

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

Complaint no. : 4311 of 2019
First date of hearing : 04.12.2019
Date of decision : 04.02.2020

Dr. Sandhya Agarwal
R/o: B-116, Kamla Nagar, Agra,
Uttar Pradesh

Complainant

Versus

M/s Emaar MGF Land Ltd.
Address: 306-308, Square One, C-2,
District Centre, Saket, New Delhi-110017.

Also at: Emaar MGF Business Park, M.G Road,
Sikandarpur Chowk, Sector 28, Gurugram.

Respondent

CORAM:

Dr. K.K. Khandelwal
Shri Samir Kumar

**Chairman
Member**

APPEARANCE:

Shri Varun Chugh Advocate for the complainant
Shri J.K Dang along with Shri Advocates for the respondent
Ishaan Dang

ORDER

1. The present complaint dated 13.09.2019 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	31.07.2009 [Page 32 of reply]
9.	Unit no.	EHF-267-A-GF-054, Ground floor, building no. Amber [Annexure E at page 50 of complaint]



10.	Unit measuring	1380 sq. ft.
11.	Date of execution of buyer's agreement	17.03.2010 [Page 39 of reply]
12.	Payment plan	Construction Linked Payment Plan [Page 78 of complaint]
13.	Total consideration as per statement of account dated 25.09.2019 (Annexure R6 at page 108 of reply)	Rs.71,03,425/-
14.	Total amount paid by the complainant as per statement of account dated 25.09.2019 (Annexure R6 at page 109 of reply)	Rs.72,02,330/-
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 56 of reply]	17.12.2012
16.	Date of offer of possession to the complainant	10.05.2019 [Annexure R11, page 129 of reply]
17.	Unit handover letter signed on	17.06.2019
18.	Conveyance deed executed on	02.07.2019
19.	Delay in handing over possession till date of offer of possession i.e. 10.05.2019	6 years 4 months 23 days
20.	Status of the project	OC was granted by the statutory authority on 09.05.2019 [Annexure R10 at page 127 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 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 the possession of the property in question was finally offered on 10.05.2019 and after making the balance payment which was to be made at the time of offering of possession, got the property transferred in her name. The project has been inordinately delayed. The respondent has resorted to misrepresentation. The complainant, therefore, seek direction to the respondent to pay interest @18% p.a. as payment, towards delay in handing over the property in question. Hence, this complaint inter-alia for the following reliefs:



- i. Direct the respondent to pay interest @ 18% p.a. as payment towards delay in handing over the property in question as per the provisions of the Act and the Rules.
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 Mrs. Richa Agarwal and Mr. Gyanendra Singh (hereinafter 'original allottee') had approached the respondent for purchase of independent unit in its project. The original allottees, in pursuance of the aforesaid application form dated 24.06.2009, was allotted an independent unit bearing no. EHF-267-A-GF-54, located on ground floor in the project vide allotment letter dated 31.07.2009. Thereafter, the complainant approached the original allottee for purchasing her rights and title in the unit in question. The original allottee as



well as the complainant herein executed transfer documents on the basis of which the unit was transferred in favour of the complainant.

- iii. That the complainant executed an indemnity cum undertaking and affidavit whereby the complainant has admitted and acknowledged that she shall not be 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 as per clause 13(v), in case 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 be extended.
- v. The respondent submitted that as per clause 15(c) of the buyer's agreement provides that 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.
- vi. That in terms of clause 15(d), in case of delay caused due to non-receipt of occupation certificate, completion



certificate or any other permission/sanction from the competent authorities, no compensation or any other compensation shall be payable to the allottees. The original allottees, having defaulted in payment of instalment, and are thus not entitled to any compensation or any amount towards interest under the buyer's agreement. Consequently, the complainant cannot demand or claim any right which was not available to the original allottees.

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 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 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 10.05.2019 after receipt of OC dated 09.05.2019. 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 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. 10.05.2019 as per provisions of section 18(1) of the Act read with rule 15 of the Rules. The complainant has already paid Rs.71,03,426/- (as per statement of account dated 25.09.2019, Annexure R6 at page 109 of reply) against the total sale consideration of Rs.71,03,425/- (as per statement of account dated 25.09.2019, Annexure R6 at page 108 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 complainant from due date of possession i.e. 17.12.2012 till the offer of possession i.e. 10.05.2019. 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.
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


(Samir Kumar)

Member

Judgement uploaded on 11.02.2020.