

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

Date of decision: **12.01.2023**

Name of the Builder		Emaar MGF Land Limited	
Project Name		Emerald Plaza at Emerald Hills, Sector 65	
S.no.	Complaint No.	Complaint title	Attendance
1.	CR/2517/2021	Vinay Raghav and Jyoti Raghav Vs. Emaar MGF Land Ltd	Shri Utkarsh Tappar (Advocate) Shri JK Dang and Harshit Batra (Advocate)
2.	CR/4232/2021	Emaar MGF Land Limited vs. Vinay Raghav and Jyoti Raghav	Shri JK Dang and Harshit Batra (Advocate) Shri Utkarsh Tappar (Advocate)
CORAM:			
Shri Vijay Kumar Goyal			Member
Shri Sanjeev Kumar Arora			Member

ORDER

1. This order shall dispose of both the complaints titled as above filed before this authority under section 31 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred as "the Act") read with rule 2B of the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter referred as "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 its obligations, responsibilities and

functions to the allottees as per the agreement for sale executed inter se between parties.

2. That the complaint bearing no. **4232/2021** has been filed by the promoter in 'Form CRA' on 27.10.2021 against the allottees seeking a direction from the authority against the allottees to take the possession of the said commercial space which is ready and in the state of being occupied after the completion of the requisite formalities by the respondent including payment of the outstanding dues along with interest as per section 19(6) and (7) of the Act of 2016. The reply of the said complaint has been filed by the allottees on 08.04.2011.
3. Since common question of facts are involved in the above-mentioned complaints and vide order dated 07.04.2022, the complaint no. 4232/2021 was tagged with the matter bearing no. 2517 of 2021, accordingly the same are being disposed of by this single order. The particulars of lead case CR/2517/2021 Case titled as **Surender Malik and Dimple Malik V/s Emaar MGF Land Ltd.**
 - A. **Project and unit related details**
4. That the particulars of the project, the details of the sale consideration, the amount paid by the complainants/allottees, the date of proposed handing over the possession, delay period, if any are being given in the tabular form.

Sr. No.	Particulars	Details
1.	Name of the project	Emerald Plaza at Emerald Hills, Sector 65, Gurugram, Baryana

2.	Total area of the project	3.963 acres
3.	Nature of the project	Commercial colony
4.	DTCP license no.	10 of 2009 dated 21.05.2009
	Validity of license	20.05.2019
	Licensee	Logical Developers Pvt. Ltd. and 8 others
	Area for which license was granted	102.7412 acres
5.	Registered/not registered	Not registered
6.	Applied for occupation certificate on	26.05.2017
		[annexure R1, page 24 of reply]
7.	Occupation certificate granted on	08.01.2018
		[annexure R2, page 25 of reply]
8.	Provisional allotment letter	16.04.2014
		[annexure R4, page 40 of reply]
9.	Unit no.	EPS-SF-011, second floor [page 10 of complaint]
10.	Area of the unit (super area)	332.01 sq. ft.
11.	Date of execution of buyer's agreement	27.05.2014
		[annexure P1, page 10 of complaint]
12.	Possession clause	16. POSSESSION (a) Time of handing over the Possession (i) That the possession of the Retail

		<p><i>Spaces in the Commercial Complex shall be delivered and handed over to the Allottee(s), within thirty (30) months of the execution hereof, subject however to the Allottee(s) having strictly complied with all the terms and conditions of this Agreement and not being in default under any of the provisions 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 Retail Spaces for his occupation and use ("Notice of Possession").</i></p> <p><i>(ii) 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 16, for applying and obtaining necessary approvals in respect of the Commercial Complex."</i></p> <p><i>(Emphasis supplied)</i></p> <p><i>[page 19 of complaint]</i></p>
13.	Due date of possession	27.11.2016 [Note: Grace period is not included]



Complaint no. 2517 of 2021 and 4232 of 2021

14.	Total consideration as per the statement of account dated 27.08.2021 at page 95 of reply	Rs.29,69,112/-
15.	Total amount paid by the complainants as per statement of account dated 27.08.2021 at page 95 of reply	Rs.10,88,381/- [Note: The complainants are alleging that they have made payment of Rs.9,96,030/- in cash to the respondent. The respondent denied receiving payment in cash. No receipt attached by the complainant in respect of the same.]
16.	Offer of possession	29.01.2018 [annexure P3, page 46 of complaint]
17.	The complainants/allottees expressed their inability to take possession of the unit vide email dated	08.02.2019

B. Facts of the complaint

5. The complainants have made the following submissions in the complaint:

- i. That in the year 2014, the complainants came across the project "EMERALD PLAZA, at EMERALD HILLS " (hereinafter referred to as "commercial project"), being developed by the respondent company, situated at sector 65, Gurugram.

- ii. The respondent company had advertised the project in an extremely stellar manner by representing that the commercial project would offers spacious and skillfully designed retail shops, commercial spaces and office space. Furthermore, it was represented that the project shall be well equipped with all the amenities to facilitate the needs of the office people. That the complainants had already invested in the residential project of the respondent, Emerald Hills, situated at Golf Course Extension Road, sector 65, Gurugram and hence the commercial project was projected as a viable option on account of its close vicinity to the residential project. Lured in by the advertisement of the commercial project made by the respondent company, the complainants approached the respondent company to further inquire about the commercial project for the purpose of purchasing a retail space in it.
- iii. The officials of the respondent company represented an extremely rosy picture of the project to the complainants and promised them that they would be given the possession of the retail space within thirty (30) months from the date of execution of the builder buyer agreement and furthermore the respondent shall also be entitled to a grace period of 120 days. That lured in by the promises and assurances made by the officials of the respondent company, the complainants agreed to purchase a retail space (hereinafter referred to as "retail unit") bearing unit no. EPS-SF-011, admeasuring in aggregate approximately, a super area of 332.01

sq. ft. at the rate of Rs. 7500 per sq. ft. amounting to a basic sale consideration of INR 24,90,075/- and car parking charges @ Rs. 4,00,000/- aggregating to Rs. 2662388.19/- as total sale consideration.

- iv. That in the year 2009, the complainants had come across a residential project of the respondent namely "Emerald Hills" in Sector 65, Gurugram. That the complainants invested in the said project for a 3bhk floor and executed a builder buyer agreement ("BBA") dated 28.12.2009. That the possession of the floor was promised by the respondent within 30 months from the date of execution BBA along with a grace period of 120 days. Intrigued by the idea of a commercial project being built in close radius of the residential project and trusting the promises of the respondent of getting the possession of the residential floor in the stipulated time, the complaints decided to invest in the commercial project.
- v. Subsequently, on 24.03.2014, the complainants paid Rs. 2,50,000/- as the booking amount towards the purchase of the unit in the commercial project. That a sum of INR 9,96,030/- was paid in cash to one of the representatives of the respondent, in order to confirm the deal. That it is pertinent to mention that before signing the retail space buyer's agreement the respondent company assured the complainants that the construction of the commercial project would be at an extremely fast pace so that there is no delay in handing over the possession. That on 27.05.2014, the retail space buyer's agreement of the unit was

executed between the respondent company, the complainants and active promoters private limited (Confirming Party). In terms of the RSBA, the possession of the unit had to be offered to the complainants by or before 27.10.2016, or 27.01.2017, if 3 months grace period was included. Further, as per the terms of the RSBA, the total consideration of the unit was 26,62,388.19/-.

- vi. That subsequent to signing of the RSBA, the complainants made two payments through net banking dated 30.05.2014 and 19.08.2014 for a sum of INR 5,18,000/- and Rs. 2,58,355/- respectively. However, it is pertinent to mention that the construction of the project was extremely slow, which was contrary to the promises the respondent company made to the complainants at the time of signing the RSBA.
- vii. That since the commercial project was also lagging behind, the complainants sought clarification for the slow-paced construction, to which the officials of the respondent company assured the complainants that they had no reason to worry and the possession would be provided on the promised date. That since the complainants had paid more than 75% of the cost towards the unit and the residential project of the respondent was also far beyond the possession date, the complainants stopped making payments and demanded for timely possession.
- viii. That the respondent vide letter dated 29.01.2018 offered the possession of the unit to the complainants and further demanded for an amount of Rs. 22,83,431/- as the settlement amount for

clearance of the dues towards the unit from the complainants, to be paid by 28.02.2018. That it is imperative to mention that the possession of the unit was being offered after a delay of almost one (1) year. That on the other hand the residential floor that the complainants had bought at the respondent's residential project was nowhere near completion and the respondent in July, 2018 asked the complainants to either opt for a refund or chose any other unit in some other residential project of the respondent.

- ix. That on account of the unprofessional and unethical conduct of the respondent company, the entire purpose of buying the retail unit was defeated and the dreams, plans and future planning of the complainants were all put in jeopardy. That in October 2018, the respondent informed the complainants that the construction of the residential project has been resumed and the respondent is willing to offer the possession at the earliest and the complainants should abide by the payment schedule. That on account of such discrepancies that were displayed by the respondent, the financial management of the complainants was highly impacted. That since at the time, the complainants' need for a house was far greater than the retail unit, the complainants continued to make payments towards the residential floor.
- x. That the complainants vide e-mail dated 08.02.2019, expressed their inability to take possession of the unit, due to the delay and subsequently requested the respondent to adjust the amount paid to them till date towards the payment of installment of the

residential floor. That the request of the complainants was outrightly denied without considering the merits of his appeal. That the complainants subsequently wrote many emails dated 10.04.2019, 12.04.2019, 13.04.2019 and 25.04.2019, requesting for the cancellation of his unit at the commercial project and in turn adjusting the payments made by them towards the residential project. That all the requests of the complainants fell on the deaf ears of the respondent, as they remained adamant to get the remaining amount from the complainants for completing the sale of the retail unit. That despite the repeated requests of the complainants to withdraw from the retail unit in the commercial project of the respondent, the respondent has failed to take note of the same and continues to make illegitimate demands of monies from the complainants with excessive amounts of interest being incurred on the outstanding amount of the retail unit.

- xi. Thus, till date, the complainants have paid Rs. 20,22,385/- in lieu of the retail unit at the commercial project. That the respondent company had to deliver the possession of the unit by or before 27.10.2016, or 27.01.2017, if the grace period is included. However, the possession was offered after almost 1 year from the promised date of possession, and the complainants were nowhere in the position to afford the unit. Thus, it is prominently clear from the face of it, that the respondent company, since the very beginning has been deficient in the services provided to the complainants and now is not ready to accept the withdrawal of

the complainants from the retail unit. That the complainants even issued a legal notice dated 15.09.2020 to the respondent company, requesting them to refund their monies along with compensation for the delay in possession. However, the respondent company chose to ignore the same.

- xiii. That the complainants are suffering from grave mental agony and financial hardship due to the illegal, unethical and unprofessional acts of the respondent company. It is because of the deficient services and unfair trade practices that the complainants are being cheated of their hard-earned money invested in the retail unit, for which they have paid a huge amount.

C. Relief sought by the complainants:

6. The complainants have sought following relief(s):

(i) Direct the respondent to refund the entire amount of Rs. 20,22,385/- along with prescribed rate of interest.

7. 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

8. The respondent has contested the complaint on the following grounds.
- i. That the complainants have got 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 27.05.2014, as shall be evident from the submissions made in the following paras of the present reply, that the complainants are estopped by their own acts, conduct, acquiescence, laches, omissions etc. from filing the present complaint.

- ii. That the complainants are not an "allottee" but an investor who have booked the unit in question as a speculative investment in order to earn rental income/profit from its resale. The unit in question has been booked by the complainants as a speculative investment and not for the purpose of self-use.
- iii. That the complainants had approached the respondent sometime in the year 2014 for purchase of an independent unit in its upcoming residential project "emerald plaza" at the emerald estate, sector 65, Gurgaon (hereinafter "the project"). It is submitted that prior to approaching respondent, the complainants had conducted extensive and independent enquiries regarding the project and it was only after the complainants were fully satisfied with regard to all aspects of the project, including but not limited to the capacity of respondent to undertake development of the same, that the complainants took an independent and informed decision to purchase the unit, un-influenced in any manner by the respondent.
- iv. That thereafter the complainants vide application form dated 24.03.2014 applied to respondent for provisional allotment of a unit in the project. The complainants, in pursuance of the

aforesaid application form, were allotted an independent unit bearing no EPS-SF-011, in the project vide provisional allotment letter dated 16.04.2014. Buyer's agreement was executed between the complainants and the respondent on 27.05.2014.

- v. That it is submitted that the complainants had persistently and regularly defaulted in remittance of installments on time. That is pertinent to mention that clause 18 of the buyer's agreement provides that compensation for any delay in delivery of possession shall only be given to such allottees who are not in default of their obligations envisaged under the agreement and who have not defaulted in payment of instalments as per the payment plan incorporated in the agreement. In case of delay caused due to non- receipt of occupation certificate, completion certificate or any other permission/sanction from the competent authorities, no compensation or any other amount shall be payable to the allottees. As delineated hereinabove, the complainants, having defaulted in timely remittance of the instalments, were not entitled to any compensation or any amount towards interest as an indemnification for delay, if any, under the buyer's agreement.
- vi. That it is respectfully submitted that the rights and obligations of complainants and the respondent are completely and entirely determined by the covenants incorporated in the buyer's agreement, which continue to be binding upon the parties thereto with full force and effect. It is submitted, that as per clause 16 of

the buyer's agreement provides that subject to the allottees having complied with all the terms and conditions of the agreement, and not being in default of the same, possession of the unit would be handed over within 30 months plus grace period of 120 days, from the date of execution of the buyer's agreement. It is further provided in the buyer's agreement that time period for delivery of possession shall stand extended on the occurrence of delay for reasons beyond the power and control of the respondent. Furthermore, it is categorically expressed in clause 16(b)(vi) that in the event of any default or delay in payment of instalments as per the schedule of payments incorporated in the buyer's agreement, the time for delivery of possession shall also stand extended. The complainants are fully aware of the fact that they are not entitled to any compensation or refund on account of the defaults in terms of the buyer's agreement and have filed the present complaint to harass the respondent and compel the respondent to surrender to their illegal demands. It is submitted that the filing of the present complaint is nothing but an abuse of the process of law.

- vii. That it is reiterated that clause 18 of the buyer's agreement further provides that in case of delay caused due to non- receipt of occupation certificate, completion certificate or any other permission/sanction from the competent authorities, no compensation or any other compensation shall be payable to the allottees. It is respectfully submitted that the time taken by the

statutory authorities in granting the occupation certificate in respect of the project needs to be excluded in determining the time period utilised for implementation of the project. That the respondent completed construction of the unit/tower and made an application for issuance of the occupation certificate on 22.05.2017 to the concerned statutory authority for grant of occupation certificate in respect of the project in question. The occupation certificate was thereafter granted by the concerned statutory authority on 8th of January 2018. It is respectfully submitted that the grant of occupation certificate is the prerogative of the concerned statutory authority, and the respondent does not exercise any control or influence over the same. Therefore, time period utilized by the concerned statutory authority in granting the occupation certificate to the respondent is necessarily required to be excluded from computation of time period utilized for implementation of the project.

- viii. That upon receipt of the occupation certificate, possession of the unit was offered to the complainants vide the letter of offer of possession letter dated 29.01.2018. The complainants were called upon to remit balance payment including delayed payment charges and to complete the necessary formalities/documentation necessary for handover of the unit in question to them. However, the complainants intentionally refrained from completing their duties and obligations as enumerated in the buyer's agreement.

- ix. That the complainants willfully refrained from obtaining possession of the unit in question. It is submitted that the complainants did not/do not have adequate funds to remit the balance payments requisite for obtaining possession in terms of the buyer's agreement and consequently in order to needlessly linger on the matter, the complainants have preferred the instant complaint in order to needlessly blackmail and vex the respondent. Therefore, there is no equity in favour of the complainant.
- x. It needs to be highlighted that an amount of Rs. 35,64,737/- was due and payable by the complainants as on 27.08.2021. The complainants have intentionally refrained from remitting the aforesaid amount to the respondent. It is submitted that the complainants have consciously defaulted in their obligations as enumerated in the buyer's agreement. The complainants cannot be permitted to take advantage of their own wrongs. The instant complaint constitutes a gross misuse of process of law.
- xi. That without admitting or acknowledging in any manner the truth or correctness of the frivolous allegations levelled by the complainants and without prejudice to the contentions of the respondent, it is submitted that the alleged interest frivolously and falsely sought by the complainants was to be construed for the alleged delay in delivery of possession. It is pertinent to note that an offer for possession marks termination of the period of delay, if any. The complainants are not entitled to contend that the

alleged period of delay continued even after receipt of offer for possession. The complainants have consciously and maliciously refrained from obtaining possession of the unit in question. Consequently, the complainants are liable for the consequences including holding charges, as enumerated in the buyer's agreement, for not obtaining possession.

- xii. That it needs to be highlighted that the respondent has paid an amount of Rs. 62,026/- on account of anti-profiting to the complainants. The aforesaid amounts have been accepted by the complainants in full and final satisfaction of their alleged grievances. The instant complaint is nothing but a gross misuse of process of law. Without prejudice to the rights of the respondent, delayed interest if any has to be calculated only on the amounts deposited by the allottees/complainants towards the basic principle amount of the unit in question and not on any amount credited by the respondent, or any payment made by the allottees/complainants towards delayed payment charges (dpc) or any taxes/statutory payments etc. 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. It is further submitted that merely because the Act applies to ongoing projects which are

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

- xiii. It is further submitted that the interest for the alleged delay demanded by the complainants is beyond the scope of the buyer's agreement. The complainants cannot demand any interest or compensation beyond the terms and conditions incorporated in the buyer's agreement.
- xiv. That without prejudice to the contentions of the respondent, it is submitted that the allegations of the complainants that possession was to be given by 27.10.2016 or lastly by 27.01.2017 are wrong, malafide and result of afterthought in view of the fact that the complainants had consciously and voluntarily made several payments to respondent even after 27.01.2017. The complainants have wantonly and needlessly leveled false, defamatory and vexatious allegations against the respondent.
- xv. That since the complainants were not forthcoming with the outstanding amounts, the respondent was constrained to issue the final notice dated 20.06.2019 to them. The respondent had categorically notified the complainants that they had defaulted in remittance of the amounts due and payable by them. It was

further conveyed by the respondent to the complainants that in the event of failure to remit the amounts mentioned in the said notice, the respondent would be constrained to cancel the provisional allotment of the unit in question issued in their favour.

xvi. That upon receipt of the aforesaid notice issued by the respondent, the complainants approached the respondent requesting it to not give effect to the said notice and further promised the respondent that they would remit the remaining instalments on time. The complainants further promised that they would not stake any claim against the respondent on account of delay, if any. The respondent did not have any reason to suspect the bona fide of the complainants and consequently desisted from cancellation of the provisional allotment issued in their favour. It needs to be taken into reckoning that the respondent has refrained from cancellation of the allotment issued in favour of the complainants relying upon their deliberate representations. Therefore, the instant complaint is barred by estoppel.

xvii. That it needs to be highlighted that the respondent had issued a letter dated 01.10.2019 reminding the complainants to come forward and obtain possession of the unit in question. However, the complainants consciously and wilfully refrained from obtaining possession of the unit in question. Moreover, the complainants have maliciously concealed all the relevant documents from this hon'ble office. there is no equity in favor of

the complainants. The instant complaint constitutes a gross misuse of process of law.

- xviii. That it is submitted that several allottees, had defaulted in timely remittance of payment of instalments which was an essential, crucial and an indispensable requirement for conceptualization and development of the project in question. Furthermore, when the proposed allottees default in their payments as per schedule agreed upon, the failure has a cascading effect on the operations and the cost for proper execution of the project increases exponentially whereas enormous business losses befall upon the respondent. The respondent, despite default of several allottees, has diligently and earnestly pursued the development of the project in question and has constructed the project in question as expeditiously as possible.
- xix. That it is submitted that all the demands that have been raised by the respondent are strictly in accordance with the terms and conditions of the buyer's agreement duly executed and agreed to between the parties. there is no default or lapse on the part of the respondent. It is evident from the entire sequence of events, that no illegality can be attributed to the respondent. the allegations levelled by the complainants are totally baseless. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.

E. Jurisdiction of the authority

9. The respondent has raised preliminary objection regarding jurisdiction of authority to entertain the present complaint. 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

10. As per notification no. 1/92/2017-TTCP 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

11. 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)(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;

The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA dated..... Accordingly, the promoter is responsible for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.

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.

12. So, in view of the provisions of the Act of 2016 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 complainant at a later stage.
13. 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."

14. 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.1 Objection regarding complainants are investors not consumer

15. The respondent submitted that the complainants are investor and not consumer/allottee, thus, the complainants are not entitled to the protection of the Act and thus, the present complaint is not maintainable.
16. The authority observes that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims and objects of enacting a statute but at the same time preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that under section 31 of the Act, any aggrieved person can file a complaint against the promoter if the promoter 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 buyer's agreement, it is revealed that the complainants are an allottees/buyers and they have paid total price of Rs. 10,88,381/- to the promoter towards purchase of the said unit 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;"

17. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the buyer's agreement executed between respondent and complainants, it is crystal clear that the complainants are 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) I.t.s. 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 complainant-allottee being investors is not entitled to protection of this Act stands rejected.

G. Findings on the relief sought by the complainants:

G.1 Direct the respondent to refund the entire amount of Rs. 20,22,385/- along with prescribed rate of interest.

18. In the present complaint, the complainants intend to withdraw from the project and are seeking return of the amount paid by it in respect

of subject unit along with interest at the prescribed rate as provided under section 18(1) of the Act. Sec. 18(1) of the Act is reproduced below for ready reference.

"Section 18: - Return of amount and compensation

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

(a) in accordance with the terms of the agreement for sale of, 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."

19. As per clause 16 of the flat buyer agreement dated 27.05.2014 provides for handing over of possession and is reproduced below:

16. POSSESSION

(a) Time of handing over the Possession

(i) That the possession of the Retail Spaces in the Commercial Complex shall be delivered and handed over to the Allottee(s), within thirty (30) months of the execution hereof, subject however to the Allottee(s) having strictly complied with all the terms and conditions of this Agreement and not being in default under any of the provisions 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 Retail Spaces for his occupation and use ("Notice of Possession").

*(ii) 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 16, for applying and obtaining necessary approvals in respect of the Commercial Complex.***

20. At the outset, it is relevant to comment on the present possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement, and the complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee(s) that even a single default by the allottee(s) in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee(s) and the commitment time period for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee(s) of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted

such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

21. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within thirty (30) months of the execution, and further provided in agreement that promoter shall be entitled to a grace period of 120 days for applying and obtaining necessary approvals in respect of the commercial complex. The date of execution of buyer's agreement is 27.05.2014. The period of 36 months expired on 27.11.2016 as a matter of fact, the promoter has not applied to the concerned authority for obtaining necessary approvals within the grace period 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 120 days cannot be allowed to the promoter at this stage.
22. The question that arises before the authority for consideration is that whether the allottee(s) are entitled for refund of the amount paid along with interest or the allottees shall be directed for taking the possession after clearing the outstanding dues along with interest?
23. In the present complaint, the complainants-allottees submitted that vide e-mail dated 08.02.2019, they expressed their inability to take possession of the unit due to the delay and subsequently requested the respondent to adjust the amount paid to them till date towards

the payment of instalment of the residential floor. The complainants subsequently wrote many emails dated 10.04.2019, 12.04.2019, 13.04.2019 and 25.04.2019 requesting for the cancellation of unit at the commercial project and in turn adjusting the payments made by them towards the residential project. That all the requests of the complainants fell on the deaf ears of the respondent, as they remained adamant to get the remaining amount from the complainants for completing the sale of the retail unit. The respondent had to deliver the possession of the unit by or before 27.10.2016 or 27.01.2017, if the grace period is included. However, the possession was offered after almost 1 year from the promised date of possession, and the complainants were nowhere in the position to afford the unit.

24. The respondent/promoter submitted that the aforesaid emails have been created by the complainants in order to collect false evidence to the prejudice of the respondent and the contents of the emails do not advance the case of the complainants. Also, the complainants cannot legally and lawfully claim any adjustment of the payments made by them towards the unit in question against the sale consideration of the residential unit purchased by them. It is submitted that the complainants do not have the adequate funds to remit to the respondent and have preferred the instant complaint to mount

undue pressure upon the respondent. Therefore, the complainants aren't entitled to any adjustment of instalments remitted towards the unit in question.

25. The authority is of the view that there is no statutory provision in the Act which enables/entitles the allottee to adjust the amount paid for one unit towards the consideration to be paid for another unit and neither there is any contractual obligation upon the respondent to adjust the same. Moreover, the respondent had obtained the occupation certificate from the competent authority on 08.01.2018 and had thereafter offered possession of the subject unit to the complainants on 29.01.2018. No doubt that there had been delay in handing over the possession of the subject commercial unit, but it is pertinent to note that the complainants had express their willingness to cancel the subject commercial unit and adjustment of the amount paid after such offer of possession.
26. 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.
27. This is an eventuality where the promoter has 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. The allottees in this case expressed their inability to take the possession of the unit only on 08.02.2019 after possession of the unit was offered to them 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 them 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 complainants are 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

28. 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. 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 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.

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

"5. AMOUNT OF EARNEST MONEY

Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment/plot/building as the case may be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer."

30. The authority observes that the complainants-allottees made a total payment of Rs.10,88,381/- against the sale consideration of Rs.29,69,112/- and the same was acknowledged by the respondent-promoter as per statement of account dated 27.08.2021. It is interesting to note that the complainants-allottees have failed to pay a single penny after 19.08.2014. From the conduct of the complainants-allottee and as per the submissions made by the complainants, it is quite evident that the complainants-allottees does not intend to continue with the project.

31. Keeping in view, the request of the complainants, the respondent/promotor directed to refund the paid-up amount after deducting 10% of the basis sale consideration and shall return the amount along with interest at the rate of 10.60% (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 08.02.2019 (*inadvertently recorded wrong as 01.02.2019 in proceedings dated 12.01.2023*) till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

H. Directions of the authority

32. Hence, the authority hereby passes this order and issue 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 paid-up amount of Rs.10,88,381/- after deducting 10% of the basic sale consideration of Rs. 29,69,112/- with the interest at the prescribed rate i.e., 10.60% is allowed on the balance amount if any, from the date of surrender till date of actual refund.
- ii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

Complaint no. 2517 of 2021 and 4232 of 2021

33. A copy of this order be placed on the connected case file bearing no. CR/4232/2021.
34. Both the complaints stand disposed of.
35. File be consigned to registry.


Sanjeev Kumar Arora
Member


Vijay Kumar Goyal
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 12.01.2023



HARERA
GURUGRAM