

**PROCEEDINGS OF THE DAY**

Day and Date	Thursday and 17.01.2019
Complaint No.	528/2018 Case titled as Ms. Shallu Jain V/S M/S Emaar MGF Land Ltd
Complainant	Ms. Shallu Jain
Represented through	Shri Sanjay Jain husband of the complainant in person with Shri Sandeep Choudhary, Adv.
Respondent	M/S Emaar MGF Land Ltd.
Respondent Represented through	Shri Ketan Luthra, authorized representative on behalf of respondent-company with Shri Ishaan Dang, Advocate.
Last date of hearing	11.12.2018
Proceeding Recorded by	Naresh Kumari & S.L.Chanana

**Proceedings**

**Project is registered with the authority.**

Cost of Rs.5,000/- imposed upon the respondent vide order dated 11.12.2018 has been paid by way of demand draft dated 16.1.2019.

Arguments heard.

A Builder Buyer Agreement was signed inter-se both the parties on 1.4.2013. As per clause 14 (a) of BBA, the possession of unit No. GGN-27-0901, 9<sup>th</sup> floor, tower-27, in project "Gurgaon Greens" Sector-102, Gurugram was to be delivered within a period of 36 months from the date of start of construction i.e. 25.6.2013 (on start of PCC for foundation, as per statement of account in Annexure-C2) + 5 months grace period which comes out to be

25.11.2016. The complainant has already paid a sum of Rs.44,21,725/- against a total sale consideration of Rs.1,33,12,400/- to the respondent. Till today the possession has not been offered to the complainant by the respondent, as such complainant is entitled to seek refund of the deposited amount alongwith interest at the rate of 10.75%. However, the counsel for the respondent has submitted that 90% construction work is complete and they shall apply for occupation certificate in the month of April 2019.

Keeping in view the facts and circumstances of case and the contention raised by the complainant, below noted directions are given:-

- a) If the builder/respondent fails to offer possession by 31.7.2019 to the complainant, in that case, the complainant shall be entitled to withdraw from the project and shall be entitled to get back his deposited amount alongwith prescribed rate of interest i.e.10.75% per annum.
- b) Since the respondent has failed to deliver the possession, as such the respondent will not charge any interest from the buyer/complainant. on delayed payment, if any.

Complaint stands disposed of. Detailed order will follow. File be consigned to the registry.

Samir Kumar  
(Member)

Subhash Chander Kush  
(Member)

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

**Complaint no. : 528 of 2018**  
**Date of first hearing : 11.09.2018**  
**Date of Decision : 17.01.2019**

Ms. Shallu Jain,  
R/o T -2/802, Vipul Belmonte, Sector 54  
Gurugram- 122001, Haryana

**...Complainant**

Versus

Emaar MGF Land Limited,  
Emaar MGF Business Park, Mehrauli road  
Gurugram , sector 28 , Gurugram

**...Respondent**

**CORAM:**

Shri Samir Kumar  
Shri Subhash Chander Kush

**Member**  
**Member**

**APPEARANCE:**

Shri Sandeep Choudhary and Shri Sanjay Jain husband of the complainant in person

Advocate of complainant

Shri Ishaan Dang  
Shri Ketan Luthra

Advocate of respondent  
Authorized representative on behalf of respondent-company



**Order**

1. A complaint dated 11.07.2018 was filed under section 31 of the Real Estate (Regulation and Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 by the complainant Ms. Shallu Jain

against the promoter M/s Emaar MGF Land Ltd, on account of violation of clause 14(s) of buyer's agreement dated 01.04.2013 for flat no. GGN-27-0901 , 9<sup>th</sup> floor building no. 27 in the project 'Gurgaon Greens ' with a super area of 1650 sq. ft. for not giving possession on the due date i.e. 25.11.2016 which is an obligation of the promoter under section 11 (4) (a) of the Act *ibid*.

2. Since, the buyer's agreement dated 01.04.2013 has been executed prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, therefore, the penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non compliance of contractual obligation on the part of the promoters/respondents in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016.

3. The particulars of the complaint are as under: -

1.	Name and location of the project	Gurgoan Greens", Sector 102, Gurugram
2.	Project area	13.531 acres
3.	Flat/Apartment/Plot No./Unit No.	GGN-27-0901, 9 <sup>th</sup> floor, tower no. 27
4.	Nature of project	Group housing colony
5.	RERA registered/ not registered.	Registered (36 of 2017)
6.	Revised date of completion as per registration certificate	31.12.2018



7.	Unit admeasuring	1650 sq. ft.
8.	DTCP license no.	75 of 2012
9.	Total consideration amount as per agreement	Rs. 1,33,12,400/-
10.	Total amount paid by the complainants upto date	Rs. 44,21,725/-
11.	Date of buyer's agreement	01.04.2013
12.	Date of delivery of possession. (36 months + 5 months grace period from date of start of construction) (clause 14 (a)) Date of start of construction i.e. 25.06.2013	25.11.2016
13.	Delay of number of months/ years upto date	2 year 1 months
14.	Penalty clause (clause 16(a))	Rs. 7.50/- per sq.ft. per month of the super area

3. As per the details provided above, which have been checked as per record of the case file, a buyer's agreement dated 01.04.2013 is available on record for flat no. GGN-27-0901, building no. 27, according to which the possession of the aforesaid unit was to be delivered by 25.11.2016. The promoter has failed to deliver the possession of the said unit to the complainant by the due date nor paid any compensation till date.

4. Taking cognizance of the complaint, the authority issued notice to the respondents for filing reply and for appearance.

The respondent appeared on 11.12.2018. The case up on



hearing on 11.12.2018 and 17.01.2019. The reply has been filed by the respondent has been presued.

### **Facts of the complaint**

5. The complainant had booked a 3 BHK residential unit admeasuring 1650 sq. ft. of area in the Gurgaon Greens project of the respondent company situated at Sector 102, Gurgaon.
6. The complainant submitted that the complainant has paid to the respondent the initial booking amounts and the respondent company allotted a unit no. GGN 27-0901 admeasuring 1650 sq. ft. in the Gurgaon Greens project of the respondent company situated at Sector 102, Gurugram.
7. The complainant submitted that the respondent company presented a standard form buyer's agreement to be executed between the parties and the complainant without having any negotiating power executed the same whereby the complainant was allotted the said unit.
8. The complainant submitted that as per the representations of the agents and representatives of the respondent, the respondent was to complete the project by January 2016, but



the respondent cleverly and in the most unfair manner, in the buyer's agreement vide clause 14(i) got it written that the respondent shall hand over the possession within 36 months + 5 months from the start of construction. However, the respondent could not deliver the possession as per their initial understanding between the parties and nor could deliver as per their own standard terms so stated in the buyer's agreement.

9. The complainant submitted that the complainant in her complete readiness and willingness of purchasing the said residential property initially paid all amounts as per the call of the respondent and within 6 months of booking the property in the year 2013 the complainant paid an amount of Rs. 44,21,725/-
10. The complainant submitted that however, the respondent did not even start the construction up to 25.06.2013 when they raised a demand upon the complainant for the amount due on start of construction i.e. PCC for foundation. But when the complainant and her husband visited the site they did not find any construction activity on the project and the



complainant thereafter started enquiring about the project and the respondent company and it was revealed that the respondent company has certain internal disputes amongst its Indian and Foreign partners and that the project is going on a slow pace and that it is highly uncertain as to which of the entities shall proceed with the project.

11. The complainant submitted that the delayed and non-performance of the obligations of construction by the respondent are even evident from the manner in which the respondent has raised the demands of amounts due as per the recent statement of account as on 1.05.2018. It is quite evident that from start of PCC for foundation on 25.06.2013 the respondent has raised the subsequent demand of casting of ground floor slab only on 14.10.2014 i.e. more than 14 months after and thereafter demand against casting of 3<sup>rd</sup> floor was raised on 29.06.2015, which on the face of it highly doubtful. And thereafter there has been no demands from 1.07.2015 till 20.02.2017 which shows that the respondent abandoned the construction of the project for more than 2



years and hence the respondent miserably failed to perform its agreed obligations.

12. The complainant submitted that despite the complainant's readiness and willingness to perform her obligations and having paid a substantial amount already, as on date also, the construction is at a very slow pace and it shall at least take another 2-3 years' time in completion of the project. Thereby the complete plans of the complainant in having a residential property for herself have been shattered and frustrated due to the acts of the respondents and the complainant is therefore, constrained to seek refund of the amount so paid.

13. The complainant submitted that on the basis of the above it can be concluded that the respondent has miserably failed in completing the construction of the building and in handing over the possession of the unit of the complainant in accordance with the agreed terms and has committed grave unfair practices and breach of the agreed terms between the parties. the respondent could not even complete the basic structure of the building and thereby the complainant as per the provisions of section 18(1)(a) of the Real Estate



(Regulation and Development Act, 2016 is entitled for the refund of the amount of Rs. 44,21,725/- along with interest at the rate of 24% p.a. and also compensation an amount of Rs. 10,00,000/- for mental agony and harassment being suffered right from the year 2013.

14. The complainant submitted that no other complaint or legal proceedings are pending before any court of law or forum between the parties.
15. The complainant submitted that the cause of action for filing the present complaint is a subsisting and continuing one as the respondent have committed gross breach of their obligations of development of the project.

**Issue Raised by the Complainant:**

- i. Whether the respondent constructed the project in accordance with the agreed terms?
- ii. Whether the complainant is entitled to refund of the amount paid to the respondent along with interest?



### Relief Sought:

Direct the respondents to refund the amount of Rs.44, 21,725/- to the complainant along with the interest at the rate of 24% per annum.

### Respondent's reply

16. The respondent submitted that the present complaint is not maintainable in law or on facts. The complainant has filed the present complaint seeking compensation and refund for alleged delay in delivering possession of the apartment booked by the complainant. It is respectfully submitted that complaints pertaining to compensation and refund are to be decided by the adjudicating officer under section 71 of the Real Estate (Regulation and Development ) Act, 2016 (hereinafter referred to as "the Act" for short) read with Rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017, (hereinafter referred to as "the Rules") and not by this hon'ble authority. The present complaint is liable to be dismissed on this ground alone.

17. The respondent submitted that the complainant has got no locus standi or cause of action to file the present complaint.



The present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the buyer's agreement.

18. The respondent submitted that complainant is a wilful and persistent defaulter who has failed to make payment of the sale consideration as per the payment plan opted by the complainant. The complainant has concealed the real and true facts which are as under.
19. The respondent submitted that complainant had approached the respondent through a property dealer and expressed her interest in booking an apartment in the residential group housing project being developed by the respondent known as "Gurgaon Greens" situated in Sector 102, village dhankot, Tehsil & District Gurgaon . Prior to making the booking, the complainant conducted extensive and independent enquiries with regard to the project and it was only after the complainant was fully satisfied about all aspects of the project, that the complainant took an independent and



informed decision, uninfluenced in any manner by the respondent, to book the apartment in question.

20. The respondent submitted that clause 21 of the application form submitted by the complainant specifically mentions that possession of the apartments shall be handed over within a period of 36 months plus five months grace period, from the date of start of construction of the project, subject to any limitations as may be provided in the buyer's agreement. The said condition, as well as others set out in the application form, including timely payment of instalments and other amounts as and when demanded by the respondent, were duly understood and accepted by the complainant and the complainant undertook to abide by the same.

21. The respondent submitted that complainant was provisionally allotted apartment no. GGN-27-0901, located on the 9<sup>th</sup> floor in tower no 27, admeasuring 153.29 sq. mtrs. or 1650 sq. ft. approx. super area, the complainant had opted for a construction linked payment plan. The provisional allotment letter and payment plan. That right from the very



beginning, the complainant started defaulting in making payment of instalments.

22. The respondent submitted that from a perusal of the aforesaid communications as well as the statement of account, it is evident that after 26.05.2013 , no further payment had been made by the complainant although the respondent has been repeatedly addressing demand notices, reminders etc, calling upon her to make payment in accordance with the payment plan. It is also evident that the construction has been progressing at a rapid pace and that the apartment is nearing completion. At present the project is more than 90 % complete and the respondent has invested its own funds for constructing the same as there are a number of allottees who defaulters are including the complainant herein due to which also there has been some delay in the project. Complainant is only an investor and not a consumer and the complaint is liable to be dismissed in this ground alone.



23. That in the meanwhile, the respondent has registered the project under the provisions of the Act. The certificate of

registration of the project is Annexure R 43. The project is expected to be completed by December 2018 and possession is intended to be offered after applying and obtaining the occupation certificate from the competent authority.

24. That thus, it is evident that the entire case of the Complainant is nothing but a web of lies and the false and frivolous allegations made against the respondent are nothing but an afterthought. The complainant has sought to justify her failure to pay demanded instalments on the false and specious plea that after the complainant had 'sensed' delay in the project. It is respectfully submitted that it is evident from the demand letters sent to the complainant that the construction was progressing as per schedule. The buyer's agreement itself does not stipulate offer of possession prior to 36 months plus grace period of 5 months, from the date of start of construction. Construction commenced on 25<sup>th</sup> June 2013. Hence, there was no cogent or plausible reason for the complainant to have formed a premature and baseless conclusion that the project would be delayed. There is



absolutely no justifiable reason for the complainant to have defaulted in payment of instalments.

25. That it is submitted that consequent to the coming into force of the Act, after the project in question has been registered under the same, the date of completion of the apartment stands extended to December 2018. It is only after December 2018, if the construction of the apartment has not been completed, subject to force majeure conditions or any extension of registration under the Act, can the complainant make any complaint seeking refund, compensation etc. At this point in time, the complaint is highly premature.

26. That the cause of action, if any, for filing of the present complaint arose prior to the date of coming into force of the present Act. Hence the complaint is not maintainable on this ground also.

27. That it is evident from the entire sequence of events, that no illegality or lapse can be attributed to the respondent. Thus the allegations levelled by the complainant qua the respondent are totally baseless and do not merit any consideration by this hon'ble authority. The present



application is nothing but an abuse of the process of law. Thus, it is most respectfully submitted that the present application deserves to be dismissed at the very threshold.

### Determination of issues

28. In regard to **first issue** raised by the complainant the promoters have failed to handover the possession of the flat as agreed in the agreement dated 01.04.2014. As per clause 14(a) of the agreement the promoters shall deliver the possession within 36 months plus 5 months grace from the date of start of construction i.e. 25.06.2013. Therefore, the due date of the possession is 25.11.2016. Therefore, there is delay of 2 year and 1 months and interest shall be allowed. This shows that the respondent failed in constructing the project as per terms of agreement. The clause reproduced below:

*“.....the developer proposes to hand over the possession of the flat within a period of 36 months from the date of start of construction. The flat buyer agrees and understands that the developer shall be entitled to a grace period of 5 months, after the expiry of thirty six months, for applying and obtaining the occupation certificate in respect of the group housing complex.....”*



29. In regard to the **second issue** raised by the complainant, it is decided as reply stated by the respondent the project is 90%

is completed and revised date of completion in the registration certificate is 31.12.2018. Hence the complainant is not entitled for the refund the amount deposited by him to protect the interest of the other allottees who has invested in the project. The delay compensation payable by the respondent @ Rs.7.5/- per sq. ft. per month of the super area of the said flat as per clause 16(a) of apartment buyer's agreement is held to be very nominal and unjust. The terms of the agreement have been drafted mischievously by the respondents and are completely one sided as also held in para 181 of Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and ors. (W.P 2737 of 2017), wherein the Bombay HC bench held that:

*"...Agreements entered into with individual purchasers were invariably one sided, standard-format agreements prepared by the builders/developers and which were overwhelmingly in their favour with unjust clauses on delayed delivery, time for conveyance to the society, obligations to obtain occupation/completion certificate etc. Individual purchasers had no scope or power to negotiate and had to accept these one-sided agreements."*

31. As the possession of the flat was to be delivered by 26.11.2016 as per the clause referred above, the authority is of the view that the promoter has failed to fulfil his obligation under section 11(4)(a) of the Haryana Real Estate



(Regulation and Development) Act, 2016, which is reproduced as under:

“11.4 The promoter shall—

*(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be: Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed.”*

32. The complainant made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above.

**34 (f) Function of Authority –**

*To ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.*



33. The complainant requested that necessary directions be issued by the authority under section 37 of the Act ibid to the

promoter to comply with the provisions and fulfil obligation which is reproduced below:

**37. Powers of Authority to issue directions**

*The Authority may, for the purpose of discharging its functions under the provisions of this Act or rules or regulations made thereunder, issue such directions from time to time, to the promoters or allottees or real estate agents, as the case may be, as it may consider necessary and such directions shall be binding on all concerned.*

34. The complainant reserves his right to seek compensation from the promoters for which he shall make a separate application to the adjudicating office.

**Findings of the authority**

35. **Jurisdiction of the authority-** The authority has complete territorial jurisdiction to entertain the present complaint. As the project in question is situated in planning area of Gurugram, therefore the authority has complete territorial jurisdiction vide notification no.1/92/2017-1TCP issued by Principal Secretary (Town and Country Planning) dated 14.12.2017 to entertain the present complaint. As the nature of the real estate project is commercial in nature so the authority has subject matter jurisdiction along with territorial jurisdiction.

The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the



promoter as held in ***Simmi Sikka v/s M/s EMAAR MGF Land Ltd.*** leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

36. Keeping in view the facts and circumstances of the complaint and submissions made by the parties during arguments, the authority has observed that since a builder buyer agreement was signed inter-se both the parties on 01.04.2013. As per clause 14 (a) of BBA, the possession of unit no. GGN-27-0901, 9<sup>th</sup> floor, tower-27, in project "Gurgaon Greens" Sector-102, Gurugram was to be delivered within a period of 36 months from the date of start of construction i.e. 25.06.2013 (on start of PCC for foundation, as per statement of account in Annexure-C2) + 5 months grace period which comes out to be 25.11.2016. The complainant has already paid a sum of Rs.44,21,725/- against a total sale consideration of Rs.1,33,12,400/- to the respondent. Till today the possession has not been offered to the complainant by the respondent, as such complainant is entitled to seek refund of the deposited amount along with interest at the rate of 10.75%. However, the counsel for the respondent has submitted that 90% construction work is complete and they shall apply for occupation certificate in the month of April 2019.



### Decision and directions of the authority

37. Thus, the authority, exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issue the following directions to the respondent:

- i. If the builder/respondent fails to offer possession by 31.07.2019 to the complainant, in that case, the complainant shall be entitled to withdraw from the project and shall be entitled to refund his deposited amount along with prescribed rate of interest i.e.10.75% per annum.
- ii. Since the respondent has failed to deliver the possession, as such the respondent will not charge any interest from the buyer/complainant. on delayed payment, if any.

38. The order is pronounced.

39. Case file be consigned to the registry.



**(Samir Kumar)**  
Member

**(Subhash Chander Kush)**  
Member

Dated : 17.01.2019

Judgement Uploaded on 25.01.2019