

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

Complaint no. : 3051 of 2021
Complaint filed on : 13.08.2021
Date of decision : 27.04.2023

Emaar India Ltd.

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

Complainant

Versus

1. Jayanti Banerji
2. Aniruddha Banerji

Address: P 3A025, Princeton Estate,
DLF Phase IV, Gurgaon, Haryana.

Respondents

CORAM:

Shri Vijay Kumar Goyal

Member

APPEARANCE

Shri Dhruv Rohatgi

Advocate for the complainant

Ms. Aditi Saxena

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	Palm Gardens, Sector 83, Gurugram, Haryana
2.	Total area of the project	21.90 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no.	108 of 2010 dated 18.12.2010
	Validity of license	17.12.2020
	Licensee	Logical Developers Pvt. Ltd. and 2 others
	Area for which license was granted	21.9 acres



5.	HRERA registered/ not registered	Registered vide no.330 of 2017 dated 24.10.2017 (1,2,6,8 to 12 and other facilities and amenities)
	HRERA registration valid up to	31.12.2018
	HRERA extension of registration vide	02 of 2019 dated 02.08.2019
	Extension valid up to	31.12.2019
6.	Occupation certificate	17.10.2019 [annexure H, page 130 of complaint]
7.	Provisional allotment letter dated	27.01.2013 [annexure C, page 57 of complaint]
8.	Unit no.	PGN-02-0504, 5 th floor, building no. 02 [annexure F, page 69 of complaint]
9.	Area of the unit	1720 sq. ft.
10.	Date of execution of buyer's agreement	22.05.2014 [annexure F, page 67 of complaint]
11.	Possession clause	10. POSSESSION (a) Time of handing over the Possession <i>Subject to terms of this clause and subject to the Allottee(s) having complied with all the terms and conditions of this Buyer's Agreement, and not being in default under any of the provisions of this Buyer's 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 execution</i>

		<p><i>of agreement, subject to timely compliance of the provisions of the Buyer's Agreement by the Allottee. The Allottee(s) agrees and understands that the Company shall be entitled to a grace period of 3 (three) months, for applying and obtaining the completion certificate/ occupation certificate in respect of the Unit and/or the Project.</i></p> <p>(emphasis supplied) [Page 82 of complainant]</p>	
12.	Due date of possession	<p>22.05.2017 [Note: Grace period is not included]</p>	
13.	Total consideration	As per statement of account dated 02.11.2019 at page 22 of reply	As per payment plan annexed with the buyer's agreement at page 98 of complaint
		Rs. 1,40,52,448/-	Rs.1,34,17,692/-
14.	Total amount paid by the allottees as per statement of account dated 02.11.2019 at page 23 of reply	Rs.55,58,625/-	
15.	Offer of possession	<p>02.11.2019 [annexure], page 145 of reply]</p>	

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 "Palm Gardens" on the 'land' admeasuring 21.90 acres, situated at Sector-83, Village Kherki Daula, 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.
- ii. That pursuant to the construction and development of the said project, the competent authority, after due inspection and verification, have granted occupation certificate dated 17.10.2019.
- iii. That the respondents in the month of March 2014, 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 schedule of payment. The respondents made a payment of Rs. 7,50,000/- to the

- complainant for the said booking. The complainant issued a receipt dated 04.03.2014 to the respondents against the said booking.
- iv. That respondents have already been given the following benefits at the time of booking their flat:
- PLC waiver of Rs. 6,02,000/-
 - 1.5% discount of Rs.1,80,575/- on the basis amount of unit.
- v. That in view of the commitments made by the respondents to make timely payments, the complainant provisionally allotted unit no. "PGN-02-0504" in said project. The respondents were provisionally allotted a residential apartment admeasuring approx. 1720 sq. ft. super area on the 5th floor of tower no.2 in the said project vide provisional allotment letter dated 21.03.2014.
- vi. That the complainant forwarded two copies of the buyer's agreement to the respondents vide letter dated 25.03.2014 and thereafter sent reminders for the execution of the buyer's agreement vide letters dated 29.04.2014 and 15.05.2014 to the respondents for execution. That the buyer's agreement was executed between the parties on 22.05.2014. 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 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.

- vii. That the respondents as per their own decision and after fully understanding their obligations opted for the schedule of payment as per the buyer's agreement. 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 due and timely payments, for which the complainant developer issued various reminder letters and also made repeated follow-ups.
- viii. 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.
- ix. That despite of default by the respondents in fulfilling their 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 allottee 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.

- x. That the 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 11.02.2019. That despite best efforts and regular follow-ups, the complainant received the occupation certificate only on 17.10.2019 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.

- xi. That upon the receipt of the occupancy certificate, the complainant issued letter of offer of possession dated 02.11.2019, which was dispatched on 04.11.2019 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.
- xii. That aggrieved by the non-responsive attitude of the respondents, the complainant sent a reminder letter for offer of possession dated 05.12.2019 to the respondents, calling upon them to comply with the previous communications sent by the complainant for offer of possession 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.
- xiii. That as per the calculation sheet and statement of account of common area maintenance charges/common area electric charges as on 28.07.2021, there is an outstanding due of Rs.1,19,63,547.40/- against the said unit booked by the

respondents. The said amount is inclusive of Rs.87,82,749/- towards the balance sale consideration and Rs.28,81,795/- towards the delay payment charges, and Rs. 1,50,135/- as on 13.07.2021 towards the holding charges as per clause 13.1(a) of the buyer's agreement and Rs. 1,48,868.40 calculated till 28.07.2021 towards common area maintenance charges and common area electricity charges. 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 @ 6% i.e. Rs. 7,29,480/- along with other ancillary charges towards E-Challan and HVAT Security.

- xiv. 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 respondent on 02.11.2019 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.

- xv. That the present complaint is filed under section 19 (6) read with section 19 (7) of the Act in order to seek the delayed interest as prescribed under the Act. That the complainant falls under the definition of promoter as defined under the Act.

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.87,82,749/- along with delay payment charges at prescribed rate amounting to Rs.28,81,795/-.
 - iii. Direct the respondents to pay holding charges amounting to Rs.1,50,125/- 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 02.11.2019 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 along with common area electricity charges amounting to Rs.1,48,868/-.
 - v. 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 the respondents are not entitled to pay any amount as claimed in the present complaint as the terms of the buyer agreement dated 22.05.2014 are one sided and the answering respondents were made to sign on pre-printed format with dotted lines. Therefore, the same are not binding on the respondents. It is submitted that various clauses relating to the rate of interest, right to cancel agreement, refund on account of cancellation are not equitable as the complainant have superior/dominating rights as compared to those of the respondents. In view of the aforesaid, the

complainant is not entitled for any relief as prayed for in the present complaint.

- ii. That the present complaint is not maintainable in view of the arbitration clause stipulated in the buyer agreement. The present dispute raised herein has arisen out of and in connection with the buyer agreement executed between the parties. It is further submitted that the execution of the buyer agreement is duly admitted though the respondents dispute certain clauses being one sided and unilateral. Therefore, in terms of clause 32 of the buyer agreement the present dispute can only be adjudicated by an arbitrator.
- iii. That the complainant is estopped from filing the present complaint on account of its own acts, deeds, conduct and acquiescence. It is an admitted fact that the buyer's agreement was executed on 22.05.2014 and as per clause 10 (a) of the buyer's agreement, the possession of the flat was to be handed over to the respondents within 36 months from the date of execution of the buyer's agreement i.e. on or before 21.05.2017 and latest by end of August 2017. However, as per the own admission of the complainant, the possession of the flat was offered to the respondents on 02.11.2019 i.e. after a long and unexplained delay of 2 years and 6 months. It is submitted that by the time, possession of the flat was offered to the respondents, the complainant, had already received a sum of Rs. 55,58,625/- from the respondents. The respondents therefore are entitled to delayed compensation charges at the

prescribed rate i.e. 10.75% per annum from 22.05.2017 till 02.11.2019 on the amount already deposited with the complainant. The respondents are thus entitled to a sum of Rs. 14,93,880/- till 02.11.2019. Since the complainant has refused to pay the abovesaid amount to the respondents therefore they are also entitled to further interest at the rate of 10.75% per annum i.e. Rs. 3,32,185/- on the abovesaid sum i.e. Rs. 14,93,880/- from 02.11.2019 till its realization. Therefore, as on date of filing of the present reply, the complainant is liable to pay as sum of Rs.18,15,065/- to the respondents towards delayed possession charges.

- iv. That the possession of the flat was offered by the complainant vide offer letter dated 02.11.2019 and along with the letter of offer, the complainant also shared a statement of account detailing the status of payments as on 02.11.2019. It is submitted that the said statement of accounts reflects that as on 02.11.2019, the respondents have already made a payment of Rs. 55,58,625/- to the complainant. However, to the contrary in the present complaint, the complainant has alleged that the respondents have only made the payment of Rs. 45,19,697/-. It is pertinent to mention here that the said statement of account has been concealed by the complainant and has been intentionally not filed by the complainant.
- v. That after the possession of the flat was offered by the complainant, the respondents have been repeatedly requesting the

complainant that they are in the process of availing the housing loan from the bank and the bank has requested them to submit the occupation certificate, RERA details, Escrow Account details, Authority Letter in favour of the Authorized Signatory. The respondents therefore several times requested the complainant telephonically and through e-mails to provide them the abovesaid documents however the complainant failed to provide the documents. Therefore, despite the repeated requests of the respondents, the complainant has failed/refused/neglected to provide the said document to the respondent. Due to the said lackadaisical approach of the complainant, the respondents could not avail the loan facility from the bank. The respondents till date have been requesting the complainant to provide them the requisite documents so that they may avail the loan facility and make the payment of balance sale consideration. However, the complainant has refused to share the said requisite documents with the respondents. It is due to the acts and omissions on the part of the complainant the respondents were not able to avail the loan facility from the banks. The respondents therefore even requested the complainant to cancel the buyer agreement and refund the money already deposited by the respondents after deducting a reasonable amount from the earnest money. However, the complainant has refused to cancel the buyer agreement and are threatening the respondents either to take the possession of the flat or they will forfeit the entire money deposited by the respondents towards the sale consideration of the flat.

Furthermore, the complainant cannot be allowed to approbate and reprobate at the same time when they are itself at fault.

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 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.87,82,749/- along with delay payment charges at prescribed rate amounting to Rs.28,81,795/-.
 - iii. Direct the respondents to pay holding charges amounting to Rs.1,50,125/- 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 02.11.2019 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 along with common area electricity charges amounting to Rs.1,48,868/-.
9. **Due date of possession and admissibility of grace period:** Clause 10(a) of the buyer's agreement provides for time period for handing over of possession and is reproduced below:

"10. POSSESSION

(a) Time of handing over the Possession

*Subject to terms of this clause and subject to the Allottee(s) having complied with all the terms and conditions of this Buyer's Agreement, and not being in default under any of the provisions of this Buyer's 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 execution of agreement**, subject to timely compliance of the provisions of the Buyer's Agreement by the Allottee. The Allottee(s) agrees and understands that the Company shall be entitled to a **grace period of 3 (three) 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 22.05.2014. The period of 36 months expired on 22.05.2017. 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 22.05.2017.

11. In the present complaint, the due date for handing over of possession comes out to be 22.05.2017 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 17.10.2019 and the complainant has offered possession of the subject unit to the respondents-allottees on 02.11.2019. 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 (b) 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 (b) reproduced as under:

“(b) Payment Plan

The Allottee(s) agrees and undertakes to pay the balance amount of the Total Consideration strictly in accordance with the Payment Plan detailed in “Schedule of Payment” annexed hereto at Annexure – 3 hereto. In the event the Allottee(s) fails, neglects and/or delays the payment of installments then, notwithstanding the right of the Company to cancel such allotment at its sole discretion at any time after such default in such 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(s) shall pay interest on the instalment due, in addition to the installment due, to be calculated from the due date of outstanding installment charge simple interest @ 24% per annum till the date on which such installment is paid by the Allottee(s) to the Company. It is made clear and so agreed by the Allottee(s) 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).

In case of delay in making payment by the Allottee(s) to the Company as per the Schedule of Payments as stated in Annexure- 3, the Company shall have the right to terminate the Agreement and forfeit the Earnest Money along with the processing fee, any interest paid, due or payable, any other amount of a non-refundable nature including brokerage paid by the Company to the brokers etc. (“Non Refundable Amounts”)...”

13. The authority observes that the possession of the unit was offered to the respondents-allottees on 02.11.2019 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 due to financial crunch, the allottee does not want to continue with the project. The counsel for the complainant promoter states that after deduction of 10% of the statutory taxes and brokerage may also be allowed.
15. The due date of possession as per the buyer's agreement as computed above is 22.05.2017. The complainant promoter obtained the occupation certificate for the said project on 17.10.2019 and offered possession of the subject unit to the respondents allottees on 02.11.2019. Despite being offered possession of the subject unit, the respondents allottees have failed to take possession of the subject unit after remitting the outstanding amounts.
16. The authority observes that vide email dated 18.01.2021, the respondents-allottee requested the complainant builder to provide certain documents for availing loan and stated that '*Waiver of the DPC, Holding charges & recurring Maintenance charges of the apartment, which I will be planning to take hand-over for my personal use.*' In the

present complaint, the respondents- allottees have stated that the due to the acts and omissions on the part of the complainant, the respondents were not able to avail loan facility from the bank. Therefore, they requested the complainant to cancel the buyer's agreement and refund the money already deposited by the respondent after deducting a reasonable amount from earnest money, however, it is observed that there is no communication on record in support of the request of refund of the deposited amount made by the respondents.

17. 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 offered possession of the unit after obtaining occupation certificate and on demand of due payment at the time of offer of possession, the allottee wishes to withdraw from the project and demand return of the amount received by the promoter in respect of the unit with interest at the prescribed rate.
18. The right under section 18(1) and section 19(4) of the Act accrues to the allottees on failure of the promoter to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein. If allottees have not exercised the right to withdraw from the project after the due date

of possession is over till the offer of possession was made to them, it impliedly means that the allottees tacitly wished to continue with the project. The promoter has already invested in the project to complete it and offered possession of the allotted unit. Although, for delay in handing over the unit by due date in accordance with the terms of the agreement for sale, the consequences provided in proviso to section 18(1) of the Act will come in force as the promoter has to pay interest at the prescribed rate of every month of delay till the handing over of possession and allottee's interest for the money they have paid to the promoter is protected accordingly and the same was upheld by in the judgement of the Hon'ble Supreme Court of India in the cases of ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra) reiterated in case of M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020*** decided on 12.05.2022; that: -

25. The unqualified right of the allottees to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottees, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottees/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottees does not wish to withdraw from

the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed.

19. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act, the rules and regulations made thereunder or to the allottees as per agreement for sale. This judgement of the Supreme Court of India recognized unqualified right of the allottees and liability of the promoter in case of failure to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. But the respondents-allottees failed to exercise his right although it is unqualified one. The respondents-allottees has to demand and make their intentions clear that they wish to withdraw from the project. Rather tacitly wished to continue with the project and thus made themselves entitled to receive interest for every month of delay till handing over of possession. It is observed by the authority that the allottee invest in the project for obtaining the allotted unit and on delay in completion of the project never wished to withdraw from the project and when unit is ready for possession, such withdrawal on considerations other than delay such as reduction in the market value of the property and investment purely on speculative basis will not be in the spirit of the section 18 which protects the right of the allottees in case of failure of promoter to give possession by due date either by way

of refund if opted by the allottees or by way of delay possession charges at prescribed rate of interest for every month of delay.

20. The authority is of the view that 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.**

21. In the present complaint, the respondents have made their intention clear to withdraw from the project by filing reply to the present complaint.

22. As far as contention of the complainant regarding obligation of the respondents-allottee 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 themselves are at default in making the payment as per the payment schedule and still they intend to withdraw from the project which 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" .

23. Hence, keeping in view the aforesaid factual and legal provisions, the authority hereby directs the complainant-promoter to return the paid-up amount of Rs. 55,58,625/- to the respondents-allottees after deduction of 10% of the sale consideration (less brokerage charges subject to maximum @ 0.5%). The complainant-promoter is further

directed to pay an interest on the balance amount at the rate of 10.70% p.a. (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 filing of reply to the present complaint i.e., 22.11.2021 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 complainant-builder to comply with the directions given in this order and failing which legal consequences would follow.

F. Directions of the authority:

24. 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 complainant-promoter is directed to return the paid-up amount of Rs. 55,58,625/- to the respondents-allottees after deduction of 10% of the sale consideration (less brokerage charges subject to maximum @ 0.5%). The complainant-promoter is further directed to pay an interest on the balance amount at the rate of 10.70% p.a. as prescribed under rule 15 of the rules, 2017 from the date of filing of reply to the present complaint i.e., 22.11.2021 till the actual date of refund of the amount within the timelines provided in rule 16 of the rules, 2017.



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

25. Complaint stands disposed of.

26. File be consigned to registry.

Vijay Kumar Goyal
(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 27.04.2023



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