

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

Complaint no. : 2483 of 2018
First date of hearing : 12.03.2019
Date of decision : 28.01.2020

Ms. Preeti Trehan
R/o: B-1/13, 1st floor, Malviya Nagar,
New Delhi-110017.

Complainant

Versus

M/s Emaar MGF Land Ltd.
Address: Emaar MGF Business Park, M.G.
Road, Sikandarpur Chowk, Sector 28,
Gurugram, Haryana.

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

**Member
Member**

APPEARANCE:

Shri Preeti Trehan
Shri Varun Chugh
Shri Ishaan Dang
Shri Ketan Luthra

Complainant in person
Advocate for the complainant
Advocate for the respondent
AR of the respondent
company

ORDER

1. The present complaint dated 31.12.2018 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 allottees 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 Floors Premier III at Emerald Estate, Sector 65, Gurugram.
2.	Project area	25.499 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	06 of 2008 dated 17.01.2008 Valid/renewed up to 16.01.2020
5.	Name of licensee	Active Promoters Pvt. Ltd. and 2 others C/o Emaar MGF Land Ltd.
6.	HRERA registered/ not registered	Registered vide no. 104 of 2017 dated 24.08.2017 for 82768 sq. mtrs.
7.	HRERA registration valid up to	23.08.2022
8.	Date of provisional allotment letter	15.09.2011 [Annexure R5 at page 45 of reply]
9.	Unit no.	EFP-III-53-0001, Ground Floor, Building No. 53
10.	Unit measuring	1975 sq. ft.

11.	Date of execution of buyer's agreement	20.03.2012 [Page 20 of complaint]
12.	Payment plan	Instalment payment plan [Page 46 of reply]
13.	Total consideration as per statement of account dated 20.08.2019 (page 47 of reply)	Rs.1,56,29,690/-
14.	Total amount paid by the complainant as per statement of account dated 20.08.2019 (page 48 of reply)	Rs.1,36,94,510/-
15.	Due date of delivery of possession as per clause 11(a) of the said agreement i.e. 24 months from the date of execution of buyer's agreement (20.03.2012) plus 3 months grace period [Page 29 of complaint]	20.06.2014
16.	Date of offer of possession to the complainant	Not offered
17.	Delay in handing over possession till date of decision i.e. 28.01.2020	5 years 7 months 8 days

3. As per clause 11(a) of the agreement, the possession was to be handed over within a period of 24 months from the date of execution of buyer's agreement i.e. 20.03.2012 plus grace period of 3 months for applying and obtaining the CC/OC in respect of the unit and/or the project which comes out to be 20.06.2014. Clause 11 of the buyer's agreement is reproduced below:

"11. POSSESSION
(a) 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 buyer's agreement, and not being in default under any of the provisions of this buyer's agreement and compliance with all provisions, formalities, documentation etc. as prescribed by the company, the company proposes to hand over the possession of the unit within 24 months from the date of execution of buyer's agreement. The allottee(s) agrees and understands that the company shall be entitled to a grace period of 3 months, for applying and obtaining the occupation certificate in respect of the unit and/or the project."

4. The complainant submitted that on the pretext of making false promises of handing over the possession of the apartment within abovementioned stipulated time, owing the delayed construction and possession by the respondent, on 28.03.2018, the complainant was further trapped and coerced by the respondent to sign a one-sided settlement agreement, in favour of the respondent wherein the complainant was required to undertake, not to claim or raise any compensation for delay in handing over possession of the property. That despite entering into a biased and one-sided settlement agreement, the respondent has failed to handover the possession of the apartment even as per the new schedule provided by the respondent the respondent has committed gross violation of section 18(1) of the Act by not handing over the timely possession of the flat in question and not giving interest to the buyer. Hence, this complaint inter-alia for the following reliefs:

- i. Direct the respondent to handover the property/apartment to the complainant in time bound manner.
 - ii. Direct the respondent parties to pay interest at the prescribed rate for every month of delay from due date of possession till the actual handing over the possession on amount paid by the complainant as per section 18 of the Act.
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 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. That clause 11(b)(iv) provides that in case of any default or delay by the allottees in payment as per schedule of payment incorporated in the buyer's agreement, the date of handing over of possession shall be extended accordingly. Since, the complainant and Mr. Sunil Kumar

Trehan have defaulted in timely remittance of payments as per schedule of payment, the date of delivery of possession is not liable to be determined in the manner sought to be done in the present case by the complainant.

iii. That as per clause 13 of the buyer's agreement, compensation for delay in delivery of possession shall 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.

iv. The respondent submitted that-

'14. That without admitting or acknowledging in any manner the truth or legality of the allegations levelled by the complainant and without prejudice to the contentions of the respondent, it is submitted that the project has got delayed on account of following reasons which were/are beyond the power and control of the respondent.

1. Second staircase issue

The building plans for the apartment/tower in question was approved by the competent authority under the then applicable National Building Code (NBC) in terms of which buildings having height of 15 mtrs. or above but having area of less than 500 sq. mtrs. on each floor, were being approved by the competent authorities with a single staircase and construction was being carried out accordingly.

Subsequently, NBC was revised in the year 2016 and in terms of the same, all high-rise buildings (i.e. buildings having height of 15 mtrs. and above), irrespective of the area of each floor, are now required to have two staircases.

Furthermore, it was notified vide gazette published on 15.03.2017 that the provisions of NBC 2016 supersede those of NBC 2005.



The Fire Department is seeking to retrospectively apply the said provision and while processing the Fire NOC application has been insisting on two staircases in all high-rise buildings even in cases where the building plans stood approved with a provision for a single staircase and which have been constructed accordingly. The Fire Department has issued a provisional Fire NOC with the requirement that the second staircase would be constructed by the developer within one year from the date of issuance of provisional Fire NOC...

Eventually, so as not to cause any further delay in the project and so as to avoid jeopardising the safety of the occupants of the buildings in question including the building in which the apartment in question is situated, the respondent has taken a decision to go ahead and construct the second staircase. It is expected that the construction of the second staircase will be completed in a year's time. Thereafter, upon issuance of the OC and subject to force majeure conditions, possession of the apartment shall be offered to the complainant.'

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 and other submissions made and the documents filed by the complainant and the respondent, 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. 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 11(a) of the buyer's agreement executed between the parties on 20.03.2012, possession of the booked unit was to be delivered within a period of 24 months plus 3 months grace period from the date of execution of buyer's agreement (i.e. 20.03.2012). The grace period of 3 months 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 20.06.2014. 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, it is the failure of the promoter to fulfil his obligations, responsibilities as per the buyer's agreement dated 20.03.2012 to hand over the possession within the stipulated period. 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. In this case, the respondent has not offered the possession of the unit to the complainant. As such the complainant is entitled to delayed possession interest at rate of the prescribed @ 10.20% p.a. w.e.f. 20.06.2014 till the offer of possession as per provisions of section 18(1) of the Act read with rule 15 of the Rules. The complainant has already paid Rs.1,36,94,510/- against the total sale consideration of Rs. 1,56,29,690/- as per statement of account dated 20.08.2019 at page 47 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. 20.06.2014 till the offer of possession.
 - ii. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order and thereafter monthly payment of interest till offer of possession shall be paid before 10th of each subsequent month.
 - iii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.



- iv. The respondent shall not charge anything from the complainant which is not part of the buyer's agreement.
- v. 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.



(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 28.01.2020

Judgement uploaded on 02.03.2020


(Subhash Chander Kush)

Member

Haryana Real Estate Regulatory Authority, Gurugram