

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

Complaint no. : 267 of 2019
First date of hearing : 04.12.2019
Date of decision : 04.02.2020

Pushpa Gogia
R/o H-44 SF, Residency Greens,
Sector 46, Gurugram-122003.

Complainant

Versus

M/s Emaar MGF Land Ltd.
Address: 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 Utkarsh Thapar Advocate for the complainant
Shri J.K Dang along with Shri Ishaan Dang Advocates for the respondent

ORDER

1. The present complaint dated 31.01.2019 has been filed by the complainant/allottee 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 complainant, 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 Hills-Floors, 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	06.07.2009 [Page 36 of reply]
9.	Unit no.	EHF-267-A-SF-108, 2 nd floor, building no. Amber [Annexure P/2 at page 36 of complaint]
10.	Unit measuring	1380 sq. ft.
11.	Date of execution of buyer's agreement	17.03.2010 [Page 52 of reply]



12.	Payment plan	Construction Linked Payment Plan [Page 91 of complaint]
13.	Total consideration as per statement of account dated 14.02.2019 (Annexure R6 at page 40 of reply)	Rs.51,91,935/-
14.	Total amount paid by the complainant as per statement of account dated 14.02.2019 (Annexure R6 at page 41 of reply)	Rs.52,35,144/-
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. 17.03.2010) plus grace period of 6 months. [Page 70 of reply]	17.12.2012
16.	Date of offer of possession to the complainant	30.07.2018 [Annexure P6, page 51 of complaint and page 127 of reply]
17.	Delay in handing over possession till date of offer of possession i.e. 30.07.2018	5 years 7 months 13 days
18.	Status of the project	OC was granted by the statutory authority on 30.05.2018 [Annexure R23 at page 155 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. 17.03.2010 plus grace



period of 6 months which comes out to be 17.12.2012. 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 complainant submitted that based on the date of intimation of possession (i.e. 30.07.2018), there has been a delay of 5 years 7 months and 13 days. As per section 18(1) of the Act, the developer is required to pay interest at the prescribed rate for every month of delay till handing over of possession. Hence, this complaint inter-alia for the following reliefs:
 - i. Direct the developer to the complainant interest, at the prescribed rate, for delay in handing over the unit.
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 Ms. Pooja Kharbanda (hereinafter 'original allottee') had approached the respondent some time in year 2009 for purchase of independent unit in its project. The original allottees, in pursuance of the application form dated 06.06.2009, was allotted an independent unit bearing no. EHF-267-A-SF-108, located on second floor in the project vide allotment letter dated 06.07.2009. Thereafter, the complainant approached the original allottee for purchasing her rights and title in the unit in question. The original allottee acceded to the request of the complainant and agreed to transfer and convey her rights, entitlement and title in the unit in question to the complainant for a valuable sale consideration of Rs.13,95,000/-.
- iii. That the complainant had executed an affidavit and indemnity cum undertaking dated 11.02.2010 whereby the complainant had consciously and voluntarily declared and affirmed that she would be bound by all the terms and



- conditions of the provisional allotment in favour of original allottee.
- iv. The respondent submitted that the complainant was stepping into the shoes of the original allottee and therefore all the rights and liabilities of the original allottee were transferred to the complainant. Since, the original allottee had defaulted in timely remittance of the instalments as explained hereinabove, the complainant was not entitled to any compensation or interest or any other amount for delay, if any, in accordance with the terms and conditions of the application form.
- v. That the complainant was too irregular regarding the timely remittance of instalments. The respondent was constrained to issue payment request letters, reminders etc. requesting the complainant to remit the outstanding dues mentioned therein. However, the complainant maliciously chose to ignore the request letters and reminders sent on behalf of the respondent.
- vi. That as per clause 13(b)(v), in the event of any default or delay in payment of instalments as per the schedule of payment incorporated in the buyer's agreement, the time for delivery of possession shall also stand extended. The complainant has defaulted in timely remittance of

instalments and therefore the time period for delivery of possession is not liable to be determined in the manner sought to be done by the complainant.

- vii. 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 envisaged under the agreement and who have not defaulted in payment of instalments as per the payment plan incorporated in the agreement.
 - viii. That the time taken by the statutory authorities in granting the OC in respect of the project needs to be excluded in determining the time period utilised for implementation of the project.
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 complainant is of considered view that there is no need of further hearing in the complaint.
 9. Arguments heard.

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. Counsel for the complainant after consulting the complainant intends to forgo other reliefs except delayed possession charges.
12. 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 17.03.2010, 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 17.12.2012. In the present case,



the complainant was offered possession by the respondent on 30.07.2018 after receipt of OC dated 30.05.2018. 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 complainant as per the terms and conditions of the buyer's agreement dated 17.03.2010 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 complainant is entitled to delayed possession at rate of the prescribed interest @ 10.20% p.a. w.e.f. 17.12.2012 till the offer of possession i.e. 30.07.2018 as per provisions of section 18(1) of the Act read with rule 15 of the Rules. The complainant has already paid Rs.52,35,144/- (as per statement of account dated 14.02.2019, Annexure R6 at page 41 of reply) against the total sale consideration of Rs.51,91,935/- as per statement of account dated 14.02.2019, Annexure R6 at page 40 of reply.

13. 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."

14. 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 complainant from due date of possession i.e. 17.12.2012 till the offer of possession i.e. 30.07.2018. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the 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 respondent shall not charge anything from the complainant which is not part of the buyer's agreement.
 - iv. Interest on the due payments from the complainant shall be charged at the prescribed rate @10.20% by the promoter which is the same as is being granted to the complainant in case of delayed possession charges.
15. Complaint stands disposed of.
16. File be consigned to registry.

(Dr. K.K. Khandelwal)

Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 04.02.2020

Judgement uploaded on 11.02.2020.

(Samir Kumar)

Member