

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

Complaint no. : 3529 of 2021
Complaint filed on : 01.09.2021
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. Devender Singh Nagi
2. Sundeep Kaur

Address: B-609, Katyayani Apartment,
Plot No. 8, Sector 6, Dwarka, Ne. Delhi - 110075.

Respondents

CORAM:

Shri Vijay Kumar Goyal
Shri Ashok Sangwan
Shri Sanjeev Kumar Arora

Member
Member
Member

APPEARANCE

Shri Harshit Batra

Advocate for the complainant

Shri Sayad Faraz Ali

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:

S.No.	Heads	Information
1.	Project name and location	"Imperial Gardens", Sector 102, Gurugram.
2.	Project area	12 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no.	107 of 2012 dated 10.10.2012
	License validity status	09.10.2020
	Name of licensee	Kamdhenu Projects Pvt. Ltd. and Emaar MGF Land Ltd.

5.	HRERA registered/ registered	not	Registered in two phases i. 208 of 2017 dated 15.09.2017 [Valid up to 31.12.2018 for 49637 sq. mtrs. and extension granted vide no.3/2019 dated 02.08.2019 which is extended up to 31.12.2019] ii. 14 of 2019 dated 28.03.2019(Phase II) [Valid up to 17.10.2018 for 4.57 acres]
6.	Occupation granted on	certificate	17.10.2018
7.	Unit no.		IG-09-0203, 2 nd floor, tower/ building no. 09 [Page 104 of complaint]
8.	Unit measuring		2000 sq. ft. (Super area) [Page 104 of complaint]
9.	Date of execution of buyer's agreement		31.03.2015 [Page 101 of complaint]
10.	Total consideration as per payment plan annexed with the agreement		Rs.1,55,68,660/- [Page 119 of complaint]
11.	Total amount paid by the complainants as per calculation sheet filed by the complainant		Rs.1,24,38,667/- [Page 150 of complaint]
12.	Possession clause		14.POSSESSION <i>Subject to terms of this clause and barring force majeure conditions and subject to the Allottee(s) 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,</i>

		<p><i>formalities, documentation etc., as prescribed by the Company, the Company proposes to handover the possession of the Unit within 36 (Thirty Six) months from the date of execution of Buyer's Agreement; subject to timely compliance of the provisions of this Agreement by the Allottee. The Allottee agrees and understands that the Company shall be entitled to a grace period of three (3) months after the expiry of the said period of 36 months, for applying and obtaining the completion certificate/ occupation certificate in respect of the Unit and/or the Project.</i></p> <p><i>[Page 111 of complaint]</i></p>
13.	Due date of delivery of possession	31.03.2018
14.	Date of offer of possession to the complainants	31.10.2018 [Page 131 of complaint]

B. Facts of the complaint

3. The complainant/promoter has made following submissions in the complaint:
 - i. That the licence no. 107 of 2012 dated 15.10.2012 for development of a group housing colony was granted to the complainant by the Director, Town & country Planning, Govt. of Haryana upon which the complainant devised the development of the project under the name and style "Imperial Gardens". After the implementation of the Act in the state of Haryana, the complainant had registered the project after noting compliance with all the prerequisite details

and attained registration no. 110/2018 dated 28.03.2019. Before the expiry of the registration certificate, the occupancy certificate for the project was obtained on 17.10.2018. It is to be noted that the construction of all the booked apartments has been completed, out of which 448 units were handed over and consequently 260 families are residing in the project at the time of filing this complaint. It is pertinent to highlight that application for occupation certificate was applied on 21.03.2018 and the occupation certificate was received on 17.10.2018.

- ii. That the project has been duly completed after having obtained all the necessary approvals and fulfilling all the requirements as per the existing bye laws. That at the outset, without prejudice to the contents of this complaint, it must be noted that the complainant is a renowned real estate developer of international repute.
- iii. That the respondents approached the complainant expressing an intention of booking an allotment in the project and a willingness to pay for the same, upon which a buyer's agreement dated 31.03.2015 was executed between the complainant and the respondents for unit no. IG-09-203 in the project for a total sale consideration of Rs.1,64,18,168/-. The respondents assented to pay the monies against the unit as per Annexure 3 of the buyer's agreement encompassing the 'Schedule of Payment'. However, the respondents have defaulted in the payment against the unit since the very beginning. In lieu of these defaults, the complainant had also issued a final notice dated 20.06.2019 to the respondents requesting payment of dues.

- iv. That no demand was raised before-hand by the complainant. In order to ensure utmost transparency, the complainant raised demands as and when the construction was being done. That the respondents had always caused delay which has been critical to the complainant and stands in gross violation of the agreement. That such delay has gravely hampered the smooth functioning and construction of the project. This clearly shows the *mala fide* conduct exercised by the respondents which is in complete breach of the terms of the agreement.
- v. That the delivery of possession of the unit by the complainant, as per clause 14(a) of the agreement is 31.06.2018 which was "*subject to the Allottee having timely complied with all the terms and conditions of this Agreement, and not being in default under any provisions of this Agreement and compliance with all provisions, formalities, documentation etc...*". That it must be noted by the Hon'ble Authority that despite the default caused by the respondents in fulfilling its obligations, the complainant did not default and instead 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 a 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.

- vi. That the delivery of possession was further subject to *force majeure* conditions as spelled out in clause 31 of the agreement. 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 and demanding the prices only as and when the construction was being done. All these circumstances come within the purview of the force majeure clause and hence allow a reasonable time to the complainant builder. That it must also be noted that the complainant had the right to suspend the construction of the project upon happening of circumstances beyond the control of the complainant as per clause 14(b)(i) of the agreement, however, despite all the hardships faced by the complainants, the complainants did not, suspend the construction and managed to keep the project afloat through all the adversities.
- vii. That soon after tackling all the adversities beyond the control of the complainant, the complainant completed the construction of the project and only after obtaining the requisite permissions, legally offered the possession of the unit to the respondents on 31.10.2018 and request the payment of final dues and taking the possession of the unit on or before 01.12.2018. Thereafter, the

respondents failed to take the possession of the unit. The complainant went beyond and ahead of its obligations and time and again issued possession reminder - REMINDER/719168 to the respondents requesting them to take the possession upon the clearing of dues and completion of formalities.

- viii. That the complainant raised a demand of Rs. 74,86,100/- on account of application for occupation certificate on 11.04.2018, which is in line with the payment plan opted by the respondents. The respondents only paid Rs. 46,00,000/- against the demand raised by the complainant. Therefore, it is pertinent to highlight that the respondents defaulted in making complete payment against the demand raised and subsequently, no payment has been made by the respondents ever since 18.05.2018. This clearly shows the *mala fides* exercised by the respondents in order to safeguard its speculative investment and to avoid cancellation of the respective unit.
- ix. That even after the issue of letter of offer of possession and the occupation certificate, the respondent has not cleared the pending dues against the unit, till date, i.e., even after almost 2 years. That the period of delay caused by the respondent is almost equivalent to a period taken for development of a new unit. That this inordinate delay is inexcusable and inexplicable. The pending dues payable by the respondents amounts to Rs.52,75,018/- as is evident from the calculation sheet. Additionally, the CAE amounting to Rs. 16,378/- and CAM amounting to Rs.3,20,333.58/- are payable as calculated on 29.07.2021.

- x. That it is the obligation of the respondents under section 19(6), (7) and section 19(10) of the Act to make the due payments, as agreed, to take the possession of the allotment within two months of occupancy certificate and to thereafter execute the conveyance deed. The respondents have a corresponding obligation as per the agreement to make the due payments against the unit, to take the possession within 30 days of offer of possession, and to have the sale deed executed upon full payments being made. Thus, the respondents are liable to clear its dues as per the calculation sheet along with statement of accounts annexed herewith and take the possession of the unit and execute and register the conveyance deed of the unit accordingly.
- xi. That in line with the holding of the Hon'ble Supreme Court in **Ireo Grace Realtech Pvt, Ltd. Vs. Abhishek Khanna and Ors., decided on 11.01.2021 - MANU/SC/0013/2021** where, Phase1 of the project had been issued the occupancy certificate, consequently, the developer offered the possession to the respective allottees. The Supreme Court directed such allottees to take the possession of their respective allotments.
- xii. That the project is 100% completed and thus the respondents should be bound to make the due payments and should, under no circumstances, be allowed to wiggle out of its obligations by mere forfeiture. That should that be directed or allowed by the Hon'ble Authority, the complainant would be adversely affected despite having performed its obligations in a timely, efficient and effective manner. Hence, the Hon'ble Authority is requested to take note of

the matter and direct the respondents to comply with its contractual and legal 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 and execute the conveyance deed in respect of the said apartment.
- ii. Direct the respondents to pay balance sale consideration in respect of the said apartment amounting to Rs.56,11,729/- along with delay payment charges at prescribed rate.
- iii. Grant any other relief as this Hon'ble Authority deems fit in the peculiar 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.

Reply by the respondents

6. The respondents have contested the complaint on the following grounds:

- i. That both the respondents are residing in Tanzania since 2002 and now through the Special Power of Attorney attested by the Attache (Consular), High Commission of India, Dar-es-Salaam, Tanzania dated 18.08.2022 has duly authorised his father, Mr. Kulwant

- Singh Nagi for the first time to represent personally or to engage the service of lawyers to represent the respondents before the Haryana Real Estate Regulatory Authority.
- ii. That the respondent no.1 during the period between 2017-2019 has been unemployed consequently rendering his income almost negligible during that period. Amidst that the respondents somehow managed to meet their household expenses including their children's educational expenses through borrowing funds from their relatives and well-wishers. In this regard the letter of termination has been placed on record.
 - iii. That the respondents also tried to raise funds to clear complainant's outstanding dues through selling off one of his commercial property (shop) located at Dwarka, New Delhi. However, entire world came under global health emergency because of COVID-19 Pandemic since December 2019 and in India since March 2020, the respondent no. 1 was not able to sell the above-mentioned shop at a reasonable price and use the sale proceeds to pay off the complainant's outstanding amount.
 - iv. That the respondent's daughter & son were studying, and their educational expenses has also been the major burden over respondent no.1' s financial viability and therefore this has been a foremost cause for respondent's default in making timely payment for the flat property in question. The respondent no. 1 is endeavouring his level best to arrange monetary funds by availing loan in Tanzania as well as in India however same may take 2-4 months approximately owing to respondent no. 1's current

financial status. Moreover, respondent no. 1 had himself suffered from COVID-19 and was hospitalized during the month of August 2021. Furthermore, respondent no.1 underwent heart operation in May 2022, thereby further affecting his ability to arrange funds. That respondent no. 2, Mrs. Sundeep Kaur, wife of respondent no. 1 is a homemaker and has no source of income of her own.

- v. That the respondent no.1 through letter dated 02.10.2021 to the Head of Customer Services/ Head of Finance, Emaar India Ltd. had already stated all the above-mentioned reasons and admitted his liability of legitimate outstanding dues amounting to Rs.58,20,446/- as claimed in mail dated 23.06.2021 of Ms. Surbhi, Customer Service, EMAAR. Moreover, they had also asked to grant some time for making arrangements of loan from banks and/or selling off his commercial property (shop) at Dwarka , New Delhi and further requested to kindly stall further prosecution against the respondents.
- vi. That the buyer's agreement dated 31.03.2015 entered between the complainant and the respondents entitles or exempts the complainant/builder from any consequences of any delay on account of certain force majeure events as spelled out in clause 31 of the agreement. However, the agreement does not provide any such exceptions to the respondents / buyers in case of such force majeure events occurrence. This is totally one-sided agreement, unconscionable and hence should not be permitted to be given any benefits to the complainant. Furthermore, one has to see the spirit of the RERA Act which basically provides whatever rights and

remedies are available to a builder should also be equally applicable to a buyer also. So, if in case the builder is entitled to seek benefits of the Force Majeure events, similar benefits should also be given to the buyer.

- vii. That now the reasons for the non-payment /delayed payment on behalf of the respondents is the occurrence of the COVID-19 pandemic and the resultant loss the respondents have himself suffered is on record. Therefore, in view of that the similar benefits which the complainant/ builder would have otherwise been able to receive under the agreement should be given to the respondents as well. The delay should be condoned and the respondents should be permitted to make the remainder balance payments within a reasonable time period and take possession of the unit.

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.1 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 and execute the conveyance deed in respect of the said apartment.
- ii. Direct the respondents to pay balance sale consideration in respect of the said apartment amounting to Rs.56,11,729/- along with delay payment charges at prescribed rate.

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 and subject to the Allottee(s) 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 handover the possession of the Unit **within 36 (Thirty Six) months from the date of execution of Buyer's Agreement**; subject to timely compliance of the provisions of this Agreement by the Allottee. The Allottee agrees and understands that the Company shall be entitled to a grace period of three (3) months after the expiry of the said period of 36 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 execution of buyer's agreement and it is further provided in agreement that promoter shall be entitled to a grace period of 3 months after the expiry of the said period of 36 months for applying and obtaining completion certificate/occupation certificate in respect of the unit and/or the project. The buyer's agreement was executed on 31.03.2015. The period of 36 months expired on 31.03.2018. 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 3 months cannot be allowed to the promoter at this stage. Therefore, the due date of possession comes out to be 31.03.2018.

11. In the present complaint, the due date for handing over of possession comes out to be 31.03.2018 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 17.10.2018 and the complainant has offered possession of the subject unit to the respondents-allottees on 31.10.2018. 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). 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 case of delay in making payment by the Allottee to the Company as per the Schedule of Payments, the Company shall have the right to terminate the Agreement and forfeit the Earnest Money along with the Non-Refundable Amounts. However, the Company may in its sole discretion waive its right to terminate this Agreement and enforce all the payments and seek specific performance of this Agreement. The Company, if it decides to waive its right of termination, shall be entitled to charge delayed payment charges @ 24% p.a. at the time of every succeeding installment from the due date of instalment, as per the Schedule of Payments, till the date of payment. In such a case, the Parties agree that the possession of the Unit will be handed over to the Allottee only upon the payment of all outstanding dues, penalties etc. along with delayed payment charges by the Allottee to the satisfaction of the Company."

13. The authority observes that the possession of the unit was offered to the respondents-allottees on 31.10.2018 and despite repeated reminders 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. The counsel for the respondents-allottees states that the allottees are interested in continuing with the project and requests for payment of outstanding amount within 5 months' time period along with the interest at the prescribed rate i.e., 10.70% per annum on the delayed part of instalments. Further, no charges shall be demanded which are not part of BBA and no holding charges shall be levied.
15. That the AR of the promoter company gives his consent for the above offer of the allottee to make payment of outstanding amount along with prescribed rate of interest within 5 months failing which the promoter can proceed with the cancellation by forfeiting 10% earnest money. Further, 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.
16. 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 5 months failing which the complainant-promoter may proceed with the cancellation and to refund the balance amount after deduction of 10% earnest money.

17. 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 five months from the date of this order. The complainant-promoter shall adjust the delayed possession charges w.e.f. 31.03.2018 till 31.12.2018 (offer of possession dated 31.10.2018 plus 2 months), at equitable rate of interest i.e., 10.70% p.a. 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.

F. Directions of the authority:

18. 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:

- i. 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 five months.
- ii. The complainant-promoter shall adjust the delayed possession charges w.e.f. 31.03.2018 till 31.12.2018 (offer of possession dated 31.10.2018 plus 2 months), at equitable rate of interest i.e., 10.70% p.a. 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 five months, the complainant-promoter may proceed with the cancellation and to refund the balance amount after deduction of 10% earnest money.
19. Complaint stands disposed of.
20. 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