

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

Complaint no.	:	1197 of 2022
First date of hearing:		12.05.2022
Date of decision	:	06.10.2023

Rohit Sachdeva R/o: - House no. 493/11, Rattan Garden, old no. 84/9 Behind Aryan Hospital, Gurgaon, Haryana - 122001	Complainant
Versus	
Emaar MGF Land Limited Regd. office - 306-308, 3 rd Floor, Square One, C-2, District Centre, Saket, New Delhi - 110017 Also at Emaar Business Park, Sikanderpur, Sector - 28, Gurgaon, Haryana - 122001	Respondent
CORAM:	
Shri Sanjeev Kumar Arora	Member
APPEARANCE:	
Sh. Krishna Sharma (Advocate)	Complainant
Sh. Dhruv Rohtagi (Advocate)	Respondent

ORDER

1. The present complaint dated 21.03.2022 has been filed by the complainant/builder 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 provisions of the act or the rules and regulations made there under or to the allottee as per the agreement for sale executed *inter se*.

A. Unit and project details

2. The particulars of unit, 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:

Sr. No.	Particulars	Details
1.	Name of the project	Emaar Digihomes, Sector-62, Gurugram.
2.	Total area of the project	14.025 acres
3.	Nature of the project	Group Housing Colony
4.	HRERA registration	RC/REP/HARERA/GGM/337/69/2019/31 dated 24.05.2019 Valid up to 31.03.2024
5.	Unit no.	DGH-B-8-01, 8 th floor, building no. B [Page 74 of reply]
6.	Area of the unit (super area)	1508.26 sq. ft.
7.	Date of execution of buyer's agreement	14.11.2019 [page 65 of reply]
8.	Possession clause	6. POSSESSION AND SALE DEED/CONVEYANCE (a) Within 90 (ninety) days from the date of issuance of part occupation certificate/occupation certificate by the concerned Authorities, the Company shall



		<p>offer the possession of the Unit to the Allottee on or before 31-Mar-2024 and/or such extended period as may be granted by the competent Authority. Subject to Force Majeure and fulfilment by the Allottee of all the terms and conditions of this Agreement including but not limited to timely payment by the Allottee of the Total Consideration payable in accordance with Payment Plan, Annexure-III, along with stamp duty, registration and incidental charges and other charges in connection thereto, due and payable by the Allottee and also subject to the Allottee having complied with all formalities or documentation as prescribed by the Company, the Company shall offer the possession of the Unit to the Allottee as stipulated above.</p> <p>[Page 81 of reply]</p>
9.	Due date of possession	31.03.2024 (As mentioned in row no. 8 of this table and as per clause 6 of agreement)
10.	Sale consideration	Rs. 1,37,17,358/- (Page 11 of the agreement)
11.	Total amount paid by the complainant as page 123 of reply	Rs. 17,36,424/-
12.	Occupation Certificate	Not yet obtained
13.	Offer of possession	Not offered
14.	Cancellation letter	31.12.2020 [page 120 of reply]

B. Facts of the complaint

3. The complainant has made the following submissions: -

- I. That in pursuance to the advertisements, assurances, representations and promises made by respondent in the brochure circulated by them about the timely completion of a premium project with impeccable facilities and believing the same to be correct and true, the complainant booked a unit in the said project for a total consideration of Rs.1,37,17,358/-. That pursuant to the elaborate advertisements and promises that were made by the respondent in the brochure that the project would be premium with impeccable facilities and amenities and would be completed on or before 31st March 2024 and/or such extended period as maybe granted by the competent Authority.
- II. That pursuant to the booking of the unit, he was allotted unit i.e. DGH-B-8-01 in the said project. That the apartment buyer's agreement dated 14.11.2019 was executed between the parties which included all the details of the project such as amenities promised, site plan, payment schedule etc.
- III. That it is noteworthy to mention that the first instalment i.e. 10% of the unit price as per the schedule of payment described in the annexure-III of the agreement was due within 30 days from the issuance of allotment letter. That he has paid the first instalment



to the tune of Rs. 12,26,444/- on 02.01.2020 as per the agreement.

- IV. It is further stated that the respondent sent an email dated 07.05.2020 stating that all the construction activities have been compulsorily halted at site due to the Covid-19 Pandemic. That it is pertinent to note that the Second instalment was due on completion of ground floor roof slab of respective tower as per the annexure-iii of the agreement. However, the respondent raised the said demand prior to the completion of ground floor roof slab dated 25.05.2020. It is submitted that the respondent without providing any credible evidences of timely construction demanded the instalments which is totally arbitrary and illegal.
- V. That it is further submitted that he was in utter shock when he received the cancellation letter regarding the unit No. DGH-B-8-01 dated 31.12.2020 from the respondent. It is submitted that the unit booked by the him was cancelled by the respondent on its own without any prior intimation or without giving any opportunity of being heard, which is totally absurd, arbitrary and unjust in nature.
- VI. That the respondent in absolute disregard of terms of construction linked payment plan raised the instalments whereas on the said date the construction has not reached the desired level

of construction which is firmly in complete disobedience of construction linked payment plan as agreed between the parties.

- VII. That his dream of having shattered and scattered dreams of owning his own unit herein are constrained and left with no option but to approach this Hon'ble Authority. Further, he is seeking and entitled to full refund of the amount including but not limited to all the payments made in lieu of the said unit/flat, as per the terms and conditions of the builder buyer agreement. That he cannot be held responsible by any stretch of imagination. Further, he pleads to the authority to reserve his right(s) to add/supplement/amend/change/alter any submission(s) made herein in the complaint and further, reserve the right to produce additional document(s) or submissions, as and when necessary or directed by this Hon'ble Authority.
- VIII. That the present complaint sets out the various deficiencies in services, unfair and/or restrictive trade practices adopted by the respondent in sale of their units and the provisions allied to it..

C. Relief sought by the complainant:

4. The complainants have sought following relief(s):
- To cancel the booking of the residential unit booked by the complainant & refund the total amount paid with interest as per RERA Act.

D. Reply by the respondent

5. The respondent has contested the complaint on the following grounds.

- I. That the complainant 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 14.11.2019, as shall be evident from the submissions made in the following paras of the present reply. That the Complainant is estopped by his own acts, conduct, acquiescence, laches, omissions etc. from filing the present complaint. The reliefs sought in the false and frivolous complaint are barred by estoppel.
- II. That the complainant is not an "allottee" but an investor who has booked the apartment in question as a speculative investment in order to earn rental income/profit from its resale. This is evident from the prayer and/ or relief sought in the complaint. The complainant has categorically stated and sought for payment of assured rental income in his complaint other than refund of the total sale consideration. This clearly shows the intent of the complainant and the present complaint should not be categorized as a recovery tool of mesne profit/ rental income to be derived from the unit in question.

- III. That the complainant has time and again denied to pay the outstanding demands raised by the respondent as per the terms of the buyers agreement. The complainant opted for a construction linked payment plan. Adequate time and opportunities were given by the respondent as per the provisions of RERA for payment of remaining dues. However, no heed was paid by the complainant to the requests of the respondent. Instead the complainant filed the present complaint for fulfillment of his illegal demands.
- IV. That it is pertinent to note that out of a total sale consideration of Rs.. 1,50,12,091/- to be paid against the unit in question, the complainant paid only a meagre sum of Rs. 17,36,424/- and thereafter, stopped paying the remaining demands raised as per the construction linked plan opted by the complainant.
- V. That it needs to be highlighted that the complainant was not forthcoming with the outstanding amounts as per the schedule of payments. The respondent had categorically notified the complainant that he had defaulted in remittance of the amounts due and payable by him. It was further conveyed by the respondent to the complainant 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.

- VI. That subsequently, the respondent sent the buyer's agreement to the complainant, which was executed between the parties on 14.11.2019. Clause 6(c) provides that if, however, the possession of the unit is delayed due to force majeure, the time period for offering possession shall stand extended automatically to the extent of the delay caused under the force majeure circumstances. It is submitted that the registration of the project is valid till 31.03.2024. Also, as per the buyer's agreement the time of handing over possession was on 31.03.2024.
- VII. That pursuant to the reluctance of the complainant in making timely payments and despite of issuance of notices, reminder letters, the respondent was constrained to cancel the allotment of the complainant as per the buyer's agreement. That as per clause 15(d)(ii) of the buyer's agreement, in case of default by the allottee under the condition listed in clause 15(d)(i) for a period of 90 days, the company shall be entitled to, at its sole discretion, to cancel this agreement and allotment thereof of the Unit, and refund the amount received from the allottee after deducting the earnest money and delayed payment charges. That the said unit in question was cancelled vide cancellation letter dated 31.12.2020.
- VIII. That, without admitting or acknowledging the truth or legality of the allegations advanced by the complainant and without prejudice to

the contentions of the respondent, it is respectfully submitted that pursuant to the cancellation of the said unit in question, the respondent refunded the amount paid by the complainant vide cheque bearing number 926308 dated 16.01.2021 drawn upon HSBC Bank after deducting the earnest money and delayed payment charges as per the terms and conditions of the registered buyer's agreement. However, the complainant wilfully failed to encash the said cheque. It is noteworthy to mention that a letter dated 20.01.2021 (Annexure R-7) was also issued to the complainant informing him about the refund of his total paid amount after necessary deduction and for return of the original documents pertaining to the said unit in question to the respondent. It is further submitted that the said cheque was duly accepted by the complainant. That the complainant was made clear that, on acceptance of the cheque, the complainant immediately releases and forever discharges the company and all its representatives from any and all past, present or future claims, compensation etc. as well as the complainant will be left with no surviving grievances, claims or any demands against the company.

- IX. That it is submitted that due to the nationwide lockdown, all the construction activities were at a standstill including the real estate market. Despite of all the contingent events and force majeure

conditions, the construction is going on at a good pace. It is further 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. Therefore, no default or lapse can be attributed to 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 complainant are totally baseless. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.

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

E. Jurisdiction of the authority

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

E. I Territorial jurisdiction

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

purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

9. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11

(4) The promoter shall-

(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be.

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

10. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.
11. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement

passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (Supra) and reiterated in case of M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*** wherein it has been laid down as under:

"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. if the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."

12. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the cases mentioned above, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

F. Findings on the objection raised by the respondent

F.I Objection regarding entitlement of refund on account of complainants being investors.

13. The respondent has taken a stand that the complainant is the investor and not consumer, therefore, he is not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observed that the respondent is correct in stating 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 & 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 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 apartment buyer's agreement, it is revealed that the complainants are buyer and they have paid total price of Rs. 17,36,424/- to the promoter towards purchase of an apartment in the project of the promoter. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment

through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"

14. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyer's agreement executed between promoter and complainants, it is crystal clear that the complainants are allottee(s) 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. 000600000010557 titled as M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.* has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.

G. Findings on the relief sought by the complainant

- **G.I To cancel the booking of the residential unit booked by the complainant & refund of the total amount paid with interest as per RERA Act.**

15. The complainant was allotted a unit in the project of the complainant detailed above for a sale consideration of Rs. 1,37,17,358/-. The builder buyer's agreement was executed on 14.11.2019. The possession of the subject unit was to be offered on or before 31.03.2024. The due date of

completion of project and offering possession of the unit comes out 31.03.2024.

16. The complainant is stating that the 1st installment of Rs.12,26,444/- was paid by the complainant as per the aforesaid plan. After 2 months of 1st installment paid by the complainant, the complainant received an email dated 07.05.2020 informing him that the construction activities have been compulsorily stalled/halted at the site and the situation will take at least a few months to stabilize and pick-up the pace of work once again post the curfew/lockdown is lifted. Additionally, it was also mentioned that the 'Basement roof slab was completed; Ground Floor roof slab work was in progress in Tower B'. Thereafter vide letter dated 25.05.2020, the respondent raised second demand on account of 'On completion of Ground floor roof slab of respective tower'.
17. But the complainant has not paid the demand raised and finally, the respondent cancelled the unit of the complainant vide letter dated 31.12.2020. The respondent states that the pursuant to reluctance of the complainant in making timely payments as per clause 15(d)(ii) of the buyer's agreement and despite of issuance of notices, reminder letters, the respondent cancelled the allotment of the complainant vide letter dated 31.12.2020. Further, the respondent refunded the amount paid by the complainant vide cheque dated 16.01.2021 after deducting the earnest money and delayed payment charges as per the terms and conditions of

the registered buyer's agreement. However, the complainant willfully failed to encash the said cheques. The authority observes that the buyer's agreement was executed inter se parties on 14.11.2019. As per clause 15(d)(ii) of the buyer's agreement, the allottee was liable to pay the installment as per payment plan opted by the complainant. Clause 15(d)(ii) of the buyer's agreement is reproduced under for ready reference:

"15(d)(ii) of the buyer's agreement

In case of default by the allottee under the condition listed above continues for a period of 90 days, the Company shall be entitled to, at its sole discretion, to cancel this Agreement and allotment thereof of the Unit, and refund the amount received from the allottee after deducting the earnest money and delayed payment charges.

18. Clause 1.2(c) of the agreement dated 14.11.2019, mentions the consequences in the event of cancellation. The relevant part of the clause is reproduced as under:

In case of cancellation of allotment for any reason whatsoever, for no fault of the company, the company shall be entitled to cancel the booking and forfeit the earnest money along with delayed possession charges if any and thereafter refund the balance amount, if any to the allottee within the time stipulated under the Real Estate Act.

19. It is observed that the respondent has raised various demand letter to the complainant and as per section 19 (6) & (7) of Act of 2016, the allottee was under an obligation to make timely payment as per payment plan towards consideration of the allotted unit. In view of the aforesaid facts and on the basis of documents on record the cancellation of the subject unit is upheld.

20. Further complainant can seek refund of the paid-up amount and as section 18(1) is applicable only in the eventuality where the promoter fails to complete or unable to give possession of the unit in accordance with terms of agreement for sale or duly completed by the date specified therein. This is an eventuality where the promoter has neither offered possession of the unit nor obtained occupation certificate as the unit is not ready for occupancy and the allottee has made a request to the promoter for refund of his amount before the due date of possession.

21. Further, as per Clause 1.2(c) of the agreement and 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."

22. It is evident from the above mentions facts that the respondent paid a sum of Rs. 17,36,424/- against sale consideration of Rs. 1,37,17,358/-. Though

the amount paid by the complainant against the allotted unit is about 12.6% of the sale consideration

23. Also, the counsel for the complainant stated at bar that they do not wish to continue with the project because the occupation certificate of the project in which unit of the complainant is situated has not been obtained.

24. Thus, the respondent cannot retain the amount paid by the complainant against the subject unit and is directed to refund the same in view of the agreement by forfeiting the earnest money which shall not exceed the 10% of the sale consideration of the said unit and shall return the balance amount along with interest at the rate of 10.75% (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 cancellation i.e., 31.12.2020 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

25. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

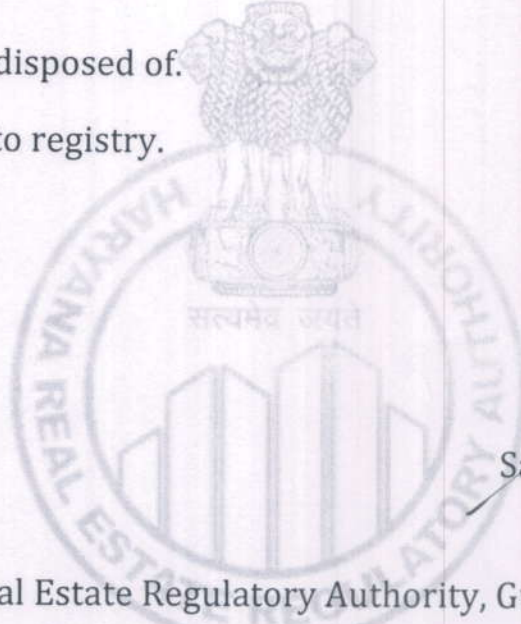
- i. The respondent is directed to refund to the complainant the paid-up amount after deducting 10% as earnest money of the sale

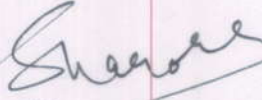
consideration with interest at the prescribed rate i.e., 10.75% is allowed on the balance amount, from the date of cancellation till the date of actual refund.

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

26. Complaint stands disposed of.

27. File be consigned to registry.




Sanjeev Kumar Arora
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 06.10.2023

HARERA
GURUGRAM