of September, 2021 the complainant(s) executed documents for addition of name of Lokesh Gupta in the documents of allotment.

7. It was further pleaded that after the submission of documents by complainant(s) in September 2021, the agreement for sale dated 3.09.2021 was executed between the parties and date for handing over of possession as per clause 7.1 of agreement for sale was 04.03.2026 and even payment plan details were again shared with complainants. It was further pleaded that it was the duty of the complainant(s) to arrange for home loan for the purchase of flat and it is not the responsibility of respondent company to arrange for the loan on behalf of complainant(s). It was further pleaded that the complainant(s) have failed to make any payment after paying initial earnest money and have defaulted in making due payments therefore it was pleaded that the respondent company is right in forfeiting the earnest amount and cancel the allotment. It was further pleaded that for the delay in payments the complainant(s) were liable to pay delay interest along with the due amounts. The copies of demand letter/reminders/show cause letters dated 14.08.2021, 10.09.2021, 01.10.2021 and 14.10.2021 are annexed as Annexure R-7, R-8, R-9 and R-10 respectively. It was further pleaded that further clause 9.3 of buyer agreement provides for cancelation and forfeiture of earnest money, and thus the earnest money of Rs 3,54,099/- paid by complainant(s) has been legally forfeited. It was further pleaded that the respondent company on being asked to provide documents for arranging of loan by complainant(s) for SBI Bank provided them with the letter of permission to mortgage as well as tripartite agreement.

8. It was further pleaded that the complainant(s) have made reference of another booking made by Abha Gupta in another project of a group company of the respondent herein, at Zirakpur, Punjab. It was further pleaded that the said booking at "JOYNEST MOH.1" project at Zirakpur, Punjab cannot be looked into by this Hon'ble Authority for want of jurisdiction. It was further pleaded that the cancellation and forfeiture is legally maintainable and the respondent company is relying upon judgments of Apex Court in Maula Bux Vs. Union of India - 1969 (2) SCC 554, Kunwar Chiranjit Singh Vs. Har Swarup - AIR 1926 PC1, Shree Hanuman Cotton Mills & Ors. Vs. Tata Air Craft Ltd.- 1969 (3) SCC 522 and Satish Batra Vs. Sudhir Rawal - (2013) 1 SCC 345.

9. Rejoinder-

In rejoinder it was further pleaded that payment plan is only applicable after the signing of the agreement for sale. It was further pleaded that date of agreement for sale quoted by respondent is 03.09.2021 but it was pleaded that the same was actually executed much later in the month of Oct, 2021. It was further pleaded that the complainant(s) had clearly indicated to the respondent company that they wanted all the documentation work in joint name of both the complainant(s) but despite that the respondent company issued all the documents in the name of Abha Gupta alone and did not rectify the defect. It was further pleaded that the entire efforts of complainant(s) to obtain loan from bank came to standstill as Respondent company was not providing requisite documents in time and even when provided they were not of correct value and were undervalued due to which the complainant(s) could not obtain finances in time. It was further pleaded that respondent company cannot retain and forfeit

earnest amount paid by the complainant(s) and are duty bound to return it as per rules along with interest, penalty and compensation. It was further pleaded that the demands for payments raised by the respondent company were unjustified as the allotment letter dated 23.07.2021 has still not been corrected and complainant(s) have also not received the tripartite agreement despite sending several emails. It was further pleaded that after several requests and reminders the respondent company handed over the agreement for sale in the month of Oct, 2021. It was further pleaded that the respondent company had already sent the show cause notice to the complainant hence the complainants were unable to proceed further with the loan and therefore were constrained to seek relief against the issuance of show cause notice qua termination of allotment.

10 Written Arguments on behalf of the complainant(s)-

The complainants re-iterated the facts mentioned in the complaint during the course of arguments and it was argued that the booking form/application form was jointly signed by both the complainant(s) on 30.04.2021 but the respondent company issued allotment letter on 23.07.2021 in single name. It was further argued that the respondent company with malafide intention emailed the allotment letter on 21.09.2021. It was further argued that respondent company instead of accepting error on their part coerced the complainant(s) to submit affidavits and "indemnity cum undertaking" dated 02.09.2021 for addition of name of complainant Lokesh Gupta in the documents and complete other paper work so as to issue allotment letter in joint name but till date it was argued that the complainant(s) have not received the correct allotment letter. It was further argued that it was a preplanned strategy of the respondent company to entrap the

complainant(s) by forfeiting their money and also not providing the rental income to the complainant(s). It was further argued that in the present case agreement for sale was not even executed until October 2021 and since then the complainant(s) are in process of obtaining loan/finance but in between the respondent company issued show cause notice for termination of allotment and unilaterally forfeited the earnest amount. The complainant(s) further relied on judgment of Hon'ble Supreme Court of India in case of Civil appeal no.6239/2019 also known as Wg. Cdr. Arifur Rahman Khan & Aleya Sultana & Ors vs. DLF Southern Homes Pvt. Ltd. wherein the Hon'ble Apex Court has held that "the Courts are not constrained by the terms provided in the builder's agreement while awarding compensation to the flat buyer." It was further argued that allotment letter is still not correct. It was further argued that complainant is ready to make balance payment if the name of Lokesh Gupta is added along with Abha Gupta in the allotment letter.

11 Arguments by respondent:-

The respondents re-iterated its version made in the reply while arguing the matter. No written arguments were filed on behalf of respondent company. It was argued that the allegations of the complainant(s) qua JOYNEST MOH.1 cannot be entertained by this Authority as it has no territorial jurisdiction to adjudicate upon the same since the project is situated in State of Punjab. It was further argued that as per Section 19(6) of the Act, every allottee who enters into agreement for sale shall make necessary payments as specified and agreed. It was further argued that as per Section 11(5) promoter has right to cancel the allotment in case of non-payment of dues. It was further argued that allotment has rightly been terminated. It was further argued that as per

Clause 9.3 of agreement for sale which is strictly in accordance with FORM L of format specified with rules formulated by the State of H.P., the promoter has right to terminate the contract in case of default in payment made by allottee. It was further argued that complainant(s) did not make any further payment beyond 10% of the total amount despite repeated reminders been made by respondent company in this behalf. It was further argued that it was only after repeated reminders that respondent company was constrained to issue show cause notice for cancellation of allotment. It was further argued that application was made jointly by both the complainants but at the instance of complainant(s) the allotment was made only in favour of Abha Gupta. It was further argued that allotment letter in favour of Abha Gupta alone was not retaliated/ protested at all by the complainants till November, 2021 and it was for this reason that complainant(s) were asked to execute affidavit and undertaking cum indemnity bond to the effect that agreement be executed in favour of both. It was further argued that project is almost 50-60% complete and unit of the complainant(s) was also 50-60% complete.

12 CONCLUSION/ FINDINGS OF THE AUTHORITY:-

We have heard the arguments advanced by the Ld. Counsels for the complainant(s) & respondent company and also perused the record pertaining to the case. We have duly considered the entire submissions and contentions submitted before us during the course of arguments. This Authority is of the view that there are two issues that require the consideration in the present case for adjudication, namely:-

- A. Jurisdiction of the Authority.
- B. Whether the Act of the respondent company in issuing show cause notice for termination of the allotment in

favour of complainant(s) was unjust, unilateral and without any sufficient cause?

13 A. Jurisdiction of the Authority.

Section 31 of the Act prescribes that any aggrieved person can file a Complaint before the Authority or the Adjudicating Officer as the case may be for any violation of the provisions of the Act *ibid*. Thus, this Section provides that a separate Complaint be lodged with the Authority and the Adjudicating Officer, "as the case may be." Accordingly Rule 23 of the Himachal Pradesh Real Estate (Regulation and Development) Rules, 2017 provides the procedure of filing Complaint with the Authority and prescribes 'Form M' for filing a Complaint. In this case, the Complainant has filed the Complaint in 'Form-M.'

Section 11(5) of the Act prescribes as follows:

"The promoter may cancel the allotment only in terms of the agreement for sale:

Provided that the allottee may approach the Authority for relief, if he is aggrieved by such cancellation and such cancellation is not in accordance with the terms of the agreement for sale, unilateral and without sufficient cause. "

Therefore in view of the above, proviso to Section 11(5) of the RERD Act, 2016 enables the allottee to approach the Authority for relief, if he is aggrieved by the cancellation/ termination of allotment and Section 37 of the RERD Act, 2016 empowers the Authority to issue directions in discharge of its function provided under the Act. Therefore the Authority is empowered to hear and adjudicate complaints pertaining to cancellation of allotment

However, this Authority can hear and adjudicate complaints pertaining project(s) situated in the State of Himachal Pradesh as

it has no territorial jurisdiction over projects situated in the State of Punjab therefore issues pertaining to JOYNEST MOH.1, Zirakpur Mohali cannot be heard and decided by this Authority and can hear and decide the part of the complaint pertaining to project "ELEMENTA SUSHMA" which is registered with HP RERA under Section 11(5) read with Section 31 of the RERD Act, 2016.

14 Whether the Act of the respondent company in issuing show cause notice for termination of the allotment in favour of complainant(s) was unjust, unilateral and without any sufficient cause?

The relevant facts in the present case as they emanate from the record available with this Authority are that the complainants had booked a flat in "ELEMENTA SUSHMA" project. The total price as per the agreement for sale annexure VI was Rs. 37,89,900/- and the total amount received as per annexure IV and receipts annexure R2 and R3 was Rs 3,57,641/-. As per the receipts the payments were made to respondent company by complainant Lokesh Gupta on 20.04.2021 and 21.06.2021. The due date of delivery of possession of the flat/ apartment in question as per the agreement for sale is 4.03.2026. Further it is also clear that as per application from annexure R-1 it is clear that the apartment was jointly applied by both the complainants. From the perusal of the allotment letter annexure VII and annexure R -4 it transpires that allotment letter has been issued in favour of Abha Gupta alone. As per the emails appended with complaints annexure VIII particularly email dated 19th September, 2021 and 1st October, 2021 it is clear that complainants protested/agitated the issue of allotment letter being issued in the name of Abha Gupta alone and not in favour of both the complainants. Further from the email

dated 19th September, 2022 it is clear that there was delay in execution of agreement for sale as when agreement for sale was first executed the address mentioned in the same was wrong. It was further mentioned in this email that second time when the agreement for sale was executed the name of co-applicant Mr. Lokesh Gupta was found missing. It was also mentioned in this email that the agreement for sale dated 3.9.2021 now appended with the complaint is the third agreement for sale between the parties but the copy of the same was also not supplied to the complainant(s) in time for the purpose of proceeding loan and the allotment letter was issued in the name of Abha Gupta alone. It was also mentioned in this email that without the supply of agreement for sale loan of the complainant(s) cannot be processed. The complainants have further vide email dated 19.09.2021 and 09.10.2021 raised the issue of delay and non supply of corrected documents in the name of both the applicants. These emails have not been controverted/ rebutted by the respondent company by leading any cogent and substantial evidence. This Authority is satisfied that the complainant(s) from time to time by way of different emails kept on agitating/ protesting the issue of non supply of corrected documents in the name of both the complainant(s) but respondent has not rectified the defect till date. No plausible explanation or any document has been placed on record by the respondent company to justify the non supply of rectified documents.

15 There are two affidavits and one indemnity cum undertaking appended with the reply by way of which the respondent has tried to prove that initially it was at the instance of the complainant(s) themselves that the allotment letter was issued in favour of Abha Gupta alone and thereafter on the execution of the affidavit(s) and

indemnity cum undertaking the complainant(s) had requested for addition of name of other complainant in the allotment letter. For this purpose the Authority gone through these documents. One affidavit dated 2nd July, 2021 by Abha Gupta is qua another project 'Joynest MOH- 1' and is therefore in consequential in the present case and cannot be gone into by this Authority for want territorial jurisdiction. Further an "Indemnity cum undertaking" bond dated 2nd September, 2022 which has been signed and executed by Mrs. Abha Gupta the perusal of which shows that Mrs. Abha Gupta wanted to add the name of Lokesh Gupta in the allotment. Another affidavit of the same date i.e. 2nd September, 2021 of Sh. Lokesh Gupta is also appended wherein he states that he has no objection in case his name is added as co-applicant along with Abha Gupta in the allotment. Even if the aforesaid defense of the respondent company is believed even then the Authority fails to understand as to why the defect was not rectified after the complainant(s) executed the aforesaid Affidavit and indemnity cum undertaking bond dated 2.09.2021.

16 In fact the only conclusion that arises from the record of the case is that the correct allotment in favour of both the complainant(s) has not been handed over to them even till the date of passing of this judgment. Even otherwise the allotment letter and agreement for sale are self contradictory for the reason that the earlier document is in favour of Abha Gupta alone whereas the latter document is in favour of both the complainants. There is no justification on behalf of respondent company to have issued allotment in favour of one and agreement for sale in favour of both which certainly has prevented the complainants from processing the loan with their bank. This Authority is further of the conclusion that respondent company could not have invoked clause 9.3 of the agreement for sale dated 3.9.2021

for termination of contract and forfeiture of earnest money as the actual fault for non payment was of the respondent company itself and "*Nullus Commodum Capere Protect De Injuria Sua Propria*" is a well established legal maxim which has been upheld by the Hon'ble Supreme Court in Eureka Forbes Limited vs. Allahabad Bank and Ors. (03.05.2010 - SC): MANU/SC/0322/2010 and this legal maxim means no man can take advantage of his own wrong. It was due to non supply of correct documents as discussed in para supra that the complainants could not make balance payment(s) on due date. The respondent company is hereby held in default for non supply of correct documents in the name of both the complainant(s). Therefore show cause notice for termination of allotment dated 14.10.2021 and forfeiture of earnest money is unjust, unilateral and without any sufficient cause. Further reliance of respondent company placed on the judgments passed by Apex Court in Maula Bux Vs. Union of India - 1969 (2) SCC 554, Kunwar Chiranjit Singh Vs. HarSwarup - AIR 1926 PC1, Shree Hanuman Cotton Mills &Ors. Vs. Tata Air Craft Ltd. 1969 (3) SCC 522 and Satish BatraVs. Sudhir Rawal – (2013) 1 SCC 345 is not applicable to the present facts.

17 This Authority had already stayed the show cause notice for cancellation of the flat/ apartment dated 14.10.2021 vide its zimni order dated 29.11.2021


18 In so far as the prayer of the complainant for claiming rent is concerned this Authority has no jurisdiction to adjudicate on the issue of rent.

19 RELIEF:-

19 RELIEF:-

Keeping in view the abovementioned facts, this Authority in exercise of powers vested in it under various provisions of the Act issues the following orders/directions:

- i.* The Complaint is partly allowed.
- ii.* The show cause notice dated 14.10.2021 for cancellation/ termination of allotment is hereby quashed.
- iii.* The respondent company is directed to hand over all the relevant documents including allotment letter in favour of both the complainants jointly and enter fresh agreement for sale at the same price within 60 days from the date of passing of this Order.
- iv.* The complainants are directed to make balance payments in terms of the fresh agreement for sale.
- v.* The respondent company is directed not to levy any interest penal or otherwise on the payments that will be made in terms of this order.


B.C. Badalia
MEMBER


Dr. Shrikant Baldi
CHAIRPERSON