

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

Complaint no. : 542 of 2022  
Complaint filed on : 09.02.2022  
First date of hearing : 07.04.2022  
Date of decision : 21.02.2023

Ms. Poonam Yadav  
R/o: H.No. 1543, Sector 46,  
Jharsa, Gurugram, Haryana 122002.

**Complainant**

Versus

M/s Emaar India Ltd.  
Address: Emaar MGF Business Park,  
MG Road, Sikanderpur Chowk,  
Sector 28, Gurugram, Haryana.

**Respondent**

**CORAM:**

Shri Vijay Kumar Goyal  
Shri Ashok Sangwan  
Shri Sanjeev Kumar Arora

**Member**  
**Member**  
**Member**

**APPEARANCE:**

Shri K.K. Kohli  
Shri Dhruv Rohtagi

Advocate for the complainant  
Advocate 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. N.	Particulars	Details
1.	Name and location of the project	"Emerald Hills" at sector 65, Urban Estate, Gurgaon, Haryana
2.	Nature of the project	Commercial Complex
3.	Project area	102.741 acres
4.	DTCP license no.	10 of 2012 dated 21.05.2019
5.	Name of licensee	M/s Logical Developers Pvt. Ltd. and 15 others
6.	RERA Registered/ not registered	Registered vide no. 162 of 2017 dated 29.08.2017 upto 28.08.2022
7.	Apartment no.	EPS-FF_089 (Annexure C-1 on page no. 27 of complaint)
8.	Unit area admeasuring	1025.7 sq. ft. (Annexure C-1 on page no. 27 of complaint)
9.	Date of provisional allotment letter	22.02.2019 [pg. 56 of complaint]



10.	Date of builder buyer agreement	12.03.2019 (Annexure C-1 on page no. 26 of complaint)
11.	Possession clause	<b>16. Possession</b> <b>a. Time of handing over the possession</b> <i>That the possession of the retail spaces in the commercial complex shall be delivered and handed over to the Allottee(s) <b>within 12 months of the execution</b> hereof, subject however to the Allottee(s) having strictly complied with all the terms and condition of this Agreement and not being in default under any provisions of this agreement and all amounts due and payable by the Allottee(s) under 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>
12.	Due date of possession	12.03.2020 (Calculated from the date of execution)
13.	Withdrawal letter by complainant	23.06.2020, 16.07.2020, 11.08.2020, 18.06.2021, 12.07.2021
14.	Total sale consideration as per payment plan	Rs. 1,24,52,074/- [pg. 56 of complaint]
15.	Total sale consideration as per statement of account dated	Rs. 1,24,66,235/-



	05.05.2020 at pg. 58 of complaint	
16.	Amount paid by the complainant as per statement of account dated 05.05.2020 on page no. 58 of complaint	Rs. 1,21,30,670/-
17.	Occupation certificate	08.01.2018 (Page no. 82 of reply)
18.	Offer of possession	09.01.2020 (Page no. 84 of reply)

**B. Facts of the complaint**

3. The complainant made following submissions in the complaint:

- i. That in 2009, approval to the respondent was granted for the development of the project Emerald Plaza Retail, Sector 65, Gurgaon, Haryana by the Haryana Development and Regulation of Urban Areas Act, 1975 vide license no. 10 of 2009 dated 21.05.2009.
- ii. That the complainant while searching for a unit were lured by the advertisements/ brochures/ sales representatives of the respondent company to buy a unit in the commercial complex in the project "Emerald Plaza Retail, Sector 65, Gurgaon, Haryana". That at the time the booking the representatives of the respondent made various claims that international MCS shall be soon taking over portions of the retail space, based on these representations



- the complainant went ahead with booking of the unit. The respondent claimed that they have taken all due approvals, sanctions and Government permissions towards development and construction of said project and after representing through brochures, about the facilities to be provided, the respondent managed to impress the complainant, who then decided to invest in the said project. That the complainant made a payment of amount Rs. 12,50,000/- vide reference no.000000012058, drawn on CANARA BANK. The earnest money was paid against the total consideration of the amount of Rs. 1,24,25,803/- acknowledged by the respondent in their statement of account dated 17.08.2021.
- iii. That vide allotment letter dated 22.02.2019, the respondent allotted the unit no. EPS-FF-089 in favour of the complainant. Thereafter, the retail space buyer's agreement was executed between the complainant and the respondent company on 12.03.2019. The complainant had been allotted the unit no. EPS-FF-089 for the unit measuring 1025.7 sq. ft. acknowledged by the respondent in their statement of account dated 17.08.2021. The complainant paid an amount of Rs. 1,21,30,670/- against a demand of Rs. 1,24,52,074/- raised by the respondent.
- iv. That vide various emails dated 23.06.2020, 16.07.2020, 11.08.2020, 18.06.2021, 12.07.2021, the complainant sought cancellation as they were unhappy with the condition of the project

and the bad maintenance on site. The office of the respondent's vide email dated 13.07.2020 assured the complainant that the amount paid towards the unit shall be returned to her subject to certain deductions. However, the respondent till date has not returned the amount paid by the complainant. The complainant aggrieved by the unfair trade practices of the respondent is constrained to file a complaint seeking cancellation of her unit as per the prescribed law.

- v. That as per the provisions of Regulation No.11/RERA GGM Regulations 2018 dated 05.12.2018, the Authority has decided that the forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount of the real estate 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.

**C. Relief sought by the complainant**

4. The complainant has filed the present complaint for seeking following relief:
- i. Direct the respondent to refund the total amount of Rs. 1,21,30,670/- along with interest calculated at the rate of highest

- MCLR of SBI + 2% p.a. after the deduction of 10% under Regulation 11 of the Haryana Real Estate Regulatory Authority.
- ii. Direct the respondent to pay compensation for harassment / injury both mental on account of mental agony, hardship and trauma and physical to the tune of Rs. 15,00,000/- holding the respondent guilty of indulging into unfair practices and providing deficient services to the complainant.
  - iii. Grant the cost of litigation of Rs. 1,00,000/- (One Lakh Only) in favour of the complainant and against the respondent.
  - iv. 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 is not an "allottee" but an investor who has booked the said unit in question as a speculative investment in order to earn rental income/profit from its resale. The own documents of the complainant, i.e. the emails clearly show that the

- complainant had made the booking with an intention to earn appreciation cost in the project and not as a consumer.
- ii. That the complainant had approached the respondent and expressed an interest in booking a commercial unit in the commercial complex developed by the respondent and booked the unit in question, bearing no. **EPS-FF-089** in the project known as **“Emerald Plaza Retail”** at Sector-65, Gurugram, Haryana. That thereafter the complainant vide application form dated 20.01.2019 applied to the respondent for provisional allotment of a unit bearing number EPS-FF-089 in the project. The complainant took an independent and informed decision to purchase the unit, un-influenced in any manner by the respondent. The complainant consciously and willfully opted for a payment plan as suited to her for remittance of the sale consideration for the unit in question and further represented to the respondent that the complainant shall remit every installment on time as per the payment schedule. The respondent had no reason to suspect bonafide of the complainant. That the respondent issued the provisional allotment letter dated 22.02.2019 to the complainant.
- iii. That subsequently, the respondent sent the buyer’s agreement to the complainant, which was executed between the parties on 12.03.2019. It is pertinent to mention that the buyer’s agreement was consciously and voluntarily executed by the complainant after





reading and understanding the contents thereof to her full satisfaction. It is submitted that the rights and obligations of the complainant as well as 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. Clause 16(a) of the buyer's agreement provides that the possession of the retail spaces in the commercial complex shall be delivered and handed over to the allottee(s), within 12 (twelve) months of the execution hereof. The complainant even failed to clear her outstanding dues and to take the possession of the said unit in question.

- iv. That the respondent completed construction and had submitted an application on 26.05.2017 for grant of occupation certificate before the concerned statutory authority. The occupation certificate has been granted by the concerned department vide memo no. ZP-560-A/SD(BS)/2017/528 dated 08.01.2018. It is respectfully submitted that once an application for grant of occupation certificate is submitted to the concerned statutory authority the respondent ceases to have any control over the same. The grant of occupation certificate is the prerogative of the concerned statutory authority and the respondent does not exercise any influence over the same. It is pertinent to note that the respondent has been given the occupation certificate before executing the buyer's agreement



with the complainant, so, the complainant cannot take the plea that the construction on site is bad and she was not happy with the construction. It is pertinent to submit that the complainant booked the unit in question in 2019, after the occupation certificate was already granted to the respondent from the competent authority.

- v. That the complainant had satisfied itself with the quality of construction and the services available at the project and hence, it is wrong and prejudicial to claim that the complainant has been misrepresented or that the quality of construction or the maintenance is not up to the mark. It is clearly evident that the complainant is finding lame excuses to withdraw from the project by evading her liability by making false remarks on the top of the class project in question. It is noteworthy to mention that all the construction has been executed as per the sanctioned plans approved by the competent authority. Without admitting or acknowledging in any manner the truth or legality of the allegations leveled by the complainant and without prejudice to the contentions of the respondent, it is respectfully submitted that the complaint preferred by the complainant is devoid of any cause of action.
- vi. That as per clause 16 of the buyer's agreement, the respondent was supposed to offer the possession of the said unit in question on 12.03.2020 and the respondent had offered the same to the



complainant well before time vide the letter of offer of possession dated 09.01.2020. The complainant has failed to comply with its obligations to take the possession of the unit in question. The instant complaint is a gross misuse of process of law. Therefore, no cause of action has accrued in favor of the complainant in the facts and circumstances of the case.

- vii. That the complainant did 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 complainant refrained from obtaining possession of the unit in question. The complainant needlessly avoided the completion of the transaction with the intent of evading the consequences enumerated in the buyer's agreement. Therefore, there is no equity in favour of the complainant. The complainant is not entitled to contend the refund of the amount paid even after receipt of offer for possession. The complainant has consciously and maliciously refrained from obtaining possession of the unit in question. Consequently, the complainant is liable for the consequences including holding charges, as enumerated in the buyer's agreement, for not obtaining possession.
- viii. That it is the obligation of the complainant under section 19(10) and (11) of the Act to take the possession of the allotment within two months of occupancy certificate and to thereafter execute the

conveyance deed. The complainant is not only in breach of the Section 19(10) & (11) of the Act by failing to take possession of the unit but also in breach of the clauses of the buyer's agreement.

- ix. That the project stood completed after grant of occupation certificate on 08.01.2018. The complainant being fully aware of the status, quality and the marketability of the project booked her unit in 2019 and hence, the allegations of the complainant are false on the face of it. It is submitted that despite being offered with the possession of the said unit in question, the complainant asked for the refund of the amount paid by her for the reasons best known to her. That the complainant even failed to clear the outstanding dues pending to the respondent to the tune of Rs. 3,35,565/- (excluding holding charges, maintenance charges, registration fee, stamp charges etc.). It is pertinent to note that pursuant to the email of the complainant dated 23.06.2020, the respondent vide its email dated 13.07.2020 informed the complainant about the terms and conditions of the cancellation policy as per the terms and conditions of the buyer's agreement. However, the complainant thereafter, failed to confirm her decision after receiving intimation about the applicable deductions.
- x. That it is evident from the entire sequence of events, that no illegality can be attributed to the respondent. The allegations levelled by the complainant are totally baseless. Thus, it is most

respectfully submitted that the present complaint deserves to be dismissed at the very threshold.

7. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents.

**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 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.

**F. Findings on the objections raised by the respondent**

**F.I Objection regarding entitlement of relief under the Act on ground of complainant being investor**

12. The respondent submitted that the complainant is investor and not consumer/allottee, thus, the complainant is not entitled to the protection of the Act and thus, the present complaint is not maintainable.
13. 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 complainant is an allottee/buyer and she has paid total price of Rs. 1,21,30,670/- 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;"*

14. 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 complainant, it is crystal clear that the complainant is allottee as the subject unit was allotted to her by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as **M/s Srushti**



***Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.***

has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the complainant-allottee being investor is not entitled to protection of this Act stands rejected.

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

15. **Relief sought by the complainant:** Direct the respondent to refund the total amount of Rs. 1,21,30,670/- along with interest calculated at the rate of Highest MCLR of SBI + 2% p.a. after the deduction of 10% under Regulation 11 of the Real Estate Regulatory Authority.
16. **Due date of possession as per buyer's agreement:** Clause 16 of the buyer's agreement provides for time period for handing over of possession and is reproduced below:

**"16. POSSESSION**

**(a) Time of handing over the possession**

*That the possession of the retail spaces in the commercial complex shall be delivered and handed over to the Allottee(s) **within 12 months of the execution** hereof, subject however to the Allottee(s) having strictly complied with all the terms and condition of this Agreement and not being in default under any provisions of this agreement and all amounts due and payable by the Allottee(s) under 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")."*

17. The promoter has proposed to hand over the possession of the said unit within 12 months from the date of execution of buyer's agreement. Therefore, the due date of possession comes out to be 12.03.2020.
18. The complainant booked a commercial unit in the project of the respondent named as "Emerald Plaza at Emerald Hills" situated at





Sector 65, Gurugram, Haryana for a sale consideration of Rs. 1,24,52,074/-. The complainant paid an amount of Rs. 12,50,000/- as booking amount. Thereafter, a retail space buyer's agreement was executed between the parties on 12.03.2019. As per clause 16 of the agreement, the respondent has agreed to handover the possession of the unit within a period of 12 months from the date of execution. Therefore, the due date for handing over of possession comes out to be **12.03.2020**. On perusal of documents on record, it is observed that the occupation certificate of the said project was granted by the competent authority on 08.01.2018 and the respondent has offered possession of the subject unit on 09.01.2020 i.e., before the due date of possession. However, the complainant has sent emails on various dates 23.06.2020, 16.07.2020, 11.08.2020, 18.06.2021, 12.07.2021 seeking the refund of the paid amount from the respondent.

19. 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.**

20. Now the peculiar situation is that after the offer of possession on 09.01.2020, the complainant wants to surrender the unit and is seeking refund of the amount along with interest.
21. The complainant has approached the authority for the refund of her deposited amount at a very belated stage. The authority is thus of the view that forfeiture of earnest money is necessary to make good the losses of the respondent who has completed the project and even offered possession of the unit. The deduction should be made as per the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 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."*

22. Hence, the authority hereby directs the promoter to return the paid-up amount of Rs. 1,21,30,670/- 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 i.e., 21.01.2020 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.

**H. Directions of the authority**

23. 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. 1,21,30,670/- 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 i.e., 21.01.2020 till the actual date of refund of the amount.

- ii. 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.

24. Complaint stands disposed of.

25. File be consigned to registry.

  
(Sanjeev Kumar Arora)  
Member

  
(Ashok Sangwan)  
Member

  
(Vijay Kumar Goyal)  
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 21.02.2023