

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

Complaint no. : 111 of 2018
First date of hearing : 01.05.2018
Date of decision : 16.01.2019

Satish Kumar Chawla
R/o H. No 60, Cedar Drive, Malibu Town,
Sohna Road, Gurugram, Haryana.

...Complainant

Versus

M/s Emaar MGF Land Limited
Registered office: 306-308, Square One, C-
2, District Center, Saket, New Delhi-110017
Marketing Office : Emaar MGF Business
Park, Mehrauli-Gurgaon Road, Sikandarpur
chowk, Sector 28, Gurugram-122002

...Respondent

CORAM:

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

Chairman
Member
Member

APPEARANCE:

Shri Sukhbir Yadav
Shri Ketan Luthra

Advocate for the complainant
Advocate for the respondent

ORDER

1. A complaint dated 28.03.2018 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 Mr. Satish Kumar



Chawla, against the promoter M/s Emaar MGF Land Limited, on account of violation of the clause 16(a) of office space buyer's agreement executed on 27.12.2010 in respect of office space described as below for not handing over possession by the due date which is an obligation of the promoter under section 11(4)(a) of the Act *ibid*. An amendment to the complaint was filed by the complainant wherein they have stated that they are not appearing before the authority for compensation but for fulfilment of the obligations by the promoter as per provisions of the said Act and reserve their right to seek compensation from the promoter for which they shall make separate application to the adjudicating officer, if required. Now the matter is before the authority not for compensation but for fulfilment of obligation by the promoter as per section 18(1) of the Act *ibid* due to failure to give possession on the due date as per the said agreement.

2. Since, the office space buyer's agreement has been executed on 27.12.2010 i.e. prior to the commencement of the Act *ibid*, 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 statutory obligation on the part of the promoter/respondent in



terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016.

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

- **RERA Registered/Not Registered** : Not Registered
- **DTCP license no.:** 10 of 2009 dated 21.05.2009

1.	Name and location of the project	"Emerald Plaza in Emerald Hills" at Sector 65, Gurugram
2.	Unit no.	EP0-05-012
1.	Unit measuring as per the said agreement	810.69 sq. ft.
2.	Project area	3.963 Acres
3.	DTCP license no	10 of 2009 dated 21.05.2009
4.	Registered/Not Registered	Not Registered
5.	Date of booking	18.06.2010
6.	Date of office space buyer agreement	27.12.2010
7.	Total consideration as per statement of account dated 27.02.2018	Rs. 46,40,185/-
8.	Total amount paid by the complainant as per statement of account dated 27.02.2018	Rs. 52,55,480/-
9.	Date of delivery of possession as per clause 16 of agreement Within 30 months+ 120 days grace period from execution of agreement	27.10.2013
10.	Delay of number of months/ years upto 27.01.2018	4 years 3 months



11.	Penalty clause as per retail space buyer agreement	Clause 18(a) of the said agreement i.e. interest calculated at 9% p.a. (simple interest) on the amount(s) paid by the allottee for such period of delay.
12.	Occupation certificate	08.01.2018
13.	Offer of possession	27.01.2018

4. The details provided above have been checked on the basis of record available in the case file which have been provided by the complainants and the respondent. As per clause 16(a) of the office space buyer's agreement dated 27.12.2010, the due date of handing over possession was 27.10.2013 and the possession was offered to the complainants on 27.01.2018. The respondent has refused to give interest on delayed possession @10.70% per annum as per clause 18(a) of the buyer's agreement executed by the parties. Therefore, the promoter has not fulfilled their committed liability.
5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. Accordingly, the respondent appeared on 01.05.2018. The case came up for hearing on 01.05.2018, 05.06.2018, 12.07.2018, 25.07.2018, 09.08.2018, 25.09.2018, 25.10.2018 and 13.11.2018, 16.11.2018, 07.12.2018 and 16.01.2019. The reply

has been filed on behalf of the respondent on 15.05.2018 which has been perused.

FACTS OF THE CASE:

6. The complainant submitted that the complainant visited the site of project named "Emerald Plaza", Sector 65, Gurugram. The location of the project was excellent, therefore they consulted the local representative of the developer. The local representative of developer assured the complainant with special characteristics of project and other world class amenities of the project
7. The complainant submitted that the complainant relying on the promises and undertakings given by the respondent in the brochures and catalogues, the complainant has booked a shop bearing no EP0-05-012 admeasuring 810.69 sq. ft. in 'Emerald Plaza' at sector 65, Gurugram developed by the respondent.
8. The complainant submitted that the complainant continued to pay the instalments as per the payment schedule of the retail space buyer agreement and had already paid more than 86% amount i.e. Rs. 46,61,908 till 14.11.2013 along with interest and other allied charges, but when the complainant observed that there is no progress in construction of subject office space for a long time, he raised his grievance to the complainant. The

complainant was always ready and willing to pay the remaining instalments provided that there is progress in the construction of office space. Thereafter also complainant paid all further demands raised by the respondent.

9. The complainant submitted that since April 2014 the complainant is regularly visiting the office of the respondent as well as the construction site and making efforts to get the possession of the allotted office spaces but all in vain, in spite of several visits by the complainant. The complainant never was able to understand the actual status of construction.
10. The complainant submitted that the complainant paying more than 95% of the actual amount and also willing to pay the remaining amount, on date 27.01.2018 the respondent party offered possession of 20% less area to the complainant. The agreed area was 810.69 sq. ft. and possession offered area is 651.52 sq. ft.
11. The complainant submitted that the complainant purchased the said space for his office use, the lesser space is of no use to him. The complainant requested the respondent to increase the offered area and also the pay the penal interest on delay possession but the respondent refused despite receiving a legal notice through the complainants counsel. This inordinate delay



of office space has caused the complainant a huge financial loss as he expected some financial support by saving rent.

12. The complainant submitted that the respondent was to deliver possession of fully constructed office along with the facilities shown in brochure at the time of sale i.e. by July 2013, hence there is a deficiency of service on the part of respondent party.

ISSUE RAISED BY THE COMPLAINANT

13. The following issue has been raised by the complainant:
- i. Whether the respondent has erred in its statutory obligations by failing to deliver the office space as per the office space buyer's agreement in?
 - ii. Whether the respondent has any reasonable justification for offering the possession 20% less than the agreed on office space buyer's agreement?
 - iii. Whether the respondent should be directed to cancel the office space buyer's agreement and refund the total amount paid by the complainant along with the interest calculated @24% per annum?

RELIEF SOUGHT BY THE COMPLAINANT

14. The following relief has been prayed for:

- a. Pass an appropriate award directing the respondent party to give the possession of agreed area i.e. 810.69 sq. ft.
- b. Pass an appropriate award directing the respondent to refund the total amount of Rs. 52,55,480/- paid by the complainant to the respondent party as instalments towards purchase of shop along with interest @24% per annum compounded from the date of deposit.

REPLY BY THE RESPONDENT

15. The respondent submitted that the present complaint is not maintainable in law or on facts. The provisions of the Real Estate (Regulation and Development) Act, 2016 are not applicable to the project in question. The application for issuance of occupation certificate in respect of the unit in question was made on 26.05.2017, i.e. well before the notification of the Haryana Real Estate (Regulation and Development) Rules, 2017. The occupation certificate has been thereafter issued on 08.01.2018. Thus, the project in question is not an "ongoing project" under rule 2(1)(o) of the Rules *ibid*. The project has not been registered under the provisions of the Act *ibid*. This hon'ble authority does not have the jurisdiction to entertain and decide the present complaint. The present complaint is liable to be dismissed on this ground alone.



16. The respondent submitted that the complainant has filed the present complaint seeking interest, damages and compensation for alleged delay in delivering the possession of the said unit booked by the complainants. The respondent submitted that complaint pertaining to compensation, damages and interest are to be decided by the adjudicating officer under section 71 of the Real Estate (Regulation and Development) Act, 2016 read with rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 and not by this hon'ble authority. So, the present complaint is liable to be dismissed.
17. The respondent submitted that the complainants have 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 office space buyer's agreement dated 27.10.2010.
18. The respondent submitted that the complainants have agreed to purchase commercial unit number EPS-FF-049, Emerald Plaza, Sector 65, Gurugram, Haryana from the respondent. Office space buyer's agreement was executed between the parties on 27.10.2010.

19. The respondent submitted that the tentative super area of the said office space was 8.10.69 sq. ft. However, after completion of construction of the complex, the final super area of the said office space works out to 651.52 sq. ft. and the same was duly conveyed to the complainant vide letter dated 27.01.2018 along with the revised calculation.

20. The respondent submitted that the complainants have also completely misinterpreted the terms and conditions of the said agreement. So far as alleged non-delivery of physical possession is concerned, clause 16(a)(i) of the aforesaid contract clearly states that possession of the unit in question would be delivered by the respondent to the complainants with a period of 30 months from the date of execution of the aforesaid contract subject to complainants having strictly complied with all the terms and conditions of the contract and not being in default under any provisions of the contract. It was further provided that the time period indicated above would be confirmed to, if all the amounts due and payable by the complainants in terms of the agreement were duly paid in time by them.

21. The respondent submitted that it was provided in the aforesaid contract that the respondent would be entitled to a grace period of 120 days over and above the period mentioned above, for





applying and obtaining necessary approvals in respect of the commercial complex. It was mentioned in clause 16(b) of the aforesaid contract that that in case the completion of the commercial complex was delayed due to sanction of any revised building/zoning plans or due to any other reason beyond the control of the respondent, in that event the respondent would be entitled to reasonable extension of time for handing over possession of the commercial unit. It is respectfully submitted that once an application for grant of any permission/sanction or for that matter building plans/zoning plans etc. are submitted for approval in office of any statutory authority, the respondent ceases to have any control over the same.

22. The respondent submitted that clause 18 of the office space buyer's agreement further provides that compensation for any delay in delivery of possession shall only be given to such allottees who are not in default of the agreement and who have not defaulted in payment as per the payment plan of the said agreement.

23. The respondent submitted that from the facts and circumstances mentioned above, it is comprehensively established that the time period mentioned hereinabove was consumed in obtaining of requisite permission/sanctions from

the concerned statutory authorities. It is respectfully submitted that the project in question could not have been constructed, developed and implemented by the respondent without obtaining the sanctions referred above. Thus, the respondent has been prevented by circumstances beyond its power and control from undertaking the implementation of the project during the time period indicated above and therefore the same is not to be taken into reckoning while computing the said period.

24. The respondent submitted that there is no default or lapse on the part of the respondent. It is the complainant who is refraining from taking possession of the unit by raising false and frivolous excuses.

Written arguments filed by the complainants:

25. During the pendency of complaint, the complainant issued a written argument which has been taken on record in their writing argument than have reiterated.


26. The complainant submitted that license to licensee was granted on 21.05.2009 vide license no. 10 of 2009 and it was valid upto 20.05.2013. the respondent deliberately delay in apply of approval of sanction plan and other approvals. Pollution control board permission was applied on 02.02,2012 and was granted



on 21.05.2012 and construction was commenced on 24.11.2011 and 3rd basement roof was casted on 31st July, 2012. The act of respondent clears the possession that respondent is a lawless person and violated rules/ conditions of license and other applicable acts.

27. The complainant further submitted that on date 31.07.2012, respondent called a demand of Rs. 3, 74,311/- as per payment plan on stage of "completion of 3rd basement roof slab". The complainant made the payment on date 26.06.2012. it is pertinent to mention here that said building do not have 3rd floor basement parking as it has only 2 floor basement parking.

28. The complainant further submitted that it is pertinent to mention here that the respondent called a demand on 10.05.2017 as per construction link plan i.e. "on completion of exterior façade" and another demand raised on date 31.07.2017 on "installation of services". It is clear from the above mention facts that OC application was applied before the completion of the construction and required NOC's were not present with OC application.

 29. The complainant further submitted that as per section 12 of the RERA Act, 2016, the promoter is liable to returned entire investment along with interest to the allottees of an apartment,



building or project for giving any incorrect, false statement etc.
the relevant portion of the section 12 is reproduced below,

“ Where any person makes an advance or a deposit on the basis of the information contained in the notice advertisement or prospectus, or on the basis of any model apartment, plot or building, as the case may be, and sustains any loss or damage by reason of any incorrect, false statement included therein, he shall be compensated by the promoter in the manner as provided under this Act:

Provided that if the person affected by such incorrect, false statement contained in the notice, advertisement or prospectus, or the model apartment, plot or building, as the case may be, intends to withdraw from the proposed project, he shall be returned his entire investment along with interest at such rate as may be prescribed and the compensation in the manner provided under this Act.”

In addition to the above mentioned provision, the respondent is also bound by the Haryana Real Estate Regulation Rules, 2017 which lists the interest to be computed while calculating compensation to be given by a promoter to an allottee in case of a default. Section 15 of the said rules is reproduced below,

“Interest payable by promoter and Allottee

15. *An allottee shall be compensated by the promoter for loss or damage sustained due to incorrect or false statement in the notice, advertisement, prospectus or brochure in the terms of section 12. In case, allottee wishes to withdraw from the project*



due to discontinuance of promoter's business as developers on account of suspension or revocation of the registration or any other reason(s) in terms of clause (b) sub-section (I) of Section 18 or the promoter fails to give possession of the apartment/plot in accordance with terms and conditions of agreement for sale in terms of sub-section (4) of section 19. The promoter shall return the entire amount with interest as well as the compensation payable. The rate of interest payable by the promoter to the allottee or by the allottee to the promoter, as the case may be, shall be the State Bank of India highest marginal cost of lending rate plus two percent. In case, the allottee fails to pay to the promoter as per agreed terms and conditions, then in such case, the allottee shall also be liable to pay in terms of sub-section (7) of section 19:

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public."

DETERMINATION OF ISSUES:

After considering the facts submitted by the complainant, reply by the respondent and perusal of record on file, the issue wise findings of the authority is as under:

- i. With respect to the **first issue**, that the authority came across that the project in question is ready for possession as the respondent had received the occupation certificate vide memo no ZP-560-A/SD(BS)/2017/528 dated 08.01.2018 but the respondent has failed to deliver the possession of the booked unit on due date and as per clause 16(a)(i) of the office space buyer's agreement, the possession of the flat was to be handed over within 30 months from the date execution of office space



buyer's agreement with a grace period of 120 days has been given to the respondent due to exigencies beyond the control of the respondent. In the present case, the due date of possession was 27.10.2013 and the possession has been delayed by four years three months. The clause regarding the possession of the said unit is reproduced below:

"16(a) Time of handing over the possession

- (i.) *That the possession of the office spaces in the commercial complex shall be delivered and handed over to the allottee(s) within 30 months of the execution hereof, subject however to the allottee(s) having strictly complied with all the terms and conditions of this agreement and not being in default under any provisions of this agreement and all amounts due and payable by the allottee(s) under this agreement having been paid in time to the company. The company shall give notice to the allottee(s), offering in writing, to the allottee to take possession of the office spaces for his occupation and use (notice of possession).*
- (ii.) *The allottee(s) agrees and understands that the company shall be entitled to a grace period of one hundred and twenty (120) days over and above the period more particularly specified here-in-above in sub-clause (a)(i) of clause 16, for applying and obtaining necessary approvals in respect of the commercial complex."*

As the possession of the office was to be delivered by 27.10.2013, the authority is of the view that the promoter has failed to fulfil his obligation under section 11(4)(a) of the Real Estate (Regulation and Development) Act, 2016. As the



promoter has failed to fulfil his obligation, the promoter is liable under section 18(1) proviso of the Act ibid read with rule 15 of the rules ibid, to pay interest to the complainants, at the prescribed rate, for every month of delay till the handing over of possession.

- ii. With respect to the **second issue**, that the authority came across that as the construction of the project is fully completed evident by the grant of occupation certificate vide memo no ZP-560-A/SD(BS)/2017/528 dated 08.01.2018, the respondent is directed to offer the possession of the booked space to the complainant along with prescribed interest of 10.45% per annum determined according to rule 15 of Haryana Real Estate(Regulations and Development) rules, 2017 for the period of delay form the assured date of delivery of possession i.e. 27.10.2013 till the date of offer of possession. The increase in booked area of the allotted office by the respondent has a reasonable justification by the virtue of clause 6(d) of the office space buyer's agreement. The clause 6(d) of the said agreement is reproduced below:

"in case of any alteration/modification resulting in any increase or decrease in super area of the retail space in the sole opinion of the company at any time prior to and upon the grant of occupation certificate, the company shall intimate the allottee in writing the such increase or decrease in super area thereof"

- iii. With respect to the **third issue**, that the authority is of the view that the offer of possession letter has been given to the complainant on 27.01.2018 and also received the occupation certificate on 08.01.2018. Thus, the respondent cannot refund the amount and cancel the booking as it doesn't look appropriate in the eyes of law because the respondent is in status of about to deliver the project.

FINDINGS OF THE AUTHORITY:

30. **Jurisdiction of the authority-** The project "Emerald Plaza" is located in Sector 65, Gurugram, thus 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.

30. The preliminary objections raised by the respondent regarding jurisdiction of the authority stands rejected. 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.

31. The following issues were raised during arguments:
- i. Payment of interest for every month of delay in handing over possession.
 - The authority decides that promoter shall be liable to pay interest for every month of delay till handing over the possession at the prescribed rate.
 - ii. Holding charges.
 - For the time being, till view is taken by the authority regarding holding charges, these shall not be applicable for the period the matter remained sub-judice.

DIRECTIONS OF THE AUTHORITY:

31. After taking into consideration all the material facts as adduced and produced by both the parties, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issues the following directions to the respondent and the complainants in the interest of justice and fair play:

- i. The respondent is directed to pay the interest at the prescribed rate i.e. 10.70% per annum for every month of delay on the amount paid by the complainant from due date of possession till the actual offer of possession.
 - ii. The respondent is directed to pay interest accrued from 27.12.2010 to 27.01.2018 on account of delay in handing over of possession to the complainant within 90 days from the date of issuance of this order.
 - iii. Thereafter, the monthly payment of interest till the offer of possession shall be paid on or before 10th of each subsequent month.
 - iv. The respondent is directed to desist from charging holding charges for the period the matter remained sub-judice.
32. The order is pronounced.

33. Case file be consigned to the registry


(Samir Kumar)
Member


(Subhash Chander Kush)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 16.01.2019

Judgement uploaded on 08.07.2019