

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

Complaint No. : 161 of 2018
First date of Hearing : 16.05.2018
Date of Decision : 20.09.2018

Mr. RajanWalia
Ms. Harminder Kaur Walia,
R/o : The Hibiscus, Building No. 6,
Flat No. 7B, Hibiscus Avenue, Near Baai
Square, Sector-50, Gurugram-122018.

Complainants

Versus

Emaar MGF Land Limited.
Address: Emaar Business Park,
M.G. Road, Sikanderpur Chowk, Sector 28,
Gurugram-122002.

Respondent

CORAM:

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

Chairman
Member
Member

APPEARANCE:

Shri Tushar Bahmani Advocate for the complainants
Shri Dheeraj Kapoor Advocate for the respondent
Shri Kethan Luthra Authorized representative on
behalf of the respondent
company.

ORDER

1. A complaint dated 16.04.2018 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 complainants Mr. Rajan



Walia and Ms. Harminder Kaur Walia, against the promoter M/s Emaar MGF Land Ltd., on account of violation of the clause 14(a) of buyer's agreement executed on 03.05.2013 in respect of unit described as below for not handing over possession on the due date i.e. 11th August 2017 which is an obligation under section 11(4)(a) of the Act ibid.

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

1.	Name and location of the project	"Imperial Gardens", Sector 102, Gurugram, Haryana.
2.	RERA registered/ not registered	Registered
3.	HRERA registration no.	208 of 2017
4.	Date of completion as per HRERA registration certificate.	31.12.2018
5.	Unit no.	IG-04-1604, 16 th floor, tower/ building no. '04'.
6.	Unit measuring	2000 sq. ft.
7.	Buyer's agreement executed on	03 rd May 2013
8.	Total consideration amount as per statement of account dated 11.06.2018	Rs.1,50,50,027/-
9.	Total amount paid by the complainants till date	Rs.1,42,35,569/-
10.	Percentage of consideration amount	Approx. 94.58 percent
11.	Date of delivery of possession as per clause 14(a) of buyer's agreement. (42 months from the date of start of construction plus grace period of 3 months)	11 th August 2017
12.	Date of start of construction	11 th November 2013
13.	Delay in handing over possession till date	1 Year 1 month 09 days
14.	Penalty clause as per buyer's	Clause 16(a) of the



	agreement dated 03.05.2013	agreement i.e. Rs.7.50/- per sq. ft. per month of the super area of unit for the period of delay
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3. The details provided above have been checked on the basis of record available in the case file which has been provided by the complainants and the respondent. A buyer's agreement is available on record for the aforesaid unit. The possession of the said unit was to be delivered by 11th August 2017 as per the said agreement. Neither the respondent has delivered the possession of the said unit as on date to the purchaser nor they have paid any compensation @ Rs.7.50/- per sq. ft. per month of the super area of the unit for the period of delay as per clause 16(a) of the buyer's agreement dated 03.05.2013. 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. The respondent through his counsel appeared on 16.05.2018. The case came up for hearing on 16.05.2018, 05.07.2018, 09.08.2018 and 20.09.2018. The reply has been filed on behalf of the respondent on 13.06.2018 has been perused.

Brief facts of the complaint

5. Briefly stated, the facts of the complaint are that after



learning about the upcoming residential project of the respondent, the complainants met the officials of the respondent at their office and the respondent convinced the complainants with their lucrative promises to provide the complainants with world class residential property in the millennium town Gurugram. The respondent prepared the provisional allotment letter for unit no. IG-04-1604, in the project named 'Imperial Gardens' of the respondent which was signed on 27.02.2013. The complainants agreed to the schedule of payment which was given to them along with the provincial allotment letter.

6. The complainants submitted that they paid a sum of Rs.10,00,000/- as registration/ booking amount for the said unit in the complex. At the time of payment of booking amount the officials of the respondent had told the complainants that the possession of the booked unit shall be given within 42 months from booking date. But the respondent deliberately failed to mention possession date in the buyer's agreement and only mentioned that the possession will be delivered from start of the construction work whereas there is no mention of the date of commencement of the construction which did not start till



November 2013. The complainants paid Rs.40,32,064/- approximately before construction started.

7. The buyer's agreement was signed between the complainants and the respondent on 03.05.2013. The sale consideration was Rs.1,43,15,000/- (basic sale consideration + charges of one car park + charges of PLC applicable). The service tax levied on the sale consideration is Rs.5,66,483.50/- after which the total sale consideration to be paid by the complainant is Rs.1,48,81,483.50/-.
8. The complainants submitted that clause 14(a) of the buyer's agreement dated 03.05.2013 mentions that the respondent shall handover the possession of the unit within a period of 42 months from the date of start of construction, subject to certain limitations as may be provided in the buyers' agreement and timely compliance of the provisions of the buyer's agreement by the complainants. The complainants and the respondent also agreed to a grace period of 3 months for applying occupation certificate in respect of the unit after the said period of 42 months.
9. The complainants submitted that clause 16(a) of the buyer's agreement specifies that in the event the respondent fails to deliver the possession of the unit to the complainants within



the stipulated time period and as per the terms and conditions of the buyer's agreement, then the respondent shall pay to the complainants compensation at the rate of Rs.7.50/- per sq. ft. per month of the super area of the said unit for the period of delay.

10. The complainants submitted that they have paid 95% of the total amount of sale consideration as per the payment schedule i.e. Rs.1,42,35,569/- as demanded by the respondent. This is admitted fact as per the statement of accounts as on 18.02.2018. That, there is no default on part of the complainants as regard to the payments and that the payments have been duly paid to the respondent within time rather the excess amount of Rs.2,861/- has been paid to the respondent.
11. The complainants submitted that as per the buyer's agreement, the respondents were required to hand over the actual physical possession of the mentioned unit no. IG-04-1604 on or before 11.11.2017. Infact, if the additional 3 months i.e. grace period mentioned in the buyer's agreement for applying occupation certificate is taken after 42 months, the time to deliver the actual physical possession was to be on or before 11.02.2018. But due to the factual circumstances at the site of the said project, the construction work has not



completed even 50% of the total construction work. That there is a delay in completion of the mentioned project by the respondent which amounts to breach of the terms and conditions of the buyer's agreement dated 03.05.2013.

12. The complainants submitted that the actual ground reality regarding the status of the construction of the said project is absolutely shocking and strong reason to believe that the respondent has misrepresented the facts related to the construction status to the complainants and demanded the entire sale consideration illegally and fraudulently. The ground reality at the construction site is way different from what the respondent had claimed to the complainants regarding the completion of the project.
13. The complainants submitted that they have been duped off with their hard-earned money invested in the said project and the said investment was made by the complainants with all their efforts to suffice the dream of their daughters of having their own homes and live a peaceful and secured life.
14. The complainants submitted that the respondent has committed grave deficiency on its part and adopted serious unfair trade practice with the complainants by failing to deliver the possession of the unit booked.



15. The issues raised by the complainants are as follow:

- i. Whether there is delay in completion of the project in dispute?
- ii. Whether the payments made by the complainants as per the payment schedule to the respondent are justified whereas the onsite construction work is not completed as per the schedule of construction till date?
- iii. Whether there has been deliberate or otherwise, misrepresentation on part of the developer where the developer has deposited more than 95% of the total sale consideration but the project is not getting completed no sooner than April 2019?

16. Relief sought

The complainants are seeking the following reliefs:

- i. Direct the respondent to refund the entire amount of sale consideration deposited till date with them by the complainants i.e. Rs.1,42,35,569/- along with interest @ 24% from the date of provisional allotment i.e. on 27.02.2013 till its realization of the payment and cancel the allotment upon entire refund.



- ii. Direct the respondent to pay Rs.1,00,000/- as compensation to the complainants for causing mental agony.
- iii. Direct the respondent to pay Rs,50,000/- as litigation expenses.

Respondent's reply

17. 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. It is also submitted that the complaint is not signed by any of the two complainants and is not supported by any proper affidavit with a proper verification. In the absence of a proper verified and attested affidavit supporting the complaint, the complaint is liable to be rejected.
- iii. The respondent submitted that the hon'ble authority has no jurisdiction to entertain the present complaint as the complainants have not come to this authority with clean hands and has concealed the material facts.



- iv. 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 consumer in the real estate sector. RERA is not enacted to protect the interest of investors in the real estate sector. As the said Act has not defined the term consumer, therefore the definition of consumer as provided under the Consumer Protection Act, 1986 has to be referred for adjudication of the present complaint. The complainants, who are already the owner and resident of A-01/901, Sahara Grace Apartments, M.G. Road, Gurugram (address mentioned in the personal details form and the buyer's agreement); A-803, Pilot Court, Essel Towers, Gurugram (address mentioned in the conveyance deed of A-01/901, Sahara Grace Apartments, M.G. Road, Gurugram); Flat no. 7-B, The Hibiscus, Building no. 6, Hibiscus Avenue, Sector 50, Gurugram (address mentioned in the present complaint); and even as per their passports, the complainants are British citizens, are investors, having invested in 2 apartments (unit no. IG-04-0201 for which complainants have filed separate complaint numbered



as CR/162/2018) in the 'Imperial Gardens' project of the respondent.

- v. The respondent submitted that the complainants are defaulters having deliberately failed to make the payment of various installments within the time prescribed, which resulted in delay payment charges, as reflected in the statement of account dated 18.02.2018 & 11.06.2018. The current outstanding amount as on 25.05.2018 is Rs.2,861/-.
- vi. The respondent submitted that from the date of booking till the filing of the present complaint i.e. for more than 6 years, the complainants had never ever raised any issue whatsoever and on the contrary the complainants kept on making the payment of installments, though not within the time prescribed, which resulted in delay payment charges.
- vii. The respondent submitted that despite several adversities, the respondent has continued with the construction of the project and is in process of completing the construction of the project and should be able to apply the occupation certificate for the apartment



in question by 31.12.2018 (as mentioned at the time of registration of the project with RERA).

- viii. The respondent submitted that the complainants have concocted a false story to cover up their own defaults of having deliberately failed to make the payment of dues within the time prescribed which resulted in delay payment charges and have now raised false and frivolous issues and have filed the present complaint on false, frivolous and concocted grounds. This conduct of the complainants clearly indicates that the complainants are mere speculator having invested with a view to earn quick profit and due to slowdown in the market conditions, the complainants have failed to perform their contractual obligations of making timely payments.
- ix. The authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the apartment buyer's agreement signed by the complainants. 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 complainants and the respondent. Rather, the agreement that has been referred to is buyer's agreement dated



03.05.2013 which was executed much prior to coming into force of the said Act or said Rules.

Reply on merits

15. The respondent admitted the details pertaining to the apartment, project and provisional allotment letter, schedule of payments and payment of due instalments as per the schedule of payment. The respondent denied that the respondent convinced the complainants with any lucrative promises, as alleged, or prepared the provisional allotment letter or that at the time of booking any official of the respondent told the complainants the possession shall be given within 42 months of booking or that no possession date was mentioned in the buyer's agreement.
16. The respondent submitted that it was the complainants who had approached the respondent for investing in 2 residential units and it was only after fully satisfying themselves about the interest and entitlement of the respondent in the said project and after having gathered and understood detailed information about the said project, and after completely satisfying itself about all the aspects of the said project and after a careful consideration of all the facts, terms and conditions that the complainants had applied for booking of



the said unit.

17. The respondent submitted that the complainants are caught in a web of their own lies as the proposed estimated time of handing over the possession of the said apartment was 42+3 months i.e. 45 months from the date of start of construction and not from the date of booking, as alleged by the complainants. Infact in the complaint, the complainants have themselves admitted the date of commencement of construction to be 11.11.2013. The respondent submitted that as per clause 14 of the agreement, the said proposed time of 45 months is applicable only subject to force majeure and the complainants having complied with all the terms and conditions and not being in default of any the terms and conditions of the said agreement, including but not limited to the payment of installments. 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 amount.



18. The respondent submitted that section 19(4) of the said Act provides that the allottee shall be entitled to claim 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 said 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)(I)(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)(I)(C). In the present case, the respondent had made a declaration in terms of Section 4(2)(I)(C) that it would complete the project by 31.12.2018. Thus, no cause of action can be said to have arisen to the complainants in any event to claim refund, along with interest and compensation, as sought to be claimed by it. Thus, on this score also, no relief as sought can be claimed by the complainants.



19. The respondent submitted that projects, such as 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 45 months (from the date of start of construction), agreed to a specific condition that in case the respondent fails to offer possession of the apartment within 45 months, it shall be liable to pay delay compensation @Rs.7.50/- per sq. ft. per month of the super area of the said apartment for the period of delay beyond 45 months or such extended periods as permitted under the buyer's agreement. Such a clause would not have been agreed to by the complainants had the parties not envisaged time for offer of possession beyond 45 months. The parties thus specifically envisaged a situation where time for possession may be extended beyond 45 months and remedy thereon is also specifically provided in the self-contained document (clause 16 of buyer's agreement), which the complainants signed and executed with open eyes and after understanding all the terms and conditions.

20. The respondent denied that there is no default on the part of the complainants or that all the payments have been paid within time or that any excess amount of Rs.2,861/- has been paid to the respondent. It is also wrong and denied that there is any delay in possession or that the construction work has not even completed 50% or that the alleged delay amounts to breach of the terms and conditions of the buyer's agreement



or that the respondent has made any misrepresentation or has demanded the sale consideration illegally or fraudulently, as alleged.

Determination of issues:

After considering the facts submitted by the complainants, 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 issue raised by the complainants, the authority came across that as per clause 14(a) of buyer's agreement, the possession of the said apartment was to be handed over within 42 months plus grace period of 3 months from the date of start of construction. The construction commenced on 11.11.2013. Therefore, the due date of possession shall be computed from 11.11.2013. The clause regarding the possession of the said unit is reproduced below:

"14(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 condition of this agreement and not being in default under any of the provisions of this agreement and compliance with all the provisions, formalities, documentation etc. as prescribed by the company, the company proposes to handover 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 (three) months after the expiry of said period of 42 months, for applying and obtaining the completion certificate/occupation certificate in respect of the unit and/or the project.”

22. Accordingly, the due date of possession was 11th August 2017 and the possession has been delayed by one year one month and nine days till the date of decision. The delay compensation payable by the respondent @ Rs.7.50/- per sq. ft. per month of the super area of the unit for the period of delay beyond 42 + 3 months as per clause 16(a) of buyer’s 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 second issue, the complainants have not adduced any evidence but has made only assertion and the



same has been denied by the respondent. Thus, the said issue becomes superfluous.

24. With respect to the third issue raised by the complainants, the respondent has stated that the project is almost complete and they will be able to handover the possession of the said unit by 31.12.2018 as stated in HRERA registration certificate. The complainants only made assertion regarding misrepresentation but have not adduced any evidence.

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 complainants at a later stage.

26. As the possession of the apartment was to be delivered by 11th August 2017, the authority is of the view that the promoter has failed to fulfil his obligation under section 11(4)(a) of the 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 thereunder 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.”

27. The complainants 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 thereunder.

The complainants requested that necessary directions be issued by the authority under section 37 of the Act ibid to the promoter to comply with the provisions and fulfil obligation 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.

28. In the present complaint, the complainants are seeking refund of the entire money paid till date i.e. 1,42,35,569/- along with interest @ 24% p.a. from the date of provisional allotment i.e. 27.02.2013 till its realization of the payment and cancel the allotment upon entire refund.
29. However, keeping in view the present status of the project and intervening circumstances, the authority is of the view that in case refund is allowed in the present complaint, it shall hamper the completion of the project as the project is almost complete and the respondent has committed to handover the possession of the said unit by 31st December 2018. The refund of deposited amount will also have adverse effect on the other allottees in the said project. Therefore, keeping in view the principles of natural justice and in public interest, the relief sought by the complainants cannot be allowed.
30. As the promoter has failed to fulfil his obligation under section 11, the promoter is liable under section 18(1) proviso to pay interest to the complainants, at the prescribed rate, for



every month of delay till the handing over of possession.

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 complainants during proceeding dated 05.07.2018 made a statement that they are not appearing before the authority for compensation but for fulfilment of the obligations by the promoter as per provisions of the said Act and reserve their right to seek compensation from the promoter for which they shall make separate application to the adjudicating officer, if required. Therefore, the second and third relief sought by the complainants regarding compensation becomes superfluous.



31. The authority is of the considered opinion that the respondent has failed to deliver the possession of the said unit to the complainants by the committed date i.e. 11th August 2017 and the possession has been delayed by 01 year 01 month 09 days till the date of decision i.e. 20.09.2018. Thus, the complainants are entitled to interest at prescribed rate for every month of delay till the handing over of the possession. Further, the respondent has submitted during the oral arguments that the construction of the project is almost complete and they shall offer the possession of the unit to the complainants by December 2018 as mentioned in the registration certificate.

Decision and directions of the authority

32. 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 by 31st December 2018 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. 11.08.2017 till the actual date of handing over of the possession.
- (iii) The respondent is directed to pay interest accrued from 11.08.2017 to 20.09.2018 on account of delay in handing over of possession to the complainants within 90 days from the date of decision and subsequent interest to be paid by the 10th of every succeeding month.

33. The order is pronounced.

34. 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



Dated: 20.09.2018