

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

Complaint no. : 1082 of 2018
First date of hearing : 02.01.2019
Date of decision : 29.05.2019

Mr. Rakesh Kapoor
R/o: Flat no. 1A, 8th Avenue,
Bandh Road, Village Jonapur,
New Delhi-110047.

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 and Shri Sanjeev Sharma Advocate for the complainant

Shri Ketan Luthra Authorised representative on behalf of respondent company

Shri Ishaan dang Advocate for the respondent

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. Rakesh 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 28.12.2010 in respect of unit described as below in the project "Emerald Plaza" 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*.

2. Since, the retail space buyer's agreement has been executed on 28.12.2010 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 case are as under:

1.	Name and location of the project	"Emerald Plaza" in Emerald Hills, Sector 65, Gurugram, Haryana.
2.	Nature of the project	Commercial complex
3.	Project area	3.963 acres
4.	DTCP license no.	10 of 2009 dated 21.05.2009
5.	RERA registered/ not registered	Not registered
6.	Occupation granted on	08.01.2018 [annexure R3, page 49 of reply]
7.	Retail space/unit no.	EPS-FF-015 [page 26 of complaint]

8.	Unit measuring	649.29 sq. ft.
9.	Retail space buyer's agreement executed on	28.12.2010 [annexure 1, page 23 of complaint]
10.	Total cost of the property as per statement of account dated 01.10.2018 annexed with the reply.	Rs.49,36,926/- [annexure R9, page 117 of reply]
11.	Total amount paid by the complainant till date as per statement of account dated 01.10.2018 annexed with the reply.	Rs.41,17,728/- [page 118 of reply]
12.	Due date of delivery of possession as per clause 16(a) of the said agreement (30 months + 120 days grace period from the date of execution of this agreement i.e. 28.12.2010)	28.10.2013 [page 30 of complaint]
13.	Letter of offer of possession to the complainant	27.01.2018 [annexure R5, page 54 of reply]
14.	Delay in handing over possession from due date of handing over of possession till offer of possession.	4 years 3 months 30 day
15.	Penalty clause as per the said 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 complainant and the respondent. As per clause 16(a) of the retail space buyer's agreement dated 28.12.2010, the due date of handing over possession was 28.10.2013 and the

possession was offered to the complainant on 27.01.2018. The respondent has not paid any interest for the period he delayed in handing over the possession. 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 and 05.02.2019 and 29.05.2019. The reply filed on behalf of the respondent has been perused.

Brief facts of the complaint

6. Briefly stated, the facts of the complaint are that Emaar MGF Land Ltd. is a company incorporated under the Company Act mainly based in middle east and UAE entered into the emerging and booming real estate market in India during the first decade of 21st century. All the formalities laid down by the central government were fulfilled before commencing the business. Company purchased hundreds of acres of land in Gurugram and other major cities of India.
7. The complainant submitted that the respondent company conceived, planned and was in the process of constructing and developing a residential plotted colony "Emerald Hills"

(herein after called project) to be developed on a piece of land measuring 102.471 acres in Sector 65, Urban Estate, Gurugram. The Director, Town and Country Planning, Government of Haryana has granted license bearing no. 10 dated 21.05.2009 to develop the project.

8. The complainant submitted that the “Emerald Plaza” was to be built with the state of art office spaces and retail shops with 3 levels of basement parking space. The complainant submitted that at present when the possession of unit is being offered by the respondent it has come to light that instead of 3 level basement parking only two levels have been constructed and which fact was never ever informed to the complainant.
9. The complainant submitted that he purchased unit no. EPS-FF-015 measuring super area of 649.29 sq. ft. situated at first floor at total sale consideration of Rs.49,36,926/- on the assurance that construction shall be completed in time and possession would be handed over in time and paid booking amount of Rs.3,89,574/- on 02.06.2010.
10. The complainant submitted that the retail space buyer’s agreement dated 28.12.2010 was signed between both the parties on the terms and conditions as laid down by the

company's per the said 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 4 months as provided under clause 16(a) of the said agreement.

11. The complainant submitted that as per the said agreement, the possession of the unit in question was to be handed over by June 2013, however at that time the construction of the project was far from completion.
12. The complainant submitted that after an exorbitant delay of almost 5 years, he received letter for offer of possession in January 2018 with respect to the unit in question. On receiving the demand letter and letter for possession, the complainant was aghast. 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 his level best to meet the senior officials but CRM (Customer Relation Managers) did not allow to meet, so complainant send legal notice to the promoter. respondent company didn't bother to reply and did not acknowledge the notice hence this complaint to the Haryana Real Estate Regulatory Authority at Gurugram was filed.

Issues to be decided

14. The issues raised by the complainant are as follows:

- i. Whether the respondent should have got its project "Emerald Plaza" of "Emerald Hills", Sector 65 registered with the authority up to 31.07.2017?
- ii. 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?
- iii. 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. Reliefs sought

The complainant is seeking the following reliefs:

- i. The complainant requests that the respondent 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 which sale of common area is in total contradiction of the Act, for the reasons as per the Act the monetary consideration can only be for the carpet area.

- ii. The respondent be ordered to make payment of interest accrued on amount collected by the respondent from the complainant on account of delayed offer of possession from the date as and when the amount was received by the respondent from the complainant.
- iii. The amount of GST, service tax, etc. collected from the complainant, which accrued for the reason of delayed offer of possession be refunded back to the complainant.
- iv. Any common area car parking including basement car park, which is not garage if sold than the money collected on such account shall be refunded along with interest.

Respondent's reply

The respondent has filed a separate application for rejection of the complaint on the ground of jurisdiction.

16. The respondent submitted that the present complaint is not maintainable in law or on facts. The present complaint raises several such issues which cannot be decided by way of the

present complaint in a summary proceeding 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.

17. 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 Act *ibid* or the Rules *ibid*. It is submitted that the complainant has failed to bring on record any document, evidence etc. which may even allude let alone prove that the respondent has violated the Act *ibid* or the rules *ibid*. Thirdly, the project in question is neither covered under the Rules *ibid* nor is the said project registered with this hon'ble authority. As per the definition of "ongoing projects" under the rules 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 authority.

18. The respondent submitted that in the present case, the respondent had applied for grant of occupation certificate for the said project on 26.05.2017 which is prior to the date of publication of the Rules i.e. 28.07.2018 and hence the 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 authority has no jurisdiction to entertain the present complaint and the present complaint is liable to be rejected. The occupation certificate has 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. The possession of the concerned unit has already been offered by the respondent to the complainant vide letter of possession dated 27.01.2018. However, the complainant is not coming forward to take possession of the unit.

19. The respondent submitted that the present complaint pertains to the alleged delay in giving possession of the subject unit. The complainant is seeking the relief of "interest @24% per annum, refund, withdrawal from the project",

amongst other reliefs. It is submitted that as per section 31 read with section 71 of the Act, complaint pertaining to compensation and interest under section 12, 14, 18 and 19 of the Act ibid is required to be filed before the adjudicating officer.

20. The respondent submitted that the complainant is not consumer in terms of the definition of consumer under Consumer Protection Act, 1986. The Act does not provide any definition of consumer so the same has to be derived from the Consumer Protection Act, 1986. The statement of objects and reasons as well as the preamble to the Act, clearly states that the Act is enacted for the effective consumer protection. It is submitted that the complainant is mere speculative investor having invested with a view to earn quick profit. But due to slowdown in the market conditions and having failed to resell the said unit, complainant had apparently developed an intention to raise false and frivolous issues to engage the respondent in unnecessary and false litigation.

21. The respondent submitted that when the complainant had approached the company, he was duly explained the terms and conditions of allotment. Schedule I to the application form also contained detailed terms and conditions forming part of the application for registration which had already

been explained to him in details. It was clearly explained to the complainant that the plans for the building in which the commercial unit has been applied for will be located are not yet sanctioned by the competent authority. Subsequently, vide provisional allotment letter dated 09.11.2010, allotment of subject unit was made in his favour. Thereafter, retail space buyer's agreement dated 28.12.2010 was executed between the parties. Clause 10(f) of the said agreement clearly that "the allottee(s) understands that performance by the company of its obligation under this agreement is subject to building plans by DTCP and such other related departments and/or competent authorities...".

22. The respondent submitted that the project in question is a large project and such kind of projects do take reasonable time for completion. This position is forfeited from the fact that the parties had envisaged a clause in the said buyer's agreement, in case the company was not able to handover possession within a period of 30 months from the date of execution of the buyer's agreement (with a grace period of 120 days for applying and obtaining necessary approval, after the expiry of the said period of 30 months), subject to other terms and conditions of the said agreement. Such a clause would not have been agreed to by the parties, had the parties

not envisaged a situation where in the possession was offered beyond 30 months and a grace period of 120 days. It is thus apparent that the timeline mentioned in the said agreement was a proposed estimated time for handing over of possession.

23. The respondent submitted that many of the allottees of the project defaulted/delayed in making payment of the amounts which resulted in slowdown the pace of development. It is submitted that the development of the project was dependent upon the availability of funds from the allottee. It is relevant to point out that as per statement of account dated 01.10.2018, the complainant was required to pay a sum of Rs.49,36,927/- towards the principal amount against which they have made payment of Rs.41,15,659/-, thus they are required to pay a sum of Rs.8,21,268/- on this count alone. In addition, as on 01.10.2018, a sum of Rs.1,67,467/- has been levied as delayed payment charges. As such as on 01.10.2018, they are required to pay a sum of Rs.9,88,734/- towards the unit.

24. The respondent denied that the Emerald Plaza was to be constructed with three level of basement parking space. There is a small area below the second basement which is used for housing services such as underground water tank,

etc. Casting of the roof slab for the said area has been taken as construction milestone for payment of instalments as per payment plan. No prejudice has been caused to the complainant by non-construction of third level of parking. The complainant has already been provided exclusive right to park one car in the multi-level basement parking. It is not as if that the complainant was promised parking area in third basement level and subsequently denied the same. Even otherwise parking spaces in the complex do not form part of common areas and facilities as has been clearly mentioned in clause 1.3(d) of the said agreement.

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 are as under:

25. With respect to the **first issue** raised by the complainant, the project is registerable under the authority, but has not been registered by the promoter. Thus, notice under section 59 of the real estate (regulation and development) Act,2016 for violation of section 3(1) of the act be issued to the respondent.

26. With respect to the **second issue** raised by the complainant, as per clause 16 (a) of the builder buyer agreement dated 28.12.2010 for unit No.EPS-FF-015, 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 BBA + 120 days grace period which comes out to be 28.10.2013.
27. However, the respondent has received the occupation certificate on 08.01.2018 and the possession was offered to the complainant on 27.01.2018. Complainant has already paid Rs.41,17,728/- to the respondent against a total sale consideration of Rs.49,36,926/-. As such, complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.65% per annum w.e.f. 28.10.2013 till 27.01.2018, as per the proviso to provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016.
28. With respect to the **third 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

29. The application filed by the respondent for rejection of complaint raising preliminary objection regarding

jurisdiction of the authority stands dismissed. 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. 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

30. As per clause 16 (a) of the builder buyer agreement dated 28.12.2010 for unit No.EPS-FF-015, 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 BBA + 120 days grace period which comes out to be 28.10.2013.

31. However, the respondent has received the occupation certificate on 08.01.2018 and the possession was offered to the complainant on 27.01.2018. Complainant has already paid Rs.41,17,728/- to the respondent against a total sale consideration of Rs.49,36,926/-. As such, complainant is

entitled for delayed possession charges at prescribed rate of interest i.e. 10.65% per annum w.e.f. 28.10.2013 till 27.01.2018, as per the provisions of proviso to section 18 (1) of the Real Estate (Regulation & Development) Act, 2016.

Decision and directions of the authority

32. 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 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. 28.10.2013 till the letter of offer of possession date 27.01.2018. The interest so accrued shall be paid within 90 days from date of this order.
- (ii) The 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 BBA.
- (iv) Interest on the due payments from the complainant shall be charged at the prescribed rate of interest i.e. 10.65% by the promoter which is the same as is being granted to the complainant in case of delayed possession.
33. 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 of the Act *ibid*. A copy of this order be endorsed to registration branch for further action in the matter.
34. The order is pronounced.
35. Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated:

Judgement uploaded on 11.06.2019