

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

**Complaint No. : 08 of 2018**  
**First date of hearing: 10.04.2018**  
**Date of Decision : 16.10.2018**

Ms. Sunita,  
R/o R-12A GF, Uppal Southend, Sohna road,  
Sector 49, Gurugram

**Complainant**

Versus

M/s Emaar MGF Land Limited,  
Emaar business park, MG Road, Sikanderpur,  
Sector 28, Gurugram

**Respondent**

**CORAM:**

Dr. K.K. Khandelwal  
Shri Samir Kumar  
Shri Subhash Chander Kush

**Chairman**  
**Member**  
**Member**

**APPEARANCE:**

Shri Sukhbir Yadav  
Shri Dheeraj Kapoor

Advocate for the complainant  
Advocate for the respondent

**ORDER**

1. A complaint dated 22.02.2018 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. Sunita Chandra, against the promoter M/s Emaar MGF land Ltd. , on



account of violation of clause 14(a) of the buyers agreement executed on 05.04.2013 in respect of Unit no. 0402, tower- B, Sector 102, Gurugram, described as below for not handing over possession on the due date i.e. by 05.09.2016 which is an obligation under section 11(4)(a) of the Act ibid.

2. The particulars of the complaint case are as under: -

1.	Name and location of the project	Gurgaon greens, Sector - 102, Gurugram
2.	Plot/unit no.	0402, tower -8
3.	Nature of project	Residential
4.	RERA registered/ not registered.	<b>Not registered</b>
5.	DTCP license	75 of 2012
6.	Date of execution of buyer's agreement	05.04.2013
7.	Total consideration	Rs. 1,23,15,942/- (including taxes)
8.	Total amount paid by the complainant till date 23.06.2013	Rs.39,73,016/-
9.	Date of delivery of possession (clause -13 (a) 36 months + 5 months grace period from execution of agreement)	05.09.2016
10.	Delay of number of years	2 years
11.	Payment plan	Construction linked payment plan

3. The details provided above have been checked on the basis of record available in the case file which has been provided by the complainant and the respondent. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and appearance. The respondent appeared on





10.04.2018. The case came up for hearing on 10.04.2018, 02.05.2018, 23.05.2013, 19.06.2018, 10.07.2018, 09.08.2018, 16.08.2018, 12.09.2018 and 16.10.2018. The reply filed on behalf of the respondent has been perused.

### Facts of the complaint

4. The complainant submitted that respondent is developer of a residential project known as Gurgaon Greens at Sector 102, Village Dhankot, Tehsil and District Gurgaon.
5. The complainant paid an amount of Rs.7,50,000/- by booking a residential flat admeasuring 1650, apartment no. 0402, tower no. 08, in the said project being 'Gurgaon Greens" at Sector 102, village dhankot, Gurgaon, to be referred to as the said flat. At the time of booking the respondent had assured and confirmed that the possession of the flat would be handed over within two years of booking i.e. on or before 10.09.2014. It is relevant to mention that though the cheque for sum of Rs. 7,50,000/- was paid and even encashed in or about 14.09.2012, however, receipt in respect thereof was issued only on 28.01.2013.
6. That thereafter, vide its letter dated 28.01.2013, the Respondent issued provisional allotment letter in respect of the said flat and demanded further amount of Rs. 3,79,709.25



and Rs.2,85,450.00, which was accordingly paid by the complainant.

7. The complainant submitted that by means of the provisional allotment letter dated 28.01.2013, the respondent required to the complainant to enter into/ execute an apartment buyer agreement with the respondent within a period of 30 days failing which it was informed that the respondent would forfeit the amount of Rs.7,50,000.00. It is submitted that terms of the apartment buyer agreement were totally in variance with the terms disclosed by the respondent at the time of booking and while issuing provisional allotment letter, the respondent was forced to sign the said apartment buyer agreement.
8. That as per clause 14(a) of the apartment buyer agreement, the respondent was to deliver the flat within 36 months form the date of the start of the construction with grace period of 5 months.
9. The complainant kept on making the payments as and when demanded by the respondent till 23.06.2013 and paid a total amount of Rs.39,73,016/-
10. That as on 14.06.2013. the respondent has demanded the fourth instalment which was due as per the agreement at the



start of construction therefore as per the apartment buyer agreement, the possession of the said flat was to be handed over on or before 04.09.2016.

11. After making the said payment, the complainant visited the site and realised that the respondent had played a fraud upon the complainant in as much as by that time the construction had not even started.
12. That since the respondent had not started the construction till 2016, therefore, the complainant sent various emails regarding refund of the amount deposited by it, however, the respondent refused to do it on the pretext that the respondent would forfeit an amount equivalent to 15 percent of the total sale consideration and dealer commission which was objected to be the complainant.
13. That the apartment buyer agreement mentions that the area will be allotted on super area basis, however, it is relevant to mention that in response to an application filed under Right to Information Act the Director General, Town and Country Planning Haryana, Chandigarh has specifically responded vide letter dated 19.02.2013 that a builder cannot charge any amount towards super area and can charge only with respect to actual carpet area being given.



14. The respondent has also charged amounts towards super area, however, in a judgement passed on 03.06.2016 in Writ Petition no. 2235 of 2011 titled as **Suresh Kumar Bansal Versus Union of India and others** it has been held that in the contracts for purchase of flats/shops, like the one entered into between you and the complainant, no service tax is leviable and therefore, the respondent is not entitled to charge any service tax.
15. That the apartment buyer agreement further mentions that the respondent is to pay preferential location charges towards sports/Green Facing of Rs. 2,47,500.00 and towards corner of 1,65,000.00. However, the respondent has no right to charge the said amounts.
16. Further the apartment buyer agreement mentions an amount of Rs.3,00,000 towards car parking and amount of Rs. 50,000. towards club membership, however, the respondent has no right to charge the same.
17. Apart from above, the respondent can claim EDC and IDC only on carpet area and not on super area and therefore, the respondent is bound to reduce the cost of the flat accordingly.



**Issues raised by the complainants are as follow:**

- I. Whether the respondent has defaulted in handing over the possession of residential flat admeasuring 1650, Apartment no.0402, tower No. 08 in the said project being 'Gurgaon Greens' at Sector 102. Village Dhankot, Tehsil & District Gurgaon, Haryana?
- II. Whether the respondent has a right to forfeit an amount equivalent to 15 percent of the total sale consideration and dealer commission on cancellation of the agreement; even though the respondent itself is at fault?
- III. Whether the respondent is liable to pay an amount of Rs. 39,73,016.00 along with interest at the rate of 24% per annum being the rate of interest charged by the respondent on delayed payments?
- IV. Whether the respondent is entitled to charge amount towards super area, service tax, club membership, car parking, EDC/IDC on super area etc?



**Relief sought:**

The complainant is seeking the following relief:

- i. The respondent be directed to refund the amount of Rs.39,73,016 alongwith interest at the rate of 24% per annum being the rate of interest charged by the respondent on delayed payments.

**Respondent's reply**

18. The respondent submitted that the complaint filed by the complainant is not maintainable and this hon'ble regulatory authority has no jurisdiction whatsoever to entertain the present complaint
19. The complaints pertaining to compensation and interest for a grievance under section 12, 14, 18 and 19 of the Real Estate (Regulation and Development) Act, 2016 are required to be filed before the adjudicating officer under rule-29 of the Haryana Real Estate (Regulation and Development) Act, 2017 read with Section 31 and Section 71 of the said Act and not before this hon'ble authority under Rule- 28.
20. Further provision to Section 71 which clearly stated that even in a case where complaint is withdrawn form a consumer forum/commission/NCDRC for the purpose of filing an application under the said Act and said Rules, the application,





if any, can only be filed before the adjudicating officer and not before the regulatory authority.

21. The permission to withdraw the complaint under proviso to Section 17 is applicable only for the complaints pending before any consumer forum/Commission/NCDRC established under section 9 of the Consumer Protection Act, 1986 and not before any other forum and at the same time, such permission to withdraw has to be for the purpose of filing it before the adjudicating officer under the said Act. However, in the present case, the complainant has admittedly (admitted in para- 4(3)(q) of the complaint) vide order dated 22.02.2018, withdrawn the present complaint from the permanent Lok Adalat (Public Utility Services), Gurugram and not from any Consumer Forum/ Commission/NCDRC established under section 9 of the consumer protection Act, 1986 and no such permission has been taken by the complainant



22. The statement of objects and reasons as well as the preamble of the said Act clearly state that RERA is enacted for effective consumer protection and to protect the interest of consumers in the real estate sector. RERA is not enacted to protect the interest of investors. As the said Act has not defined the term consumer, therefore the definition of consumer as provided

under the consumer protection Act, 1986 has to be referred for adjudication of the present complaint. The complainant is an investor and not a consumer and nowhere in the present complaint has the complainant pleaded as to how the complainant is a consumer as defined in the consumer protection Act, 1986 qua the respondent.

23. The complainant never had any intention to buy the apartment for his own personal use and kept on avoiding the performance of his contractual obligations of making timely payments
24. It is clear from the above that the complainant is an investor and due to financial crunch, admitted by the complainant in his email, the complainant became a defaulter, having deliberately failed to make the payment of various instalments within the time prescribed which resulted in outstanding dues and delay payment charges.
25. That despite several adversities, the respondent has continued with the construction of the project and is in the process of completing the construction of the project and should be able to apply the occupation certificate for the apartment in question i.e. GGN-08-0401 by 31.12.2018 (as



mentioned at the time of registration of the project with RERA).

26. Having failed to resell the said apartment due to general recession, the complainant could not make the payments in time and now has developed an intention to raise false and frivolous issues frivolous litigation.
27. The agreement that has been referred to for the purpose of getting the adjudication of the complaint is the apartment buyer agreement dated 05.04.2013 executed much prior to coming into force of said Act or said Rules. The adjudication of the complaint for interest and compensation has to be in reference to the agreement for sale executed in terms of said act and said rules and no other agreement.
28. It is submitted that the proposed estimated time of handing over the possession of the said apartment was 36 +5 months i.e. 41 months from the date of start of construction and not within two years of booking, as alleged by the complainant. That, without prejudice to the above, it is submitted that the said proposed time of 41 months is applicable only subject to force majeure.



## Determination of Issues

29. In respect to **first issue** raised by the complainant as per clause 14(a) of the buyer's agreement the due date of handing over the possession is 05.09.2016. The respondent has failed to deliver the possession of the said unit within the due date of handing over the possession. The counsel for the respondent submitted that the construction of the project is in progress and they shall be able to hand over the possession of the unit to the complainant by 31.12.2018. They should also be able to apply for occupation certificate by 31.12.2018 as per application for registration submitted by the respondent with the authority. The project has already been delayed for more than 2 years, as such, the builder is liable for payment of interest at the prescribed rate i.e. 10.45%. The clause regarding the possession of the said unit is reproduced below

### **14(a) offer of the possession**

*"..... the promoter proposed to hand over the possession of unit within 36 months. the allottee agrees and understand that promoter shall be entitled for grace period of 5 months for applying and obtaining the occupation certificate in respect of the unit."*



30. In regard to **second issue** raised by the complainant as per clause i of the buyer's agreement as agreed between the parties that 15% of the total consideration of the unit shall be treated as earnest money by the company to ensure the

fulfilment of the terms and condition of the agreement and the company has right to forfeit the earnest money along with non-refundable amount in the event of failure of the allottee to perform his obligation.

*Clause I : Earnest Money of the buyer's agreement as agreed between the parties that 15% of the total consideration of the unit shall be treated as earnest money by the company to ensure the fulfilment of the terms and condition of the agreement and the company has right to forfeit the earnest money along with non-refundable amount in the event of failure of the allottee to perform his obligation.*

31. In respect to **third issue** raised by the complainant as per the agreement 15 % of the total consideration of the unit shall be treated as earnest money by the company and the company has right to forfeit money and balance amount has to be refunded by the promoter as he has failed to fulfil his obligation under section 11, the promoter is liable under section 18(1) proviso to pay interest to the complainant, at the prescribed rate, for every month of delay till the handing over of possession.

**Section 18(1) is reproduced below:**

*"18.(1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,— (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or (b) due to discontinuance of his*



*business as a developer on account of suspension or revocation of the registration under this Act or for any other reason, he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act: Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed*

32. In regard to the **fourth issue** raised by the complainant the charges amounting to super area, service tax, club membership, car parking, EDC/IDC on super area etc are charged according to the buyer agreement as agreed among the parties and the agreement is signed by the complainant.
33. In the rejoinder filed by the complainant, the complainant has reasserted the facts of the complaint
34. Accordingly, the due date of possession was 05.09.2016. The delay compensation payable by the respondent @ Rs. 7.50/- per sq. ft. 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 respondent 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."*

35. 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.*

36. 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*

37. The preliminary objections raised by the respondent regarding jurisdiction of the authority stands rejected. The authority has complete jurisdiction to decide the complaint in regard to 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.

#### **Findings of the authority**

38. Keeping in view the present status of the project and intervening circumstances that the complainant has booked a unit No.0402 tower-8, in Gurugram Greens, Sector 102, Gurugram. The BBA between the parties was executed on 05.04.2013 and as per clause 13 (a) of the BBA, the due date of possession was 05.09.2016 (36+5=41 months). It was a construction linked payment plan. The counsel for the respondent submitted that the construction of the project is in progress and they shall be able to hand over the possession of the unit to the complainant by 31.12.2018. They should also be able to apply for occupation certificate by 31.12.2018 as per application for registration submitted by the respondent with the authority. The project has already been delayed for more than 2 years, as such, the builder is liable





for payment of interest at the prescribed rate i.e. 10.45% to the buyer w.e.f. 05.09.2016 as per the provisions of Section 18 (1) of the Real Estate (Regulation and Development) Act, 2016. If the builder fails to deliver the possession on the committed date i.e. 31.12.2018, in that case, the complainant can seek refund along with prescribed rate of interest w.e.f. ~~05.09.2016 till the committed date of possession~~ *has*

### Decision and directions of the authority

39. 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) The respondent is duty bound to hand over the possession of the said unit by 31<sup>st</sup> December 2018 along with the occupation certificate as committed by the respondent. If the respondent fails to handover the possession by 31.12.2018, the promotor shall refund the money along with interest @10.45%.
- (ii) The respondent is directed to give interest @ 10.45% for every month of delay from the due date of possession i.e. 05.09.2016 till handing over the possession of the unit if the possession is not given on the committed date i.e.31.12.2018 by the respondent then the complainant



*Corrected vide order  
dated 12/04/19*

shall be at liberty to further approach the authority for the refund as provided under the provision of the RERA Act.

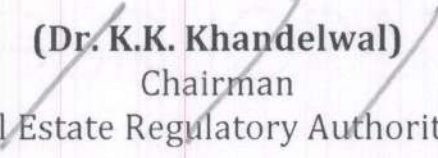
(iii) The respondent is directed to pay interest accrued from 05.09.2016 till the date of handing over the possession on account of delay in handing over of possession which shall be paid to the complainant within 90 days from the date of decision and subsequent interest to be paid by the 10<sup>th</sup> of every succeeding month.

40. The order is pronounced.

41. Case file be consigned to the registry. Copy of this order be endorsed to registration branch.

  
**(Samir Kumar)**  
Member

  
**(Subhash Chander Kush)**  
Member

  
**(Dr. K.K. Khandelwal)**  
Chairman

Haryana Real Estate Regulatory Authority, Gurugram



Dated :16.10.2018

Corrected Judgement uploaded on 27.04.2019

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

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**Respondent**

**CORAM:**

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**APPEARANCE:**

Shri Sukhbir Yadav Advocate for the complainant  
Shri Dheeraj Kapoor Advocate for the respondent

**ORDER**

1. A complaint dated 22.02.2018 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. Sunita Chandra, against the promoter M/s Emaar MGF land Ltd. , on



account of violation of clause 14(a) of the buyers agreement executed on 05.04.2013 in respect of Unit no. 0402, tower- B, Sector 102, Gurugram, described as below for not handing over possession on the due date i.e. by 05.09.2016 which is an obligation under section 11(4)(a) of the Act ibid.

2. The particulars of the complaint case are as under: -

1.	Name and location of the project	Gurgaon greens, Sector - 102, Gurugram
2.	Plot/unit no.	0402, tower -8
3.	Nature of project	Residential
4.	RERA registered/ not registered.	<b>Not registered</b>
5.	DTCP license	75 of 2012
6.	Date of execution of buyer's agreement	05.04.2013
7.	Total consideration	Rs. 1,23,15,942/- (including taxes)
8.	Total amount paid by the complainant till date 23.06.2013	Rs.39,73,016/-
9.	Date of delivery of possession (clause -13 (a) 36 months + 5 months grace period from execution of agreement)	05.09.2016
10.	Delay number of years	2 years
11.	Payment plan	Construction linked payment plan

3. The details provided above have been checked on the basis of record available in the case file which has been provided by the complainant and the respondent. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and appearance. The respondent appeared on



10.04.2018. The case came up for hearing on 10.04.2018, 02.05.2018, 23.05.2013, 19.06.2018, 10.07.2018, 09.08.2018, 16.08.2018, 12.09.2018 and 16.10.2018. The reply filed on behalf of the respondent has been perused.

### Facts of the complaint

4. The complainant submitted that respondent is developer of a residential project known as Gurgaon Greens at Sector 102, Village Dhankot, Tehsil and District Gurgaon.
5. The complainant paid an amount of Rs.7,50,000/- by booking a residential flat admeasuring 1650, apartment no. 0402, tower no. 08, in the said project being 'Gurgaon Greens" at Sector 102, village dhankot, Gurgaon, to be referred to as the said flat. At the time of booking the respondent had assured and confirmed that the possession of the flat would be handed over within two years of booking i.e. on or before 10.09.2014. It is relevant to mention that though the cheque for sum of Rs. 7,50,000/- was paid and even encashed in or about 14.09.2012, however, receipt in respect thereof was issued only on 28.01.2013.
6. That thereafter, vide its letter dated 28.01.2013, the Respondent issued provisional allotment letter in respect of the said flat and demanded further amount of Rs. 3,79,709.25



and Rs.2,85,450.00, which was accordingly paid by the complainant.

7. The complainant submitted that by means of the provisional allotment letter dated 28.01.2013, the respondent required to the complainant to enter into/ execute an apartment buyer agreement with the respondent within a period of 30 days failing which it was informed that the respondent would forfeit the amount of Rs.7,50,000.00. It is submitted that terms of the apartment buyer agreement were totally in variance with the terms disclosed by the respondent at the time of booking and while issuing provisional allotment letter, the respondent was forced to sign the said apartment buyer agreement.
8. That as per clause 14(a) of the apartment buyer agreement, the respondent was to deliver the flat within 36 months form the date of the start of the construction with grace period of 5 months.
9. The complainant kept on making the payments as and when demanded by the respondent till 23.06.2013 and paid a total amount of Rs.39,73,016/-
10. That as on 14.06.2013. the respondent has demanded the fourth instalment which was due as per the agreement at the



start of construction therefore as per the apartment buyer agreement, the possession of the said flat was to be handed over on or before 04.09.2016.

11. After making the said payment, the complainant visited the site and realised that the respondent had played a fraud upon the complainant in as much as by that time the construction had not even started.
12. That since the respondent had not started the construction till 2016, therefore, the complainant sent various emails regarding refund of the amount deposited by it, however, the respondent refused to do it on the pretext that the respondent would forfeit an amount equivalent to 15 percent of the total sale consideration and dealer commission which was objected to be the complainant.
13. That the apartment buyer agreement mentions that the area will be allotted on super area basis, however, it is relevant to mention that in response to an application filed under Right to Information Act the Director General, Town and Country Planning Haryana, Chandigarh has specifically responded vide letter dated 19.02.2013 that a builder cannot charge any amount towards super area and can charge only with respect to actual carpet area being given.



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15. That the apartment buyer agreement further mentions that the respondent is to pay preferential location charges towards sports/Green Facing of Rs. 2,47,500.00 and towards corner of 1,65,000.00. However, the respondent has no right to charge the said amounts.
16. Further the apartment buyer agreement mentions an amount of Rs.3,00,000 towards car parking and amount of Rs. 50,000. towards club membership, however, the respondent has no right to charge the same.
17. Apart from above, the respondent can claim EDC and IDC only on carpet area and not on super area and therefore, the respondent is bound to reduce the cost of the flat accordingly.





**Issues raised by the complainants are as follow:**

- I. Whether the respondent has defaulted in handing over the possession of residential flat admeasuring 1650, Apartment no.0402, tower No. 08 in the said project being 'Gurgaon Greens' at Sector 102. Village Dhankot, Tehsil & District Gurgaon, Haryana?
- II. Whether the respondent has a right to forfeit an amount equivalent to 15 percent of the total sale consideration and dealer commission on cancellation of the agreement; even though the respondent itself is at fault?
- III. Whether the respondent is liable to pay an amount of Rs. 39,73,016.00 along with interest at the rate of 24% per annum being the rate of interest charged by the respondent on delayed payments?
- IV. Whether the respondent is entitled to charge amount towards super area, service tax, club membership, car parking, EDC/IDC on super area etc?



**Relief sought:**

The complainant is seeking the following relief:

- i. The respondent be directed to refund the amount of Rs.39,73,016 alongwith interest at the rate of 24% per annum being the rate of interest charged by the respondent on delayed payments.

**Respondent's reply**

18. The respondent submitted that the complaint filed by the complainant is not maintainable and this hon'ble regulatory authority has no jurisdiction whatsoever to entertain the present complaint
19. The complaints pertaining to compensation and interest for a grievance under section 12, 14, 18 and 19 of the Real Estate (Regulation and Development) Act, 2016 are required to be filed before the adjudicating officer under rule-29 of the Haryana Real Estate (Regulation and Development) Act, 2017 read with Section 31 and Section 71 of the said Act and not before this hon'ble authority under Rule- 28.
20. Further provision to Section 71 which clearly stated that even in a case where complaint is withdrawn form a consumer forum/commission/NCDRC for the purpose of filing an application under the said Act and said Rules, the application,



if any, can only be filed before the adjudicating officer and not before the regulatory authority.

21. The permission to withdraw the complaint under proviso to Section 17 is applicable only for the complaints pending before any consumer forum/Commission/NCDRC established under section 9 of the Consumer Protection Act, 1986 and not before any other forum and at the same time, such permission to withdraw has to be for the purpose of filing it before the adjudicating officer under the said Act. However, in the present case, the complainant has admittedly (admitted in para- 4(3)(q) of the complaint) vide order dated 22.02.2018, withdrawn the present complaint from the permanent Lok Adalat (Public Utility Services), Gurugram and not from any Consumer Forum/ Commission/NCDRC established under section 9 of the consumer protection Act, 1986 and no such permission has been taken by the complainant



22. The statement of objects and reasons as well as the preamble of the said Act clearly state that RERA is enacted for effective consumer protection and to protect the interest of consumers in the real estate sector. RERA is not enacted to protect the interest of investors. As the said Act has not defined the term consumer, therefore the definition of consumer as provided

under the consumer protection Act, 1986 has to be referred for adjudication of the present complaint. The complainant is an investor and not a consumer and nowhere in the present complaint has the complainant pleaded as to how the complainant is a consumer as defined in the consumer protection Act, 1986 qua the respondent.

23. The complainant never had any intention to buy the apartment for his own personal use and kept on avoiding the performance of his contractual obligations of making timely payments
24. It is clear from the above that the complainant is an investor and due to financial crunch, admitted by the complainant in his email, the complainant became a defaulter, having deliberately failed to make the payment of various instalments within the time prescribed which resulted in outstanding dues and delay payment charges.
25. That despite several adversities, the respondent has continued with the construction of the project and is in the process of completing the construction of the project and should be able to apply the occupation certificate for the apartment in question I.e. GGN-08-0401 by 31.12.2018 (as



mentioned at the time of registration of the project with RERA).

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28. It is submitted that the proposed estimated time of handing over the possession of the said apartment was 36 +5 months i.e. 41 months from the date of start of construction and not within two years of booking, as alleged by the complainant. That, without prejudice to the above, it is submitted that the said proposed time of 41 months is applicable only subject to force majeure.



## Determination of Issues

29. In respect to **first issue** raised by the complainant as per clause 14(a) of the buyer's agreement the due date of handing over the possession is 05.09.2016. The respondent has failed to deliver the possession of the said unit within the due date of handing over the possession. The counsel for the respondent submitted that the construction of the project is in progress and they shall be able to hand over the possession of the unit to the complainant by 31.12.2018. They should also be able to apply for occupation certificate by 31.12.2018 as per application for registration submitted by the respondent with the authority. The project has already been delayed for more than 2 years, as such, the builder is liable for payment of interest at the prescribed rate i.e. 10.45%. The clause regarding the possession of the said unit is reproduced below

### **14(a) offer of the possession**

*"..... the promoter proposed to hand over the possession of unit within 36 months. the allottee agrees and understand that promoter shall be entitled for grace period of 5 months for applying and obtaining the occupation certificate in respect of the unit."*



30. In regard to **second issue** raised by the complainant as per clause i of the buyer's agreement as agreed between the parties that 15% of the total consideration of the unit shall be treated as earnest money by the company to ensure the

fulfilment of the terms and condition of the agreement and the company has right to forfeit the earnest money along with non-refundable amount in the event of failure of the allottee to perform his obligation.

*Clause I : Earnest Money of the buyer's agreement as agreed between the parties that 15% of the total consideration of the unit shall be treated as earnest money by the company to ensure the fulfilment of the terms and condition of the agreement and the company has right to forfeit the earnest money along with non-refundable amount in the event of failure of the allottee to perform his obligation.*

31. In respect to **third issue** raised by the complainant as per the agreement 15 % of the total consideration of the unit shall be treated as earnest money by the company and the company has right to forfeit money and balance amount has to be refunded by the promoter as he has failed to fulfil his obligation under section 11, the promoter is liable under section 18(1) proviso to pay interest to the complainant, at the prescribed rate, for every month of delay till the handing over of possession.



**Section 18(1) is reproduced below:**

*“18.(1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,— (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or (b) due to discontinuance of his*

*business as a developer on account of suspension or revocation of the registration under this Act or for any other reason, he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act: Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed*

32. In regard to the **fourth issue** raised by the complainant the charges amounting to super area, service tax, club membership, car parking, EDC/IDC on super area etc are charged according to the buyer agreement as agreed among the parties and the agreement is signed by the complainant.
33. In the rejoinder filed by the complainant, the complainant has reasserted the facts of the complaint
34. Accordingly, the due date of possession was 05.09.2016. The delay compensation payable by the respondent @ Rs. 7.50/- per sq. ft. 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 respondent 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.”*

35. 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.*

36. 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*

37. The preliminary objections raised by the respondent regarding jurisdiction of the authority stands rejected. The authority has complete jurisdiction to decide the complaint in regard to 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.

#### **Findings of the authority**

38. Keeping in view the present status of the project and intervening circumstances that the complainant has booked a unit No.0402 tower-8, in Gurugram Greens, Sector 102, Gurugram. The BBA between the parties was executed on 05.04.2013 and as per clause 13 (a) of the BBA, the due date of possession was 05.09.2016 (36+5=41 months). It was a construction linked payment plan. The counsel for the respondent submitted that the construction of the project is in progress and they shall be able to hand over the possession of the unit to the complainant by 31.12.2018. They should also be able to apply for occupation certificate by 31.12.2018 as per application for registration submitted by the respondent with the authority. The project has already been delayed for more than 2 years, as such, the builder is liable



for payment of interest at the prescribed rate i.e. 10.45% to the buyer w.e.f. 05.09.2016 as per the provisions of Section 18 (1) of the Real Estate (Regulation and Development) Act, 2016. If the builder fails to deliver the possession on the committed date i.e. 31.12.2018, in that case, the complainant can seek refund along with prescribed rate of interest w.e.f. 05.09.2016 till the committed date of possession

### **Decision and directions of the authority**

39. 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) The respondent is duty bound to hand over the possession of the said unit by 31<sup>st</sup> December 2018 along with the occupation certificate as committed by the respondent in the affidavit. If the respondent fails to handover the possession by 31.12.2018, the promotor shall refund the money along with interest @10.45%.
- (ii) The respondent is directed to give interest @ 10.45% for every month of delay from the due date of possession i.e. 05.09.2016 till handing over the possession of the unit if the possession is not given on the committed date i.e.31.12.2018 by the respondent then the complainant



shall be at liberty to further approach the authority for the refund as provided under the provision of the RERA Act.

(iii) The respondent is directed to pay interest accrued from 05.09.2016 till the date of handing over the possession on account of delay in handing over of possession which shall be paid to the complainant within 90 days from the date of decision and subsequent interest to be paid by the 10<sup>th</sup> of every succeeding month.

40. The order is pronounced.

41. Case file be consigned to the registry. Copy of this order be endorsed to registration branch.

**(Samir Kumar)**  
Member

**(Subhash Chander Kush)**  
Member

HARERA  
GURUGRAM



Dated :16.10.2018