

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

Complaint No. : 1410 of 2018
First date of hearing : 31.01.2019
Date of Decision : 29.05.2019

1. Mr Ashwani Madan
2. Mrs Ritu Madan
Both R/o J-1854, Chittaranjan Park, New
Delhi-110019

Complainants

Versus

1. M/s Emaar MGF Land Limited
Regd. Office : ECE House,28, Kasturba
Marg, New Delhi-110001
Office : Emaar Business Park, MG Road,
Sikanderpur, Sector 28, Gurugram-122001,
Haryana

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Sanjeev Sharma
Shri Ishaan Dhang
Shri Ketan Luthra

Advocate for complainants
Advocate for the respondent
Authorised representative on
behalf of respondent company

ORDER

1. A complaint dated 23.10.2018 was filed under Section 31 of the Real Estate (regulation & development) Act, 2016 read with rule 28 of the Haryana Real Estate (regulation and

development) Rules, 2017 by the complainants Mr Ashwani Madan and Mrs Ritu Madan against the respondent M/s Emaar MGF land limited on account of violation of clause 16 (a) of the retail space buyer's agreement executed on 16.09.2010 for unit no. EPS-GF-028 in the project "Emerald Plaza Retail" for not giving possession on 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 was executed on 16.09.2010 i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, 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 contractual 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: -

1.	Name and location of the project	"Emerald Plaza Retail in Emerald Hills" in sector 65, Gurugram
2.	Nature of real estate project	Commercial Complex
3.	Occupation certificate received on	08.01.2018
4.	Date of offer of possession	27.01.2018
5.	Project area	3.963 acres
6.	Unit no.	EPS-GF-028

7.	DTCP license	10 of 2009 dated 21.05.2009
8.	Registered/ not registered	Not registered
9.	Date of retail space buyer's agreement	16.09.2010
10.	Total consideration	Rs. 4723544/-
11.	Total amount paid by the complainant	Rs. 4733995/-
12.	Payment plan	Construction Linked Plan
13.	Date of delivery of possession (As per clause 16 (a) - 30 months + 120 days from the date of execution of agreement)	16.07.2013
14.	Delay in handing over possession till 27.01.2018	4 years 6 months and 11 days
15.	Penalty clause as per retail space buyer's agreement	Clause 18 (a)- 9 % simple interest per annum on amount paid by the allottee for period of delay

4. The details provided above have been checked as per record of the case file provided by both the parties. A retail space buyer's agreement is available on record for unit no. EPS-GF-028 according to which the possession of the aforesaid unit was to be delivered by 16.07.2013. The promoter has failed to deliver the possession of the said unit to the complainants. Therefore, the promoter has not fulfilled his committed liability as on date.

5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. Accordingly, the respondent appeared on 31.01.2019 and 29.05.2019. The case came up for hearing on 31.01.2019. The reply filed on behalf of the respondent has been perused.

FACTS OF THE CASE

6. The complainants submitted that the respondent is a company incorporated under "The Companies Act" and 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 complainants submitted that respondent conceived, planned and was in the process of constructing and developing a residential plotted colony "*Emerald Hills*" to be developed on a piece of land admeasuring 102.471 acres in sector 65 urban estate Gurugram.
8. The complainants submitted that Director, Town and country planning, Government of Haryana has granted license bearing no -10 dated 21.05.2009 to develop the project.

9. The complainants purchased units in the multistoried commercial complex "*Emerald Plaza*" admeasuring 3.963 acres forming part of the land on which license No-10 dt. 21.05.2009 admeasuring 102.471 obtained.
10. The complainant submitted that the project was to be built with the state of art office spaces and retail shops with 3 levels of basement parking space.
11. The complainant submitted that complainant purchased unit no. EPS-GF-028 measuring 575.41 sq. ft. retail shop/office space in the name of Sh. Ashwani Madan and Ritu Madan paid booking amount vide dated 23.11.2009 @ Rs. 7000/- per sq. ft.
12. The complainants submitted that as per space buyer agreement, it was assured by the promoter M/s Emaar Land Ltd. that project shall be delivered to the buyers within 30 of the execution of agreement plus 120 as grace period.
12. The complainants made regular payments as demanded by the promoter time and again and there was no default on account of making payment to the promoter.
13. The complainants submitted that complainants visited the construction site several time and visited the office of the promoter also to enquire about the slow construction and time of handing over the possession.

14. The complainants also submitted that they received offer of possession in January 2018 by the respondent.
15. 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.
16. Complainant 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. Leave reply they even did not acknowledge the notice hence this complainant to the authority at Gurugram.

ISSUE RAISED BY THE COMPLAINANT

17. The following issue has been raised by the complainant:
 - I. Whether the respondent should have got its project "Emerald Plaza" of "Emerald Hills", Sector-65 registered with the authority upto 31.07.2017?
 - II. 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 rules 2(o) of the rules ibid?

- III. 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?
- IV. Are open parking space and parking in common basements to be sold to the allottees as separate unit by the promoter, which the respondent has sold as separate units in certain cases and if not then the amount so collected be returned back to the allottees from whom charged ?
- V. 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?

RELIEF SOUGHT BY THE COMPLAINANT

18. The following relief has been prayed for:

- I. The complainant requests the authority to order refund of the money charged on account of increased unit area

without the consent obtained and moreover the increased area is part of common area and not carpet area of the unit.

- II. The promoter has sold the super area which includes the common areas. The monetary consideration should have been only for carpet area. The excess amount on account of any area in excess of carpet area of the unit should be ordered to be refunded back to the complainant with interest.
- III. The promoter shall make payment of interest accrued on account of delayed offer for possession of five years @24% as charged him from the allottees on delayed payments if any.
- IV. 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.
- V. 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 REPLY

19. 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 (hereinafter referred to as the 'Act') are not applicable to the project in question. The application for issuance of occupation certificate in respect of the commercial 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 (hereinafter referred to as the 'Rules'). The occupation certificate has been thereafter issued on 08.01.2018. Thus, the project in question (Emerald Plaza, Sector 65, Gurgaon) is not an 'Ongoing Project" under rule 2(1)(o) of the Rules. The project has not been registered under the provisions of the Act. It is also pertinent to mention that the respondent has applied for part completion certificate for the project where services are complete and hence the project does not fall in the definition of "Ongoing project". This 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.

20. The respondent submitted that the provisions of the Act are not applicable to the project in question, it is submitted that the present complaint is not maintainable before this authority. The complainants have filed the present complaint seeking possession, interest and refund for alleged delay in delivering possession of the commercial unit booked by the complainants. It is respectfully submitted that complaints pertaining to possession, compensation and refund are to be decided by the adjudicator 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 authority. The present complaint is liable to be dismissed on this ground alone.
21. 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 retail space buyer's agreement dated 16.09.2010, as shall be evident from the submissions made in the following paras of the present reply.

22. The respondent submitted that the complainants have booked the office space in question, bearing number EPS-GF-028, situated in the commercial complex developed by the respondent, known as “Emerald Plaza”, Sector 65, Gurugram, Haryana. A retail space buyer’s agreement dated 16.09.2010 was executed between the parties.
23. The respondent submitted that the complainants were offered possession of the above mentioned unit through letter of offer of possession dated 27.01.2018. The complainants were called upon to remit balance payment including delayed payment charges and to complete the necessary formalities/documentation necessary for handover of the office space to the complainants. However, the complainants did not take any steps to complete the necessary formalities or to pay the balance amount liable to be payable by them.
24. The respondent submitted that right from the beginning, the complainants were extremely irregular as far as payment of instalments was concerned. The respondent was compelled to issue demand notices, reminders etc, calling upon the complainants to make payment of outstanding amounts payable by the complainants under the payment plan/instalment plan opted by the complainants.

25. The respondent submitted that it is pertinent to mention that only such allottees, who have complied with all the terms and conditions of the retail space buyer's agreement including making timely payment of instalments are entitled to receive compensation under the retail space buyer's agreement. In the case of the complainants, they had delayed payment of instalments and consequently they were not eligible to receive any compensation from the respondent.
26. That instead of clearing their outstanding dues and obtaining possession of the unit in question, the complainants have proceeded to file the present false and frivolous complaint.
27. The respondent also submitted that clause 18 of the retail 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 further have not defaulted in payment as per the payment plan annexed with the agreement. The complainants, having defaulted in payment of instalments, are thus not entitled to any compensation under the retail space buyer's agreement.
28. The respondent also submitted that the construction of the project/allotted unit in question stands completed and the respondent is in receipt of the occupation certificate in respect

of the same. It is submitted that as soon as the balance payment is remitted by the complainants and the necessary formalities completed by them, the respondent shall hand over possession of the unit to the complainants. It is pertinent to mention that respondent has already handed over possession to number of allottees and conveyance deeds have also been executed in their favour.

29. The respondent submitted that all the demands raised by the respondent are strictly in accordance with the terms and conditions of the retail space buyer's agreement duly executed between the parties. There is no default or lapse on the part of the respondent. It is the complainants who have consciously refrained from obtaining physical possession of the unit by raising false and frivolous excuses.

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:

31. With respect to the **first and second issue** 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.*

32. With respect to the **third issue**, 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 i.e. 16.09.2010. Therefore, due date of possession shall be 16.07.2013. 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."*

Accordingly, the due date of possession was 16.07.2013.

However, the respondent sent letter of offer of possession to the complainants on 27.01.2018. Therefore, delay in handing

over possession shall be computed from due date of handing over possession till offer of possession i.e. 27.01.2018. The possession has been delayed by 4 years 6 months and 11 days from due date of possession till the offer of possession.

33. As the possession of the apartment was to be delivered by 16.07.2013, 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. The complainants made a submission before the authority under section 34 (f) of the Act *ibid* to ensure compliance/ obligations cast upon the promoter under section 11(4)(a) of the Act *ibid*. The complainants 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 its obligations. 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.

34. With respect to the **fourth issue**, clause 1.3(a)(i) of the agreement is reproduced as under:

"The retail space allottees agrees and understands that the company shall grant an exclusive right to use

one car park space for retail space allottees, for which the cost of Rs.4,00,000/- is included in the sales consideration, in the multi-level basement parking space of the building. The allottees agree and understand that the car park space assigned/transferred to the allottee 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 open parking spaces cannot be sold separately to the allottees and the multi-level basement parking cost has already been attached in the retail sale price.

35. With respect to the **fifth issue**, the complainant is directed to approach the appropriate authority for the levy of GST.

Findings of the authority

37. **Jurisdiction of the authority-** The project “Emerald Plaza Offices in Emerald Hills” is located in sector 65, Gurugram. 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.

38. The preliminary objections raised by the respondent regarding subject matter 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
39. As per clause 16 (a) of the retail space buyer's agreement dated 16.09.2010 for unit No.EPS-GF-028, in project Emerald Plaza Offices in Emerald Hills, Sector-65, Gurugram, possession was to be handed over to the complainant within a period of 30 months from the date of execution of retail space buyer's agreement + 120 days grace period which comes out to be 16.07.2013. The respondent has received the occupation certificate on 08.01.2018 and possession of the booked unit has already been offered to the complainant on 27.01.2018. Complainant has already paid Rs.47,33,995/- to the respondent against a total sale consideration of Rs.47,23,544/-. As such, complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.65% per annum w.e.f 16.07.2013 till 27.01.2018, as per the

provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016.

Decision and directions of the authority

40. 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 delay possession charges at the prescribed rate of 10.65% per annum for every month of delay from the due date of possession i.e 16.07.2013 till the date of offer of possession i.e 27.01.2018.
- ii. Complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period. And the promoter shall not charge anything from the complainant which is not part of builder buyer agreement.
- iii. 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.

iv. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order.

41. 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 section 59 of the Act *ibid*. A copy of this order be endorsed to registration branch for further action in the matter.

42. The order is pronounced.

43. Case file be consigned to the registry.


(Samir Kumar)
Member


(Subhash Chander Kush)
Member

Dated : 29.05.2019