

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

Complaint no. : 1084 of 2018
First date of hearing : 02.01.2019
Date of decision : 29.05.2019

Mr. Ravish Kapoor
Flat no. 102, The Magnolias, Golf Course Road,
Sector-42, Gurugram-122009

Complainant

Versus

Emaar MGF Land Limited.
Address: Emaar Business Park,
MG Road, Sikanderpur, Sector 28,
Gurugram-122001, Haryana.

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Ganesh Kamath Advocate for the complainant
Shri Ishaan dang Advocate for the respondent
Shri Ketan Luthra Authorized representative on
behalf of respondent company

ORDER

1. A complaint dated 16.10.2018 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. Ravish

Kapoor, against the promoter M/s Emaar MGF Land Limited, on account of violation of the clause 16(a) of retail space buyer's agreement executed on 29.12.2010 in respect of unit described as below for not handing over possession on the due date i.e. 29.10.2013, which is an obligation of the promoter under section 11(4)(a) of the Act *ibid*.

2. Since, the retail space buyer's agreement has been executed on 29.12.2010 i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, therefore, the penal proceedings cannot initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non-compliance of statutory obligation on 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 case are as under: -

DTCP licence no. 10 dated 21.05.2009

Nature of project : commercial complex

1.	Name and location of the project	"Emerald Plaza" in Emerald Hills, Sector 65, Gurugram, Haryana.
2.	RERA registered/ not registered	Not registered
3.	Occupation granted on	08.01.2018

4.	Retail space/unit no.	EPS-FF-081, first floor
5.	Retail space measuring	758.58 sq. ft. but are stands revised to 720.83 sq. ft. as per letter of offer of possession
6.	Retail space buyer's agreement executed on	29.12.2010
7.	Payment plan	Construction linked payment plan
8.	Total sale consideration	Rs.54,72,291/- as per statement of account
9.	Total amount paid by the complainants till date	Rs.47,39,452/- as per statement of account
10.	Date of delivery of possession as per clause 16(a). (30 months + 120 days grace period from the date of execution of this agreement)	29.10.2013
11.	Letter of offer of possession sent to the complainant on	25.01.2018
12.	Delay in handing over possession from due date till offer of possession	4 years 2 months 28 days
13.	Penalty clause as per retail space buyer's agreement	Clause 18.a of the agreement i.e. interest calculated at 9% p.a. (simple interest) on the amount(s) paid by the allottee for such period of delay.

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 retail space buyer's agreement dated 29.12.2010, the due date of handing over possession was 29.10.2013 and the possession was offered to the complainant on 25.01.2018. The

respondent has failed to give interest for the period possession of the unit was delayed in terms of clause 18(a) of the buyer's agreement executed by the parties. Therefore, the promoter has not fulfilled its committed liability as on date.

5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. The respondent through his counsel appeared on 02.01.2019. The case came up for hearing on 02.01.2019, 05.02.2019 and 29.05.2019. The reply filed on behalf of the respondent has been perused.

Brief facts of the complaint

6. The complainant submitted that Director, Town and Country Planning, Government of Haryana has granted license bearing no.-10 dated 21.05.2009 to develop the project. The "Emerald Plaza" was to be built with the state of art office spaces and retail shops with 3 levels of basement parking space. However, it is must to mention here that at present when the possession of the units are being offered by the respondent it has come to the light that instead of 3 level basement parking only two levels have been constructed and this fact was never ever informed to the complainant.

7. The complainant submitted that he purchased a shop / office / unit no. EPO-FF-081 admeasuring a super area of 758.58 sq. ft. situated on the first floor @ Rs. 54,72,291/- on the assurance that construction shall be complete in time and possession would be handed over in time.
8. The complainant submitted that after the booking of the above described unit a retail space buyer agreement dated 29.12.2010 was duly signed and executed between both the parties i.e. respondent herein M/s Emaar MGF Land Ltd. on one hand and the complainant on the other hand with the terms and conditions as laid down by the respondent. It is must to mention here that as per the retail space buyer's agreement, the possession of the unit in question was to be handed over within 30 months from the date of the said agreement with a grace period of 120 days as provided under clause 16(a) of the agreement.
9. The complainant submitted that he made regular payments as demanded by the promoter time and again and that has till date paid a total amount of Rs. 47,39,452/- to the respondent.

10. The complainant submitted that he after an exorbitant delay of almost 5 years received letter for offer of possession on 25.01.2018 with respect to the unit in question. However though the respondent offered the possession of the unit in question after a delay of almost 5 years, no interest for the delayed period was offered by the respondent to the complainant and aggrieved of which the complainant also visited the office of the respondent with the request/demand to pay interest for the delayed possession but the same were in vain.
11. The complainant submitted that at the time of issuance of letter of offer of possession, the respondent for the first time informed the complainant that the area of the unit in question was decreased from 758.58 sq. ft. to 720.83 sq. ft. without the consent of the complainant.
12. The complainant submitted that on receiving the demand letter and letter for possession, the complainant was aghast as there was no mention of delayed possession interest, compensation for delayed possession etc but demand and only demand for more money.

13. The complainant submitted that he visited the office of promoter and tried their level best to meet the senior officials but CRM (customer relation managers) did not allow to meet. However repeated demands were raised by the complainant for getting interest on the delayed possession as per law which all demands were in vain as the respondent completely shut his doors to the grievances of the complainant, hence this complaint to this hon'ble Haryana Real Estate Regulatory Authority at Gurugram.

14. **The issues raised by the complainant is as follow:**

1. Whether the respondent should have got its project "Emerald Plaza" of "Emerald Hills", Sector 65 registered with the authority up to 31.07.2017?
2. Whether incomplete application as per sub code 4.10 of Haryana Building Code 2017 would protect the promoter company and exempt it from the definition of "on going project" as referred under rule 2(o) of the Rules ibid?
3. Whether respondent has caused exorbitant delay in handing over possession of unit to the complainant and for which the respondent is liable to pay interest to the

complainant on amount received by the respondent from the complainant?

4. Whether open parking space and parking in common basements be sold to the allottees as separate unit by the promoter “M/s Emaar MGF Land Ltd.”, which the respondent has sold as separate units in certain cases and if not than the amount so collected be returned back to the allottees from whom charged?
5. Whether the respondent is liable to refund the GST amount collected from the complainant as the said tax became payable only due to delay in handing over the possession by the respondent?

15. Relief sought

The complainant is seeking the following reliefs:

- i. The respondent/ promoter be ordered to make refund of the excess amount collected on account of any area in excess of carpet area as the respondent has sold the super area to the complainant which also includes the common areas and sale of common area is in total contradiction of

the Act, for the reason that as per the Act the monetary consideration can only be for the carpet area.

- ii. The respondent/promoter be ordered to make payment of interest accrued on amount collected by the respondent from the complainant on account of delayed offer of possession and which interest should be @24% p.a. from the date as and when the amount was received by the respondent from the complainant.
- iii. Direct the respondent to refund the amount of GST service tax etc collected from the complainant, which had to be paid by the complainant only for the reason of delayed offer of possession, as, if the offer of possession was given on time, then no question of GST service tax would have arise as on such date GST service tax was not in existence.
- iv. The respondent should be directed to refund monies collected from the sale of any common area as car parking including basement car park, which is not garage as sold by the respondent in the present case.

- v. Orders may be passed against the respondent in terms of Section 59 of the RERA Act, 2016 for the failure on part of the respondent to register itself with this hon'ble authority under the RERA Act, 2016

Respondent's reply

14. The respondent submitted that the present complaint is not maintainable in law or on facts. It is submitted that this hon'ble regulatory authority has no jurisdiction whatsoever to entertain the present complaint. The respondent has filed a separate application for rejection of the complaint on the ground of jurisdiction and this reply is without prejudice to the rights and contentions of the respondent contained in the said application.
15. The respondent submitted that the present complaint raises several such issues which cannot be decided by way of the present complaint in a summary proceedings and requires extensive evidence to be led by both the parties, examination and cross-examination of witnesses for proper adjudication. Therefore, the disputes raised in the present complaint are beyond the purview of this hon'ble authority and can only be

adjudicated by a civil court. The present complaint therefore deserves to be dismissed on this short ground alone.

16. The respondent submitted that the present complaint is even otherwise liable to be dismissed as firstly, the complainant has no locus standi to file the present complaint. Secondly, it is submitted that as per applicable Act and the Rules, a complaint may be filed by a person only if the respondent has committed any act in violation of The Real Estate (Regulation and Development) Act, 2016 and/or the Haryana Real Estate (Regulation and Development) Rules, 2017. It is submitted that the complainant herein has failed to bring on record any document, evidence etc. which may even allude let alone prove that the respondent has violated the provisions of The Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as "the Act") or the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter referred to as "HARERA Rules"). The same goes to the root of the matter and as such the complaint is liable to be dismissed on this ground alone. Thirdly, that the project in question namely Emerald Plaza at Emerald Hills, Sector-65, Gurugram,

Haryana (hereinafter referred to as the “said Project”) of the respondent is neither covered under the Haryana Real Estate (Regulation and Development) Rules, 2017 nor is the said project of the respondent registered with this hon’ble regulatory authority. As per the definition of “ongoing projects” under rule 2(o) of the said Rules, any project for which an application for occupation certificate, part thereof or completion certificate or part-completion certificate is made to the competent authority on or before the publication of the said rules is outside the purview of this hon’ble regulatory authority

17. The respondent submitted that it had applied for grant of the occupation certificate for the said project on 26.05.2017, which is prior to the date of publication of the Rules i.e. 28.07.2017 and hence the said project is not an ongoing project as per rule 2(o)(i) and the present case is squarely covered under the first exception provided under rule 2(o) and therefore this hon’ble regulatory authority has no jurisdiction, whatsoever, to entertain the present complaint and the present complaint is liable to be rejected. It is

pertinent to mention here that even the actual occupation certificate has also been granted on 08.01.2018. Thereafter the respondent had applied for part completion certificate for the project where the services are complete and hence the project does not fall in the definition of ongoing projects. As such the project does not come under the purview of RERA and same has not been registered under the provision of the Act ibid. The possession of the concerned unit has already been offered by the respondent to the complainant vide letter of possession dated 25.01.2018. Thus, no cause of action can be said to have arisen to the complainant in any event to assert the reliefs claimed. Thus, no relief, as sought, can be granted to the complainant.

Determination of issues:

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

18. With respect to the **first and second issues** raised by the complainant, the same has already been decided by the

hon'ble authority in ***Simmi Sikka V/s M/s EMAAR MGF Land Ltd. (7 of 2018), on 21.08.2018.***

19. With respect to the **third issue** raised by the complainant, as per clause 16(a) of retail space buyer's agreement, the possession of the said unit was to be handed over within 30 months plus grace period of 120 days from the execution of the said agreement. Therefore, due date of possession shall be computed from 29.12.2010. 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 retail 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 retail 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."

20. Accordingly, the due date of possession was 29.10.2013 and the possession has been delayed by 4 years 2 months and 28

days from due date of possession till the offer of possession i.e. 25.01.2018. As the promoter has failed to fulfil its obligation under section 11 of the Act ibid, the promoter is liable to pay interest at the prescribed rate for every month of delay, till offer of possession on account of failure of the promoter to give possession in accordance with the terms of the agreement for sale as per section 18(1) proviso of the Act ibid read with rule 15 of the Rules ibid is hereby allowed.

21. With respect to the **fourth issue** raised by the complainant, the authority is of the opinion that open parking spaces cannot be sold/charged by the promoter. As far as issue regarding parking in common basement is concerned, the matter is to be dealt as per the provisions of the retail space buyer's agreement where the said agreement have been entered into before coming into force of the Real Estate (Regulation and Development) Act, 2016. Clause 1.3(a)(i) the following provisions have been made regarding parking space:

“The Retail Space Allottee(s) agrees and understands that the company shall grant an exclusive right to use one car park space for Retail Space Allottee(s) for which the cost of Rs.4,00,000/- (Rupees four lakhs only) is included in the Sales Consideration, in the multi-level basement parking space of the building. The Allottee(s) agrees and understands that the car par space assigned/transferred to the Allottee(s) shall be understood to be together with the Retail Space and the same shall not have any

independent legal entity, detached or independent, from the said Retail Space.”

The cost of parking of Rs.4,00,000/- has already been included in the sale consideration, accordingly, the promoter has no right to charge it separately from the buyer. If it has been separately charged then the amount be returned by the promoter to the allottee.

22. With respect to the **fifth issue** raised by the complainant, the complainant shall be at liberty to approach any other suitable forum regarding levy of GST.

Findings of the authority

23. 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 complainants at a later stage.
24. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Department of Town and Country Planning, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District. In the present case, the

project in question is situated within the planning area of Gurugram district, therefore this authority has complete territorial jurisdiction.

25. The complainant made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter under section 11 of the Act *ibid*. The complainant requested that necessary directions be issued to the promoter to comply with the provisions and fulfil obligation under section 37 of the Act *ibid*.
26. Brief facts of the case are that as per clause 16 (a) of the retail space buyer's agreement dated 29.12.2010 for unit no. EPS-FF-081, in project "Emerald Plaza" Sector-65, Gurugram, possession was to be handed over to the complainant within a period of 30 months from the date of execution of agreement + 120 days grace period which comes out to be 29.10.2013.
27. The respondent has received the occupation certificate on 8.1.2018 and the possession was offered to the complainant on 25.1.2018. Complainant has already paid Rs.47,39,452/- to the respondent against a total sale consideration of

Rs.54,72,290/-. As such, complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.65% per annum w.e.f **29.10.2013 till 25.1.2018**, as per the provisions of section 18 (1) of the Real Estate (Regulation and Development) Act, 2016.

Decision and directions of the authority

28. 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 both the parties in the interest of justice and fair play:

- (i) The respondent is directed to pay the interest at the prescribed rate i.e. 10.65% for every month of delay from the due date of possession i.e. 29.10.2013 till the letter of offer of possession date 25.01.2018. The interest so accrued shall be paid within 90 days from date of this order.

- (ii) Complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- (iii) The promoter shall not charge anything from the complainant which is not part of the BBA.

29. As the project is registerable and has not been registered by the promoter, the authority has decided to take suo-moto cognizance for not getting the project registered and for that separate proceeding will be initiated against the respondent under the Act *ibid*. A copy of this order be endorsed to registration branch for further action in the matter.

30. The order is pronounced.

31. Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 29.05.2019

Judgement uploaded on 11.06.2019