

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

Complaint no. : 1423 of 2022  
First date of hearing: 28.07.2022  
Date of decision : 10.11.2022

Mr. Sanjay Mathur  
R/o: - Oriental Tower, Apt. 7C, 25/1, Ekkamai Soi 12,  
Bangkok- 10110

**Complainant**

Versus

M/s Emaar MGF Land Limited.  
Office at: 306-308, Third Floor, Square One, C-2,  
District Centre, Saket, New Delhi-110017

**Respondent**

**CORAM:**

Shri Vijay Kumar Goyal  
Shri Ashok Sangwan  
Shri Sanjeev Kumar Arora

**Member  
Member  
Member**

**APPEARANCE:**

Sh. Medhya Ahluwalia (Advocate)  
Sh. Ishaan Dang (Advocate)

Complainant  
Respondent

**ORDER**

1. The present complaint dated 20.04.2022 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:

S. No.	Particulars	Details
1.	Name of the project	Digital greens, sector-61
2.	Total area of the project	3.33 acres
3.	Nature of the project	Commercial space
4.	DTCP license no. and validity status	66 of 2008 dated 20.03.2008 valid till 19.03.2018
5.	Name of licensee	Active Promoters Pvt. Ltd. and Sidhivinayak Buildcon Pvt. Ltd. C/o Emaar MGF Land Ltd.
6.	<b>Occupation certificate</b> granted on	20.03.2017 [Annexure R8, Page 79-80 of reply]
7.	Provisional allotment letter	6.09.2008 [Annexure R2, Page 29-30 of reply]
8.	Unit no.	06-015



9.	Area of the unit (super area)	1469.93 sq. ft.
10.	Date of execution of buyer's agreement	17.09.2009
11.	Supplementary Agreement with revised payment Schedule	18.09.2009 [Page 64-71 of reply]
12.	Possession clause	<p><b>15. POSSESSION</b></p> <p><b>(a) Time of handing over the Possession</b></p> <p><i>The possession of the unit in the complex shall be delivered and handed over to the allottee <b>within 36 months of the execution hereof</b>, subject however to the Allottee(s) having strictly complied with all the terms and conditions of this agreement and all amounts due and payable by the Allottee(s) under this agreement having been paid in time to the company. The company shall give notice to the Allottee(s). offering in writing to the allottee to take possession of the unit for his occupation and use ("Notice of Possession")</i></p> <p style="text-align: right;"><i>(Emphasis supplied)</i></p> <p><b>As per Clause 3 of the supplementary agreement Parties further agree and confirm that</b></p>

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clause 15(a) dealing with "Time of handing over the Possession" of the Buyer's Agreement shall be substituted with the following clause:

**Clause 15 (a):** Time of Handing over the Possession

(i) That the possession of the Unit in the Complex shall be delivered and handed over to the Allottee(s), within eighteen **(18) months of the execution hereof**, subject however to the Force Majeure conditions as stated in clause 32 of the Buyer's Agreement and further subject to the Allottee(s) having strictly complied with all the terms and conditions of this Agreement and not being in, default under any provisions of this Agreement and all amounts due and payable by the Allottee(s) under the Buyer's Agreement and/or this Supplementary Agreement having been paid in time to the Company. The Company shall give notice to the Allottee(s), offering in writing, to the Allottee to take possession of the Unit for his occupation and use ("Notice of Possession").

The Allottee(s) agrees and understands that the Company shall be entitled to a grace period of one hundred and twenty (120) days over and above the period more particularly specified here-in-above in sub-clause (a)(i) of clause 15, for applying and obtaining necessary approvals in respect of the Complex.

13.	Due date of possession	18.03.2011 [ <b>Note:</b> Grace period is not included]
14.	Total consideration as per revised payment schedule on page 71 of reply	Rs.1,09,69,139/-
15.	Total amount paid by the complainant as per legal notice	Rs. 34,35,961/-
16.	Offer of possession	09.06.2017 [Annexure R9 Page 81-86 of reply]
17.	Legal Notice sent by the complainant to the respondent on	30.03.2021 [Annexure R10 page 87-91 of reply]
18.	Pre cancellation notice dated	13.08.2021 [Annexure R11 Page 92-93 of reply]
19.	Cancellation letter issued by the respondent on	25.09.2021 [annexure R12, page 94 of reply]

**B. Facts of the complaint**

3. The complainant has made the following submissions: -

- I. That sometime in the month of February 2007, the complainant was desirous of purchasing a commercial property in Gurgaon and was

heavily influenced by the brochure issued and circulated by the respondent in the market and in pursuance thereof, the complainant approached to the respondent to explore the units in the commercial project namely "Digital Green" situated at Village Ghata, Tehsil & District Gurgaon, Haryana.

- II. That the respondent represented to the complainant that they are prominent developers by executing various projects and made extensive claims about the brand value of Emaar MGF Land Limited and stated that they deliver high quality commercial as well as residential projects within the agreed time frame. The respondent had also represented to the complainant that it has a large amount of experience in the construction field and has successfully launched several residential and commercial projects in different parts of the Country.
- III. That the respondent painted an extremely rosy picture of their project "Digital Greens" stating that the project will be developed as a premier project alongside high-end facilities/amenity. The respondent had further represented that they would develop the project as shown in the brochure/advertisement displayed at site as well as on the official website of the company with amenities /facilities. The respondent to the complainant that the said project will be developed, and possession will be handed over within the

promised timeframe as stipulated in the agreement executed between parties.

- IV. That the complainant booked a unit in the aforesaid project against the total consideration of Rs.1,28,94,405/- and thereafter, in the year 2007-2008, the complainant made various subsequent payments to the respondent total amounting to Rs.34,35,961/-.
- V. That on account of inordinate delay, failure to give any response and resorting to other acts of deficiencies, the complainant spoke to the concerned officials on a telephonic call and requested them to refund the amount paid by him towards the consideration of the commercial unit in question. It is stated that the request of the complainant was considered and accepted by the officials of the respondent and the complainant was requested to send an official communication on email with respect to his refund claim.
- VI. That on 17.09.2009, the respondent induced the authorized representative of the complainant to execute the builder buyer's agreement of the unit in question and it is recorded that a unit bearing no. 06-015 on 6<sup>th</sup> floor was allotted to the complainant. That the officials of respondent further induced the authorized representative of the complainant to execute a supplementary agreement dated 18.09.2009.

- VII. That the complainant was in abroad at the time of execution of the aforesaid agreements dated 17.09.2008 and 18.09.2008 between the authorized representative of the complainant and respondent. It is stated that upon perusal of the aforesaid agreements dated 17.09.2008 and 18.09.2008 are totally unfair and one-sided terms. That the complainant approached the concerned officials of the respondent and raised the concern over various one-sided clauses of the builder buyer's agreement, however the respondent represented to the complainant that builder buyer's agreement is a pre-printed document and cannot be customized. That the complainant informed the officials of the respondent that he not at all satisfied with their response and he wants to exit from the project.
- VIII. That somewhere in fourth week of September, the complainant spoke to the representative of respondent, requested for the refund w.r.t. his email dated 25.09.2008. It is stated that the representatives of the respondent kept on assuring the complainant that they will discuss the case of the complainant with the management and get back to him when a decision is made on his request.
- IX. That the complainant has been following up with the representatives of the respondent from time to time for the refund and each time the respondent kept on assuring the complainant that



they are trying hard to find the alternative buyer for the unit in question and as and when they found a buyer, the amount of the complainant shall be returned to him. It is stated that the complainant resides abroad and was not able to follow up frequently. It is further stated that as and when the complainant approached the respondent for the refund of the amount, then he was given inducements and assurances but not the resolution to his queries.

- X. That the respondent upon receipt of the occupation certificate for the unit in question has immediately sent a pre-mature offer of possession dated 09.06.2017 to the complainant, despite the fact the request of the complainant for refund was pending and also knowing well that neither the unit is complete nor the promised facilities and amenities. It is stated that replying on the one-sided unfair terms of the builder buyer's agreement, you imposed excessive penalties and costs.
- XI. That the complainant again approached the respondent and apprised that he has already made the request for refund and therefore, there was no reason for the respondent to issue such letters to the complainant. It is stated that the representatives of the respondent accepted the mistake and again promised to consider the request of complainant at the highest level. However, despite

- repeated follow ups by the complainant and his authorized representatives, the respondent failed to refund the payment made by complainant amounting to Rs.34,35,961/-.
- XII. That in any event the said project was to be completed in 18 months from the date of supplementary agreement and the said time expired on 18.05.2011. It is admitted that the respondent offered the possession of the unit on 09.06.2017.
- XIII. That the intention was dishonest right from the beginning and that is why the respondent had drafted unilateral terms and conditions of the builder buyer's agreement. It is stated that the said terms & conditions are totally unfair, unjust, unconscionable, oppressive and one sided. The perusal of the terms & conditions unravels that due to the disparity between the bargaining power and status of the parties, imposed by the respondent upon the complainant is totally biased and the same cannot be termed as negotiated contract.
- XIV. That the complainant got legal notice dated 30.03.2021 served upon the respondent calling upon it to refund the money with interest at the rate of @ 15% per annum.
- XV. That after receipt of the legal notice, the representatives of the respondent contacted the complainant and offered to refund the money after deducting the taxes. The draft of proposed settlement which was received by the complainant once again contained one

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sided term and the entire blame was put on the complainant. The complainant vide email wrote to the respondent that the entire fault falls on the respondent and that the respondent should also consider paying some compensation and there was no reasoning for deducting alleged taxes from complainant's principal sum. The respondent sent second draft of settlement wherein the respondent amended the clause which stated that the fault was on the part of the complainant, however the respondent did not consider granting compensation and was also adamant to deduct taxes from complainant's principal sum. The complainant sent emails and apprised the respondent that its offer was not genuine, hence this complaint.

- XVI. That the complainant was extremely shocked to receive a pre-cancellation notice dated 13.08.2021 issued by the respondent threatening the complainant to forfeit his hard-earned money. That on one hand the representative of the respondent was sharing the settlement agreements with the complainant and on another hand the respondent was conspiring at the back of the complainant at the same time. The complainant duly replied to the said pre-cancellation notice vide his reply dated 16.09.2021 and called upon the respondent to immediately and unconditionally withdraw the said pre-cancellation notice

**C. Relief sought by the complainant:**

4. The complainant has sought following relief(s):

- I. Direct the respondent to refund a sum of Rs.34,35,961/- along with interest @ 15% per annum from the date when payments were made till realization of the amount in full.
- II. Direct the respondents to pay a sum of Rs.5,00,000/- to the complainant towards the cost of the litigation.

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 has contested the complaint on the following grounds.

- I. That the complaint is not maintainable in law or on facts. The complaint preferred by the complainant is not in consonance with the Act, 2016 and the Rules, 2017. This authority does not have the jurisdiction to hear or decide the complaint or to grant any relief to the complainant. The present complaint is liable to be dismissed on this ground alone.
- II. That the complainant has no locus standi or cause of action to file the complaint. Furthermore, the 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 buyer's



agreement dated 17.09.2009 as amended by the supplementary agreement dated 18.09.2009.

- III. That the complainant is not an "Allottee" but an investor who has booked the unit in question as a speculative investment in order to earn rental income/profit from its resale. The complainant does not even reside in India. The complainant has not come before this authority with clean hands and has suppressed vital and material facts from this authority.
- IV. That the complainant, had approached the respondent and expressed an interest in booking a unit in the IT/ITES colony developed by the respondent known as "Digital Greens" situated in Sector 61, Gurugram. Prior to making the booking, the complainant conducted extensive and independent enquiries with regard to the project and it was only after the complainant was fully satisfied about all aspects of the project, that the complainant took an independent and informed decision, uninfluenced in any manner by the respondent, to book the unit.
- V. That unit bearing number DG-B-06-016 (previously TWR B-06-015) having tentative super area of 136.55 sq. metres (1469.93 sq. ft.) was provisionally allotted to the complainant on 06.09.2008. The provisional allotment letter dated 06.09.2008 in favour of the complainant. That the buyer's agreement, willingly and voluntarily executed between both the parties on 17.09.2009. Thereafter, a supplementary agreement dated 18.09.2009 executed between the complainant and the respondent revising, inter alia, the

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payment plan, possession due date and offering certain rebates/incentives to the complainant.

- VI. That the complainant had opted for a construction linked payment plan and had agreed and undertaken to make payment in accordance therewith. However, the complainant defaulted in timely payment of sale consideration right from the very beginning. Payment request letters and reminders for payment issued by the respondent. The calculation sheet reflecting the details of payments made by the complainant. It is evident from a perusal of the payment details referred to above that no payment was made by the complainant after 29.08.2008.
- VII. That it is most respectfully submitted that the contractual relationship between the parties is governed by the terms and conditions of the buyer's agreement dated 17.09.2009 as amended by the supplementary agreement dated 18.09.2009 executed by the parties. Clause 15(a) of the supplementary agreement provides that subject to force majeure conditions and delay caused on account of reasons beyond the control of the respondent, and subject to the allottee not being in default of any of the terms and conditions of the buyer's agreement as well as supplementary agreement, the respondent expects to deliver possession of the apartment within a period of 18 months plus 120 days of grace period, from the date of execution of the supplementary buyer's agreement. In the case of delay by the allottee in making payment or delay on account of reasons beyond the control of the respondent, the time for delivery of possession stands extended



automatically. In the present case, the complainant had defaulted in making timely payment of sale consideration as per the payment plan and consequently is not entitled to any compensation for delay under clause 17(c) of the buyer's agreement. The time period for delivery of possession also stands automatically extended in accordance with clause 15(b)(vii) of the buyer's agreement, solely on the respondent's discretion till payment of all outstanding amounts to the satisfaction of the respondent.

- VIII. That the respondent also drew the complainant's attention to clauses 1.2(c) and 1.2(i) of the buyer's agreement to the effect that timely payment of sale consideration as per the applicable payment plan was the essence of the contract and that delay in payment would attract penal interest and in the case of continuing default, might lead to cancellation of the allotment and forfeiture of earnest money (representing 10% of the sale consideration) as well as processing fee, brokerage, interest on delayed payments and other amounts of a non-refundable nature. The respondent craves leave of this authority to extensively refer to and rely upon various clauses of the buyer's agreement dated 17.09.2009 as well as the supplementary agreement dated 18.09.2009, in order to establish the respective rights and obligations of the complainant and the respondent, at the time of addressing arguments in the matter.
- IX. That in view of the explanation given by the respondent, the complainant agreed to continue with the project. However, despite assurances given by the complainant to make timely payment of

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installments, the complainant continued to make the defaults. Despite defaulting allottees such as the complainant and other adverse circumstances, the respondent succeeded in completing construction of the project and obtained the occupation certificate from the competent authority on 20.03.2017. That when allottees default in timely remittance of sale consideration as per the applicable payment plan, the financial planning of the developer is disrupted, and the developer is forced to obtain funding from the market at short notice and at high rates of interest. This not only exponentially increases the estimated cost of the project but also delays the completion of the project as a whole.

- X. That upon receipt of the occupation certificate, possession of the unit was offered to the complainant vide offer of possession dated 09.06.2017. The complainant was called upon to make payment of balance amount, complete the requisite formalities and documentation and take possession of the unit.
- XI. That instead of taking possession of the unit after making payment of the balance amount as per the buyer's agreement, the complainant sent a false and frivolous legal notice dated 30.03.2021 whereby the complainant had demanded refund of the amount of Rs 34,35,961/- along with interest.
- XII. That after issuance of the legal notice referred to above, the complainant approached the respondent and again requested for cancellation of allotment, which is evident from his email dated 05.05.2021 and expressed his inability to make payment of the balance sale consideration in accordance with the buyer's

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agreement dated 17.09.2009 as amended by the supplementary agreement dated 18.09.2009.

- XIII. That although the buyer's agreement dated 17.09.2009 as amended by the supplementary agreement dated 18.09.2009 does not have any provision for cancellation of allotment by an allottee, nevertheless as a gesture of goodwill, the respondent offered to refund the amount paid by the complainant after deducting HVAT amounting to Rs.1,06,385/- and GST amounting to Rs.1,07,107/-. That the complainant is bound to pay the taxes applicable on the unit in accordance with clause 2 of the buyer's agreement. Furthermore, the taxes are paid to the government and not retained by the respondent. The respondent merely collects the proportionate amount from the allottees and the makes payment to the Government. Although, the respondent is entitled to deduct various amounts such as earnest money, interest on delayed payments etc, the respondent confined its deductions only to the extent of the applicable taxes on the unit.
- XIV. That under the circumstances, the respondent was constrained to issue a pre cancellation notice dated 13.08.2021, whereby the complainant was called upon to clear his outstanding dues and take possession of the unit within a period of 30 days from the date of dispatch of the said notice failing which the allotment was liable to be cancelled in accordance with the buyer's agreement. Despite receipt of the precancellation notice referred to above, the complainant willfully ignored the same and did not clear his outstanding dues. Accordingly, the respondent was left with no

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option but to cancel the allotment in accordance with the buyer's agreement.

XV. That it is evident from the entire sequence of events that the respondent has duly fulfilled its contractual obligations under the buyer's agreement. Thus, the complaint deserves to be dismissed at the very threshold. The allegations levelled by the complainant are totally baseless. There is no merit in the allegations raised by the complainant. Thus, it is most respectfully submitted that the present application 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**

The application of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

**E. I Territorial jurisdiction**

8. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the

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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**

9. 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.

10. 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.
11. 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*

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***and Developers Private Limited Vs State of U.P. and Ors. (Supra) 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."*

12. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the cases 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 objections raised by the respondent**

**F. I Objections regarding the complainants being investors.**

13. The respondent has taken a stand that the complainant is the investors and not consumer and therefore, they are not entitled to the protection of the Act and thereby not entitled to file the complaint under section

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31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumer of the real estate sector. It is settled principle of interpretation that the preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time, the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if he contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainants are buyers and paid total price of **Rs.34,35,961/-** to the promoter towards purchase of an apartment in the project of the promoter. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

*"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"*

14. In view of above-mentioned definition of "allottees" as well as all the terms and conditions of the apartment application for allotment, it is

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crystal clear that the complainant is allottee as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as *M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.* has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottee being investor is not entitled to protection of this Act also stands rejected.

**F. II Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act.**

15. Objection raised the respondent is that the authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter se in accordance with the flat buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions



/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of **Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)** decided on 06.12.2017 which provides as under:

“119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter.....

122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports.”

16. Also, in appeal no. 173 of 2019 titled as **Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya**, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed-

“34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into

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*operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."*

17. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

**G. Findings on the relief sought by the complainant**

**G. I Direct the respondent to refund a sum of Rs.34,35,961/- along with interest @ 15% per annum from the date when payments were made till realization of the amount in full.**

18. The complainant submitted that the respondent did not complete the construction on time and did not offer of possession of the allotted unit to the complainant within the specified time. Thereafter he served a legal notice through their counsel dated 30.03.2021 upon the respondent. The relevant para of legal notice is reproduced as under:

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15. *That your intention was dishonest right from the beginning and that is why you have drafted unilateral terms & conditions of the BBA. The said terms & conditions are totally unfair, unjust, unconscionable, oppressive and one sided. The perusal of the terms & conditions unravel that due to the disparity between the bargaining power and status of the parties, you imposed upon our client totally biased terms and conditions. The same cannot be termed as a negotiated contract. It is abundantly clear that you have trapped our client to make you payment of exorbitant amount while you were aware that you will not be able to fulfill your commitments. Accordingly, our client is entitled to refund of the deposited amount and interest @ 15% per annum on the amount deposited by him i.e. on sum of Rs. 34,35,961/- w.e.f. date of payments till the date of payment.*
19. In this case complainant-allottee already has to make their intention clear to withdraw from the project through legal notice which was send to the respondent on **30.03.2021**.
20. The complainant submitted that he had booked a unit in the commercial project namely digital greens. The BBA was executed between the parties on 17.09.2009 for a total sale consideration of Rs. 1,09,69,139/- out of which he paid up an amount of Rs. 34,35,961/-. The due date of possession was 18.03.2011 thereafter the respondent had obtained the OC on 20.03.2017 and offered the possession of the said unit on 09.06.2017.
21. The section 18(1) is applicable only in the eventuality where the promoter fails to complete or unable to give possession of the unit in accordance with terms of agreement for sale or duly completed by the date specified therein. This is an eventuality where the promoter has

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offered possession of the unit after obtaining occupation certificate and on demand of due payment at the time of offer of possession the allottee wishes to withdraw from the project and demand return of the amount received by the promoter in respect of the unit with interest at the prescribed rate.

22. The due date of possession as per agreement for sale as mentioned in the table above is 18.03.2011 and there is delay of 11 years 01 month 02 days on the date of filing of the complaint. The allottee in this case has filed this application/complaint on 20.04.2022 after possession of the unit was offered to him after obtaining occupation certificate by the promoter. The allottee never earlier opted/wished to withdraw from the project even after the due date of possession and only when offer of possession was made to him and demand for due payment was raised then only filed a complaint before the authority. The occupation certificate /part occupation certificate of the buildings/towers where allotted unit of the complainant is situated is received after obtaining occupation certificate. Section 18(1) gives two options to the allottee if the promoter fails to complete or is unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein:

- i. Allottee wishes to withdraw from the project; or
- ii. Allottee does not intend to withdraw from the project



23. The right under section 18(1)/19(4) accrues to the allottee on failure of the promoter to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein. If allottee has not exercised the right to withdraw from the project after the due date of possession is over till the offer of possession was made to him, it impliedly means that the allottee has tacitly wished to continue with the project. The promoter has already invested in the project to complete it and offered possession of the allotted unit. Although, for delay in handing over the unit by due date in accordance with the terms of the agreement for sale, the consequences provided in proviso to section 18(1) will come in force as the promoter has to pay interest at the prescribed rate of every month of delay till the handing over of possession and allottee's interest for the money he has paid to the promoter are protected accordingly.
24. Further in the judgement of the Hon'ble Supreme Court of India in the cases of **Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra)** 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. it was observed

*25. The unqualified right of the allottee to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of*

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*the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed”.*

25. Keeping in view the above-mentioned facts it is proved that the allottee wishes to withdraw from the project after the due date of possession and seeks refund of the paid-up amount besides interest and compensation. He initially moved the respondent in this regard in 30.03.2021 through legal notice and followed by a complaint with the authority on 20.04.2022 the OC of the project of the allotted unit was already received by the developer on 20.03.2017 and on the basis of which it offered of the same to the allottee vide letter dated 09.06.2017. So, it means that after possession of the allotted unit was offered to him, he wants to withdrawal from the project and is seeking refund of the paid-up amount. Though it is contained on behalf of the respondent that the complainant is not entitled to seek refund of the amount paid with it, but it is well settled that an allottee cannot be compelled to take possession if he shows unwillingness due to financial and other constraints. The respondent can proceed against him as per the terms and condition of the buyer's agreement with regard to cancellation

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/surrender and forfeit the earnest money and exceeding 10% of the basic sale price besides other non-refundable statutory charges.

26. Similarly, regulation 11 of 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."*

27. Keeping in view the aforesaid legal provisions, 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 sale price of the said unit as per builder buyer agreement 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 surrender i.e., 30.03.2021, accordingly interest at the prescribed rate i.e., 10.25% is allowed on the balance amount from the date of cancellation to date of actual refund.

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**G. II. Direct the respondents to pay a sum of Rs.5,00,000/- to the complainant towards the cost of the litigation.**

28. The complainant in the aforesaid relief is seeking relief w.r.t compensation. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors.* (Decided on 11.11.2021), has held that an allottee is entitled to claim compensation under sections 12, 14, 18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation. Therefore, the complainant is advised to approach the adjudicating officer for seeking the relief of compensation.

**H. Directions of the authority**

29. 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 after deducting the earnest money which shall not exceed the 10% of the basic sale price of the said unit and shall return the balance amount to the complainant. The refund should have been made on the date

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of surrender i.e., 30.03.2021. Accordingly, the interest at the prescribed rate i.e., 10.25% is allowed on the balance amount from the date of surrender to date of actual refund.

ii. A period of 90 days is given to the respondents to comply with the directions given in this order and failing which legal consequences would follow.

30. Complaint stands disposed of.

31. File be consigned to registry.

  
Sanjeev Kumar Arora  
Member

  
Ashok Sangwan  
Member

  
V.1-3  
Vijay Kumar Goyal  
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 10.11.2022