

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

Complaint no. : 3132 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. Srinivas Krutiventi
2. Bhanupriya Rao

Address: 13, Coniston Court, 5 Carlton Drive, Putney,
London, Sw152Bz, United Kingdom

Also at: D-34, Retreat Apartments, 20 IP Extension,
Patparganj, new Delhi-110092.

Respondents

CORAM:

Shri Vijay Kumar Goyal

Member

APPEARANCE

Shri Dhruv Rohatgi

Advocate for the complainant

Shri Ashutosh Ojha

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 granted on	02.05.2019 [annexure I, page 148 of complaint]
7.	Unit no.	PGN-10-0005, ground floor, building no. 10 [annexure E, page 59 of complaint]
8.	Area of the unit	3750 sq. ft
9.	Provisional allotment letter issued on	12.08.2014 [annexure C, page 52 of complaint]
10.	Date of execution of buyer's agreement	05.09.2014 [annexure E, page 56 of complaint]
11.	Possession clause	10. POSSESSION (a) Time of handing over the Possession <i>Subject to terms of this clause and subject to 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,</i>

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		<p><i>documentation etc., as prescribed by the Company, the Company proposes to hand over the possession of the Unit within 24 (Twenty Four) months from the date of execution of the Buyer's 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) [annexure E, page 72 of complaint]</p>	
13.	Due date of possession	05.09.2016 [Note: Grace period is not included]	
14.	Total consideration	As per statement of account dated 03.03.2021, at page 46 of reply	As per payment plan annexed with the buyer's agreement
		Rs.3,09,19,260	Rs.2,95,39,601/-
15.	Total amount paid by the respondents-allottees as per statement of account dated 03.03.2021, at page 46 of reply	Rs.1,19,40,114/-	
16.	Offer of possession	07.05.2019 [annexure K, page 166 of complaint]	

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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 "EMAAR 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 02.05.2019.
- iii. That respondents in the month of August 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

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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 payment plan as enumerated in the buyer's agreement. The respondents made a payment of Rs. 25,00,000/- to the complainant for the said booking. The complainant issued a receipt dated 05.08.2014 to the respondents against the said booking.

- iv. That in view of the commitments made by the respondents to make timely payments, the complainant provisionally allotted unit no. "PGN-10-0005" in said project. The respondents were provisionally allotted a residential apartment admeasuring approx. 3750 sq. ft. super area on the ground floor of tower no.10 in the said project vide provisional allotment letter dated 12.08.2014.
- v. That the complainant forwarded two copies of the buyer's agreement to the respondents vide letter dated 13.08.2014. As per the instructions in the said letter, the respondents were under an obligation to sign return original sets of the signed buyer's agreement to the complainant.
- vi. That the buyer's agreement was executed between the parties on 05.09.2014. 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

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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 subsequently, the respondents availed a loan of Rs. 2,50,00,000/- from HDFC Ltd. for the purchase of the said unit allotted to them by the complainant and executed a tripartite agreement dated 01.12.2014.
- viii. That the respondents as per their own decision and after fully understanding their obligations opted for the schedule of payment plan 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, against which the respondents made their payments. The complainant issued receipts to the respondents against the payments made by the respondents dated 05.12.2014, 13.12.2014 and 09.02.2015. However, subsequently, the respondents defaulted in making due and timely payments, for which the complainant developer issued various reminder letters and also made repeated follow-ups.
- ix. 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

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impacts the construction progress of the project. That a perusal of the above-mentioned communications clearly spell 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.

- x. That no payment has been made by the respondents since 2015. The last payment forwarded by the respondents dates back to 09.02.2015. This clearly shows the *mala fides* exercised by the respondents as the respondents are speculative investor.
- xi. That despite of default by the respondent in fulfilling its obligations, the complainant did not default and completed the construction of the project without having regular payment of monies by the respondent. 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

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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 respondent.

- xii. 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 30.03.2018 and 21.12.2018. That despite best efforts and regular follow-ups, the complainant received the occupation Certificate only on 02.05.2019 i.e. after a period of almost 13 months from the first application. 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.
- xiii. That upon the receipt of the occupancy certificate, the complainant issued letter of offer of possession dated 07.05.2019 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

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after completing the possession related formalities and paperwork.

- xiv. That aggrieved by the non-responsive attitude of the respondents, the complainant sent reminder letters for offer of possession dated 07.06.2019, 08.07.2019, 01.10.2019, 01.11.2019 and 01.12.2019 to the respondents, calling upon them to comply with the previous communications sent by the complainant for offer of possession to the respondent, 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. It is pertinent to mention that respondents have paid only Rs. 1,13,51,835/- against total demand of Rs.3,12,86,274/-.
- xv. That as per the calculation sheet as on 26.07.2021, there is an outstanding due of Rs. 2,87,40,975/- against the said unit booked by the respondents. The said amount is inclusive of Rs.1,99,34,439/- towards the balance sale consideration and Rs. 88,06,536/- towards the delay payment charges in terms of clause 13.1(b). Apart from the said amounts, the respondents are further liable to pay a sum of Rs. 5,22,635/- towards the holding charges as per clause 13.1(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 @ 6% i.e. Rs. 16,10,820/- along with other ancillary charges towards E-

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Challan and HVAT Security. It is pertinent to mention that the respondents are further liable to pay Rs. 4,75,337/- towards Common Area Maintenance Charges and Common Area Electricity Charges.

- xvi. 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 07.05.2019 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 respondent 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.





- xvii. 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 complainants fall under the definition of promoter as defined under the Act. Thus, 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.
- xviii. That the said group housing project consists of total 1086 units / apartments out of which 1081 apartments already stand sold and possession also offered to the eligible allottees. Already possession of 955 apartments have been taken over by the respective allottees and conveyance deed of 880 apartments has been executed and most of the families have already moved therein and are residing therein and the said figure is increasing day by day. It is pertinent to mention here that the project is very much habitable. Further, the respective allottees are enjoying the facilities and amenities as provisioned for their comfort in the group housing colony. It is pertinent to bring to notice herein that the respondents are in default of their contractual obligations and resisting to perform its part of obligation and the inaction is nothing but a tool to blackmail the complainant company to bow down to their illegal demands without having to pay the amount outstanding on its part.
- xix. That the price of the said apartment is Rs.3,12,86,274/- plus stamp duty, registration charges etc. It is submitted that the respondents have paid only an amount of Rs. 1,13,51,835/- to the complainant

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till date and the balance amount of Rs.1,99,34,439/- (excluding the Stamp Duty charges @ 6%) excluding delay payment charges is still outstanding, which in spite of the complainant's reminders, has not been paid. As already stated above, the respondents are further liable to pay the delayed payment charges as well as holding charges against the said allotment in terms of the buyer's agreement.

- xx. That the complainant developer who has been regularly incurring all the costs towards the development and construction of the said project in question, has been regularly contacting the respondents allottees for the payment of pending dues qua the apartment in question, but all in vain.
- xxi. That the respondents have failed to abide by the terms of agreement by not making the payments in timely manner and thus, cannot be benefited with reciprocal promise to deliver the project in timely manner and benefits related thereto. Thus, the respondents have clearly breached the terms of the buyer's agreement and upon the relevant clauses, it becomes quite evident that the respondents are not entitled to get any compensation as described under the agreement.
- xxii. That the cause of action to file the present compliant 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

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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 and execute the conveyance deed in respect of the said apartment after clearing all the dues.
- ii. Direct the respondents to pay balance sale consideration in respect of the said apartment amounting to Rs.1,99,34,439/- along with delay payment charges at prescribed rate amounting to Rs.88,06,536/-.
- iii. Direct the respondents to pay holding charges amounting to Rs.5,22,635/- in respect to the said apartment at the rate of Rs.7.50 per sq. ft. per month of the super area of the said apartment from 07.05.2019 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.4,75,337/-.

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- 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 booked a unit being unit no. PGN-10-0005 on 06.08.2014, with super area admeasuring 3750 sq. ft. in the residential project of the complainant titled as "EMAAR Palm Gardens" located in Sector 83, Gurgaon, Haryana being developed by the complainant. That the respondents had made a payment of Rs. 25,00,000/- to the complainant at the time of booking for the said unit. The said unit was provisionally allotted to the respondent with vide provisional allotment letter dated 12.08.2014.
- ii. That in pursuance of the said allotment, a buyer's agreement was executed between the complainant and the respondent on 05.09.2014. As per the conditions agreed to by the parties in the buyer's agreement, the payment with respect to the aforementioned unit was to be made in accordance with a

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'Construction Linked Payment Plan' as provided under Annexure-3 of the buyer's agreement.

- iii. That furthermore, under the conditions in the buyer's agreement, specifically clause 10(a), the possession of the unit was to be handed over to the respondents within 24 months of the date of execution of the buyer's agreement. However, the complainant was entitled to a grace period of 3 months for applying and obtaining the completion certificate/occupation certificate for the unit/and or the project, and hence the possession was to be handed over to the respondent latest by 06.12.2016 inclusive of the grace period as per the buyer's agreement. Evidently, the complainant only completed construction and obtained an OC for the same in May 2019 i.e. two and a half years after the agreed date of handover. Furthermore, there was no reason accorded for the delay by the complainant or even informed to the respondents despite regular requests by the respondents. Therefore, it is an admitted fact by the complainant itself that the complainant is liable for breach of the buyer's agreement as a result of inordinate and unexplained delay in construction of the project and handover of the unit.
- iv. That in accordance with the payment plan as attached to the buyer's agreement, the respondents duly made payments to the complainant for the first two stages i.e. On Booking and within 4 months of Booking and Within 6 months of Booking, on 05.12.2014, 13.12.2014, 09.02.2015 respectively. While raising the said demands, the complainant misled the respondents to believe



that the construction of the project was continuing in accordance with the original timeline proposed by the complainant, and that the said unit will be handed over for possession as per the agreed date. The complainant extracted undue amounts from the complainant in false pretext of completion of construction in a proper timebound manner.

- v. That the third payment as per the payment plan was supposed to be demanded by the complainant after the application of occupancy certificate. That however, there were no demands for further construction-linked installments raised by the complainant from the respondents even until December 2016 i.e. the promised date of handover of possession (inclusive of grace period of 3 months). It is pertinent to note that prior to December 2016, the respondents regularly contacted the representatives of the complainant to enquire about the status of construction and it was informed that the construction of the project was ongoing in a proper manner and that the said construction shall be duly completed within the timeline provided as per the buyer's agreement. The respondents, not residing in India, had no option but to believe the complainant. Accordingly, the respondents were misled to believe that the construction was happening in a timely manner by the complainant.
- vi. That on account of delay in construction, the complainant did not apply for occupation certificate as per the scheduled time and therefore did not make any demand for money. It is submitted that

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the respondents had both, willingness and capability, to make the said payments as per the agreed time schedule; however, the same was delayed only on account of delay in construction by the complainant. It is further pertinent to mention that the respondents made multiple attempts via calls to confirm the status of construction but the complainant did not provide any satisfactory answers to the respondents' requests. Section 19(2) of the Act entitles the allottees with the right to know the status of construction of the concerned project and levies a duty on the promoter to inform the allottee about the status of construction as agreed as per the plan. In blatant violation of the aforesaid section 19(2) of the Act, the complainant did not bother to inform the respondents' regarding the status of construction despite the fact that the agreed time limit for completion of construction and handover of possession i.e. December 2016, had already passed. It is this delay caused by the complainant coupled with the non-responsive nature and dilatory tactics used by the complainant that developed a sense of deep distrust for the complainant in the minds of the respondent.

- vii. That the respondents had already cleared all pending payment payments with respect to the first two stages of the mutually agreed payment plan. This is evident from the entries dated 01.09.2016 in the statement of account dated 03.03.2021 generated by the complainant itself. That the complainant has wrongfully alleged, with the intention of misleading this Hon'ble

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Authority, that the respondents were in breach of their obligations of making timely payments. It is submitted that it is only once inordinate and unexplained delay was caused by the complainant that the respondents' lost faith in the complainant and sought for evidence of actual construction before making the requisite leftover payments.

- viii. That however, it was the complainant who made no communication whatsoever to the respondents that the construction of the aforementioned project was facing considerable delays and possession of the said unit will not be handed over to the respondent as per the originally agreed date. It is pertinent to mention here that the complainant continued to send further communication regarding payment for other stages of the payment plan but made no mention of the delays in the project.
- ix. That on 28.12.2017, the complainant with payment request letter, falsely demanded the payment for the third stage of the payment plan by 23.01.2018. The said payment was only to be demanded after the complainant made an application to the prescribed authority for the issuance of an occupation certificate with respect to the project/allotted unit.
- x. That the complainant itself contradicts its own stance when it admits multiple different dates for applying for the occupation certificate for the unit. As per the payment demand letters issued by the complainant and the submissions made in the complaint, multiple distinct dates have been mentioned as the date for the

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application for an occupation certificate including 30.03.2018 and 21.12.2018. Furthermore, in email conversations between the representatives of the complainants and the respondents, the representatives of the complainants themselves have admitted that the application for an occupation certificate with respect to the unit allotted to the respondents was made only on 21.12.2018. Thus, the complainants with their Payment Request Letter dated 28.12.2017, falsely demanded payments from the respondents by misrepresenting that the application for an occupation certificate had already been made.

- xi. That the respondent had no pending payments as of 28.12.2017 with respect to any of the first two stages of the payment plan. In fact, as per the aforementioned Payment Request Letter dated 28.12.2017 issued by the complainant themselves, the respondents had a previous surplus balance of Rs.3,04,684/-. The complainants in their submissions have omitted this important fact and have made an effort with a mala fide intention to mislead the Hon'ble Authority by stating that the respondents were in default of their payments.
- xii. That furthermore, the complainants through a notice dated 02.04.2018 falsely communicated to the respondents that they were in breach of their obligation of making timely payments with respect to the third stage of the payment plan. However, by this date, the complainants had not even made an application for an occupation certificate with respect to the unit allotted to the

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respondents and misrepresented the abovementioned facts with a mala fide intention. As stated earlier, the occupation certificate for the allotted unit was only applied for on 21.12.2018, approximately 12 months after the demand for a payment linked to the aforementioned application had already been made.

- xiii. That the respondents did not make any further payments with respect to these demands as the construction of the project was facing considerable delays and the originally agreed date of handover of possession had already passed with no communication from the complainant on any such expected delays. Further, the respondents could not conduct proper due diligence on the actual progress of the construction of the project as they were not in country, and repeated clarifications requested from the complainants on the status of the project were not answered satisfactorily.
- xiv. That further, through a payment request letter dated 08.01.2019, the complainants once again made a completely new demand for payment for the third stage of the payment plan, by 31.01.2019. Moreover, the complainants once again through a Notice dated 15.02.2019, alleged that the respondents were in breach of their obligation to make timely payments. It is important to note that both of these communications completely omitted any reference to the earlier communication on the payment demand for the third stage of the payment plan.

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- xv. That it is extremely crucial to point towards the fact that the complainants in the statement of accounts provided to the respondents since 2019 have completely omitted that through the abovementioned payment request letter dated 28.12.2017, they had demanded the payment for the third stage of the payment plan by 23.01.2018, and have only mentioned the payment request letter dated 08.01.2019 through which they had demanded the payment for the third stage of the payment plan by 31.01.2019. That this clearly shows the intent of the complainant is to mislead the respondents as well as the Hon'ble Authority through contradictory submissions and communications.
- xvi. That the respondents, already cautious due to the misrepresentations of the complainant, sought clarifications on the status of the project and the application for OC through emails to the representatives of the complainant in month of February and March 2019. The respondents, even after repeated requests, did not receive any satisfactory response from the complainants on any of the clarifications sought, and thus refrained from making any further payments towards the allotted unit owing to the mala fide intentions of the complainant.
- xvii. That further, through a letter of offer of possession dated 07.05.2019, the complainants offered the possession of the allotted unit to the respondents, upon the payment of the pending amount. The possession was offered after a delay of approximately 30 months from the original agreed date and the complainant has till

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date, not offered any explanation whatsoever in writing to the respondents with respect to such considerable delays. When the respondents physically reviewed the construction of the project, it was found that the while the allotted unit was being offered for possession, there was still a considerable amount of work left that would make the unit habitable for the respondents. Thus, the complainants were once again misrepresenting the fact that the allotted unit was ready for possession on the aforementioned date.

xviii. That as per clause 12(a) of the aforementioned buyer's agreement executed between the complainant and the respondent, the complainant is also liable to pay compensation to the respondent for the delay in the handing over of the possession of the allotted unit at the rate of Rs.7.50/- per sq. ft. of the super area per month of the delay. That the complainant is also mandated under the proviso to section 18(1) of the Act to pay such compensation to the respondents. The complainant has not taken into account these charges while calculating the final pending balance of the respondents, and has instead added arbitrary additional payment obligations upon the respondents.

xix. That despite the fact that the while the respondents had fulfilled their duty of completing the payments of the first two stages of the 'Construction Linked Payment Plan' as agreed to by the parties in the buyer's agreement, the complainants failed to complete their end of the agreement with respect to the timely construction of the project and correct representation of all material facts.



- xx. That the complainants, without due consideration to the already deposited payments, have continued to arbitrarily charge exponential delayed payment/holding charges and have continued to misrepresent/conceal material facts throughout the years with a mala fide intention. The erosion of trust, due to such constant misrepresentations has caused great distress to the respondents who despite having attempted to clear their doubts regarding the status of their unit were faced with nothing but unfair fine charges for the shortcomings that occurred on the complainant's part.
- xxi. That the construction of the said project and handover of possession of the unit was liable to be concluded by 09.12.2016 in terms of the buyer's agreement dated 09.05.2014. That however, the complainant failed to complete construction in due course of time and therefore is in default of the agreement as well as provisions of the Act. The allotment of the unit is liable to be cancelled and the complainant is obligated to refund the entire amount along with interest to the respondents. Respondents are entitled to interest/delay penalty on the payment already to the complainant in light of the inordinate delay caused by the complainant as per section 18 of the Act.
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.

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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 after clearing all the dues.
 - ii. Direct the respondents to pay balance sale consideration in respect of the said apartment amounting to Rs.1,99,34,439/- along with delay payment charges at prescribed rate amounting to Rs.88,06,536/-.
 - iii. Direct the respondents to pay holding charges amounting to Rs.5,22,635/- in respect to the said apartment at the rate of Rs.7.50 per sq. ft. per month of the super area of the said apartment from 07.05.2019 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.4,75,337/-.
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 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 24 (Twenty Four) months from the date of execution of the Buyer's 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 24 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 24 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 05.09.2014. The period of 24 months expired on 05.09.2016. 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 3 months cannot be allowed to the promoter at this stage. Therefore, the due date of possession comes out to be 05.09.2016.
11. In the present complaint, the due date for handing over of possession comes out to be 05.09.2016 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 02.05.2019



and the complainant has offered possession of the subject unit to the respondents-allottees on 07.05.2019. The respondents have opted for the following plan:

S.No.	Linked stages	Due date	Total amount
1.	On Booking and within 4 months from the date of booking	12-Deec-14	Rs.69,60,329.49
2.	Within 6 months from the date of booking	12-Feb-15	Rs.44,40,711.74
3.	On application of OC	-	1,65,74,530.97
4.	Intimation of possession	-	15,64,029.25
TOTAL			Rs.2,95,39,601.45

12. It is observed that the respondent allottees have paid installments nos. 1 & 2 on time as per the aforesaid payment plan. The 3rd installment was payable on "Application of OC" and as per the documents available on record, the OC was applied by the complainant on 21.12.2018. However, the complainant promoter raised demand on account of 3rd installment vide 'Payment Request Letter' dated 28.12.2017 which seems to be in gross violation of the payment plan opted by the respondents-allottees. So, the said demand raised by the promoter is not valid and it cannot be said that the respondent allottees have defaulted in making payment as per the said demand letter. Thereafter, the said demand was again raised vide 'Payment Request Letter' dated 08.01.2019 and the respondents-allottees have failed to make payment thereafter. 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).*

13. 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 one 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")..."

14. The authority observes that the possession of the unit was offered to the respondents-allottees on 07.05.2019 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.
15. The counsel for the respondents-allottees states that due to financial A 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.

16. The due date of possession as per the buyer's agreement as computed above is 05.09.2016. The complainant promoter obtained the occupation certificate for the said project on 02.05.2019 and offered possession of the subject unit to the respondents allottees on 07.05.2019. 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.
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*

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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. 1,19,40,114/- 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., 11.02.2022 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:

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- i. The complainant-promoter is directed to return the paid-up amount of Rs. 1,19,40,114/- 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., 11.02.2022 till the actual date of refund of the amount within the timelines provided in rule 16 of the rules, 2017.

- 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)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 27.04.2023

HARERA
GURUGRAM