

PROCEEDINGS OF THE DAY

Day and Date	Thursday and 20.09.2018
Complaint No.	265/2018 Case titled as Mrs. Shalini Ahuja V/s M/s Emaar MGF Land Ltd.
Complainant	Mrs. Shalini Ahuja
Represented through	Shri Pradeep Sharma, Advocate for the complainant.
Respondent	M/s Emaar MGF Land Ltd.
Respondent Represented through	Shri Ketan Luthra, authorized representative on behalf of the respondent-company with Shri J.K.Dang and Ankit Mehta, Advocates.
Last date of hearing	11.9.2018
Proceeding Recorded by	

Proceedings

The project is ready and for occupation certificate, the application has already been moved to the competent authority on 24.4.2017. Accordingly, possession will be handed over to the complainant as soon as occupation certificate is received from the competent authority.

Counsel for the complainant raised the issue regarding likely date of possession, in case occupation certificate has been applied by the respondent. The DTCP be asked to submit factual report regarding the status of their application for grant of occupation certificate. Counsel for the complainant made a statement that their matter be heard by the authority regarding compliance of the obligations of the promoters and not other

matter as listed in the relief sought in heading of the complaint. There is delay on the part of the respondent in handing over possession, accordingly, keeping in view the provisions of Section 18 (1) of the Real Estate (Regulation & Development) Act, 2016, the authority orders that interest at the prescribed rate of interest i.e. 10.45% for every month of delay be paid to the complainant. The arrears accrued so far shall be paid within 90 days from the issuance of the order and then monthly payment of interest shall be paid before 10th of subsequent months till handing over possession.

Counsel for the respondent pleaded that interest shall not be charged retrospectively for which the authority has already taken a view that interest is applicable with retrospective effect.

Also the counsel for the respondent made a submission that logically the interest shall be payable upto the date of application for grant of occupation certificate and not beyond the date as the respondent has no control over the authority for occupation certificate. The authority is of the view that it is the obligation of the promoter/respondent to pursue their application for grant of occupation certificate as grant of OC is linked with application on the prescribed form alongwith Annexures and pre-requisites are made within a reasonable time before the competent authority. If there are some serious delay in this regard even after completion of pre-requisites then the respondent may approach before the appropriate forum.

Counsel for the complaint made a submission that he may be paid interest at the same rate as has been charged from him. This issue has already been dealt with by the authority. As far as obligations of the promoter for

determinate part i.e. the amount paid by the allottee and the interest at the prescribed rate is concerned, it is already fixed by the statute whereas in the proceedings of compensation, it is either compensation or interest, as the case may be, and the counsel for the complainant may seek interest at the rate they have paid to the respondent in case of default on their part. The authority can also issue directions for compliance of the obligations on the part of the respondent where ever these are decided by the statute and not the compensatory interest as has been demanded by the counsel for the complainant.

The complaint stands disposed of. Detailed order will follow. File be consigned to the registry.

Samir Kumar
(Member)

Subhash Chander Kush
(Member)

Dr. K.K. Khandelwal
(Chairman)
20.09.2018

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

Complaint No. : 265 of 2018
Date of First Hearing : 27.06.2018
Date of Decision : 20.09.2018

Mrs. Shalini Ahuja
R/o H.No. 315-R, Model Town, Panipat-
132103, Haryana **...Complainant**

Versus

M/s EMAAR MGF Land Limited,
EMAAR MGF Business Park, Mehrauli-
Gurugram, Road, Sikandpur Chowk, sector
28, Gurugram-122002, Haryana **...Respondent**

CORAM:

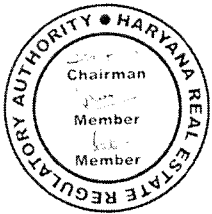
Dr. K.K. Khandelwal
Shri Samir Kumar
Shri Subhash Chander Kush

Chairman
Member
Member

APPEARANCE:

Shri Pradeep Sharma
Shri Ankit Metha
Shri Ketan Luthra

Advocate for the complainant
Advocate for the respondent
Legal representative of
respondent



ORDER

A complaint dated 14.05.2018 was filed under section 31 of the Real Estate (Regulation and Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and

Development) Rules, 2017 by the complainant Mrs. Shalini Ahuja against the promoter M/s EMAAR MGF Land Limited for not giving possession on the due date which is an obligation of the promoter under section 11 (4) (a) of the Act *ibid.*

The particulars of the complaint are as under: -

1	Name and location of the project	Palm Hills, Sector-77, Gurgaon
1.	Unit no.	PH4-31-0902, 9 th Floor, Block no. 31
2.	Registered/Unregistered	Registered
3.	Total consideration	Rs. 78,98,508.53/-
4.	Total amount paid by the complainant	Rs. 78,40,762/-
5.	Date of agreement	20.07.2010
6.	Date of delivery of possession. (22.05.2011 as on this date the respondent raised the demand on the start of construction)	Clause 11-33 months + grace period of 3 months from commencement of construction i.e.22.05.2014
7.	Delay of number of months	4 years 4 months
8.	Penalty Clause as per builder buyer agreement dated 20.07.2010	Rs. 7.50 /-per sq. ft. per month till the date of notice of possession

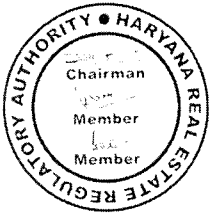


3. As per the details provided by the parties in the complaint and the reply, the developer/promoter was bound to deliver the possession of unit no. PH4-31-0902, 9th floor, block no. 31. The promoter has failed to deliver the possession of the

- said unit to the complainant by the due date as per apartment buyer agreement dated 20.07.2010. Therefore, the promoter has not fulfilled his committed liability as on date.
4. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. Accordingly, the respondent appeared on 27.06.2018. The case came up for hearing on 27.06.2018, 25.07.2018 & 11.09.2018. The reply has been filed by the respondent dated 25.07.2018.

FACTS OF COMPLAINT

5. The complainant submitted that the respondent had been proclaiming in general public through Newspaper advertisements, marketing emails, SMS and telemarketing that they had launched an integrated residential township in Gurugram. The said integrated township as claimed is being set up after necessary approvals of all the competent authorities. It was further claimed that all the necessary approvals, clearances and procedures had been duly obtained and sanctioned as regards the proposed integrated township. The complainant booked a flat in the project, namely 'Palm Hills' situated at sector-77, village shikohpur, tehsil & district Gurugram, Haryana and paid a sum of Rs. 5,00,000/- towards



the booking amount. Thereafter, unit no. PH4-31-0902 ad-measuring 1950 sq. ft. was allotted to the complainant.

6. The complainant submitted that thereafter, a buyer's agreement was executed between the respondent and the complainant on 20.07.2010 at Gurugram. According to the buyer's agreement the possession of the flat was to be handed over within 33 months from the date of start of construction with a grace period of 3 months i.e. 22.05.2014.
7. The complainant submitted that the buyer's agreement has been drafted in such a manner, which is beneficial for the respondent and prejudicial to the interests of the complainant. For delay in handing over the possession that in clause No 13, of the buyer's agreement dated 20.07.2010 it was mentioned that in case of delay in handing over the possession to the allottee, the allottee(s) shall be entitled to compensation for delay @ Rs. 7.50/- per sq. ft. per month of the super area of the unit for the period of delay beyond 33+3 months till the date of notice of possession. Further in clause 14, it was mentioned that if the allottee fails to take the possession, the Developer shall charge the holding over charges @ Rs.25/- per sq. ft. of the super area of the unit per month and further interest @ 24% per annum over the delayed payments.



8. That according to the BBA, the respondent was required to handover the possession of the apartment within 33 months from the date of start of construction and admittedly, the construction was started by the respondent on 22.05.2011, as it clear from the schedule of the payment and the respondent failed to offer the possession within the stipulated period.
9. The complainant submitted that the total sale consideration was Rs. 78,98,508.53/- and according to the account statement, the complainant has already paid a sum of Rs. 78,40,762/-.
10. The respondent is legally bound to compensate the complainant for the delay in handing over possession of the flat in question at the same rate, which the respondent would have otherwise charged the complainant that is to pay the holding over charges @ Rs 7.50/- per sq ft. of the super area and also interest @ 24% on the due amount till the time the possession of the flat in question is handed over to complainant. The possession is to be handed over to the complainant within the stipulated period, the complainant would have been using the flat in question for her personal requirements which is why the complaint continued to make, rather forced, to make the payments as per the demands made by the respondent despite the fact that the



respondent was not adhering to the schedule of construction and was more interested in fleecing the complainant.

11. The complainant submitted that the complaint has been made to pay for the super area of the flat which also covers the area which a builder/developer cannot charge from the allottee. As per annexure IV of the buyer's agreement dated 20.07.2010, the area of the apartment is 91% of the super area. It has also been mentioned in the same annexure that the ratio of apartment area to the super area may undergo change till the completion of the building/project. In such circumstances it has become difficult for the complainant to decipher as to how much of the excess amount has been charged by the respondent for the area for which the respondent cannot otherwise charge with from the complainant. The respondent is under statutory obligation to disclose the carpet area and refund the amount taken for the area which is not chargeable under Real Estate (Regulation and Development) Act, 2016.

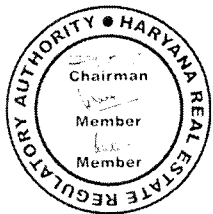


12. ISSUES RAISED BY THE COMPLAINANT

- i. Whether the promoter was under legal obligation to hand over the flat in question in terms of the buyer

agreement dated 20.07.2010? If the same has not been done, then what is the effect?

- ii. Whether the Promoter is liable to pay charges @ 7.50/- per sq. ft. of the super area that is 21950 sq. ft. and also interest @ 24% on the amount of Rs. 78,40,762/-w.e.f. 21.02.2014?
- iii. Whether the Promoter is liable to disclose the carpet area of the Flat in question and refund the proportionate amount taken for the area which is not chargeable under Real Estate (Regulation and Development) Act, 2016?
- iv. Whether the complainant is entitled for grant of compensation for inconvenience, mental harassment and damages suffered by complainants due to deficiency in service on the part of the Respondent? If so, then what is the quantum?



13. RELIEF SOUGHT

- i. To direct the respondent to hand over the possession of the flat bearing unit no. PH4-31-0902 admeasuring 181.16 sq. mtrs. (1950 sq. ft. approx.) in the project

namely 'Palm Hills' situated at Sector 77, Village Shikohpur, Tehsil & District Gurugram, Haryana.

- ii. Direct the respondent to pay charges @ 25/- per sq. ft. of the super area that is 1950 sq. ft. and also interest @ 24% on the amount of Rs. 78,40,762/- w.e.f. 21.02.2014, till the time the possession of the flat is handed over to the complainants.

REPLY

The respondent submitted various preliminary objections and submissions. They are as follow:

14. That the respondent submitted that this Hon'ble Regulatory Authority has no jurisdiction whatsoever to entertain the present complaint. The respondent has filed a separate application for the rejection of the complaint on the ground of the jurisdiction and this reply is without prejudice to the rights and contention of the respondent contained in the said application. The claims have been made in a manner unknown to the common law of contract and are specifically contrary to the text of the Indian contract act, 1872 itself.

15. The respondent has received occupation certificate for 25 towers in the said project and has handed over possession of the same. Respondent has also applied for occupation



certificate for 24 towers including the tower which the unit in question allotted to the complainant dated 24, April 2017. Hence, the part of the project is neither covered as per the rules ibid nor the project of the said respondent registered with this Hon'ble Regulatory Authority.

16. The respondent submitted that as per applicable act and rules a complaint may be filed by a person only if the respondent has committed any act in violation of the real estate act, 2016 as the complainant has failed to bring on record any document, evidence etc. which may even allude let alone prove that the respondent has violated the provisions of the act and the complainant has no locus standi.

17. The respondent submitted that the complaint is not supported by an attested affidavit and as such the complaint is without proper attestation and cannot be read as legal pleading.

18. The complainant has filed the present complaint seeking refund of the payment made to the respondent, compensation and interest for alleged delay in delivery of possession of the apartment booked by the complainant. It is respectfully submitted that complaints pertaining to compensation and refund are to be decide by the Adjudicator



under Section 71 & Section 31 of the Real Estate (Regulation and Development) Act, 2016.

19. Further the complainant is not a consumer in terms of definition of consumer under Consumer Protection Act, 1986. That the respondent submits that the complainant is clearly an investor, the fact that Smt. Shalini Ahuja wife of Mr. Rippen Ahuja has applied for and has been provisionally allotted Unit No. PH4-31-0902 in the said project of the respondent. It is a matter of record that Mr. Rippen Ahuja has filed another complaint no. 268/2018 in "Palm Gardens" Project, Gurugram and which is pending before the authority. The complainant is thus clearly investors having invested with a view to earn quick profit but due to the sluggishness in the market conditions, they might have failed to resell the said unit, and have now raised false issues to engage the respondent in unnecessary litigation. The respondent submits that it is a well settled law established by the Hon'ble Supreme Court of India, that booking of more than one unit falls within the definition of investor.



20. The respondent submits that there is a delay in handing over of possession of the unit to the complainant and the company was liable to hand over possession of the said unit on or before 21.02.2014. on the point of construction and the time

line of handing over the possession of the unit, it is relevant to mention that it had been categorically conveyed to the complainant that the company would endeavour to complete the project and hand over the possession of the unit booked, as expeditiously as possible, subject to the reasons beyond the control of the company, as also subjected to the terms and condition contained in the buyer agreement. Being law abiding company, possession of a unit can only be handed over once all the statutory permission/ approvals have been obtained.

21. The respondent submits that the project in question is a large project and such kind of projects do take reasonable time for completion. This position is fortified from the fact that the parties had envisaged a compensation clause in the application form/ buyers agreement in case the company was not able to handover the possession within 33 months from the date of start of construction and conditions of buyer's agreement.



22. The respondent submits that the complainant is defaulters and deliberately fail to make payments of instalments within time, which results in delayed payment charges as reflected in statement of accounts. The respondent has also sent several reminders to make the payments, but the

complainant failed to make payment on time. The current outstanding amount towards delay payment charges is Rs. 52,305/- as of 13.06.2018.

23. The respondent submits that from the date of booking till filing of present complaint the complainant has never ever raised any issue whatsoever. The complainant has never objected to the terms & conditions of the application form or the buyer's agreement till date.
24. During hearings, oral arguments have been advanced by both the parties in order to prove their contentions. The counsel of the respondent states that the project is ready and for occupation certificate, the application has already been moved to the competent authority on 24.04.2017. Accordingly, possession will be handed over to the complainant as soon as occupation certificate is received from the competent authority. Counsel of the complainant raised the issue regarding likely date of possession. The DTCP be asked to submit the factual report regarding the status of their application for the grant of the certification certificate. Moreover, made a statement that their question was heard by the authority regarding the compliance of the promoters and not other matter as listed in the relief sought in heading of the complaint. Counsel for the respondent pleaded that



interest shall not be charged retrospectively for which the authority has already taken a view that interest is applicable with retrospective effect. Also the counsel for the respondent made a submission that logically the interest shall be payable upto the date of application for grant of occupation certificate and not beyond the date as the respondent has no control over the authority for occupation certificate. Counsel of the complainant made a submission that he may be paid interest at the same rate as has been charged from him.

25. Determination of issues

- I. Regarding the **first issue**, the promoter was under a legal obligation for handing over the possession as per the BBA. However, they committed a default in doing the same and thus, they are liable to pay delayed interest.
- II. Regarding **second and third issue**, the respondent shall be liable to pay delayed interest at the prescribed rate of 10.45% as has been pronounced in the subsequent paras.
- III. Regarding **fourth issue**, the award of compensation by the respondent, the complainant must make an application before the adjudicating officer.



26. Findings of Authority

Keeping in view the facts of the case, there is delay on the part of the respondent in handing over possession. Thus, as per the provisions of section 18(1) of the Real Estate (Regulation & Development) Act, 2016, the authority orders that interest at the prescribed rate of interest i.e. 10.45% for every month of delay be paid to the complainant. The arrears accrued so far shall be paid within 90 days from the issuance of the order and then monthly payment of interest shall be paid before 10th of subsequent months till handing over possession. The authority is of the view that it is the obligation of the promoter / respondent to pursue their application for grant of occupation certificate as grant of OC is linked with application on the prescribed form along with annexure and pre-requisites are made within a reasonable time before the competent authority. If there are some serious delays in this regard even after completion of pre-requisites then the respondent may approach before the appropriate forum.



27. Accordingly, the due date of possession was 22.05.2014. As far as grant of statutory approvals is concerned, it is held to be one sided as also held in para 181 of the judgment in

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.”

27. As the possession of the flat was to be delivered by 22.05.2014 as per the clause referred above, the authority is of the view that the promoter has violated section 11(4)(a) of the Haryana Real Estate (Regulation and Development) Act, 2016, which is reproduced as under:

“11.4 The promoter shall—

(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made there under or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be: Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed.”



28. The complainant made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above. Section 34(f) is reproduced below:

“34 (f) Function of Authority -

To ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made there under.”

It has been 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.



29. As per obligations on the promoter under section 18(1) proviso, in case the allottee wishes to continue with the project, the promoter is obligated to pay interest at the prescribed rate as the promoter has not fulfilled his obligation. Section 18(1) is reproduced below:

“18.(1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,— (a)

in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or (b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason, he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act: Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

The complainant reserve her right to seek compensation from the promoter for which she shall make separate application to the adjudicating officer, if required.

30. 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.



Decision and directions of the authority

31. 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 is duty bound to hand over the possession of the said unit as soon as the occupation certificate is received as committed by the respondent.
- (ii) The respondent is duty bound to pay the interest at the prescribed rate i.e. 10.45% for every month of delay from the due date of possession i.e. 22.05.2014 till the actual date of handing over of the possession.
- (iii) The respondent is directed to pay interest accrued from 22.05.2014 to 20.09.2018 on account of delay in handing over of possession to the complainant within 90 days from the date of decision and subsequent interest to be paid by the 10th of every succeeding month.



32. The order is pronounced.

33. Case file be consigned to the registry. Copy of this order be endorsed to the registration branch.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated 20.09.2018

