BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 2220 of 2020
Date of decision : 25.07.2022

1. Samarth S Rajnayak
2. Mrs. Mamta A. Rajnayak
3. Dr. Sudhir K. Jain

Address:- H. No. 2514, Sector-D, Pocket-2 Vasant Kunj, New Delhi – 110070 **Complainants**

Versus

Emaar MGF Land Ltd.
Registered address: 306-308, Square One, C-2, District Centre, Saket, New Delhi, Delhi 110017
also, at: ECE, House, 28 Kasturba Gandhi Nagar, New Delhi – 110001 **Respondent**

CORAM:
Dr. K.K Khandelwal **Chairman**
Shri Vijay Kumar Goyal **Member**

APPEARANCE:
Complainants in person
Sh. Yuvraj Samant, Ms. Neha Amola and Sh. Pranav Pareek Advocate for the complainants
Sh. Ishaan Dang Advocate for the respondent

ORDER

1. The present complaint dated 13.08.2020 has been filed by the complainant 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 thereunder or to the allottee as per the agreement for sale executed inter se.

A. Project and unit related details

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

S.N.	Particulars	Details
1.	Name of the project	Emerald Floors Premier III, Sector- 65
2.	Nature of project	Residential colony
3.	Unit no.	EFP-III-44-0102
4.	Unit measuring	183.48 sq. mtr 1975 sq. ft.
5.	Allotment letter	17.10.2011
6.	Date of execution of flat buyer's agreement	22.02.2012
7.	Possession clause	***11. POSSESSION*** ***(a) Time of handing over the Possession*** *Subject to terms of this clause and barring force majeure conditions, subject to the Allottee 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*

response to emails sent to the respondent, the complainant filed a complaint with the authority on 12.06.2020.

C. The complainants are seeking the following relief:

4. To refund the entire amount of Rs. 1,11,55,635/- along with interest at 24% p.a. and also direct to withdraw additional demands of payment made from the purchaser date.

D. Reply filed by the respondent

5. The respondent had contested the complaint on the following grounds:

i. That the complainants are estopped by their own acts, conduct, acquiescence, laches, omissions etc. from filing the present complaint. That the complainants have 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 buyer's agreement dated 22.02.2012, as shall be evident from the submissions made in the following paras of the present reply.

ii. That as per the averments in the complaint, the due date for offer of possession was May 2014. Therefore, without prejudice to the contentions of the respondent that there has been no delay or default on the part of the respondent and without admitting in any manner any truth in the allegations made by the complainants, it is submitted that the cause of action, if any, for filing of the present complaint arose prior to the date of coming into force of the present Act. Hence the complaint is barred by limitation and liable to be dismissed on this ground also.

iii. That the complainants are not "allottees" but investors who have booked the said unit as a speculative investment in order to earn rental income/profit from its resale. That the complainants have not come before the authority with clean hands and have suppressed vital and material facts from the authority. The correct facts are set out in the succeeding paras of the present reply.

iv. That the complainants had opted for a construction linked payment plan and had agreed and undertaken to make payment in accordance therewith. However, the complainants started defaulting in payments right from the very beginning and consequently became liable for payment of delayed payment charges. Consequently, the respondent was compelled to issue multiple demand letters and reminders for payment. That it is most respectfully submitted that the contractual relationship between the complainants and the respondent is governed by the terms and conditions of the buyer's agreement dated 22.02.2012. The buyer's 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 same, the respondent expects to deliver possession of the apartment within a period of 24 months plus three months grace period, from the date of execution of the 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

complainants are defaulters who have failed to make timely payment of sale consideration as per the payment plan. The time period for delivery of possession automatically stands extended in the case of the complainants. On account of delay and defaults by the complainants, the due date for delivery of possession stands extended in accordance with clause 11(b)(iv) of the buyer's agreement, till payment of all outstanding amounts to the satisfaction of the respondent.

v. That, without admitting or acknowledging the truth or legality of the allegations advanced by the complainants 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. The provisions of the Act relied upon by the complainants for seeking refund, interest or compensation cannot be called in to aid in derogation and in negation of the provisions of the buyer's agreement as amended. The complainants cannot claim any relief which is not contemplated under the provisions of the buyer's agreement as amended. Assuming, without in manner admitting any delay on the part of the respondent in delivering possession, it is submitted that the refund along with interest for the alleged delay demanded by the complainants is beyond the scope of the buyer's agreement. The complainants cannot demand any refund, interest or compensation beyond or contrary to the agreed terms and conditions between the parties.

vii. Subsequently, the National Building Code (NBC) was revised in the year 2016 and in terms of the same, all high rise buildings (i.e buildings having height of 15 mtrs and above) , irrespective of the area of each floor, are now required to have two stair cases. Gazette published on 15.03.2017 that the provisions of NBC 2016 supersedes those of NBC 2005. The Fire Department is seeking to retrospectively apply the said provision and while processing the Fire NOC application has been insisting on two stair cases in all high rise buildings even in cases where the building plans stood approved with a provision for a single staircase and which have been constructed accordingly. The Fire department has issued a provisional Fire NOC with the requirement that the second staircase would be constructed by the developer within one year from the date of issuance of the provisional Fire NOC.

viii. In view of the practical difficulties in constructing a second staircase in a building that already stands constructed according to duly approved plans, the respondent made several representations to various government authorities requesting that the requirement of a second staircase in such cases be dispensed with. It was pointed out by the respondent that construction of a second staircase would not be possible for several technical reasons such as obstruction of Fire tender path, violation of the setback norms, violation of fire safety norms in as much as the second staircase would not be connected to the common lobby area and that construction of second staircase by connecting balconies of the dwelling units would pose a security and privacy concern. The respondent had also pointed out that

the allottees of the dwelling units were also eagerly awaiting possession of their units since long and requested that the Fire NOC be issued without any preconditions.

ix. The Fire department inspected the site of the project and sought alternate proposals from the respondent to meet the requirement of second staircase in the buildings in question. The respondent accordingly submitted various proposals to the Fire department. Eventually, the respondent took the decision to go ahead and construct the second staircase. It is stated that the construction of the second staircase has already been completed and OC has already been applied on 20.07.2020. Thereafter, upon issuance of the occupation certificate and subject to force majeure conditions, possession of the apartment shall be offered to the complainant. It is evident from the entire sequence of events that no illegality can be attributed to the respondent. The allegations levelled by the complainants are totally baseless. There is no default or lapse insofar as the respondent is concerned. The respondent is not in violation of any provisions of the Act or the rules, as alleged in the complaint. It is the complainants who have defaulted in making timely payment of the instalments to the respondent on false and specious pretexts and have rendered themselves liable for the consequences as enumerated under the buyer agreement. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.

E. Jurisdiction of the authority

6. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below:

E.I Territorial jurisdiction

7. 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

8. 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***
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> .....
>
> *(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:***
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> *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.*

9. 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.

10. 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 Pvt. Ltd. and other Vs. Union of India and other 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."*

11. 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 relief sought by the complainants/allottees.

F. I To refund the entire amount of Rs. 1,11,55,635/- along with interest at 24% p.a. and also direct to withdraw additional demands of payment made from the purchaser date.

12. Keeping in view the fact that the allottees/complainants wishes to withdraw from the project and demanding return of the amount received by the promoter in respect of the unit with interest on failure of the promoter to complete or inability to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. The matter is covered under section 18(1) of the Act of 2016. The due date of possession as per agreement for sale as mentioned in the table above is 22.02.2014 and there is delay almost 6 years on the due date of possession. The occupation certificate /part occupation certificate of the buildings/towers where allotted unit of the complainants are situated is received after filing of application/complaint by the complainants for return of the amount received by the promoter on failure of 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. The complainants-allottees have already wished to withdraw from the project and the allottees have become entitled his right under section 19(4) to claim the refund of amount paid along with interest at prescribed rate from the promoter as the promoter fails to comply or

unable to give possession of the unit in accordance with the terms of agreement for sale. Accordingly, the promoter is liable to return the amount received by him from the allottees in respect of that unit with interest at the prescribed rate.

13. The authority is well within its jurisdiction to procced further in the matter to grant refund to the complainant in view of the recent judgement of the Hon'ble Apex court in the case of ***Newtech Promoters and Developers Private Limited Vs. State of U.P. and Ors. (11.11.2021) MANU/SC/1056/2021*** and wherein it was observed as under:

> *"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 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.* (Emphasis supplied)

14. While considering the view on the basis of the aforesaid reasonings, the authority elucidated the above facts and establishes the entitlement of the allottees for refund as the respondent-promoter has defaulted in fulfilling his obligations and responsibilities as per the buyer's agreement to hand over the possession of the allotted unit within the

stipulated period. Keeping in view the facts of the present matter, the authority is of the view that the allottees cannot be expected to wait endlessly for taking possession of the unit which was allotted to them and for which they have paid a considerable amount of money towards the sale consideration. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established.

15. Furthermore, the hon'ble Apex Court in **civil appeal no. 12238 OF 2018 titled as Pioneer Urban Land & Infrastructure Ltd. Vs. Govindan Raghavan,** wherein it was held that the flat purchaser cannot be compelled to take possession of the flat even though it was offered almost 2 years after the grace period under the agreement expired. The relevant para is reproduced as under:

> *"We see no illegality in the Impugned Order dated 23.10.2018 passed by the National Commission. The Appellant – Builder failed to fulfill his contractual obligation of obtaining the Occupancy Certificate and offering possession of the flat to the Respondent – Purchaser within the time stipulated in the Agreement, or within a reasonable time thereafter. The Respondent – Flat Purchaser could not be compelled to take possession of the flat, even though it was offered almost 2 years after the grace period under the Agreement expired. During this period, the Respondent – Flat Purchaser had to service a loan that he had obtained for purchasing the flat, by paying Interest @10% to the Bank. In the meanwhile, the Respondent – Flat Purchaser also located an alternate property in Gurugram. In these circumstances, the Respondent – Flat Purchaser was entitled to be granted the relief prayed for i.e., refund of the entire amount deposited by him with Interest."*

16. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the

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respondent is established. As such, the complainants are entitled to refund the entire amount paid by them at the prescribed rate of interest i.e., @ 9.80% p.a. (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 each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

G. Directions of the authority

17. 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/promoter is directed to refund the amount i.e. Rs. 1,11,55,635/- received by it from the complainants along with interest at the rate of 9.80% (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 each payment till the actual date of refund of the deposited amount.

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

18. Complaint stands disposed of.

19. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman
Haryana Real Estate Regulatory Authority, Gurugram

Dated: 25.07.2022