

**BEFORE THE HARYANA REAL ESTATE APPELLATE
TRIBUNAL**

Appeal No.155 of 2022

Date of Decision: 15.01.2024

Emaar India Limited (Formerly known as Emaar MGF Land Limited), 306-308, 3rd Floor, Square One, C-2, District Centre, Saket, New Delhi-110017, also at Emaar Business Park, MG Road, Sikanderpur Chowk, Sector-28, Gurugram-122002, Haryana through its authorised representative Sayantan Mondal son of Shri S.N. Mondal.

Appellant

Versus

1. Mr. Akshay Kumar Gupta
2. Ms. Swati Gupta

Both Residents of House No.1103, Ricmon Omaxe Hills, Badkal, Surajkund Road, near Anangpur Chowk, Sector-43, Faridabad-121010, Haryana.

Respondents

CORAM:

Justice Rajan Gupta Chairman
Shri Anil Kumar Gupta, Member (Technical)

Argued by: Ms. Tanika Goyal, Advocate,
for the appellant.

Ms. Bhawna Thakur, Advocate,
for the respondents.

ORDER:

ANIL KUMAR GUPTA, MEMBER (TECHNICAL)

The present appeal has been preferred under Section 44(2) of the Real Estate (Regulation and Development)

Act 2016 (further called as, 'the Act') by the appellant/promoter against impugned order dated 12.08.2021 passed by the Haryana Real Estate Regulatory Authority, Gurugram (for short, 'the Ld. Authority') whereby the Complaint No. 598 of 2021 filed by the respondent-allottees was disposed of with the following directions:

- "i. The respondent is directed to pay the interest at the prescribed rate i.e. 9.30% per annum for every month of delay on the amount paid by the complainants from due date of possession i.e. 26.08.2013 till 20.01.2021 i.e. expiry of 2 months from the date of offer of possession (20.11.2020). The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order as per rule 16(2) of the rules.*
- ii. The respondent/promoter is not entitled to charge any amount towards GST from the complainants/allottees as the liability of GST had not become due up to the due date of possession as per the buyer's agreement.*
- iii. The respondent shall not charge anything from the complainants which is not the part of the buyer's agreement. The respondent is also not entitled to claim holding charges from the complainants/allottees at any point of time even after being part of the buyer's agreement as per law settled by Hon'ble Supreme Court in*

Civil appeal nos. 3864-3889/2020 decided on 14.12.2020.”

2. As per the averments made in the complaint, Mrs. Aparna Kapur (original allottee) had booked a unit/Flat bearing No. EEA-E-F05-02, 5th floor, building no.E, measuring 1310 sq.ft. in the project of the appellant/promoter, namely, “Emerald Estate Apartments” situated at Sector-65, Gurugram, in the year 2009. The provisional allotment letter of the above said unit was issued on 11.08.2009. The respondent/allottees had purchased the unit from the original allottee vide agreement to sell dated 18.10.2012 at a price of Rs.87,57,450/- out of which the respondent/allottees had paid an amount of Rs.35,27,810/- to the original allottee and the remaining amount of Rs.52,29,640/- was the sale consideration payable to the appellant/promoter as per the ‘Construction Linked Plan’. The appellant/promoter acknowledged the respondent/allottees vide nomination letter dated 05.12.2012 for the said unit.

3. It was further pleaded that the buyer’s agreement (hereinafter called as ‘the agreement’) dated 20.02.2010 was endorsed to the respondent/allottees. As per the agreement, the appellant/promoter was liable to give possession of the unit by 20.02.2013. The appellant/promoter failed to deliver possession of the unit till the filing of the complaint, however,

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an offer of possession was received vide letter dated 20.11.2020. According to the respondent/allottees, the possession was delayed for which the appellant/promoter is liable to pay the interest for every month of delay as per Section 18 of the Act w.e.f. the due date of possession i.e. 20.02.2013. If the appellant/promoter would have given possession of the unit in time i.e. up to 20.02.2013, then the respondent/allottees were liable to Value Added Tax (VAT) and not the Goods and Service Tax (GST) which came into effect in the year 2017. The difference between the two different taxes is substantial and the appellant/promoter is liable to bear the extra financial implication so arisen.

4. The respondent/allottees requested the promoter to compensate them for the delay in handing over the possession as per the terms of the agreement but the promoter refused to pay for the same. Therefore, the respondent/allottees filed the complaint before the Authority seeking following reliefs:-

- “i. Direct the respondent to provide the complainants with prescribed rate of interest on delay in handing over of possession of the apartment on the amount paid by the complainant from the due date of possession as per the buyer’s agreement till the actual date of possession of the apartment.*

- ii. *Direct the respondent to handover physical possession of the unit to the complainants.*
- iii. *Direct the respondent to charge taxes at the same rate which were supposed to be paid if the possession was handed over on the greed date of delivery of the unit as the respondent should charge service tax at Value added Tax rates and not Goods and Services Tax rate.*
- iv. *Pass such other order or further order as this Hon'ble authority may deem fit and proper in the facts and circumstances of the present case."*

5. The complaint was resisted by the appellant/promoter on the grounds of the jurisdiction of the learned Authority and on some other technical grounds. It was pleaded that the complaints pertaining to compensation are to be decided by the Adjudicating Officer under Section 71 of the Act read with Rule 29 of the Rules 2017 and not by the Authority. It was further pleaded that the provisions of the Act are not retrospective in nature and the same cannot undo or modify the terms of the agreement which was executed prior to coming into force of the Act. The provisions of the Act relied upon by the respondent/allottees for seeking interest cannot be called in to aid in derogation and ignorance of the provisions of the agreement. The interest is compensatory in nature and cannot be granted in derogation and ignorance of

the provisions of the buyer's agreement. The interest for the alleged delay demanded by the respondent/allottees is beyond the scope of the agreement. The original allottee had agreed and undertook to be bound by the terms and conditions of the application form and the agreement and also undertook to make timely payment as per the payment schedule. However, the original allottee defaulted in making timely payment of the sale consideration right from the very beginning. Consequently, the original allottee became disentitled to any compensation under clause 13(c) of the agreement.

6. It was further pleaded that the time taken by the statutory authorities in granting the 'Occupation Certificate' (OC) in respect of the project needs to be excluded in determining the time period utilized for implementation of the project. Furthermore, clause 11(b)(iv) provides that in the event of any default or delay in payment of instalments as per the schedule of payments incorporated in the buyer's agreement, the time for delivery of possession shall also stand extended. Besides, in the event of delay due to force majeure conditions and other events beyond the control of the appellant/promoter, time taken by statutory/government authorities in according approvals, permissions, sanctions etc., such time period is also to be excluded while reckoning the time period for delivery of possession. The

appellant/promoter completed construction of the apartment/building and applied for the issuance of the Occupation Certificate on 21.07.2020. The Occupation Certificate was issued by the competent authority on 11.11.2020 and upon receipt of the Occupation Certificate, possession of the apartment has been offered to the complainants vide offer of possession letter dated 20.11.2020. The respondent/allottees were called upon to make remaining payments and complete the necessary formalities required enabling the appellant/promoter to hand over possession to the respondent/allottees, but, instead of making balance payment and taking possession, they filed false and frivolous complaint.

7. It was further pleaded that the time taken by statutory authorities to grant the 'Occupation Certificate' (OC) for the project should be excluded from the period of delay possession charges. Additionally, clause 11(b)(iv) states that if there is a default in payment or delay in instalments according to the agreement, the period of delivery for possession stands extended. Moreover, delays due to force majeure conditions and events beyond the promoter's control, like statutory approvals, should also be excluded. The promoter finished construction and applied for the Occupation Certificate on 21.07.2020, which was issued on 11.11.2020. Possession was

offered on 20.11.2020, but the allottees filed a complaint instead of making the payments.

8. It is further pleaded that the project faced delays which were beyond the promoter's control. First, a contractor 'BL Kashyap' termination led to a delay which followed legal actions. The High Court appointed an arbitrator, who gave liberty for the appointment of a new contractor. Simultaneously, changes in the National Building Code in 2016 mandated two staircases for all high-rise buildings (i.e. buildings having height of 15 mtrs. and above), irrespective of the area of each floor, causing further delays. The promoter sought approvals but decided to proceed without waiting, although the BL Kashyap issue hindered progress. Some allottees' payment defaults also impacted the project. The tower containing the unit has been completed, and the possession of the unit has already been delivered to respondent/ allottees.

9. After controverting all the pleas raised by the respondent/allottees, the appellant/promoter pleaded for dismissal of the complaint being without any merit.

10. The learned authority after hearing the pleadings of both the parties passed the impugned order, the operative part of which has already been reproduced in paragraph No.1 of this order.

11. We have heard, learned counsel for the parties and have carefully examined the record of the case.

12. It was contended by learned counsel for the appellant that as per clause 11(a) of the Buyer's Agreement, the delivery of possession of the unit is to be given within 36 months plus grace period of six months from the commencement of the construction subject to timely payment of the instalments and compliance by the complainant of all the terms and conditions of the said agreement. Grace period cannot be denied merely on account of delay caused in completion of the project. Further grace period of six months is for applying and obtaining the occupation certificate in respect of the Unit. It was submitted that once an application is submitted before the statutory authority, the appellant ceases to have any control over the same. Therefore, the time taken by the concerned statutory authority to issue occupation certificate in respect of the project has to be excluded from the computation of the time taken for implementation and development of the project. Furthermore, no compensation or any interest shall be payable to the allottees in case of delay caused due to non-receipt of Occupation Certificate, Completion Certificate or any other permission/sanction from the competent authorities in conformity to the buyer's agreement. She submitted that

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Occupation Certificate was issued on 11.11.2020 and letter of offer of possession was issued on 20.11.2020 and the respondent-allottees have taken over the possession on 11.04.2021.

13. She stated that the interest for delay in delivery of possession to the respondent-allottees for the payment made by them prior to due date of possession i.e.26.02.2014 should be calculated from due date of possession i.e. 26.02.2014 and the interest on payments made by them after 26.02.2014 should be calculated from the date of respective payments.

14. It was also submitted that the respondent-allottees had been defaulter and had failed to make payments on time. The respondent-allottees shall also be liable to pay interest on the payments which have been delayed by them on the same rate of interest as being granted to the respondent-allottees in case of delayed possession charges.

15. She contended that the Authority does not have the jurisdiction to entertain issues relating to GST and VAT and the respondent-allottees are at liberty to approach the appropriate forum in case they have any grievance against the levying of GST. The GST is not a new law which has been made applicable w.e.f. 01.07.2017 in lieu of VAT. The appellant is passing on the benefit of anti-profiting and input tax credit to the respondent-allottees under the GST regime.

Moreover, as per agreement, taxes are payable by the respondent-allottees as per Government rules as applicable from time to time. Therefore, the order of the authority with regards to the issue of GST is not as per the law of the land.

16. With these contentions, it was contended by learned counsel of the appellant/promoter that the present appeal may be allowed and the impugned order dated 12.08.2021 may be modified accordingly.

17. Per contra, learned counsel for the respondent/allottees contended that the impugned order passed by the Authority is just and fair and is as per the Act and Rules. There is no merit in the appeal and the same deserves to be dismissed.

18. We have duly considered the aforesaid contentions of both the parties.

19. The undisputed facts of the case are that Mrs. Aparna Kapur (original allottee) in the year 2009 had booked the unit bearing No. EEA-E-F05-02, 5th Floor, building no.E, measuring 1310 sq. ft., in the project of the appellant/promoter, namely, "Emerald Estate Apartments" situated at Sector 65, Gurugram, Haryana. The agreement was executed between the original allottee and the appellant on 20.02.2010. The respondent/ allottees had purchased the unit from the original allottee vide agreement to sell dated

18.10.2012. The appellant/promoter endorsed the said unit in the name of the respondent/allottees vide nomination letter dated 05.12.2012. According to clause 11 (a) of the agreement, the appellant/promoter was to deliver the possession of the unit within 36 months from the date of start of construction. There is also a provision of grace period of six months for applying and obtaining the Occupation Certificate in respect of the unit/or the project. The Occupation Certificate was issued on 11.11.2020. The letter for offer of possession of the unit was issued on 20.11.2020. The possession of the unit in question has been handed over to the respondent-allottees on 11.04.2021.

20. The Authority did not acknowledge the grace period of six months provided in the agreement. Learned counsel for the appellant/promoter has argued that the appellant/promoter is entitled to six months' grace period as specified in Clause 11(a) of the agreement. To resolve this dispute, let's take a closer look at the exact wording of Clause 11(a) reproduced as below:

“(a) Time of handing over the Possession:-

“Subject to terms of this clause and subject to the Allottee(s) having complied with all the terms and conditions of this Buyer’s Agreement, and not being in default under any of the provisions of this Buyer’s Agreement

and compliance with all provisions, formalities, documentation etc., as prescribed by the Company, the Company proposes to hand over the possession of the Unit within 36 months from the date of commencement of construction and development of the Unit. The Allottee(s) agrees and understands that the Company shall be entitled to a grace period of six months, for applying and obtaining the completion certificate/occupation certificate in respect of the Unit and/or the Project.”

21. The date of start of construction, which is 26.08.2010, is undisputed. In accordance with the aforementioned clause 11 (a), the possession of the unit was to be handed over by 26.08.2013, considering the 36-month period from the commencement of construction. The Clause 11(a) allows a grace period of six months for obtaining the Occupation Certificate 'OC'. Perusal of the Occupation Certificate dated 11.11.2020, (page 374) shows that the appellant/promoter had applied for the 'OC' on 21.07.2020 and received it on 11.11.2020. Thus, it took 3 months and 20 days in applying and obtaining the 'OC'. Applying and obtaining such certificates takes time, a fact widely acknowledged. Section 18 of the Act states that if a project by the promoter is delayed and the allottee chooses to withdraw, he can seek a refund. Alternatively, if the allottee decides to

continue with the project, the promoter must pay interest for each month of delay. In our view, if the allottee opts to continue with the project, he implicitly accepts the agreement's terms, including the grace period for obtaining the Occupation Certificate. Hence, considering these circumstances, the appellant/promoter has the right to consider the time taken in applying and obtaining the Occupation Certificate for arriving at the deemed date of possession. Consequently, with the inclusion of 3-months and 20 days consumed in obtaining 'OC' as grace period, the total period for handing over possession of the unit becomes 39 months and 20 days. As a result the due date for delivery of the unit should be 15.12.2013, not 26.08.2013 as stated in the impugned order. Consequently the respondent/allottees shall be entitled for delay possession interest at the prescribed rate from 15.12.2013 till 20.01.2021 instead from 26.08.2013 till 20.01.2021.

22. Further argument of the appellant is that the interest at the specified rate on payments, demanded by the appellant and made by the respondent/allottees after the due date of possession i.e.15.12.2013, should be payable from the respective dates the payments were made by the respondent/allottees to the appellant/promoter. This argument is logical. Consequently, interest at the prescribed

rate on payments made by the respondent/allottees before the due date of possession of unit should start from 15.12.2013 and the payments made after the due date of possession i.e.15.12.2013 should accrue interest from the dates those payments were made by the respondent/allottees to the appellant/promoter.

23. Additionally, the appellant/promoter contends that the respondent/allottees failed to make timely payments, making them liable to pay interest on the delayed payments at the same rate as applied to the respondent/allottees for delayed possession charges. This argument aligns with the definition of interest in the Act and is therefore valid. The appellant/promoter has the right to charge interest on delayed payments (if any) at the same rate as the interest awarded to the respondent/allottees for delayed possession charges.

24. The appellant's lawyer argued that the Authority does not have the right to deal with the GST matter. She pointed out that GST came into play on 01.07.2017, replacing VAT and Service Tax. According to the agreement, the allottee must pay applicable taxes as per the current regulations. Importantly, the appellant didn't raise any objection in their response to the complaint or in the grounds of appeal. The Authority made its decision based on a previous Tribunal

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order in Appeal No.21 of 2019, titled 'M/s Pivotal Infrastructure Pvt. Ltd. vs. Prakash Chand Arohi', dated 20.05.2020. In the current case, the possession date is before GST's applicability on 01.07.2017, and the appellant didn't raise this argument earlier. As per clause 10(f) of the agreement, the allottees are responsible for government taxes up to the possession date of 15.12.2013. The appellant's delay in possession and offering it after 20.11.2020, when GST was in effect, does not entitle them to charge GST from the allottees. The authority's order aligns with the Tribunal's decision in M/s Pivotal Infrastructure Pvt. Ltd. vs. Prakash Chand Arohi (supra), so we see no issues with the authority's decision on the allottees' GST liability.

25. No other issue was pressed before us.

26. Consequently, the present appeal filed by the appellant is partly allowed and the impugned order is modified as per the above said observations.

27. The amount of Rs.39,84,909/- deposited by the appellant/promoter with this Tribunal in view of proviso to Section 43(5) of the Act, along with interest accrued thereon, be sent to the learned Authority, for disbursement to the respondent/allottees as per the above said observations and

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the balance amount be remitted to the appellant, subject to tax liability, as per law and rules.

28. No order as to costs.

29. Copy of this order be communicated to both the parties/counsel for the parties and the learned Authority.

30. File be consigned to the record.

Announced:
January 15, 2024

Justice Rajan Gupta
Chairman
Haryana Real Estate Appellate Tribunal

Anil Kumar Gupta
Member (Technical)

CL