

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

Complaint no. : 2631 of 2019
First date of hearing : 04.12.2019
Date of decision : 04.02.2020

1. Dinesh Kumar Yadav
2. Ms. Richa
Both RR/o 2/8, Olearia Way, Aberlasslyn,
NWS, Australia, Post code-2320.

Also at: 7, Palika Sadan, Harish
Chandra Mathur Lane, Janpath, New Delhi.

Complainants

Versus

M/s Emaar MGF Land Ltd.
Address: ECE House, 28 Kasturba Gandhi
Marg, New Delhi- 110001.

Also at: 306-308, Square One, C-2, District
Centre, Saket, New Delhi- 110017

Respondent

CORAM:

Dr. K.K. Khandelwal
Shri Samir Kumar

**Chairman
Member**

APPEARANCE:

Shri Sukhbir Yadav
Shri J.K Dang along with Shri
Ishaan Dang

Advocate for the complainants
Advocates for the respondent

ORDER

1. The present complaint dated 21.06.2019 has been filed by the complainants/allottees in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short,



the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions to the allottee as per the agreement for sale executed inter se them.

2. The particulars of the project, the details of sale consideration, the amount paid by the complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Project name and location	Emerald Floors at Emerald Hills, Sector 65, Gurugram.
2.	Project area	102.7412 acres
3.	Nature of the project	Residential plotted colony
4.	DTCP license no. and validity status	10 of 2009 dated 21.05.2009 Valid/renewed up to 20.05.2019
5.	Name of licensee	Active Promoters Pvt. Ltd. & others C/o Emaar MGF Land Ltd.
6.	HRERA registered/ not registered	Registered vide no. 162 of 2017 dated 29.08.2017 for 55.962 acres
7.	HRERA registration valid up to	28.08.2022
8.	Date of provisional allotment letter	03.07.2009 [Page 35 of reply]



9.	Unit no.	EHF-267-C-GF-030, ground floor, block/building no. Coral [Page 37 of complaint]
10.	Unit measuring	1380 sq. ft.
11.	Date of execution of buyer's agreement	26.02.2010 [Page 35 of complaint]
12.	Payment plan	Construction Linked Payment Plan [Page 71 of complaint]
13.	Total consideration as per statement of account dated 24.08.2019 (Annexure R9 at page 92 of reply)	Rs.60,91,859/-
14.	Total amount paid by the complainants as per statement of account dated 24.08.2019 (Annexure R9 at page 93 of reply)	Rs.57,35,725/-
15.	Due date of delivery of possession as per clause 13(i) of the said agreement i.e. 27 months from the date of execution of this agreement (i.e. 26.02.2010) plus grace period of 6 months. [Page 50 of complaint]	26.11.2012
16.	Date of offer of possession to the complainants	08.04.2019 [Annexure 5, page 166 of complaint]
17.	Delay in handing over possession till date of offer of possession i.e. 08.04.2019	6 years 4 months 13 days
18.	Status of the project	OC was granted by the statutory authority on 03.04.2019 [Annexure R12 at page 117 of the reply]

3. As per clause 13(i) of the buyer's agreement, the possession was to be handed over within a period of 27 months from the date of execution of agreement i.e. 26.02.2010 plus grace period of 6 months which comes out to be 26.11.2012. Clause 13 of the buyer's agreement is reproduced below:

"13. POSSESSION

(i.) 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 agreement, and not being in default under any of the provisions of this agreement and compliance with all provisions, formalities, documentation etc. as prescribed by the company, the company proposes to hand over the possession of the floor within 27 months from the date of execution of this agreement. The allottee(s) agrees and understands that the company shall be entitled to a grace period of 6 months, for applying and obtaining the occupation certificate in respect of the floor and/or the project."

4. The complainants submitted that the respondent has miserably failed to complete the project within stipulated period of 27 months under clause 13(i) of the agreement from the date of agreement with grace period of 6 months. The possession should have been given to the complainants latest by November 2012. However, possession was not given that time and therefore, the complainants became entitled to interest due to delay in construction and handing over of possession. Hence, this complaint inter-alia for the following reliefs:



- i. Direct the respondent to pay amount for delay in construction and handing over of possession along with interest as applicable under the Act calculated till the date of actual payment.
 - ii. Pass such order or further directions as this hon'ble authority may deem fit and proper in the facts and circumstance of the present case.
5. On the date of hearing, the Authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4)(a) of the Act to plead guilty or not to plead guilty.
6. The respondent contests the complaint on the following grounds:
 - i. The respondent submitted that complaints pertaining to refund, compensation and interest are to be decided by the Adjudicating Officer under Section 71 of the Act read with rule 29 of the Rules and not by this hon'ble authority.
 - ii. The respondent submitted that Mr. Roji Pappachan Koshy and Ms. Binitha Baby/Binitha Koshy (hereinafter 'original allottee') has approached the respondent in year 2009 for purchase of a unit in its project. The original allottees, in pursuance of the application form dated 07.06.2009, was allotted an independent unit bearing no. EHF-267-C-GF-



030, located on ground floor in the project vide allotment letter dated 03.07.2009. Agreement to sell between the original allottees and the complainants. The allotment was transferred in favour of the complainants on the basis of transfer documents executed by both the parties.

- iii. That the complainants have executed an indemnity-cum-undertaking whereby the complainants agreed and undertook to be bound by the terms and conditions of the original allotment and further admitted and acknowledged that they were not entitled to claim any compensation for delay in handing over possession or any rebate or discount from the respondent and further agreed and undertook not to raise any claim with regard to the same from the respondent.
- iv. That the complainants repeatedly defaulted in making timely payment of instalments as per the payment plan. Consequently, the respondent was constrained to issue demand notices and payment reminders and even notices for cancellation to the complainants.
- v. That as per clause 13(v), in case of any default/delay in payment of instalments as per the schedule of payment incorporated in the buyer's agreement, the date of delivery of possession shall be extended accordingly.



- vi. The respondent submitted that as per clause 15 of the buyer's agreement, the compensation for any delay in delivery of possession shall only be given to such allottees who are not in default of their obligations under the agreement and who have not defaulted in payment of instalments as per the payment plan incorporated in the agreement.
7. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents.
8. The Authority on the basis of information, explanation, other submissions made, and the documents filed by the complainants is of considered view that there is no need of further hearing in the complaint.
9. Arguments heard at length.
10. The Act is to protect the rights of the stake-holders i.e. the promoter, allottee and the real estate agent as provided under the Act and also to balance their interest as per its provisions. The Authority is empowered to not only monitor the projects but also to ensure their timely compliance and in case where the projects are held up or stopped to take steps so that these are completed in time and interests of allottees are protected.



11. On consideration of the circumstances, the documents and other record and submissions made by the parties and based on the findings of the authority regarding contravention as per provisions of rule 28(2)(a), the Authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 13(i) of the buyer's agreement executed between the parties on 26.02.2010, possession of the booked unit was to be delivered within a period of 27 months plus 6 months grace period from the date of execution of the agreement. The grace period of 6 month is allowed to the respondent due to exigencies beyond the control of the respondent. Therefore, the due date of handing over possession comes out to be 26.11.2012. In the present case, the complainants were offered possession by the respondent on 08.04.2019 after receipt of OC dated 03.04.2019. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainants as per the terms and conditions of the buyer's agreement dated 26.02.2010 executed between the parties. As such this project is to be treated as on-going project and the provisions of the Act shall be applicable equally to the builder as well as allottee. Accordingly, the non-compliance of the mandate contained in



section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainants are entitled to delayed possession at rate of the prescribed interest @ 10.20% p.a. w.e.f. 26.11.2012 till the offer of possession i.e. 08.04.2019 as per provisions of section 18(1) of the Act read with rule 15 of the Rules. The complainants have already paid Rs. 57,35,725/- as per statement of account dated 24.08.2019 (Annexure R9 at page 92 of reply) against the total sale consideration of Rs.60,91,859/- as per statement of account dated 24.08.2019 (Annexure R9 at page 92 of reply).

12. In ***Capital Greens Flat Buyer Association and Ors. V. DLF Universal Ltd., Consumer case no. 351 of 2015***, it was held that the execution of indemnity-cum-undertaking would defeat the provisions of section 23 and 28 if the Indian Contract Act, 1872 and therefore would be against public policy, besides being an unfair trade practice. The relevant portion is reproduced below:

"Indemnity-cum-undertaking

30. the developer, while offering possession of the allotted flats insisted upon execution of the indemnity-cum-undertaking before it would give possession of the allotted flats to the concerned allottee. Clause 13 of the said indemnity-cum-undertaking required the allottee to confirm and acknowledge that by accepting the offer of possession, he would have no further demands/claims against the company of any nature, whatsoever.

It is an admitted position that the execution of the undertaking in the format prescribed by the developer was



a pre-requisite condition, for the delivery of the possession. The opposite party, in my opinion, could not have insisted upon clause 13 of the Indemnity-cum-undertaking. The obvious purpose behind such an undertaking was to deter the allottee from making any claim against the developer, including the claim on account of the delay in delivery of possession and the claim on account of any latent defect which the allottee may find in the apartment. The execution of such an undertaking would defeat the provisions of Section 23 and 28 of the Indian Contract Act, 1872 and therefore would be against public policy, besides being an unfair trade practice. Any delay solely on account of the allottee not executing such an undertaking would be attributable to the developer and would entitle the allottee to compensation for the period the possession is delayed solely on account of his having not executed the said undertaking-cum-indemnity."


13. Hence, the Authority hereby pass the following order and issue directions under section 34(f) of the Act:
- i. The respondent is directed to pay the interest at the prescribed rate i.e. 10.20% per annum for every month of delay on the amount paid by the complainants from due date of possession i.e. 26.11.2012 till the offer of possession i.e. 08.04.2019. The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order.
 - ii. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
 - iii. The respondent shall not charge anything from the complainants which is not part of the buyer's agreement.



iv. Interest on the due payments from the complainants shall be charged at the prescribed rate @10.20% by the promoter which is the same as is being granted to the complainants in case of delayed possession charges.


14. Complaint stands disposed of.

15. File be consigned to registry.


(Dr. K.K. Khandelwal)

Chairman

Haryana Real Estate Regulatory Authority, Gurugram


(Samir Kumar)

Member

Dated: 04.02.2020

Judgement uploaded on 11.02.2020.