

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

Complaint no. : 1171 of 2019
Complaint filed on : 11.04.2019
First date of hearing : 17.12.2019
Order reserved on : 14.02.2023
Order pronounced on: 21.04.2023

Ms. Archana Gupta
R/o: D-13, 1st floor,
Vivek Vihar, Delhi- 110095.

Complainant

Versus

M/s Emaar India Ltd.
(Earlier known as Emaar MGF Land Ltd.)
Address: Emaar MGF Business Park,
MG Road, Sikanderpur Chowk,
Sector 28, Gurugram, Haryana.

Respondent

CORAM:

Shri Ashok Sangwan
Shri Sanjeev Kumar Arora

**Member
Member**

APPEARANCE:

Shri Shourya Mehra and Shri Sahil Agarwal Advocates for the complainant
Shri Ishaan Dang and Shri Ashwarya Hooda Advocates for the respondent

ORDER

1. The present complaint has been filed by the complainant/allottee in Form CRA 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 to the allottee as per the agreement for sale executed inter se them.

A. Project and unit related details

2. The particulars of the project, the details of 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	Imperial Garden, Sector 102, Gurugram, Haryana
2.	Total area of the project	12 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no.	107 of 2012 dated 10.10.2012
	Validity of license	09.10.2020
	Licensee	Kamdhenu Projects Pvt. Ltd.
	Area for which license was granted	12 acres
5.	Provisional allotment letter	27.02.2013 [page 31 of reply]
6.	Unit no.	IG-09-1403, 14 th floor, tower-09 [page 31 of reply]



7.	Unit area	2000 sq. ft.
8.	Date of flat buyer agreement	04.04.2013 [page 43 of reply]
9.	Possession clause	<p>14. POSSESSION</p> <p>(a) Time of handing over the Possession</p> <p><i>Subject to terms of this clause and barring force majeure conditions, and subject to the Allottee(s) having complied with all the terms and conditions of this Agreement, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc. as prescribed by the Company, the Company proposes to hand over the possession of the Unit within 42 (Forty Two) months from the date of start of construction; subject to timely compliance of the provisions of the Agreement by the Allottee. The Allottee agrees and understands that the Company shall be entitled to a grace period of 3 (three) months after the expiry of said period of 42 months, for applying and obtaining the completion certificate/occupation certificate in respect of the Unit and/or the Project. (Emphasis supplied)</i></p> <p>[page 61 of reply]</p>



10.	Date of start of construction as per the statement of account dated 10.02.2020 at page 138 of reply	11.11.2013
11.	Due date of possession	11.05.2017 [Note: Grace period is not included]
12.	Delay in handing over possession w.e.f. due date of handing over possession i.e., 11.05.2017 till date of offer of possession plus 2 months i.e., 30.12.2018	1 years 7 month and 19 days
13.	Total sale consideration as per statement of account dated 10.02.2020 at page 137 of reply	Rs. 1,52,71,831/-
14.	Amount paid by the complainant as per statement of account dated 10.02.2020 at page 137 of reply	Rs. 66,40,578/-
15.	Occupation certificate	17.10.2018 [page 143 of reply]
16.	Offer of possession	31.10.2018 [page 145 of reply]
17.	Legal notice by the complainants to the respondent seeking refund of the amount paid by her	01.12.2018 [Page 159 of complaint]

B. Facts of the complaint

3. The complainant made following submissions in the complaint:

- i. That the complainant signed the buyer's agreement with the respondent on 04.04.2013 after booking of the subject flat/unit in the project 'Imperial Garden' in Sector 102, Gurugram by paying the booking amount of Rs.7,50,000/- and Rs. 2,50,000/- on 20.10.2012 and 07.11.2012 respectively. Further, the complainant has paid an amount of Rs. 66,15,996/- till date inclusive of five instalments. The complainant requested for certain information relating to the project by writing various emails to the respondent wherein details such as copy of license/ revised building plan, NOC from DTCP Chandigarh stating that all dues are clear, further seeking details of amount received till date and expenses occurred till date on construction along with the bank certificate stating that the surplus funds are kept in this project Escrow account. Additionally, she asked for the latest calculation of super built area along with clarification with regard to the refund of amount which was illegally taken by the builder company for parking space, in violation of Hon'ble Supreme Court Order.
- ii. That not a single satisfactory reply was provided by the builder company to the queries raised by the complainant, instead they kept on demanding for the sixth instalment without giving any answer to the genuine concerns of their client who had invested a

- huge sum of money in their project, which further lead to loss of trust on account of professional inadequacy by the respondent.
- iii. That thereafter the possession letter for the abovementioned unit was provided on 31.10.2018 with a delay of more than 30 months in violation of clause 14 of the buyer's agreement. When the complainant visited the unit, she realised that even after such enormous delay in possession, the place is completely inhabitable due to ongoing construction in the nearby towers.
- iv. That due to loss of faith and inadequate service, the complainant wanted to cancel allotment of the said unit by writing to the respondent and demanded refund of the whole amount. The complainant sent a legal notice (dated 01.12.2018) through her Counsel, Advocate Sarwar Raza to the builder/promoter to refund the amount as she was not satisfied with the construction of the said building by the builder and felt cheated.
- v. That aggrieved by the approach, callous behaviour of the builder/promoter, the complainant is under serious apprehension of being tricked, bamboozled and deceived and does not have any other recourse than to knock the door of this Hon'ble Authority to get justice.

C. Relief sought by the complainant

4. The complainant has filed the present compliant for seeking following relief:

- i. Direct the respondent to refund the total amount paid with respect to the subject unit i.e., Rs. 66,15,996/- as the complainant is financially incapable to purchase and also the complainant is not satisfied with the quality of construction and the inhabitable state of the unit provided by the respondent.
 - ii. Abrogate clause no.22 with regard to forceful purchase of the unit of the project by the allottee even if they become bankrupt/financially incapable to afford the unit.
 - iii. Pass such other or further order(s), which this Hon'ble Authority may deem fit and proper in the facts and circumstances of the present case.
5. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4)(a) of the Act and to plead guilty or not to plead guilty.

D. Reply by the respondent

6. The respondent has contested the present complaint on the following grounds:
- i. That the complainant and her husband, Mr. Rajeev Gupta had approached the respondent and expressed an interest in booking a unit in the residential group housing project being developed by the respondent known as "Imperial Gardens" situated in Sector 102, Village Kherki Majra Dhankot, Tehsil & District Gurgaon. Prior

- to making the booking, the complainant and her husband, Mr. Rajeev Gupta had 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, including the approvals, licences, permissions as well as the capacity of the respondent to undertake the project in question, that the complainant took an independent and informed decision, uninfluenced in any manner by the respondent, to book the unit in question. The complainant's husband, Mr. Rajeev Gupta also booked another unit in the same project being unit no. IG-04-402.
- ii. That the complainant was provisionally allotted apartment number IG-09-1403, located on the 14th floor in tower/building number 09, having approximate super area of 185.81 sq. mtrs. or 2000 sq. ft. vide provisional allotment letter dated 27.02.2013. The complainant had opted for a payment plan which was partially construction linked. Thereafter, the buyer's agreement was executed between the parties on 04.04.2013.
- iii. That right from the very beginning, the complainant had been extremely irregular with regard to payment. Consequently, the respondent had to issue notices and reminders calling upon the complainant to pay the amounts as per the payment plan. Payment request letter dated 02.04.2013, 02.05.2013, reminder dated 06.05.2013, reminder dated 29.05.2013, payment request letter

dated 18.10.2013, 20.02.2014, 05.05.2014, reminder dated 27.06.2014, second reminder dated 14.07.2014, notice dated 30.07.2014, payment request letter dated 04.08.2014, 01.10.2014, notice dated 18.12.2014, payment request letter dated 06.01.2015, notice dated 30.01.2015, payment request letter dated 04.03.2015, notice dated 7.05.2015, payment request letter dated 22.01.2016, HVAT payment request letter dated 30.03.2017, reminder dated 2.04.2017, payment request letter dated 06.03.2017, 10.07.2017, second reminder dated 09.10.2017, notice dated 08.02.2018, 02.05.2018 and 25.06.2018, were sent to the complainant to make payment. That the statement of account dated 10.02.2020 reflects the payments made by the complainant and accrued delayed payment interest as on 10.02.2020. It is evident that no payment has been made by the complainant after April 2014. It is pertinent to mention that an amount of Rs. 2,27,530/- is payable by the complainant towards Holding Charges as has been reflected in the Statement of Account. However, the delayed payment charges and holding charges are recurring in nature.

- iv. That as per the terms and conditions of the buyer's agreement dated 04.04.2013, the complainant is under a contractual obligation to make timely payment of all amounts payable under the buyer's agreement, on or before the due dates of payment

failing which the respondent is entitled to levy delayed payment charges in accordance with clause 1.2(c) read with clauses 12 and 13 of the buyer's agreement dated 04.04.2013. The complainant had been habitual defaulters since the very beginning.

- v. That however, in so far as tower in which the apartment in question is situated is concerned, the respondent completed construction of the same within the initial period of registration and applied for the occupation certificate in respect thereon on 21.03.2018. The occupation certificate was issued by the competent authority on 17.10.2018.
- vi. That upon receipt of the occupation certificate, the respondent offered possession of the apartment in question to the complainant vide letter dated 30.10.2018. The complainant was called upon to remit balance amount of Rs. 1,44,88,721/- as per the attached statement and also to complete the necessary formalities and documentation so as to enable the respondent to hand over possession of the apartment to the complainant. Since the complainant did not come forward to take possession of the apartment and also failed to remit the balance payment due and payable by the complainant, reminders for possession dated 11.12.2018 and 19.01.2019 were issued to the complainant by the respondent.

- vii. That instead of remitting the balance payment as per the buyer's agreement, the husband of the complainant sent false and frivolous emails to the respondent claiming to have handed over several post-dated cheques to the respondent towards payment of balance sale consideration towards the unit in question as well as a letter requesting transfer of funds from another unit booked by the complainant/her family, being unit no. IG-04-402, in the same project. Thereafter, the husband of the complainant sent an email to the respondent requesting the respondent not to encash the cheques claimed to have been handed over by him. In fact, the complainant's husband never handed over any cheques as claimed by him in his email and the respondent had never agreed to any so called transfer of funds from unit no. IG-04-402 to the unit in question. It is submitted that the same is yet another pretext adopted by the complainant to avoid her contractual obligations.
- viii. That it is evident that the entire case, that the complainant is nothing but a web of lies and falsehoods and the baseless and frivolous allegations made against the respondent are nothing but an afterthought. The respondent has duly completed construction of the apartment in question and has also offered possession of the same to the complainant within the period of registration under the Act. There is no default or lapse on the part of the respondent.

- ix. That the contractual relationship between the complainants and the respondent is governed by the terms and conditions of the buyer's agreement dated 04.04.2013. Clause 12 of the buyer's agreement provides that time shall be the essence of the contract in respect of the allottee's obligation to perform/observe all obligations of the allottee including timely payment of the sale consideration as well as other amounts payable by the allottee under the agreement.
- x. That the construction of the tower in which the apartment in question is situated was commenced on 11.11.2013. The period of 42 months plus 3 months grace period expires on 11.08.2017. However, on account of delay and defaults by the complainant, the due date for delivery of possession stands extended in accordance with clause 14(b)(iv) of the buyer's agreement, till payment of all outstanding amounts to the satisfaction of the respondent. Furthermore, the respondent had completed construction of the apartment/tower by March 2018 and had applied for issuance of the occupation certificate on 21.3.2018. The occupation certificate was issued by the competent authority on 17.10.2018.
- xi. That the complainant has admittedly purchased the apartment in question as a speculative investment. The complainant never intended to reside in the said apartment and have booked the same with a view to earn a huge profit from resale of the same. One

another unit, i.e. no IG-04-402 in the same project was also booked by the complainant's husband Mr. Rajeev Gupta. In the entire complaint, there is not even a mention that the complainant had booked the apartment in question for her own use. It is for this reason that the complainant is reluctant to take possession of the same. The complainant is an investor who never had any intention to buy the apartment for her own personal use and have kept on intentionally avoiding the performance of her contractual obligations of making timely payments and has now filed the present complaint on false and frivolous grounds. The complainant has categorically admitted that she does not have the funds to make payment of the balance sale consideration. The complainant is not an "allottee" under the Act but an investor and thus the present complaint is not maintainable at the complainant's behest.

xii. That the respondent has been prevented from timely implementation of the project by reasons beyond its power and control. It is submitted that the respondent had appointed a contractor on 17.09.2013 operating under the name and style of Capacite Infraprojects Ltd., for construction and implementation of the project in question. The said contractor had represented and claimed that it has the necessary resources, competence, capacity, capability and expertise for undertaking, performing, effectuating and completing the work undertaken by it. The respondent had no

reason to suspect the bona fide of the said contractor at the relevant time and awarded the work to the said contractor. However, the said contractor was not able to meet the agreed timeline for construction of the project. The said contractor failed to deploy adequate manpower, shortage of material, etc. The respondent was constrained to issue several notices, requests etc. to the said contractor to expedite progress of the work at the project site but to no avail. The said contractor consciously and deliberately chose to ignore the legitimate and just requests of the respondent on one pretext or the other and defaulted in carrying out the work in a time bound manner. Therefore, no fault or lapse can be attributed to the respondent in the facts and circumstances of the case.

xiii. That no illegality or lapse can be attributed to the respondent. Thus, the allegations levelled by the complainant qua the respondent are totally baseless and do not merit any consideration by this Hon'ble Authority. The present application is nothing but an abuse of the process of law. 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.

E. Jurisdiction of the authority

8. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the following 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 Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. 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 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 as per provisions of section 11(4)(a) of the Act leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant 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.*** "SCC Online SC 1044 decided on 11.11.2021 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. Furthermore, the said view has been reiterated by the Division Bench of Hon'ble Punjab and Haryana High Court in "***Ramprastha Promoter***

and Developers Pvt. Ltd. Versus Union of India and others dated 13.01.2022 in CWP bearing no. 6688 of 2021. The relevant paras of the above said judgment reads as under:

“23) The Supreme Court has already decided on the issue pertaining to the competence/power of the Authority to direct refund of the amount, interest on the refund amount and/or directing payment of interest for delayed delivery of possession or penalty and interest thereupon being within the jurisdiction of the Authority under Section 31 of the 2016 Act. Hence any provision to the contrary under the Rules would be inconsequential. The Supreme Court having ruled on the competence of the Authority and maintainability of the complaint before the Authority under Section 31 of the Act, there is, thus, no occasion to enter into the scope of submission of the complaint under Rule 28 and/or Rule 29 of the Rules of 2017.

24) The substantive provision of the Act having been interpreted by the Supreme Court; the Rules have to be in tandem with the substantive Act.

25) In light of the pronouncement of the Supreme Court in the matter of M/s Newtech Promoters (supra), the submission of the petitioner to await outcome of the SLP filed against the judgment in CWP No.38144 of 2018, passed by this Court, fails to impress upon us. The counsel representing the parties very fairly concede that the issue in question has already been decided by the Supreme Court. The prayer made in the complaint as extracted in the impugned orders by the Real Estate Regulatory Authority fall within the relief pertaining to refund of the amount; interest on the refund amount or directing payment of interest for delayed delivery of possession. The power of adjudication and determination for the said relief is conferred upon the Regulatory Authority itself and not upon the Adjudicating Officer.”

14. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the matter of **M/s Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra)**, and the division bench of Hon'ble Punjab and Haryana High Court in **“Ramprastha Promoter and Developers Pvt. Ltd. Versus Union of India and others. (supra)**, the authority has the jurisdiction to

entertain a complaint seeking refund of the amount paid by allottee alongwith interest at the prescribed rate.

F. Findings on the reliefs sought by the complainant

15. Relief sought by the complainant:

- i. Direct the respondent to refund the total amount paid with respect to the subject unit i.e., Rs. 66,15,996/- as the complainant is financially incapable to purchase and also the complainant is not satisfied with the quality of construction and the inhabitable state of the unit provided by the respondent.
- ii. Abrogate clause no.22 with regard to forceful purchase of the unit of the project by the allottee even if they become bankrupt/financially incapable to afford the unit

16. Due date of possession as per buyer's agreement: Clause 14 of the buyer's agreement provides for time period for handing over of possession and is reproduced below:

"14. POSSESSION

(a) Time of handing over the Possession

*Subject to terms of this clause and barring force majeure conditions, and subject to the Allottee(s) having complied with all the terms and conditions of this Agreement, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc. as prescribed by the Company, the Company proposes to hand over the possession of the Unit **within 42 (Forty Two) months from the date of start of construction**; subject to timely compliance of the provisions of the Agreement by the Allottee. The Allottee agrees and understands that the Company shall be entitled to a grace period of **3 (three) months after the expiry of said period of 42 months, for applying and obtaining the completion certificate/occupation certificate** in respect of the Unit and/or the Project."
(Emphasis supplied)*

17. The promoter has proposed to hand over the possession of the said unit within 42 months from the date of start of construction and it is further provided in agreement that promoter shall be entitled to a grace period of 3 months for applying and obtaining completion certificate/occupation certificate in respect of said unit and/or the project. The construction commenced on 11.11.2013 as per statement of account dated 10.02.2020. The period of 36 months expired on 11.05.2017. As a matter of fact, the promoter has not applied to the concerned authority for obtaining completion certificate/occupation certificate within the time limit prescribed by the promoter in the buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 3 months cannot be allowed to the promoter at this stage. Therefore, the due date of possession comes out to be 11.05.2017.
18. In the present complaint, the complainant intends to withdraw from the project and is seeking return of the amount paid by him in respect of subject plot along with interest at prescribed rate as per provisions of section 18 of the Act. Section 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)

19. The counsel for the complainant states that the only question that remains to be decided here as to whether 10% of the consideration amount is to be deducted or the deduction should be limited to the earnest money deposited. He further states that interest should be awarded on the amount refundable from the date of last payment. In support of this contention, the counsel for the complainant has attached citation of NCDRC in case titled as ***Karun Malhotra and another vs. Ireo Grace Realtech Pvt. Ltd. 2020 SCC*** online which has been upheld by the Supreme Court of India.
20. The counsel for the respondent states that the complainant failed to deposit the due instalments after the year 2014 and number of reminders were sent to the complainant to clear the payments. The due date for handing over possession was 11.05.2017 and the OC for the project was received on 17.10.2018 and offer of possession was made on 31.10.2018. The complainant was obligated to take the

possession of the unit and clear the balance payments. However, the complainant chose to withdraw from the project after the offer of possession on 01.12.2018. When the complainant chose to withdraw from the project, the amount recoverable from the complainant included interest and other statutory charges. So far as the citations are concerned, attention is also invited to **AIR 2021 SC 437 Ireo Grace Realtech Pvt. Ltd vs. Abhishek Khanna and others.**

21. In the present complaint, the complainant booked the subject unit in the project of the respondent named as "Imperial Garden" situated at Sector 102, Gurugram, Haryana for a sale consideration of Rs. 1,52,71,831/- and till date the complainant has made payment of Rs. 66,40,578/- against the subject unit. Thereafter, a retail space buyer's agreement was executed between the parties on 04.04.2013. As per clause 14 of the said agreement, the respondent has agreed to handover the possession of the unit within a period of 36 months from the date of start of construction along with grace period of 3 months for for applying and obtaining completion certificate/ occupation certificate in respect of said unit and/or the project. The grace period is disallowed for the reasons quoted above. Therefore, the due date for handing over of possession comes out to be 11.05.2017. On perusal of documents on record, it is observed that the occupation certificate of the said project was granted by the competent authority on 17.10.2018 and the respondent has offered possession of the subject unit on 31.10.2018.

Instead of taking possession, the allottee has filed the present complaint before the authority seeking refund under section 18 (1) of the Act. The complainant has made his intention clear to withdraw from the project only vide legal notice dated 01.12.2018 which is subsequent to the offer of possession dated 31.10.2018.

22. The authority is of the view that in case allottee wishes to withdraw from the project, the promoter is liable on demand to the allottee to return the amount received by the promoter with interest at the prescribed rate if promoter fails to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale. The words liable on demand need to be understood in the sense that allottee has to make his intentions clear to withdraw from the project and a positive action on his part to demand return of the amount with prescribed rate of interest. If he has not made any such demand prior to receiving occupation certificate and unit is ready then impliedly he has agreed to continue with the project i.e. he does not intend to withdraw from the project and the proviso to section 18(1) automatically comes into operation and allottee shall be paid by the promoter interest at the prescribed rate for every month of delay. This view is supported by the judgement of Hon'ble Supreme Court of India in case of **Ireo Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors.** and also in consonance with the judgement of Hon'ble Supreme

Court of India in case of **M/s Newtech Promoters and Developers Pvt Ltd Versus State of U.P. and Ors.**

23. As far as contention of the respondent regarding obligation of the allottee to take possession is concerned, the authority is of the view that no one can be forced to purchase a house but as the complainant herself is at default in making the payment as per the payment schedule and still she intends to withdraw from the project which will amount to the breach of the contract on her part. This has also been observed by the appellate tribunal in appeal no. 255 of 2019 titled as **Ravinder Pal Singh V/s Emaar MGF Land Ltd. & anr.** wherein it is stated as follows:

"32. However, nobody can be forced or compelled to purchase the house, but as the appellant himself is at default in making the payment as per the payment schedule and if he still intends to withdraw from the project out of his own which will amount to the breach of the contract on his part, in that eventuality he will be entitled for refund of the amount paid by him after forfeiting 10% of the basic sale consideration, which will be considered to be the reasonable earnest money amount and after deducting the statutory dues already deposited with the government".

24. As per the agreement, the complainant was liable to pay the installment as per the payment plan opted by her. In the present complaint, the complainant has made a payment of Rs. 66,40,578/- against the total sale consideration of Rs. 1,52,71,831/-. The complainant is at default in making timely payments. Further, clause 1.2(i) of the agreement provides that 15% of total sale consideration shall be treated as earnest money to ensure the fulfilment of terms and conditions of the agreement and the same is reproduced under for ready reference:

“(i)The allottee understands and agrees that 15% of the total consideration of the unit shall be treated as earnest money by the company to ensure the fulfillment of terms and condition of the agreement.”

25. A reference to clause 1.2(i) of the buyer’s agreement has been made as to whether the forfeiture of earnest money without complying with the provision of regulation 11 of 2018 framed by Haryana Real Estate Regulatory Authority, Gurugram is valid or not. The answer is in the negative. So, the deduction should be made as per the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, which 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.”

26. Hence, the authority hereby directs the promoter to return the paid-up amount of Rs. 66,40,578/- to the complainant after deduction of 10% of the sale consideration. The respondent is further directed to pay an interest on the balance amount at the rate of 10.70% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate

(Regulation and Development) Rules, 2017 from the date of surrender /withdrawal (i.e., legal notice dated 01.12.2018) till the actual date of refund of the amount within the timelines provided in rule 16 of the rules, 2017. A period of 90 days is given to the respondent-builder to comply with the directions given in this order and failing which legal consequences would follow.

G. Directions of the authority

27. 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 return the paid-up amount of Rs. 66,40,578/- to the complainant after deduction of 10% of the sale consideration.
- ii. The respondent is further directed to pay an interest on the balance amount at the rate of 10.70% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of surrender (i.e., legal notice dated 01.12.2018) till the actual date of refund of the amount.

iii. A period of 90 days is given to the respondent-builder to comply with the directions given in this order and failing which legal consequences would follow.

28. Complaint stands disposed of.

29. File be consigned to registry.


(Sanjeev Kumar Arora)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 21.04.2023


(Ashok Sangwan)

Member



HARERA
GURUGRAM