

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

Complaint no. : 3534 of 2019
First date of hearing : 04.12.2019
Date of decision : 04.02.2020

1. Vinay Naik
2. Prachi Naik
Both RR/oW-188, Regency Park-II,
DLF City, Phase IV, Gurugram.

Complainants

Versus

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

Also at: 306-308, 3rd floor, C-2, Square One,
District Centre, Saket, New Delhi-110017.

Respondent

CORAM:

Dr. K.K. Khandelwal
Shri Samir Kumar

**Chairman
Member**

APPEARANCE:

Shri Tushar Bahmani Advocate for the complainants
Shri J.K Dang along with Shri Advocates for the respondent
Ishaan Dang

ORDER

1. The present complaint dated 26.08.2019 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	11.07.2009 [Page 38 of reply]
9.	Unit no.	EHF-214-J-GF-065, ground floor, block/building no. Jemma [Page 29 and 29 of complaint]

10.	Unit measuring	1180 sq. ft.
11.	Date of execution of buyer's agreement	07.06.2011 [Page 27 of complaint]
12.	Payment plan	Construction Linked Payment Plan [Page 66 of complaint]
13.	Total consideration as per statement of account dated 03.09.2019 (Annexure R9 at page 46 of reply)	Rs.61,17,554/-
14.	Total amount paid by the complainants as per statement of account dated 03.09.2019 (Annexure R9 at page 47 of reply)	Rs.65,15,314/-
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. 07.06.2011) plus grace period of 6 months. [Page 44 of complaint]	07.03.2014
16.	Date of offer of possession to the complainants	22.07.2019 [Annexure 24, page 133 of reply]
17.	Delay in handing over possession till date of offer of possession i.e. 22.07.2019	5 years 4 months 15 days
18.	Status of the project	OC was granted by the statutory authority on 15.07.2019 [Annexure R23 at page 132 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. 07.06.2011 plus grace period of 6 months which comes out to be 07.03.2014. 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 as per the buyer's agreement dated 07.06.2011, the respondent was required to handover the actual physical possession of the said unit on or before 07.03.2014 which includes the grace period of 6 months. But due to the factual circumstances at the site of the said project, the construction work has started after much delay and that the project of the respondent has not been completed yet and the respondent has miserably failed to handover the actual physical possession of the apartment in dispute till date. Hence, this complaint inter-alia for the following reliefs:

- i. Direct the respondent to pay delayed possession charges on the entire amount of sale consideration deposited till date with i.e. Rs.65,15,314/- @24% interest rate from the

date of handing over actual physical possession agreed as per the buyer's agreement i.e. 07.03.2014 till actual handing over of physical possession of the unit in dispute after deducting the compensation credited into the statement of accounts of the unit in dispute.

- ii. Direct the respondent to handover the actual physical possession of the unit in dispute along with payment of delayed possession charges.
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. Rajesh Kumar Srivastava and Mrs. Madhu Srivastava (hereinafter 'original allottee') has approached the respondent sometime in the year 2009 for purchase of a unit in its project. The original allottees, in pursuance of the

application form dated 08.06.2009, were allotted an independent unit bearing no. EHF-214-J-GF-065, located on ground floor in the project vide allotment letter dated 11.07.2009.

- iii. That right from the beginning, the original allottees defaulted in payment of instalments. The original allottees were irregular regarding the remittance of instalments on time. The respondent was compelled to issue demand notices, reminders etc. calling upon the original allottees to make the payment of outstanding amounts payable under the payment plan opted by them.
- iv. Thereafter, the complainants approached the original allottees for purchasing their rights and title in the unit in question. The original allottees acceded to the request of the complainants and agreed to transfer and convey their rights, entitlement and title of the unit in question to the complainants for a value sale consideration of Rs.56,97,800/-. The agreement to sell was executed between the original allottees on 19.07.2011. The complainants executed an affidavit and indemnity cum undertaking dated 19.07.2013 whereby the complainants had consciously and voluntarily declared and affirmed that they would be bound by all the terms and conditions



of the provisional allotment in favour of the original allottees. The complainants were stepping into the shoes of the original allottees and therefore all the rights and liabilities of the original allottees were transferred to the complainants.

- v. 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 date of delivery of possession shall be extended.
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 07.06.2011, 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 07.03.2014. In the present case, the complainants were offered possession by the respondent on 22.07.2019 after receipt of OC dated 15.07.2019. 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 07.06.2011 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. 07.03.2014 till the offer of possession i.e. 22.07.2019 as per provisions of section 18(1) of the Act read with rule 15 of the Rules. The complainants have already paid Rs.65,15,314/- (as per statement of account dated 03.09.2019, Annexure R9 at page 47 of reply) against the total sale consideration of Rs. 61,17,554/- as per statement of account dated 03.09.2019, Annexure R9 at page 46 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. 07.03.2014 till the offer of possession i.e. 22.07.2019. 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

Dated: 04.02.2020

Judgement uploaded on 11.02.2020.


(Samir Kumar)

Member