

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

Complaint no. : 1812 of 2019  
First date of hearing : 18.09.2019  
Date of decision : 14.02.2020

Surinder Riat  
(Through SPA Holder Narender Pal Riat)  
R/o N2/4, DLF Colony,  
Phase 2, Gurugram.

**Complainant**

Versus

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

**Respondent**

**CORAM:**

Shri Samir Kumar  
Shri Subhash Chander Kush

**Member  
Member**

**APPEARANCE:**

Shri Joginder Lal Khatri  
Shri Ishaan Dang

Advocate for the complainant  
Advocate for the respondent

**ORDER**

1. The present complaint dated 08.05.2019 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	"Imperial Gardens", Sector 102, Gurugram.
2.	Project area	12 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	107 of 2012 dated 15.10.2012 valid till 09.10.2020
5.	Name of licensee	Kamdhenu Projects Pvt. Ltd. and Emaar MGF Land Ltd.
6.	HRERA registered/ not registered	<p><b>Registered in two phases</b></p> <p><b>i. 208 of 2017 dated 15.09.2017</b>  [Valid up to 31.12.2018 for 49637 sq. mtrs. and extension granted vide no.3/2018 which is extended up to 31.12.2019]</p> <p><b>ii. 14 of 2019 dated 28.03.2019(Phase II)</b>  [Valid up to 17.10.2018 for 4.57 acres]</p>
7.	Date of provisional allotment letter	28.02.2013 [Page 25 of reply to the complaint]
8.	Unit no.	IG-05-0102, 1 <sup>st</sup> floor, tower/ building no. 5 [Page 30 of complaint]
9.	Unit measuring	2000 sq. ft.

10.	Date of execution of buyer's agreement	17.05.2013 [Page 27 of complaint]
11.	Payment plan	Instalment payment plan [Page 61 of complaint]
12.	Total consideration as per statement of account dated 20.11.2019.	Rs.1,52,38,306/- [Placed on record during last hearing]
13.	Total amount paid by the complainant as per statement of account dated 20.11.2019	Rs.1,43,35,848/- [Placed on record during last hearing]
14.	Date of start of construction as per statement of account dated 20.11.2019	11.11.2013
15.	Due date of delivery of possession as per clause 14(a) of the said agreement i.e. 42 months from the date of start of construction (11.11.2013) plus grace period of 3 months for applying and obtaining the CC/OC in respect of the unit and/or the project. [Page 45 of complaint]	11.08.2017
16.	<b>Date of offer of possession to the complainant</b>	20.11.2019 [Placed on record during last hearing]
17.	Delay in handing over possession till date of offer of possession i.e. 20.11.2019	2 years 3 months 9 days
18.	Status of the project	OC granted on 17.10.2019 (Placed on record during last hearing)
19.	Specific relief sought	Direct the respondent to deliver the possession and to pay interest on the amount paid by the complainant for the delayed period.



3. As per clause 14(a) of the buyer's agreement dated 17.05.2013, the possession was to be handed over within a period of 42 months from the start of the construction (11.11.2013) 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 11.08.2017. Clause 14 of the buyer agreement is reproduced below:

**"14. POSSESSION**

**(a) Time of handing over the possession**

*Subject to terms of this clause and barring force majeure conditions and subject to the allottee 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 unit within 42 months from the date of start of construction; subject to timely compliance of the provisions of the agreement by the allottee. The allottee agrees and understands that the company shall be entitled to a grace period of 3 months after the expiry of the said 42 months, for applying and obtaining the completion certificate/occupation certificate in respect of the unit and the project..."*

4. The complainant submitted that Mr. Dhruv Prabhakar and Mrs. Geeta Prabhakar (original allottees) applied for booking on 28.02.2013 in the said project. The buyer's agreement was executed on 17.05.2013. The flat was purchased by the complainant vide agreement to sell dated 18.03.2014 and the unit was transferred in the name of complainant vide nomination letter dated 03.04.2014. The respondent has failed to hand over possession of the said unit till date of filing of this

complaint. Hence, this complaint for the aforementioned reliefs.

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. That the complaints pertaining to interest, compensation etc. 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 authority.
  - ii. That right from the beginning, the original allottees had been extremely irregular with regard to payment. Consequently, the respondent had to issue notices and reminders calling upon the original allottees to pay the amount as per the payment plan.
  - iii. That the complainant executed an affidavit and undertaking cum indemnity whereby the complainant agreed and undertook to be bound by the terms and conditions of allotment. It was specifically agreed that the complainant would not be entitled to any compensation for delay in handing over possession or any rebate under a scheme or otherwise or any discount by whatever name called from the respondent, for which the original allottees might have been entitled. The allotment of the

apartment in question was made in favour of the complainant as per this undertaking given by the complainant.

- iv. That the period of 42 months plus 3 months' grace period expired on 11.08.2017. However, on account of delay and defaults by the complainant, the due date for delivery of possession stood extended in accordance with clause 14(b)(iv) of the buyer's agreement, till payment of all outstanding amounts to the satisfaction of the respondent. Furthermore, the respondent had completed construction of the apartment/tower by January 2019 and had applied for issuance of OC on 28.01.2019. The respondent cannot be held liable in any manner for the time taken by the competent authority to process the application and issue the OC. Thus, the said period taken by the competent authority in issuing the OC as well as the time taken by the statutory authorities in according approvals, permissions etc. necessarily have to be excluded while computing the time period for delivery of possession.
- v. Para 19 of the preliminary objections of reply reads as under:

*"That it is respectfully submitted that after execution of the affidavit/undertaking by the complainant, the complainant has waived the timelines for delivery of possession of the apartment in question as set out under the buyer's agreement dated 17.05.2013. Assuming, without in any manner admitting that*



*time was the essence of the agreement in so far as delivery of possession of the apartment is concerned, it is respectfully submitted that after execution of the affidavit/undertaking referred to above, time ceased to be of essence in so far as delivery of possession of the apartment in question."*

- vi. It is prayed that the complaint be dismissed.
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. On consideration of the circumstances, the evidence and other record and submissions made by the complainant and the respondent 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 14(a) of the buyer's agreement executed between the parties on 17.05.2013, possession of the booked unit was to be delivered within a period of 42 months plus 3 months grace period from



the date of start of construction. The construction was started on 11.11.2013. 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 11.08.2017. Occupation Certificate has been received by the respondent on 17.10.2019 and the possession of the subject unit was offered to the complainant on 20.11.2019. Copies of the same have been placed on record. 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.

11. As far as contention of the respondent with respect to the exclusion of time taken by the competent authority in processing the application and issuance of occupation certificate is concerned, the respondent has applied for grant of occupation certificate on 11.02.2019 as mentioned in DTCP memo no. ZP-845/AD(RA)/2019/25815 dated 17.10.2019 whereby occupation certificate has been granted by the competent authority under the prevailing law. However, it is evident from the occupation certificate dated 17.10.2019 that an incomplete application for grant of OC was applied on 11.02.2019 as fire NOC from the competent authority was granted on 30.05.2019 which is subsequent to the filing





application of occupation certificate. Also, the Chief Engineer-I has submitted his report with respect to the laying/completion of services in the project area on 25.07.2019. The District Town Planner, Gurugram and Senior Town Planner, Gurugram has submitted requisite report about this project on 06.09.2019 and 07.09.2019 respectively. As such, the application submitted on 11.02.2019 was incomplete in the eyes of law. As per sub code 4.10.4 of the Haryana Building Code, 2017, after receipt of application for grant of occupation certificate, the competent authority shall communicate in writing within 60 days, its decision for grant/refusal of such permission for occupation of the building in Form BR-VII. In the present case, the respondent has completed its application for occupation certificate only on 07.09.2019 and consequently the concerned authority has granted OC on 17.10.2019, therefore no delay in granting occupation certificate can be attributed to the concerned statutory authority.

12. Copy of 'Affidavit (Transferor/Assignor/Nominator)' which according to the respondent is an indemnity cum undertaking given by the complainant at the time of getting the apartment in question transferred in his name is annexed as Annexure

R7D. Clause 2 of the said affidavit is relevant and reads as under:

*"That pursuant to and in agreed terms, I hereby confirm to have, nominated Sh. Surinder Riat S/o Sh. Malkiat Ram R/o 13, Larander Court, Brampton, Ontario, Postal Code- L6Y0M3, Canada (hereinafter referred to as **Transferee, Assignee/Nominee**) under the said provisional registration/registration/booking/allotment and I/We had requested the Company to substitute the Transferee, Assignee/Nominee in place of me/us under the said provisional registration/registration/booking/allotment. After substitution/transfer of the name of the Transferee, Assignee/Nominee, I/We shall ceased to be the party(ies) to the said provisional registration/registration/booking/allotment and shall not have any charge, interest or lien therein or a right to claim any sought of compensation, rebate under any scheme or otherwise or any other discount, by whatever name called, from the company. This nomination/transfer/assignment is irrevocable and shall not be cancelled by me at any point of time in future or present."*

13. The respondent has not clarified as to why a need arose for the complainant to sign any such affidavit or indemnity cum undertaking and as to why the complainant has agreed to surrender his legal rights which were available or had accrued in favour of the original allottees. It is not the case of the respondent that the complainant had executed this affidavit out of his free will and concern. Such an undertaking/ indemnity bond given by a person thereby giving up his valuable rights must be shown to have been executed in a free atmosphere and should not give rise to a suspicion. If even a slightest of doubt arises in the mind of the adjudicator that



such an agreement was not executed in an atmosphere free of doubts and suspicions, the same would be deemed to be against public policy and would also amount to unfair trade practices. Therefore, this Authority does not place reliance on the said affidavit/ indemnity cum undertaking in view of order dated 03.01.2020 in case titled as ***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."*


14. Accordingly, it is the failure of the promoter to fulfil his obligations, responsibilities as per the buyer's agreement dated 17.05.2013 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. As such the complainant is entitled to delayed possession at rate of the prescribed interest @ 10.20% p.a. w.e.f. 11.08.2017 to 20.11.2019 as per provisions of section 18(1) of the Act read with rule 15 of the Rules.
15. 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. 11.08.2017 till the offer of possession i.e. 20.11.2019. 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 take possession of the allotted unit within a period of 1 month by paying remaining payments, if any, along with prescribed rate of interest i.e. 10.20% per annum to the respondent failing which respondent shall be entitled to charge maintenance charges.
- 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.

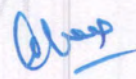
16. Complaint stands disposed of.

17. File be consigned to registry.

  
**(Samir Kumar)**

Member

Haryana Real Estate Regulatory Authority, Gurugram

  
**(Subhash Chander Kush)**

Member

Dated: 14.02.2020

Judgement uploaded on 02.03.2020