

PROCEEDINGS OF THE DAY

Day and Date	Thursday and 26.7.2018
Complaint No.	155/2018 case titled as Mr. Atul Chawla versus M/s Emaar MGF land Ltd
Complainant	Mr. Atul Chawla
Represented through	Complainant in person
Respondent	M/s Emaar MGF land Ltd
Respondent Represented through	Shri Ketan Luthra, legal representative on behalf of the respondent with Shri Dheeraj Kapoor, Advocate

Proceedings

The counsel for the respondent brought to the notice of the authority that this matter pertains to offer of the possession and interest for the delayed possession. As per agreement for sale entered between the parties on 31.10.2012, as per clause 13(a) of the agreement, the possession was to be given in 24 months + 3 months from the date of construction i.e. 13.9.2016. Accordingly, the date of possession comes out to be 13.12.2018. Although the due date of possession has so far not been crossed, accordingly at this stage, the interest for the delay possession as per Section 18 (1) of the RERA Act is not accrued. Hence, the matter is filed but the complainant shall be at liberty to file a separate complaint wherein he can seek compensation by filing an application before the Adjudicating Officer or he will come before the authority for relief keeping in view that the authority is guided by the principle of natural justice. It seems that the promoter shall not be able to give possession of the apartment before the due date as per the agreement keeping in view the fact that they have mentioned the date of completion of the project as 28.8.2020. In case the promoter is not able to hand over the possession of the unit by the due date then shall be liable to pay interest for every month of delay at the prescribed rate till the handing over of the possession to the allottee. The payment shall be made by the promoter for the previous months before 10th of every subsequent months. The matter regarding payment of GST is kept reserved for which authority shall be taking a view in

New PWD Rest House, Civil Lines, Gurugram, Haryana नया पी.डब्ल्यू.डी. विश्राम गृह, सिविल लाईंस, गुरुग्राम, हरियाणा

the matter of the GST authority. The complainant shall be at liberty to approach the authority or any other suitable forum due to GST. The complaint is disposed of. Detailed order will follow. File be consigned to the Registry.

Samir Kumar
(Member)

Subhash Chander Kush
(Member)

Dr. K.K. Khandelwal
(Chairman)
26.7.2018

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

Complaint No. : 155 of 2018
Date of first hearing: 16.05.2018
Date of Decision : 26.07.2018

Mr. Atul Chawla
Mrs. Saloni Chawla
Both R/o. A-304, Sanskriti Apartments,
Sector 43, Gurugram-122009.

Complainant

Versus

Emaar MGF Land Ltd.
Regd. Office: Emaar MGF Land Ltd.,
306-308, 3rd Floor, Square One, C-2,
District Centre, Saket, New Delhi-110017

Respondent

CORAM:

Dr. K.K. Khandelwal
Shri Samir Kumar
Shri Subhash Chander Kush

Chairman
Member
Member

APPEARANCE:

Shri Atul Chawla
Shri Dheeraj Kapoor
Shri Ketan Luthra

Complainant in person
Advocate for the respondent
Authorized Representative on
behalf of the Respondent



ORDER

1. A complaint dated 11.04.2018 was filed under section 31 of the Real Estate (Regulation & Development) Act, 2016 read

with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 by the complainant Mr. Atul Chawla, against the promoter M/s Emaar MGF Land Ltd. In the present complaint, the complainant is alleging that the due date of handing over the possession was 31st January 2015, which is 27 months from the date of execution of buyer agreement, and the respondent has failed to deliver the same by the said date which is in violation of promoter's obligation under section 11(4)(a) of the Act *ibid*.

2. The particulars of the complaint are as under: -

1.	Name and location of the project	"Emerald Floors Select" in Emerald Hills, Sector 65, Gurugram.
2.	RERA registered/not registered	Registered
3.	RERA registration no.	162 of 2017
4.	Date of completion as per RERA registration certificate.	28 th August 2022
5.	Flat/unit no.	ESF-A-T-GF-130, ground floor, block/building no. 'Topaz'
6.	Flat measuring	3400 sq. ft.
7.	Booking date	09 th October 2012
8.	Buyer agreement executed on	31 st October 2012
9.	Total consideration amount as per statement of account dated 24.05.2018.	Rs.2,94,57,587/-
10.	Total amount paid by the complainant till 24.05.2018	Rs.2,27,89,668/-
11.	Percentage of consideration	Approx. 77 percent



	amount	
12.	Date of delivery of possession as per buyer agreement (24 months + 3 months grace period from the date of commencement of construction)	13 th December 2018
13.	Construction commenced on	13.09.2016
14.	Delay in handing over the possession till date	Premature complaint
15.	Penalty clause as per buyer agreement dated 31.10.2012	Clause 15.a of the agreement i.e. Rs.7.50/- per sq. ft per month of the super area of the said flat till the date of notice of possession.

3. The details provided above have been checked on the basis of record available in the case file which has been provided by the complainant and the respondent. A buyer agreement is available on record for the aforesaid unit according to which the possession of the said apartment is to be delivered by 13th December 2018. The respondent company has not delivered the possession till 26.07.2018.

4. Taking cognizance of the complaint, the authority issued notice dated 27.04.2018 to the respondent for filing reply and for appearance. The respondent through his counsel appeared on 16.05.2018. The case came up for hearing on 16.05.2018, 27.06.2018, 18.07.2018 & 26.07.2018. The reply has been filed on behalf of the respondent on 14.06.2018. The



complainant filed the rejoinder on 21.06.2018 to rebut the reply filed by the respondent in which the complainant reasserted the contentions raised in the complaint.

5. Briefly stated, the facts of the case as culled out from the case of complainant are that the complainant booked a flat no. EFS-A-T-GF-130 measuring 3400 sq. ft. on 09.10.2012 in Emerald Hills, Sector 65, Gurugram directly from the promoter M/s Emaar MGF Land Ltd. and the total basic price of flat as per buyer agreement is Rs.2,72,38,600/-.
6. The complainant submitted that as per clause 13(a) of buyer agreement, the due date of handing over possession of the flat is within 24 months from the start of construction along with an additional grace period of 3 months for the possible delay in obtaining occupation certificate, thus a total of 27 months from start of construction. However, the buyer agreement does not specify anywhere the date of start of construction and consequently it implies that promoter has also not committed any date of offer of possession. Therefore, this agreement is totally unfair and one sided. The complainant also submitted that the buyer agreement is unjustified and in violation of business ethics as it allows promoter to delay the start of construction indefinitely and also does not require the promoter to compensate the



complainant for using the huge deposited amount of Rs.1,13,62,600/- towards part land cost within 270 days of signing of the agreement as per schedule of payment, irrespective of construction. In the present complaint, the promoter indeed delayed the start of construction by 3 years and 10 months from the date of execution of buyer agreement (from 31.10.2012 to 13.09.2016).

7. Further complainant submitted that the buyer agreement also has unfair clause 15(a) & (c), which states that in any delay (i.e. even of one day) in paying instalment to promoter would lead to no compensation to the buyer and implies that this is irrespective of any long delay by the promoter to deliver flat. The complainant also submitted that he have already paid 70% of total basic sale price of flat spread over 7 instalments and there have no delays except in one instalment (number 5) of only 6 days and on the other hand the respondent has delayed the delivery by more than 3 years (which is 27 months from the date of buyer agreement) but as per unfair clauses in buyer agreement as mentioned above, promoter is not required to pay us any compensation for this delay.
8. The complainant also submitted that post introduction of GST regime from July 2017, the respondent has incorrectly



started to charge much higher instalments by demanding full 12% GST on existing basic cost of the flat. The complainant submitted that after introduction of GST, the respondent has simply replaced the earlier service tax in the range of 3.09%-4.5% by much higher 12% GST, therefore increase of huge 7.5% on my remaining instalments thus causing additional unfair financial distress to the complainant. The complainant also stated that it is clearly unfair as per notice by Central Board of Excise and Customs. As per this governmental notice, the value of instalments, after introduction of GST, should be clearly less than the earlier instalment amount with service tax, since the promoter under GST regime is allowed compensation in form of 'Input Tax Credit' which was available to him before.

9. The complainant submitted that he asked the respondent to correct these two ambiguities i.e. correcting the ambiguity about the date of start of construction and realisation of value of instalments in GST regime but the respondent did not reply to the same.

10. **Issues raised by the complainant are as follow:**



- i. Whether the promoter is unfair by not committing the date of offer of possession in the contract?
- ii. Whether the promoter is liable to pay interest as per rule 15 of the Haryana Real Estate (Regulation & Development) Rules, 2017 for delay in handing over the possession?
- iii. Whether the promoter has overcharged & over profiteered under the excuse of GST?

11. Relief sought

The relief sought by the complainant are as follow:

- i. The complainant is claiming to fix the due date of offer of possession as 31st January 2015, which is 27 months from the date of execution of buyer agreement i.e. 31.10.2012.
- ii. The complainant is seeking interest on the amount paid for the delay caused in handing over the possession as per rule 15 of the said Rules.
- iii. The complainant is seeking that the interest amount due so far be credited within 10 days of the order of the authority and the remaining interest that would become due at the time of offer of possession should be



paid by them within 10 calendar days of receipt of last instalment from the complainant.

- iv. The respondent be directed to rationalize the value of instalments after 1.07.2017 based on GST rules and reverse unjustified excess charging and pay back the excess amount to the complainant.
- v. The promoter be directed to make sincere efforts to ensure delivery of the flat in line with the latest schedule dated March 2018 on the respondent's website, i.e. application of occupation certificate by promoter should happen not later than end of November 2018.

Respondent's Reply:

12. The respondent has raised various preliminary objections and submissions challenging the jurisdiction of this hon'ble authority. They are as follow:

- i. The complaint for compensation and interest under section 12, 14, 18 and 19 of the Act ibid is maintainable only before the adjudicating office.
- ii. The complaint is not supported by any proper affidavit with a proper verification. In the absence of proper



verified and attested affidavit supporting the complaint, the complaint is liable to be rejected.

- iii. The respondent also stated that the statement of objects and reasons as well as the preamble of the said Act clearly states that the RERA is enacted for effective consumer protection and to protect the interest of consumers in the real estate sector. RERA is not enacted to protect the interest of investors. The complainant is an investor and not a consumer as defined in the Consumer Protection Act, 1986. The complainant, who is already the owner and resident of two properties i.e. C-296, DDA-SFS Flats, Sheikh Sarai, Phase-I, New Delhi-110017 (address mentioned in the personal details form and buyer agreement) and A-304, Sanskriti Apartments, Sector-43, Gurugram-122009 (as mentioned in the present complaint) is an investor, who never had any intention to buy the floor for his personal use and kept on avoiding the performance of his contractual obligations of making timely payments.

- iv. The respondent submitted that this hon'ble authority has no jurisdiction to entertain the present complaint as the complainant has not come to this authority with clean hands and has concealed the material facts:



- (a) The complainant, along with his wife i.e. Saloni Chawla, is joint owner of the floor in question. However, the present complaint has not been filed by both the joint owners and therefore is liable to be dismissed on this ground alone.
- (b) The complainant has been a defaulter, having deliberately failed to make the payment of various instalments within the time prescribed, which resulted in delay payment charges, as reflected in the statement of account dated 24.05.2018. The current outstanding as on 24.05.2018 is Rs.6,062.
- v. The respondent submitted that from the date of booking i.e. October 2012 till August 2017, for almost 5 years, the complainant had never raised any issue whatsoever and on the contrary the complainant had admitted financial problems because of which the complainant was not in position to make payments.
- vi. The complainant has concocted a false story to cover up his own defaults of having failed to make the payments within the time prescribed, which resulted in delay payment charges, and raised false and frivolous issues and has filed the present complaint on false, frivolous



and concocted grounds. This conduct of the complainant clearly indicates that the complainant is a mere speculator having invested with a view to earn quick profit and due to slowdown in the market conditions, the complainant has failed to perform his contractual obligations of making timely payments.

- vii. The respondent submitted that despite several adversities, the respondent has continued with the construction of the said project and is in process of completing the construction of the project and should be able to apply for occupation certificate for the floor in question i.e. ESF-A-T-GF-130 by 28.08.2022 (as mentioned at the time of registration of the project with RERA).
- viii. The authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with buyer's agreement signed by the complainant. It is matter of record that no such agreement as is referred under the provisions of the said Act or said rules has been executed between the complainant and the respondent. Rather, the agreement that has been referred to is dated



31.10.2012 which was executed much prior to coming into force of the said Act or said Rules.

Reply on merits

13. The respondent admitted the details of booking of said floor at Emerald Floors Select, Emerald Hills, basic sale price, contents of clause 13 of the said agreement and delay in payment of instalment by the complainant being matter of record. The respondent denied that the built up floor was required to be ready by April 2018 or that no date for offer of possession has been committed by the respondent, or that the agreement is unfair or one sided, or that section 13 of the said Act is applicable to the facts and circumstances of the present case or present agreement or that the buyer agreement violates any law, or that the project is not registered with RERA. The respondent also denied that the buyer agreement is unjustifiable or is in violation of business ethics or allows respondent to delay the start of construction or does not provide for compensation to the complainant or that there is any delay in the start of construction which has caused any alleged loss to the complainant. It is also denied that the buyer agreement has any unfair clause or that the complainant is entitled to get any compensation for the alleged delay.



14. The respondent submitted that the terms of the buyer's agreement are binding between the parties. It is settled law that a person who signs a document which contains contractual terms is normally bound by them even though he has not read them, even though he is ignorant of the precise legal effect. This is so held by the Hon'ble Supreme Court in a number of cases.

15. The respondent submitted that complainant is caught in a web of his own lies as the proposed estimated time of handing over the possession of the said floor was 24+3 months i.e. 27 months from the date of start of construction which is also admitted by the complainant. That, without prejudice to the above, it is submitted that the said proposed time of 27 months is applicable only subject to force majeure and the complainant having complied with all the terms and conditions and not being in default of any the terms and conditions of the buyer agreement, including but not limited to the payment of instalments. In case of any default/delay in payment, the date of handing over of possession shall be extended accordingly solely at the respondent's discretion, till the payment of all outstanding amounts as also stated in clause 13 of the said agreement.



16. The respondent further without prejudice, submitted that section 19(4) of said Act provides that the allottee shall be entitled to claim the refund of the amount paid along with interest at such rates as may be prescribed and compensation in the manner as provided in the Act, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be, in accordance with the terms of agreement for sale. Section 19(3) provides that the allottee shall be entitled to claim the possession of the apartment, plot or building, as the case may be, as per the declaration given by the promoter under section 4(2)(1)(c). Thus, conjoint reading of both the provisions, as aforementioned, would show that the entitlement to claim the possession or refund would only arise once the possession has not been handed over as per the declaration given by the promoter under section 4(2)(1)(c). In the present case, the respondent had made a declaration in terms of section 4(2)(1)(c) that it would complete the project by 28.08.2022.



17. The respondent further submitted that without prejudice to the above, even otherwise also, as provided in clause-13 of the agreement, the period of 27 months commences from the date of construction i.e. 13.09.2016, when the payment

request for the 7th instalment (due to be paid on the start of excavation) was raised. The period of 27 months is still not over from 13.09.2016 and therefore no cause of action can be said to have arisen to the complainant in any event to claim any relief, as sought to be claimed. The complaint is not only misconceived but is also pre-mature and is liable to be dismissed.

18. The respondent further submitted that projects, such as the one in question, are huge projects and involve putting in place huge infrastructure and is dependent on timely payment by all the allottees. Such huge projects do take some reasonable time for completion and timelines are not absolute. This position is fortified from the fact that the parties, having envisaged that there could be some further delay after expiry of 27 months (from the date of start of construction), agreed to a specific condition that in case the respondent fails to offer possession of the floor within 27 months, it shall be liable to pay delay compensation @ Rs.7.50 per sq. ft. per month of the super area of the said floor for the period of delay beyond 27 months or such extended periods as permitted under the buyer agreement. Such a clause would not have been agreed to by the complainant had



the parties not envisaged time for offer of possession beyond 27 months.

19. The respondent denied that the respondent is not entitled to charge GST. The respondent submitted that "taxes and levies" has already been defined under clause 10(1) of the said agreement and the complainant is required to pay all the taxes, including the GST, which is charged as per law. That without prejudice to the above, the respondent submitted that this hon'ble regulatory authority has no jurisdiction to adjudicate upon the issues pertaining to the GST.
20. The respondent denied that there is any ambiguity which requires correction or that the respondent never responded or that the response of respondent that it will comply with the existing buyer agreement was not clear to the complainant.

Proposed issues by the respondent

- i. Whether or not hon'ble regulatory authority has any jurisdiction whatsoever to entertain the present complaint and therefore the complaint is liable to be dismissed for want of jurisdiction?



- ii. Whether the complainant, who is defaulter, is liable to be prosecuted under Section 19(6) and 19(7) of the said Act for non-payment of instalments, interest, etc.?
- iii. Whether the complainant is liable to make the balance payment of instalments, interest, etc. as the apartment buyer agreement and under section 19(6) & 19(7) of the said Act?
- iv. If the complainant fails to make the balance payment of instalments, interest, etc. as per the apartment buyer agreement and under section 19(6) and 19(7) of the said Act then whether the respondent is entitled to cancel the allotment of the complainant and forfeit the earnest money as well as other charges as per the terms and conditions of the buyer agreement?
- v. Whether the complaint being false and frivolous, without any cause of action and without jurisdiction is liable to be dismissed?



Determination of issues:

After considering the facts submitted by the complainant, reply by the respondent and perusal of record on file, the issue wise findings of the authority are as under:

21. With respect to the first and third issue raised by the complainant, as per clause 13(a) of buyer agreement, the possession of the unit was to be handed over within 24 months from the start of construction along with a grace period of 3 months. In the present case the construction commenced on 13.09.2016 as admitted by both the parties. Therefore, the due date of handing over the possession shall be computed from 13.09.2016. The clause regarding the possession of the said unit is reproduced below:

“13(a) Possession

Subject to terms of this clause and subject to Allottee(s) having complied with all the terms and conditions of this agreement, and not being 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 handover the possession of the Independent Floor within 24 months from the start of construction. The allottee(s) agrees and understands that the company shall be entitled to a grace period of 3 months, for applying the occupation certificate in respect of the Independent Floor and/or the project.”



22. Accordingly, the due date of possession is 13th December 2018. Although the due date of possession has so far not been crossed, the interest for the delayed possession as per section 18(1) of the Act has not accrued. However, the delay compensation payable by the respondent @ Rs.7.50/- per sq. ft. per month of the super area till the date of notice of

possession as per clause 15(a) of buyer agreement is held to be very nominal and unjust. The terms of the agreement have been drafted mischievously by the respondent and are completely one sided as also held in para 181 **of Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and ors. (W.P 2737 of 2017)**, wherein the Bombay HC bench held that:

"...Agreements entered into with individual purchasers were invariably one sided, standard-format agreements prepared by the builders/developers and which were overwhelmingly in their favour with unjust clauses on delayed delivery, time for conveyance to the society, obligations to obtain occupation/completion certificate etc. Individual purchasers had no scope or power to negotiate and had to accept these one-sided agreements."

23. With respect to the fourth issue raised by complainant, the matter regarding payment of GST is kept reserved for which the authority shall be taking a view in line with the GST authority. The complainant shall be at liberty to approach any other suitable forum regarding levy of GST.
24. With respect to the first issue raised by the respondent regarding preliminary objection is dealt by the authority in the succeeding para no. 25. With respect to the second issue raised by the respondent, if the promoter has any grievance against the complainant then he may raise the same against the complainant in a separate complaint. With respect to the



third issue, the allottee is also duty bound as per section 19(6) & (7) of the said Act, to make necessary payments in the manner & within the time as specified in the agreement for sale and shall be liable to pay interest, at prescribed rate, for any delay in making payment towards any amount or charges to be paid under sub-section (6). With respect to the fourth issue, the promoter may cancel the allotment only in terms of agreement for sale as per section 11(5) of the said Act. With respect to the fifth issue, the complaint is premature as the due date of handing over the possession is 13.12.2018 which has so far not been crossed.

Findings of the authority

25. The application filed by the respondent for rejection of complaint raising preliminary objection regarding jurisdiction of the authority stands dismissed. The authority has complete jurisdiction to decide the complaint in regard to non-compliance of obligations by the promoter as held in ***Simmi Sikka V/s M/s EMAAR MGF Land Ltd.*** leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.



26. In line with the determination of the aforesaid issues, the relief sought by the complainant becomes superfluous as the complaint is premature. However, the matter is filed but the complainant is at liberty to file a separate complaint wherein he may seek compensation by filing an application before the adjudicating officer or he may come before the authority for relief keeping in view that the authority is guided by the principles of natural justice.

Decision and directions of the authority

27. The complainant requested that necessary directions be issued to the promoter to comply with the provisions and fulfil obligation under section 37 of the Act which is reproduced below:

37. Powers of Authority to issue directions

The Authority may, for the purpose of discharging its functions under the provisions of this Act or rules or regulations made thereunder, issue such directions from time to time, to the promoters or allottees or real estate agents, as the case may be, as it may consider necessary and such directions shall be binding on all concerned.



To meet the ends of justice the authority under Section 38(2) shall be guided by the principles of natural justice. Section 38(2) is reproduced as below:

“38. Powers of Authority-

(1) ...

(2) the authority shall be guided by the principles of natural justice and, subject to the other provisions of this Act and the rules made thereunder, the Authority shall have powers to regulate its own procedure.

(3) ...”

28. However, keeping in view the present status of the project and intervening circumstances, the authority is of the view that the promoter is liable to give possession on or before 13.12.2018 as per clause 13(a) of the agreement. Moreover, it seems that the promoter may not be able to give possession of the said unit on or before the due date i.e. 13.12.2018 in terms of the said agreement as date of completion of project in HRERA registration certificate is 28.08.2022. In case the respondent fails to give possession by due date then the respondent shall be liable to pay interest for every month of delay at prescribed rate till the handing over of the possession to the allottee. However, the due date of possession so far has not been crossed, accordingly at this stage, the interest for delay in handing over the possession as per section 18(1) of the Act *ibid* has not accrued. The respondent in HRERA registration certificate has mentioned the date of completion of project as 28.08.2022. Therefore, the respondent is duty bound to complete the project by the



said date otherwise penal proceeding will be initiated against the promoter.

29. After taking into consideration all the material facts as adduced and produced by both the parties, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issues the following directions to the respondent in the interest of justice and fair play:

- (i) The respondent shall be liable to pay interest for every month of delay at prescribed rate i.e. 10.45% p.a. till the handing over of the possession to the allottee in case the respondent fails to give possession by the due date i.e. 13th December 2018.
- (ii) The payment of interest shall be made by the respondent for the previous months before 10th of every subsequent month.

30. The order is pronounced.

31. Case file be consigned to the registry.



(Samir Kumar)
Member

(Subhash Chander Kush)
Member

(Dr. K.K. Khandelwal)
Chairman
Haryana Real Estate Regulatory Authority, Gurugram



HARERA
GURUGRAM

