

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

Complaint no. : 2847 of 2021
Complaint filed on : 22.07.2021
Date of decision : 21.02.2023

Emaar India Ltd.

Address: 306-308, Square One, C-2,
District Centre, Saket, New Delhi-110017.

Complainant

Versus

1. Mr. Surinder Dass Mahant
Address: A1/14, Safdarjung Enclave,
New Delhi- 110029.

2. Mr. Ajay Mehra
Address: B1/10, Vasant Vihar, New Delhi.

Respondents

CORAM:

Shri Vijay Kumar Goyal
Shri Ashok Sangwan
Shri Sanjeev Kumar Arora

Member
Member
Member

APPEARANCE

Shri Dhruv Rohatgi

Advocate for the complainant

Shri Raj Vardhan

Advocate for the respondents

ORDER

1. The present complaint has been filed by the complainant/promoter 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 19(10) of the Act wherein it is inter alia prescribed



that the allottee shall take physical possession of the apartment, plot or building as the case may be, within a period of two months of the occupancy certificate issued for the said unit. Also, the obligation of allottee to make necessary payments in the manner and within time as specified in the agreement for sale under section 19(6) and to pay interest, at such rate as may be prescribed, for any delay in payments as per section 19(7) of the Act.

A. Project and unit related details

2. The particulars of the project, the details of sale consideration, the amount paid by the respondents, 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	Gurgaon Greens, Sector 102, Gurugram, Haryana
2.	Project area	13.531 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no.	75 of 2012 dated 31.07.2012
	Valid till	30.07.2020
	Name of licensee	Kamdhenu Projects Pvt. Ltd. and another C/o Emaar MGF Land Ltd.



5.	HRERA registered/ not registered	Registered vide no. 36(a) of 2017 dated 05.12.2017 for 95829.92 sq. mtrs.
	HRERA registration valid up to	31.12.2018
	HRERA extension of registration vide	01 of 2019 dated 02.08.2019
	Extension valid up to	31.12.2019
6.	Provisional allotment letter dated	25.01.2013 [annexure C, page 47 of complaint]
7.	Unit no.	GGN-07-1002, 10 th floor, tower no. 7 [annexure F, page 70 of complaint]
8.	Unit measuring (super area)	1650 sq. ft.
9.	Date of execution of buyer's agreement	06.05.2013 [annexure F, page 67 of complaint]
10.	Possession clause	14. POSSESSION (a) Time of handing over the Possession <i>Subject to terms of this clause and barring force majeure conditions, subject to the Allottee having complied with all the terms and conditions of this Agreement, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by the Company, the Company proposes to hand over the possession of the Unit within 36 (Thirty Six) months from the date of start of construction, subject to timely compliance of the provisions of the Agreement by the Allottee. The Allottee</i>

		<p><i>agrees and understands that the Company shall be entitled to a <u>grace period of 5 (five) months, for applying and obtaining the completion certificate/occupation certificate in respect of the Unit and/or the Project.</u></i></p> <p>(emphasis supplied)</p> <p>[annexure F, page 83 of complaint]</p>
11.	Date of start of construction as per statement of account dated 13.12.2018 at page 191 of complaint	14.06.2013
12.	Due date of possession	14.06.2016 [Note: Grace period is not included]
13.	Total consideration as per statement of account dated 13.12.2018 at page 191 of complaint	Rs.1,26,33,530/-
14.	Total amount paid by the complainants as per statement of account dated 13.12.2018 at page 192 of complaint	Rs.53,09,887/-
15.	Occupation certificate	05.12.2018 [annexure H, page 172 of complaint]
16.	Offer of possession	13.12.2018 [annexure J], page 185 of complaint]
19.	Delay compensation already paid by the complainant for delay in handing over possession as per statement of account dated 13.12.2018 at page 192 of complaint	Rs. 3,07,171/-

B. Facts of the complaint

3. The complainant/promoter has made following submissions in the complaint:

- i. That the complainant developer has developed a group housing colony ("said project") by the name of "Gurgaon Greens" on the land admeasuring 13.531 acres, situated at Sector-102, Village Dhankot, Tehsil & District Gurgaon, Haryana, *inter alia* comprising of various buildings and units therein, with suitable infrastructural facilities including multi-level basement parking. The said development of the group housing colony has been carried out in planned and phased manner over a period of time comprising of certain blocks / segments / constituents / parts / phases which have been developed, all in accordance with the license and the building plan as approved by DTCP from time to time and other approvals, sanctions, permissions by the concerned authority. Pursuant to the construction and development of the said project, the competent authority, after due inspection and verification, has granted occupation certificate dated 05.12.2018.
- ii. That respondents in the month of August 2012, after making independent enquiries and only after being fully satisfied about the project, approached the complainant company for booking of a residential unit/ apartment in the said project. The respondents had also duly signed and understood the indicative terms and conditions of the allotment along with the application form. All the terms and conditions including the cost of the apartment, size/super area of the apartment etc., were clearly mentioned in

- the said application. The respondents had opted for installment payment plan.
- iii. That in view of the commitments made by the respondents to make timely payments, the complainant provisionally allotted unit no. "GGN-07-1002" ('Aparument') in said project. The respondents were provisionally allotted a residential apartment admeasuring approx. 1650 sq. ft. super area on the 10th floor of tower no.7 in the said project vide provisional allotment letter dated 25.01.2013.
- iv. That the complainant forwarded two copies of the buyer's agreement vide letter dated 20.03.2013 to the respondents for execution. As per the instructions in the said letter, the respondents were under an obligation to return original sets of the signed buyer's agreement to the complainant. The apartment buyer's agreement was executed between the parties on 06.05.2013. The said agreement was duly signed by the respondents after properly understanding each and every clause contained in the agreement. The respondents were neither forced nor influenced by the complainant developer to sign the said agreement. It was the respondents who after understanding the clauses, signed the said agreement in their complete senses. It is pertinent to mention that the apartment buyer's agreement duly covers all the obligations, liabilities and rights of both the parties and the consequences of any breach of the agreed terms.
- v. That the respondents as per their own decision and after fully understanding their obligations opted for the installment payment plan. It is submitted that the complainant developer raised all the

demands as per the payment plan so opted for by the respondents. However, the respondents defaulted in making timely payments, for which the complainant developer issued various reminder letters and also made repeated follow-ups.

- vi. That a substantial amount of finances for the construction of a project comes from the payments made by the respective allottees in terms of the buyer's agreement. Any delay or lapses in the timely payment by the respective allottees, not adhering to the payment schedule and/or demands made by the developer, severely impacts the construction progress of the project. That a perusal of the above-mentioned communications clearly spells out the huge delays on the part of the respondents in making the timely due payments to the complainant as per the payment schedule. Despite this, the complainant developer made all diligent efforts for construction and development of the said project and completed the construction. No payment has been made by the respondents since 2014. The last payment forwarded by the respondents dates back to 13.09.2014. This clearly shows the *mala fides* exercised by the respondents as they are speculative investors. That the complainant has also credited an amount of Rs. 3,07,171/- towards compensation on 'Intimation of Possession' as a goodwill gesture to the respondents.
- vii. That despite of default by the respondents in fulfilling its obligations, the complainant did not default and completed the construction of the project without having regular payment of monies by the respondents. That as is known and practically



understood that regular and timely payments by the allottees are pertinent towards the completion of the real estate project, yet, without the same being done in the present case, the complainant has shown an exemplary conduct as a real estate promoter which should be duly taken into account. That it also needs to be noted that the complainant was adversely affected by various construction bans, lack of availability of building material, regulation of the construction and development activities by the judicial authorities including NGT in NCR on account of the environmental conditions, restrictions on usage of ground water by the High Court of Punjab & Haryana, etc. and other force majeure circumstances, yet, the complainant completed the construction of the project diligently and timely, without imposing any cost implications of the aforementioned circumstances on the respondents.

- viii. That construction of the tower wherein the said apartment of the respondents is situated was completed and the complainant developer applied to the competent authority (being the office of Director General, Town & Country Planning Haryana, Sector-17, Chandigarh) for the grant of occupancy certificate on 13.04.2018. That despite best efforts and regular follow-ups, the complainant received the occupation certificate only on 05.12.2018 i.e. after a period of almost 8 months. That this delay of the competent authorities in processing and granting the occupancy certificate cannot be attributed to and/or considered to be delay on the part of the complainant in delivering the possession of the said apartment, since on the day when the complainant applied to the

competent authority for the grant of the occupancy certificate, the said apartment was complete in all respect.

- ix. That upon the receipt of the occupancy certificate, the complainant issued letter of offer of possession dated 13.12.2018, which was dispatched on 24.12.2018 to the respondents. The complainant vide the said notice of offer of possession advised and requested the respondents to clear the outstanding dues and take the possession of the said apartment after completing the possession related formalities and paperwork.
- x. That the complainant sent possession reminder letter dated 14.01.2019. Aggrieved by the non-responsive attitude of the respondents, the complainant sent a final notice dated 20.06.2019 to the respondents, calling upon them to comply with the previous communications sent by the complainant, failing which the complainant reserved its right to cancel the allotment and deal with the said unit as per its discretion. The complainant yet again sent possession reminder letters dated 01.10.2019, 01.11.2019 and lastly on 01.12.2019 to the respondents, once again calling upon them to clear the outstanding dues, complete the necessary formalities and to take possession of the unit allotted to them. However, the respondents have paid no heed to the said reminders and continue to be in default, thereby causing loss to the complainant.
- xi. That as per the calculation sheet as on 15.07.2021, there is an outstanding due of Rs.1,11,28,096/- against the said unit booked by the respondents. The said amount is inclusive of Rs. 73,23,639/-

towards the balance sale consideration and Rs. 35,03,925/- towards the delay payment charges. Apart from the said amounts, the respondents are further liable to pay a sum of Rs.3,00,532/- towards the holding charges as per clause 17.1(a) of the buyer's agreement. Over and above the said amounts, the respondents, in order to get the conveyance / sale deed executed are further liable to pay the stamp duty @ 7% i.e. Rs. 7,74,550/- along with other ancillary charges towards E-Challan and HVAT Security. It is pertinent to mention that the respondents are further liable to pay Rs. 2,33,305/- towards common area maintenance charge.

- xii. That the complainant developer has already spent enormous amount of money towards the construction and development of the said project, of which occupation certificate(s) has been granted, including the tower in which the said apartment of the respondents is situated and the same being ready for occupation, the notice of offer for possession was issued to the respondents on 13.12.2018 followed by subsequent reminders, thereby calling upon the respondents to pay the outstanding amounts and clear all the possession related formalities and paperwork. Therefore, it is the complainant developer who after having spent enormous sums of money (including funds borrowed from banks and financial institutions and other entities) and having duly performed its obligations has been unable to realize the proceeds of the said apartment from the respondents and reap in the benefits of the development undertaken by it. The legitimate dues of the complainant developer for no just and valid cause have been withheld by the respondents and therefore, on account of such

breaches, delays and defaults of the respondents, it is the complainant developer who are entitled to claim compensation from the respondents.

- xiii. That the complainant is entitled to file the present complaint under section 19 of the said Act which provides for the rights and duties of the allottees, read with section 31 of the said Act.
- xiv. That the cause of action to file the present complaint is still continuing as respondents have failed to make timely payments and take the possession of the said apartment in question as per the terms and conditions of the buyer's agreement and the payment plan opted by the respondents. Further cause of action also arose when despite repeated follow-ups by the complainant and the complainant having performed its contractual obligations, the respondents withheld the due performance of its contractual obligations.

C. Relief sought by the complainant/promoter

4. The complainant has filed the present complaint for seeking following reliefs:
- i. Direct the respondents to take possession of the said apartment from the complainant after completion of all formalities as per the agreement, including the payment of all outstanding dues and execution of the conveyance/ sale deed in respect of the said apartment.



- ii. Direct the respondents to pay the balance sale consideration of the apartment amounting to Rs.73,23,639/- and pay delay payment charges at prescribed rate as per provisions of the Act.
 - iii. Direct the respondents to pay holding charges in respect to the said apartment @ the rate of Rs.7.50 per sq. ft. per month of the super area of the said apartment from 13.12.2018 when the offer of possession was made till such time the respondents actually take possession of the said apartment after completion of all possession formalities.
 - iv. Direct the respondents to pay common area maintenance charges amounting to Rs.2.33.305/-.
 - v. Compensate the complainant of the legal costs i.e., Rs.50.000/- incurred in instituting the present complaint
 - vi. Grant any other relief/direction which the Hon'ble Authority deem fit and proper in the facts and circumstances of the present complaint.
5. On the date of hearing, the authority explained to the respondents/allottees about the contravention as alleged to have been committed in relation to section 19(6), (7) & (10) of the Act to plead guilty or not to plead guilty.
6. Registry has sent the notice along with a copy of the complaint through speed post as well as through email to the respondents and the same is shown to has delivered as per the report available in the file. It is proper service of the notice. On the hearing dated 27.10.2022, the counsel for the respondents were directed to file reply in the registry of the authority. However, the reply has not been filed till date. Though the

respondents put in appearance through their counsel on 19.10.2021, 15.12.2021, 18.02.2022, 07.04.2022 and 27.10.2022 but have failed to file written reply despite given several opportunities. Accordingly, the defence of the respondents stand struck off. So, the authority is left with no option but to proceed with the complaint based on averments/arguments made during arguments and the documents placed on record by the parties.

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

D. Jurisdiction of the authority

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

D.I Territorial jurisdiction

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 completed territorial jurisdiction to deal with the present complaint.

D.II Subject matter jurisdiction

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 and duties of the allottee as per section 19 of the Act leaving aside compensation which is to be decided by the adjudicating officer, if pursued by the parties at a later stage.

E. Finding on the relief sought by the complainant/promoter

E.I Relief sought by the complainant: The complainant has sought the following reliefs:

- i. Direct the respondents to take possession of the said apartment from the complainant after completion of all formalities as per the agreement, including the payment of all outstanding dues and execution of the conveyance/ sale deed in respect of the said apartment.
- ii. Direct the respondents to pay the balance sale consideration of the apartment amounting to Rs.73,23,639/- and pay delay payment charges at prescribed rate as per provisions of the Act.
- iii. Direct the respondents to pay holding charges in respect to the said apartment @ the rate of Rs.7.50 per sq. ft. per month of the super area of the said apartment from 13.12.2018 when the offer of possession was made till such time the respondents actually take possession of the said apartment after completion of all possession formalities.
- iv. Direct the respondents to pay common area maintenance charges amounting to Rs.2.33.305/-.



9. Due date of possession and admissibility of grace period: Clause 11(a) of the buyer's agreement provides for time period for handing over of possession and is reproduced below:

"14. POSSESSION

(a) Time of handing over the Possession

*Subject to terms of this clause and barring force majeure conditions, subject to the Allottee having complied with all the terms and conditions of this Agreement, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by the Company, the Company proposes to hand over the possession of the Unit within **36 (Thirty Six) months from the date of start of construction**, subject to timely compliance of the provisions of the Agreement by the Allottee. The Allottee agrees and understands that the Company shall be entitled to a **grace period of 5 (five) months, for applying and obtaining the completion certificate/occupation certificate in respect of the Unit and/or the Project.***

(emphasis supplied)"

10. The promoter has proposed to hand over the possession of the said unit within 36 months from the date of commencement of construction and it is further provided in agreement that promoter shall be entitled to a grace period of five months for applying and obtaining completion certificate/occupation certificate in respect of the unit and/or the project. The construction commenced on 14.06.2013 as per statement of account dated 13.12.2013. The period of 36 months expired on 14.06.2016. As a matter of fact, the promoter has not applied to the concerned authority for obtaining completion certificate/occupation certificate within the time limit prescribed by the promoter in the buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of five



months cannot be allowed to the promoter at this stage. Therefore, the due date of possession comes out to be 14.06.2016.

11. In the present complaint, the due date for handing over of possession comes out to be 14.06.2016 as computed above. On perusal of documents on record, it is observed that the occupation certificate of the said project was granted by the competent authority on 05.12.2018 and the complainant has offered possession of the subject unit to the respondents-allottees on 13.12.2018. However, the respondents-allottees have failed to abide by the terms and conditions of the buyer's agreement by not making the payments in timely manner as per the payment plan opted by them and by not taking the possession of the unit in question as per the terms and conditions of the buyer's agreement. Further, despite repeated follow-ups by the promoter and having performed its contractual obligations, the respondents-allottees withheld to perform their contractual obligation. The respondents-allottees have failed make the requisite payment as per the provision of section 19(6) of the Act and as per section 19(7) of the Act to pay the interest at such rate as may be prescribed for any delay in payments towards any amount or charges to be paid under sub-section (6).

Proviso to section 19(6) and 19(7) reads as under:

"Section 19: - Right and duties of allottees. -

.....

- (6) every allottee, who has entered into an agreement for sale to take an apartment, plot or building as the case may be, under

*section 13[1], shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, **maintenance charges**, ground rent, and other charges, if any.*

(7) the allottee shall be liable to pay interest, at such rate as may be prescribed, for any delay in payment towards any amount or charges to be paid under sub-section (6).

12. As per clause 1.2 (c) of the buyer's agreement, the respondents-allottees are also contractually liable to pay the instalment as per payment plan opted by them. Clause 1.2 (c) reproduced as under:

(c) Payment Plan

The Allottee agrees and undertakes to pay the balance amount of the Total Consideration strictly in accordance with the Payment Plan. In the event the Allottee fails, neglects and/or delays the payment of installments then, notwithstanding the right of the Company to cancel such allotment at its discretion any time after such default in payment occurs, the Company at its sole option and discretion, without prejudice to any other rights provided to it under this Agreement, waive such failures, neglects and/or delays in the payment of installments but on the condition that the Allottee shall pay delayed payment charges @ 24% per annum on the instalment due, to be calculated from the due date of outstanding installment till the date on which such installment is paid. It is made clear and so agreed by the Allottee that the exercise of such discretion to waive such failures, neglects and/or delays in the payment of installments by any allottee(s) shall not be construed to be a precedent and/or binding on the Company to exercise such discretion in case of other allottee(s).

13. The authority observed that the possession of the unit was offered to the respondents-allottees on 13.12.2018 and despite repeated reminders (annexed as annexure G, page 120 to 170 of complaint) to the respondents-allottees, they are not coming forward to clear the outstanding dues and to execute conveyance deed. Section 19(6) & 19(7) of the Act provides that every allottee shall be responsible to make necessary payments as per agreement for sale along with

prescribed interest on outstanding payments from the allottee and to take physical possession of the apartment as per section 19(10) of the Act.

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

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

15. However, the counsel for the respondent states that the respondents are no longer interest in remaining with the project because of the delay and the complainant promoter may cancel the allotment as per the terms and conditions of the BBA subject to regulation of the authority allowing deduction of 10 % earnest money only.

16. The counsel for the complainant draws attention of the authority towards clause 9.3(2) of the Model BBA which provides deduction of interest on the amount due towards the allottee and cancel the unit. But the authority is of the view that the complainant-promoter has not chosen to cancel the unit and has retained whatever money has been deposited by the allottee till date.
17. In view of above discussion, one last opportunity is given to the respondents-allottees to make payment of outstanding amount along with interest at the prescribed rate within 4 weeks failing which the complainant-promoter may proceed with the cancellation and to refund the balance amount after deduction of 10% earnest money.
18. Accordingly, the respondents-allottees are directed to clear the outstanding dues along with interest at the prescribed rate i.e., 10.70% per annum and to take the possession of the unit within four weeks from the date of this order. The complainant-promoter shall adjust the delayed possession charges, if any, at equitable rate of interest while computing the outstanding amount payable by the respondents-allottees. The complainant-promoter shall not charge anything from the respondents-allottees which is not the part of the buyer's agreement. The complainant-promoter is not entitled to charge holding charges from the respondents-allottees at any point of time even after being part of the builder buyer's agreement as per law settled by Hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 on 14.12.2020.


E.II Compensation

19. **Relief sought by the complainant:** Compensate the complainant of the legal costs i.e., Rs.50,000/- incurred in instituting the present complaint.
20. The complainant in the aforesaid relief is seeking compensation. The authority observes that Hon'ble Supreme Court of India, in case titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors.* (civil appeal nos. 6745-6749 of 2021, decided on 11.11.2021), has held that an allottee is entitled for claiming compensation under sections 12, 14, 18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. Therefore, the complainants are at liberty to approach the adjudicating officer for seeking compensation.

F. Directions of the authority:

21. 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) of the Act:
- The respondents-allottees are directed to make the requisite payments along with interest at the prescribed rate i.e. 10.70% per annum and take the possession of the subject apartment as per the


- provisions of section 19(6), (7) and (10) of the Act, within a period of four weeks.
- ii. The complainant-promoter shall adjust the delayed possession charges, if any, at equitable rate of interest while computing the outstanding amount payable by the respondents-allottees.
 - iii. The complainant-promoter shall not charge anything from the respondents-allottees which is not the part of the buyer's agreement. The complainant-promoter is not entitled to charge holding charges from the respondents-allottees at any point of time even after being part of the builder buyer's agreement as per law settled by Hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 on 14.12.2020.
 - iv. If the respondents-allottees fails to comply with the aforesaid directions within four weeks, the complainant-promoter may proceed with the cancellation and to refund the balance amount after deduction of 10% earnest money.
22. Complaint stands disposed of.
23. 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