

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

Complaint no. : 2840 of 2021
Complaint filed on : 22.07.2021
First date of hearing : 26.08.2021
Date of decision : 18.02.2022

Emaar India Ltd.

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

Complainant

Versus

Sheetal Kalsi

R/o: H.no. 117, Arjun Marg, DLF Phase I,
Gurugram, Haryana-122002.

Respondent

CORAM:

Dr. K.K. Khandelwal
Shri Vijay Kumar Goyal

**Chairman
Member**

APPEARANCE

Shri Dhruv Rohatgi
None

Advocate for the complainant
On behalf of the respondent

ORDER

1. The present complaint has been filed by the complainant/promoter in Form CRA 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 respondent, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Project name and location	Gurgaon Greens, Sector 102, Gurugram, Haryana.
2.	Project area	13.531 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	75 of 2012 dated 31.07.2012 Valid/renewed up to 30.07.2020
5.	Name of licensee	Kamdhenu Projects Pvt. Ltd. and another C/o Emaar MGF Land Ltd.
6.	HRERA registered/ not registered	Registered vide no. 36(a) of 2017 dated 05.12.2017 for 95829.92 sq. mtrs.
	HRERA registration valid up to	31.12.2018
	HRERA extension of registration vide no.	01 of 2019 dated 02.08.2019
	Extension valid up to	31.12.2019
7.	Occupation certificate granted on	30.05.2019 [annexure I, page 183 of complaint]

8.	Provision allotment letter dated	01.02.2013 [annexure C, page 47 of complaint]
9.	Unit no.	GGN-22-0702, 7 th floor, building no. 22 [annexure F, page 68 of complaint]
10.	Unit measuring	1650 sq. ft. [Page 68 of complaint]
11.	Date of execution of buyer's agreement	05.04.2013 [annexure F, page 64 of complaint]
12.	Payment plan	Construction linked payment plan [Page 96 of complaint]
13.	Total consideration as per the statement of account dated 31.05.2019 at page 205 of complaint	Rs. 1,35,08,356/-
14.	Total amount paid by the respondent as per the statement of account dated 31.05.2019 at page 206 of complaint	Rs. 24,55,656/-
15.	Date of start of construction as per the statement of account dated 31.05.2019 at page 205 of complaint	19.06.2013
16.	Due date of delivery of possession as per clause 14(a) of the said agreement i.e. 36 months from the date of start of construction (19.06.2013) + grace period of 5 months, for applying and obtaining completion certificate/ occupation certificate in respect of the unit and/or the project. [Page 81 of complaint]	19.06.2016
17.	Date of offer of possession to the respondent	31.05.2019 [annexure K, page 199 of complaint]

B. Facts of the complaint

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

- i. That the complainant developer has developed a group housing colony by the name of "Gurgaon Greens" on the land admeasuring 13.531 acres, Sector-102, Village Dhankot, Tehsil & District Gurgaon, Haryana, *inter alia* comprising of various buildings and units therein, with suitable infrastructural facilities including multi-level basement parking. The said development of the group housing colony has been carried out in planned and phased manner over a period of time comprising of certain blocks / 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, has granted occupation certificate dated 30.05.2019 bearing no. ZP-835/AD(RA)/2018/13010.
- iii. That the respondent in the month of January 2013 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 respondent

made a payment of Rs. 7,50,000/- to the complainant for the said booking. The complainant issued a receipt dated 01.02.2013 to the respondent against the said booking.

- iv. That in view of the commitments made by the respondent to make timely payments, the complainant provisionally allotted unit no. "GGN-22-0702" in said project admeasuring approx. 1650 sq. ft. super area on the 7th floor of tower no. 22 in the said project vide provisional allotment letter dated 01.02.2013. That the buyer's agreement was executed between the parties on 05.04.2013. The said agreement was duly signed by the respondent after properly understanding each and every clause contained in the agreement. The respondent was neither forced nor influenced by the complainant developer to sign the said agreement. It was the respondent who after understanding the clauses, signed the said agreement in her 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.

- v. That the respondent as per her own decision and after fully understanding her obligations opted for the installment payment plan. It is submitted that the complainant developer raised all the demands as per the payment plan so opted for by the respondent. However, the respondent defaulted in making timely payments, for

which the complainant developer issued various reminder letters/notices and also made repeated follow-ups. 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 respondent in making the timely due payments to the complainant as per the payment schedule. The respondent herein, completely ignored the payment requests and failed to make payments as per schedule. Despite this, the complainant developer made all diligent efforts for construction and development of the said project and completed the construction.

- vi. That the construction of the tower wherein the said apartment/unit of the respondent is situated was completed and the complainant developer applied to the competent authority for the grant of occupancy certificate on 31.12.2018. That despite best efforts and regular follow-ups, the complainant received the occupation certificate only on 30.05.2019 i.e., after a period of almost 5 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/unit, 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 respects.

- vii. That upon the receipt of the occupancy certificate, the complainant issued letter of offer of possession dated 31.05.2019, which was dispatched on 01.06.2019 to the respondent. The complainant vide the said notice of offer of possession advised and requested the respondent to clear the outstanding dues and take the possession of the said apartment after completing the possession related formalities and paperwork. Complainant sent possession reminder letter dated 05.07.2019. Aggrieved by the non-responsive attitude of the respondent, the complainant sent possession reminder letters dated 06.08.2019, 05.09.2019, 01.10.2019 and 01.12.2019 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 respondent has 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 respondent has paid only Rs. 23,75,561/- against total demand of Rs.1,35,08,355/- respondent has not paid any amounts after May 2013. The last

payment forwarded by the respondent dates back to 29.05.2013. This clearly shows the *mala fides* exercised by the respondent as the respondent is a speculative investor.

- viii. 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 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.

- ix. That as per the calculation sheet as on 15.07.2021, there is an outstanding due of Rs.1,71,36,725/- against the said unit booked by the respondent. The said amount is inclusive of Rs. 1,10,52,699/- towards the balance sale consideration and Rs. 60,84,026/- towards the delay payment charges. Apart from the said amounts, the respondent is further liable to pay a sum of Rs.2,19,397/- towards the holding charges as per clause 17.1(a) of the buyer's agreement. Over and above the said amounts, the respondent, in order to get the conveyance / sale deed executed are further liable to pay the stamp duty @ 5% i.e. Rs. 5,93,750/- along with other ancillary charges towards E-Challan and HVAT security. It is pertinent to mention that the respondent is further liable to pay Rs.1,96,931/- towards common area maintenance charge.
- x. 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 respondent is situated and the same being ready for occupation, the notice of offer for possession was issued to the respondent on 31.05.2019 followed by subsequent reminders, thereby calling upon the respondent 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 respondent and therefore, on account of such breaches, delays and defaults of the respondent, it is the complainant developer who is entitled to claim compensation from the respondent.

- xi. 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. The Hon'ble High Court of Bombay in the matter titled **Neelkamal Realtors Suburban Pvt. Ltd. and Anr vs. Union of India** has already held that RERA strikes the balance between the promoter and allottees.

C. Relief sought by the complainant

4. The complainant has filed the present complaint for seeking following reliefs:
- i. Direct the respondent to take possession of the said apartment and to pay balance sale consideration of Rs.1,10,52,699/- along with interest at the prescribed rate and to execute the conveyance deed/sale deed.
 - ii. Direct the respondent to pay holding charges @ Rs.7.50/- per sq. ft. per month of the super area of the said apartment from 31.05.2019 when offer of possession was made till such time the respondent actually take possession of the said apartment after completion of all possession formalities.
 - iii. Direct the respondent to pay common area maintenance charges.
5. On the date of hearing, the authority explained to the respondent/promoter 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.

D. Reply of the respondent

6. The respondent contested the complaint on the following grounds:
- i. That after making independent enquiries and only after being fully satisfied, the complainant company approached the respondent through its authorized representatives for booking of a unit in the

said project with suitable infrastructure facilities being developed in a planned and phased manner over a period of time. It is pertinent to note that the respondent was served with the welcome letter dated 01.02.2013. Thereafter, the complainant company provisionally allotted the unit bearing no. "GGN-22-0702" in favour of the respondent vide provisional allotment letter dated 01.02.2013 for consideration of Rs. 1,30,12,441.76/-.

- ii. That the complainant company as per their own decision and after fully understanding their obligations averred that the respondent will be served with timely updates in construction as well as the demand will be raised only after providing credible evidences of timely construction to the respondent and the possession of the unit booked by the respondent will be offered within the stipulated time. It is pertinent to note that the buyer's agreement was executed between the parties on 05.04.2013. It is further submitted that the buyer's agreement duly covers all the liabilities and rights of both the parties.
- iii. That the respondent was supposed to get the peaceful and vacant possession of her unit by 05.09.2016 as per clause 14(a) the buyer's agreement but the project was going at a snail pace and the complainant company didn't even bother to provide timely updates to the respondent. It is submitted that the complainant company offered the possession of the said unit vide letter of offer of possession dated 31.05.2019 after a delay of almost three years. That the respondent paid all the demands as and when raised by the complainant company and as per the construction linked payment plan.

- iv. That the Buyer's Agreement contains the arbitrary clauses which are reproduced below:

As per clause 13(i) of the Buyer's Agreement, that in case of delay in making payment by the Allottees, the Complainant Company shall have the right to terminate the Agreement and forfeit the Earnest Money along with non-refundable amount. The Company shall also be entitled to charge delayed payment charges @ 24% p.a. at the time of every succeeding instalment from the due date of instalment, as per the Schedule of Payments, till the date of payment.

As per clause 16(a) of the Buyer's Agreement, if the Company is not able to hand over the possession to the Allottee(s) within the time stipulated as mentioned in clause 14, the Allottee(s) shall be entitled to payment of compensation for delay the rate of Rs. 7.50/- per sq. ft. per month of the Super Built up area of the Unit for the period of delay beyond 36+5 months or such extended period as permitted under this Agreement.

- v. That the respondent herein has paid an amount of Rs. 23,75,561/- till date. The respondent anticipated and believed that the money collected by the complainant company and received from the respondent would be utilized in a manner that was commensurate to the stage of construction and further that the respondent would be provided with timely updates regarding the construction work at site. Yet, the respondent herein had to constantly follow up and chase the complainant company to inquire about the status of the project, but no satisfactory response or concrete update was provided.
- vi. That even at the time of the execution of the buyer's agreement the complainant company had represented to the respondent that they are in possession of the necessary approvals from the DTCP, Haryana to commence with the construction work of the

residential project. However, the respondent visited the complainant's office and apprised their officials of the anomaly and asked them to explain the deviation but till date the officials did not have any clear explanation about the same and also showed their helplessness in the matter.

- vii. That the complainant raised the demand notice dated 23.05.2013, which was totally wrong, illegal and arbitrary. As per the schedule of payment attached in the buyer's agreement, the fourth installment was to be paid on the start of PCC for foundation. However, demand notice dated 23.05.2013 was raised prior to the start of PCC of the foundation. The respondent visited the construction site in the month of June 2013. However, to the utter dismay and shock to the respondent, the construction site was just a barren piece of land, where there was no sight for start of construction in the upcoming time. Thereafter, several efforts were made by the respondent to seek update about the status of the construction work at the site, but due to the negligence of the complainant, there was no satisfactory response from their end. That the complainant company failed to deliver the possession of the unit within the stipulated time, the respondent apprised and requested them to refund her amount paid till date but all in vain.
- viii. The respondent prayed before the authority that the complainant company be directed to cancel the booking of the residential unit booked by the respondent and to refund the entire amount received by the complainant company i.e. Rs. 23,75,561/- till date inclusive of the booking charges & taxes.

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.

E. 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.

E.I Territorial jurisdiction

As per notification no. 1/92/2017-ITCP 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.

E.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(6), (7) and (10) of the Act leaving aside compensation which is to be decided by the adjudicating officer, if pursued by the parties at a later stage.

F. Finding on the relief sought by the complainant

9. **Relief sought by the complainant:** The complainant has sought the following reliefs:

i. Direct the respondent to take possession of the said apartment and to pay balance sale consideration of Rs.1,10,52,699/- along with interest at the prescribed rate and to execute the conveyance deed/sale deed.

ii. Direct the respondent to pay holding charges @ Rs.7.50/- per sq. ft. per month of the super area of the said apartment from 31.05.2019 when offer of possession was made till such time the respondent actually takes possession of the said apartment after completion of all possession formalities.

iii. Direct the respondent to pay common area maintenance charges.

10. The complainant/promoter submitted that the respondent/allottee has failed to abide by the terms of the buyer's agreement by not making the payments in timely manner and by not taking the possession of the unit in question as per the terms and conditions of the buyer's agreement and the payment plan opted by the respondent/allottee. Also, despite repeated follow-ups by the complainant and the complainant having performed its contractual obligations, the respondent/allottee withheld to perform her contractual obligation. Therefore, the

respondent/allottee is liable to pay outstanding dues along with delayed interest as per section 19 of the Act.

11. The respondent in the reply dated 19.10.2021 has prayed for cancellation of the subject unit and refund of the entire amount received by the complainant company i.e., Rs.23,75,561/- till date inclusive of the booking charges and taxes. It was further submitted in the reply that the complainant company failed to deliver the possession of the unit within the stipulated time, the respondent requested the complainant company to return the amount paid till date but all in vain.
12. The authority observes that as per section 11(5) of the Act, the promoter may cancel the allotment in terms of the agreement for sale. The relevant clause is reproduced below:
- "11. Functions and duties of promoter-*
- ...*
- (5) The promoter may cancel the allotment only in terms of the agreement for sale:*
- Provided that the allottee may approach the Authority for relief, if he is aggrieved by such cancellation and such cancellation is not in accordance with the terms of the agreement for sale, unilateral and without any sufficient cause."*
13. In the present case, the buyer's agreement (agreement for sale) was executed inter se parties on 05.04.2013 and as per clause 1.2 (i) read with clause 13 of the said agreement, the complainant was entitled to forfeit the earnest money along with other non-refundable amounts. Also, as per clause 14 of the said agreement, the respondent allottee was obligated to make all the payments in time as per the terms of schedule

of payment. Clause 9, 14 and 15 of the buyer's agreement are reproduced as under:

"Clause 1.2. Sale Price for Sale of Unit

.....
(i) Earnest Money

(i) Earnest Money

- i. *The Allottee understands and agrees that 15% of the Total Consideration of the Unit shall be treated as Earnest Money by the Company to ensure the fulfillment of terms and condition of the Agreement.*
- ii. *The Allottee hereby agrees that the Company shall have the right to forfeit the Earnest Money along with Non Refundable Amounts in the event of the failure of the Allottee to perform his obligations or non-fulfillment of all/any of the terms and conditions set out in this Agreement executed by the Allottee or in the event of failure of the Allottee to sign and return this Agreement in its original form to the Company within thirty (30) days from the date of its receipt by the Allottee.....*

Clause 12. TIME IS THE ESSENCE

- (a)** *It is specifically and categorically understood and agreed by the Allottee that time is of the essence with respect to the Allottee(s)' obligations to perform or observe all the obligations of the Allottee under this Agreement and / or to pay the Total Consideration along with other payments such as on or before due date or as and when demanded by the Company as the case may be...*

Clause 13. DELAY IN PAYMENTS

- (i)** *Notwithstanding anything contained in clause 20, in case of delay in making payment reserved herein by the Allottee, the Company shall have the right to terminate the Agreement and forfeit the Earnest Money alongwith the Non-Refundable Amounts. However, the Company may in its sole discretion, waive its right to terminate this Agreement, and enforce all the outstanding payments and seek specific performance of this Agreement..."*

14. Further, regulation no. 11 /RERA GGM Regulations 2018 titled as the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018, states that-

"5. AMOUNT OF EARNEST MONEY

Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment/plot/building as the case may be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer."

15. The authority observes that the respondent-allottee made a total payment of Rs. 24,55,656/- against the total consideration of Rs.1,35,08,356/- and the same was acknowledged by the complainant/promoter as per statement of account dated 31.05.2019. It is interesting to note that the respondent-allottee has failed to pay a single penny after 29.05.2013. From the conduct of the respondent-allottee and as per the submissions made by the respondent vide reply dated 11.11.2021, it is quite evident that the respondent-allottee does not intend to continue with the project and it is a fit case for cancellation of the subject unit.
16. Keeping in view the aforesaid legal provisions, the complainant is allowed to cancel the subject unit by forfeiting the earnest money as per buyer's agreement read with Regulation No.11 of 2018 of the Authority,

which shall not exceed the 10% of the total consideration of the said unit and shall return the balance amount to the respondent within 90 days from the date of this order.

H. Directions of the authority:

17. 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 is allowed to cancel the subject unit by forfeiting the earnest money as per the buyer's agreement read with Regulation No.11 of 2018 of the authority, which shall not exceed the 10% of the total consideration of the said unit and shall return the balance amount to the respondent within 90 days from the date of this order.

18. Complaint stands disposed of.

19. File be consigned to registry.

V.1 - 
(Vijay Kumar Goyal)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 18.02.2022


(Dr. K.K. Khandelwal)

Chairman