

**BEFORE THE HARYANA REAL ESTATE REGULATORY
AUTHORITY, GURUGRAM**

Complaint no. : 6361 of 2019
First date of hearing: 16.01.2020
Date of decision: 25.08.2022

Puja Hemnani
Address: - 1601, 1st floor, DLF-4, Gurugram-122009

Complainant

Versus

Emaar MGF Land Limited
Address: - ECE House, 28 Kasturba Gandhi Marg,
New Delhi-110001

Respondent

CORAM:

Shri K.K. Khandelwal
Shri Vijay Kumar Goyal

**Chairman
Member**

APPEARANCE:

Shri Sanjeev Sharma
Shri J.K. Dang

Advocate for the Complainant
Advocate for the Respondent

ORDER

1. The present complaint dated 13.12.2019 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the

Act or the Rules and regulations made there under or to the allottee as per the agreement for sale executed *inter se*.

A. Unit and project related details

2. The particulars of unit details, sale consideration, the amount paid by the complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

Sr. No.	Particulars	Details
1.	Name of the project	Emerald Plaza at Emerald Hills, Sector-65
2.	Nature of the project	Commercial complex
3.	OC received on	08.01.2018 [page 19-20 of reply]
4.	Unit no.	EPS-FF-079A, 1 st floor
5.	Unit area	721.19 sq. ft.
6.	Application form	17.05.2019
7.	Date of allotment	24.06.2019 [page 33-37 of reply]
8.	Date of builder buyer agreement	Not executed
9.	Total sale consideration	Rs. 79,33,090/- [page 33 of reply]
10.	Amount paid by the complainant	Rs. 25,49,365/- [as per cancellation letter dated 09.11.2019 on 44 of the reply]

11.	1. First payment request reminder dated	01.07.2019, 04.07.2019, 30.09.2019
	2. Second payment request reminder dated	30.10.2019
	3. Cancellation letter dated	09.11.2019
12.	Grace period utilization	Not allowed

B. Facts of the complaint

3. The complainant has made the following submissions: -

- i. It is submitted that upon the representation by the respondent and advertisement done in said behalf, the complainant purchased a commercial complex no. EPS-FF-079A, admeasuring 721.19 Sq. Ft. in the project i.e. "Emerald Plaza located at Sector 65, Gurgaon, Haryana" floated by the respondent and on the inducement that the possession of the unit purchased shall be handed over on time with all amenities as promised. That as per the flat buyer agreement and statement of account as on 07.07.2019 the total sale consideration of the unit was agreed to be Rs. 84,11,809/- (including GST, other charges etc.)
- ii. That as per the clause 16 (a)(i) of the flat buyer agreement, the possession of the unit is to be given by May 2020. However, it is pertinent to note at this stage that despite persistent reminders, the respondent has miserably failed to provide with the reasonable explanations regarding the unanimous change in the area of the

commercial complex/ unit wherein upon the site inspection, the complainant was informed that showed that the complainant will be allotted a particular size however, upon demarcation, it came to the knowledge of the complainant that the respondent has decreased the area of the commercial unit from what was specified to the complainant.

- iii. It is further submitted that at the time of booking, the complainant was informed that the complainant will have to pay a total amount of Rs. 79,33,090/- including tax, other charges, etc., however, when the complainant received the demand letters and the statement of account, the complainant discovered that the total cost of the unit is Rs. 84,11,809/-. it is submitted that the respondent has played a huge fraud and by misrepresenting, has duped the complainant and extorted amount to the tune of Rs. 25,43,365/-.
- iv. It is again pertinent to note that despite repeated reminders of rectifying the area/size of the commercial complex and the escalation in the cost of the unit without any government notification as well as informing and updating the respondent about the various other encroachments and deficiencies, the respondent was sending reminders demanding the instalment amount and finally vide letter dated 09.11.2019, cancelled the allotment of the commercial complex which was allotted to the complainant, wherein the complainant was informed that the respondent shall refund an amount of Rs. 16,61,921/- and forfeited

amount of Rs. 8,81,444/- from the total amount of Rs. 25,43,365/- which was paid by the complainant.

- v. Thereafter, the complainant through her legal counsel, sent a legal notice to the respondent demanding refund of the entire amount paid by the complainant as the complainant no longer wishes to continue with the project because of the illegal and malafied acts committed by the respondent and thus, the complainant wanting to safeguard her interest, wants refund along with the compensation/ interest because of the mental harassment and unnecessary litigation caused by the respondent. The in addition to the above the respondent has committed various other discrepancies and defaults under various sections of the RERA Act, the respondent have charged extra amount of the unit in question which is completely illegal thus the respondent be directed to stop doing such unlawful acts which are against the duties and obligations of the promoter under chapter III of the real estate regulatory act.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s).
- i. Refund the entire amount deposited on the pro rate basis with interest for every month of delay at the rate of interest from the actual date of deposit of each payment till date of realization.
5. On the date of hearing, the authority explained to the respondent/promoter about the contraventions as alleged to have been



committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent

6. The respondent contested the complaint on the following grounds: -

- i. That the present complaint is not maintainable in law or on facts. The provisions of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as the 'Act') are not applicable to the project in question. The application for issuance of occupation certificate in respect of the project in question was made on 26.05.2017, i.e well before the notification of the Haryana Real Estate Regulation and Development Rules 2017 (hereinafter referred to as the 'Rules'). The occupation certificate has been thereafter issued on 8.01.2018. A. It is also pertinent to mention that the respondent has applied for part completion certificate in respect of the area of the project in which the unit in question is located after completing the installation of services and hence the project does not fall within the definition of "ongoing project". Thus, the project in question is not an 'ongoing project" under Rule 2(1)(o) of the Rules. The project has not been registered under the provisions of the Act. This hon'ble authority does not have the jurisdiction to entertain and decide the present complaint. The present complaint is liable to be dismissed on this ground alone
- ii. That without prejudice to the submission of the respondent that the provisions of the act are not applicable to the project in

question, it is submitted that the present complaint is not maintainable before this hon'ble authority. The complainant has filed the present complaint seeking refund on account of so-called deficiencies allegedly on the part of the respondent. Without admitting the truth or legality of the allegations of the complainant, it is submitted that the complainant has alleged that the due date of delivery of possession of the unit in question is May, 2020. Therefore, the complaint in the present form is devoid of any cause of action. Moreover, the complainant cannot claim any refund unless and until there is any delay in delivery of possession of the unit in question. The instant complaint is nothing but a gross misuse of process of law. The complainant by way of instant complaint is seeking to unjustly enrich herself.

- iii. That it is respectfully submitted that complaints pertaining to interest, compensation and refund are to be decided by the adjudicating officer under Section 71 of the Real Estate (Regulation and Development) Act, 2016 read with Rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017, and not by this hon'ble authority. The present complaint is liable to be dismissed on this ground alone. Moreover, it is respectfully submitted that the adjudicating officer derives his jurisdiction from the central act which cannot be negated by the rules made thereunder. That the complainant is estopped by her own acts, conduct, acquiescence, laches, omissions etc. from filing the present complaint.

- iv. That the complainant has no locus standi or cause of action to file the present complaint. The present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the application form dated 17.05.2019, as shall be evident from the submissions made in the following paragraphs of the present reply.
- v. It is pertinent to mention that prior to approaching the respondent for purchase of the unit in question, the complainant had conducted independent and extensive inquiries regarding various aspects of the project. The complainant only after being satisfied with each aspect of the project, including but not limited to the status of construction, the capacity and capability of the respondent to undertake development and implementation of the project etc. proceeded to book the unit in question.
- vi. That it needs to be highlighted that the complainant was extremely irregular as far as payment of instalments was concerned. The respondent was compelled to issue demand notices, reminders etc., calling upon the complainant to make payment of outstanding amounts payable by her under the payment plan/instalment plan opted by her. That payment request letter dated 27.08.2019, payment request letter dated 24.06.2019, first payment request reminder dated 01.07.2019, first payment request reminder dated 04.07.2019, first payment request reminder dated 30.09.2019, second payment request reminder dated 30.10.2019. That the

respondent had duly served a copy of buyer's agreement to the complainant requesting the complainant to execute the same. However, the complainant consciously and willfully refrained from executing the buyer's agreement and kept on delaying the matter on one pretext or the other.

- vii. That since the complainant was not forthcoming with remittance of the instalments nor had executed the buyer's agreement ever after repeated reminders, the respondent was constrained to issue cancellation letter dated 09.11.2019 to the complainant. The respondent had categorically notified the complainant that she has defaulted in remittance of the amounts due and payable by her. The respondent in view of the aforesaid facts cancelled the provisional allotment of the unit in question in favour of the complainant. The complainant was expressly intimated that she is left with no right, title or interest in the unit in question. Furthermore, it was specifically conveyed to the complainant that the respondent has forfeited an amount of Rs. 8,81,444/- in accordance with the terms and conditions incorporated in the application form duly executed by the complainant. Moreover, the complainant was requested to collect the amount due and payable to her after returning the original documents pertaining to the unit in question lying in her possession to the respondent. The complainant has ignored the legitimate requests of the respondent and has preferred the instant complaint on absolutely whimsical grounds in order to needlessly

victimize and harass the respondent. That it is respectfully submitted that the complainant did not have adequate funds to remit the balance payments to the respondent and consequently in order to needlessly linger on the matter, the complainant refrained from executing the buyer's agreement. The complainant needlessly avoided the execution of the buyer's agreement with the intent of evading the consequences enumerated therein. Therefore, there is no equity in favour of the complainant.

viii. That it is submitted that the complainant consciously and maliciously chose to ignore the payment request letters and reminders issued by the respondent and flouted in making timely payments of the instalments which is an essential, crucial and an indispensable requirement in accordance with the terms and conditions of the application form as well as the buyer's agreement. Furthermore, when the proposed allottees default in their payments as per schedule agreed upon, the failure has a cascading effect on the operations and the cost for proper execution of the project increases exponentially and further causes enormous business losses to the respondent. The complainant chose to ignore all these aspects and willfully defaulted in making timely payments. It is submitted that the respondent despite defaults of several allottees earnestly fulfilled its obligations under the buyer's agreement and has completed the project.

- ix. That it is pertinent to mention that only such allottees, who have complied with all the terms and conditions of the application form including making timely payment of instalments as well as execution the buyer's agreement are entitled to receive compensation or interest for delay, if any. In the case of the complainant, she has delayed payment of instalments as well as refrained from executing the buyer's agreement. Furthermore, the provisional allotment of the unit in question in favour of the complainant has been duly terminated by the respondent and consequently she is not eligible to receive any compensation or interest from the respondent.
- x. That it is pertinent to mention that the complainant is a habitual and chronic litigant. The complainant had preferred three absolutely false and frivolous complaints in respect of different units against the respondent. The complainant is fixated on obtaining wrongful gains at the expense of the respondent. That, without admitting or acknowledging the truth or legality of the allegations advanced by the complainant and without prejudice to the contentions of the respondent, it is respectfully submitted that the provisions of the act are not retrospective in nature. The provisions of the Act cannot undo or modify the terms of an agreement duly executed prior to coming into effect of the Act. It is further submitted that merely because the Act applies to ongoing projects which are registered with the authority, the Act cannot be

said to be operating retrospectively. The provisions of the Act relied upon by the complainant for seeking interest and refund cannot be called in to aid, in derogation and ignorance of the provisions of the buyer's agreement. The interest is compensatory in nature and cannot be granted in derogation and ignorance of the provisions of the buyer's agreement.

- xi. It is further submitted that the interest and refund demanded by the complainant is beyond the scope of the buyer's agreement. The complainant cannot demand any interest or refund beyond the terms and conditions incorporated in the buyer's agreement. That it is submitted that all the demands raised by the respondent are strictly in accordance with the terms and conditions of the application form duly executed by the complainant. there is no default or lapse on the part of the respondent. it is evident from the entire sequence of events, that no illegality can be attributed to the respondent. The allegations levelled by the complainant are totally baseless. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.
7. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority

8. The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

9. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. In the present case, the project in question is situated within the planning area of Gurugram district. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E.II Subject-matter jurisdiction

10. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11

.....

(4) The promoter shall-

(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

11. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-

compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

12. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2021-2022 (1) RCR (Civil), 357*** and reiterated in case of ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*** wherein it has been laid down as under:

"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. if the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."

13. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the case mentioned above, the authority has the



jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

F. Findings on the relief sought by the complainant.

F.I. Refund the entire amount deposited on the pro rate basis with interest for every month of delay at the rate of interest from the actual date of deposit of each payment till date of realization.

14. In the present complaint, the complainant intends to withdraw from the project and is seeking return of the amount paid by it in respect of subject unit along with interest at the prescribed rate as provided under section 18(1) of the Act. Sec. 18(1) of the Act is reproduced below for ready reference.

"Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building.-

- (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or*
(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

(Emphasis supplied)

15. On consideration of the documents available on record and submission by both the parties, the authority is of the view that the allottee has failed to abide by the terms of agreement by not making the payments



in timely manner as per the payment plan opted by her, the complainant paid an amount of Rs. 25,49,365/- out of the total amount of Rs. 79,33,099/-. The complainant failed to pay the remaining amount as per the schedule of payment and which led to issuance of notice of cancellation by the respondent on 09.11.2019. Now the question before the authority is whether this cancellation is valid?

16. As per clause 19 of the application form, the allottee was liable to pay the instalment as per payment plan opted by the complainant. Clause 19 of the application form is reproduced under for ready reference:

Clause 19 In case of delay of 60 days in making payment by the applicant to the company as per the schedule of payments the company shall have the right to terminate the allotment/agreement and forfeit the earnest money. The company shall also be entitled to charge interest at the rate 24% per annum from the due date of instalments as per the schedule of payments till the date of payments. However, the company may in its sole discretion waive its right to terminate the allotment/agreement and enforce all the payments in seek specific performance of the buyer's agreement. In such a case the parties agree that the possession of the commercial unit will be handed over to the applicant only upon the payment of all outstanding dues penalties etc. along with interest by the applicants to the satisfaction of the company.

17. The respondent had issue various reminders dated 01.07.2019, 04.07.2019, 30.09.2019 and 30.10.2019. That the OC for the unit of the complainant was granted on 08.01.2018. The respondent cancelled the unit of the complainant with adequate notices. Thus, the cancellation of unit is valid.

18. Further, the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, states that-

"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."

19. The rule 15 of the rules has determined the prescribed rate of interest and it provides that for the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 25.08.2022 is 8%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10%.


G. Directions of the authority

20. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

- i. The respondent is directed to refund the balance amount of the unit by deducting the earnest money which shall not exceed the 10% of the total sale consideration communicated at the time of allotment or BBA and shall return the balance amount to the complainant within a period of 90 days from the date of this order. The refund should have been made on the date of cancellation i.e., 09.11.2019, accordingly interest at the prescribed rate i.e., 10% is allowed on the balance amount from the date of cancellation till the date of actual realization.
- ii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.
21. Complaint stands disposed of.
22. File be consigned to registry.

v.1-3
(Vijay Kumar Goyal)
Member

HARYANA REAL ESTATE REGULATORY AUTHORITY
GURUGRAM


(Dr. K.K. Khandelwal)
Chairman

Dated: 25.08.2022