

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

Complaint No. : 10 of 2018
Date of Institution : 12.03.2018
Date of Decision : 10.07.2018

1. Ved Prakash Ahuja R/o D-22 Saket New Delhi-110017
2. Mr. Vimal Ahuja R/o D-22 Saket New Delhi-110017

...Complainants

Versus

1. M/s Emaar MGF Land Ltd.
EMAAR 306-308 , 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:

Complainant in person with
Shri Sukhbir Yadav
Shri Ketan Luthra,
representative with Shri
Dheeraj Kapoor

Advocate for the complainants

Advocate for the respondent

ORDER

1. A complaint dated 12.03.2018 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. Ved Prakash Ahuja & Mr.



Vimal Ahuja, against the promoter M/s EMAAR MGF Land Ltd., on account of violation of clause 14(a) of the builder-buyer agreement executed on 12.02.2008 for unit no. G-606, tower no. G in the project "The Palm Drive" for not giving possession on the due date which is an obligation of the promoter 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	The Palm Drive, sector -66, Gurugram
2.	Registered/unregistered	Unregistered
3.	Flat/apartment/plot no./unit no.	G-606
4.	Booking amount paid by the buyer to the builder/promoter/company vide agreement	Rs. 10,00,000/-
5.	Total consideration amount as per agreement dated 12.02.2008	Rs. 12,129,841/-
6.	Total amount paid by the complainant upto date	Rs. 10,626,524/-
7.	Percentage of consideration amount	88 % approx.
8.	Date of delivery of possession.	clause 14(a), December 2010 with grace period 90 days i.e. 31.03.2011
9.	Delay of number of months/ years upto	7 years
10.	Penalty Clause as per builder buyer agreement dated 12.02.2008	clause 16 (a) Rs. 5/- per sq. ft. per month
11.	Cause of delay in delivery of possession	No valid reason



3. As per the details provided above, which have been checked as per record of the case file. A builder buyer agreement is available on record for unit no. G-606 according to which the possession of the aforesaid unit was to be delivered by March, 2011. The promoter has failed to deliver the possession of the said unit to the complainants by the due date nor has paid any compensation i.e. @ Rs. 5 per sq. ft of the super area of the said unit per month for the period of the such delay as per builder buyer agreement dated 12.02.2008. 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 10.04.2018. The case came up for hearing on 10.04.2018, 02.05.2018, 23.05.2018, 19.06.2018 & 10.07.2018. The reply has been filed on behalf of the respondent dated 02.05.2018. The respondent through its reply contended that the authority does not have the jurisdiction to decide the present complaint and that the parties are bound by the terms and conditions of the agreement.



Facts of the complaint



5. The complainants submitted that unit no. G-606 in the project named "The Palm Drive", Sector -66, Gurugram was first booked by original allottee Mr. Kasturi Lal Joneja & Promilla Khanna in the month of October 2007 by making payment of booking amount of Rs. 10 Lakhs. Total payments made by original allottee Rs. 35,47,837/-. Further, the property was sold to first transferee Mr. Pankaj Kitchloo & Monica Kitchloo in the year August 2008 and they further paid Rs. 69,98,141/- via HDFC home loan.
6. The complainants submitted that the said property was then bought by the complainants in resale from the first transferee in the year 2011 for Rs. 1,19,10,887/- the complainants then became the second transferee.
7. The complainants submitted that they have been waiting for nearly 8 years & the respondent has offered the possession in March 2018.

8. **ISSUES TO BE DECIDED**





- i. Whether there was delay in handing over of possession of the property & whether the complainant can seek interest in compensation?
- ii. Whether the complainant can seek interest on the excess payment made by them for Rs. 1,55,593/- in lieu of excess EDC/IDC payment paid by them?
- iii. Whether the complainant can seek a stay on the demand letter & the penalties as outlined in the intimation of possession letter if he does not take the possession till 26.03.2018 till the case is decided by HRERA?

Reply

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

9. The respondent submits 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.





10. The complaint for compensation & interest under section 12,14, 18 & 19 of the act is maintainable only before the adjudicating officer under rule-29 of the HRERA r/w section 31 & section 71, rule-28 & rule-29.
11. The respondent submitted that the complaint is not supported by any proper affidavit with a proper verification.
12. The respondent submitted that RERA has been enacted for effective consumer protection and to protect the interest of consumers in the real estate sector. Here it is pertinent to mention that RERA has not been enacted to protect the interest of investors and in the present case the complainant is an investor and not a consumer.
13. The respondent submitted that the complainants have not come to this hon'ble regulatory authority with clean hands and have concealed the material fact that apart from the property i.e. unit no. G-606, " The Palm Drive" at Sector-66, Gurgaon, Haryana for which the complainants have filed the present complaint, the complainants have invested in five more properties of the respondent out of which two are in the same project which the complainants have also filed another





complaint no. CR/106/2018 before this hon'ble regulatory authority and three in other projects of the respondent.

14. The respondent submitted that after obtaining the occupation certificate, the respondent, has already issued the letter of offer of possession on 23.02.2018 for the said apartment along with the final payment request letter with details of all the charges, etc. However, even after receiving the notice of possession dated 23.02.2018 & various reminders thereafter, the complainants have not made any payment whatsoever till date.
15. The respondent submitted that the complainants have been a defaulter, and deliberately failed to make payment of last instalment raised at the time of possession & the current outstanding amount as on date 21.04.2018 is Rs. 15,13,380/- towards various instalments, delay payment interest etc.
16. The respondent submitted that he has already obtained the occupation certificate dated 25.01.2018 for the said apartment.





17. The respondent denied that the complainants bought the said apartment in 2011 or since, then they are the second transferee. It is submitted that the complainants purchased the apartment from the second allottee in the year 2012, as can be seen from the agreement to sell filed by the complainants themselves as annexure -4
18. The respondent denied that the complainants have been waiting for the possession for the last 8 years. It is submitted that it was only on 08.02.2012 that the allotment of the said apartment was transferred in favour of the complainants & the possession has already been offered vide letter of possession dated 23.02.2018 .
19. The respondent denied that the complainants are entitled to any interest on the excess credit of Rs. 1,55,593/- towards EDC/IDC demand. The respondent submitted that adjustment of EDC is to be carried out at the time of offer of possession and not before that.





Rejoinder

20. The complainants submitted that the respondent is liable to pay interest as per his commitment in the letter enclosed on the amount of Rs. 1,55,593/- towards his EDC and IDC demand, which was credit balance in favour of the complainants in statement of account as on 01.09.2012, the interest liable to paid on this amount is to be compounded quarterly @24 % p.a. compounded monthly.
21. The complainants submitted that the respondent has failed to honour his commitment for the above said property for which a loan Rs. 29,27,598/- was sanctioned under the subvention scheme. The amount was charged to the complainants on 24.11.2011, whereas, it was to be charged at the time of possession which should have been on 28.03.2018.
22. **Determination of issues**
- i. Regarding **first issue**, as per clause 14 of the builder-buyer agreement, the company proposed to hand over the possession of the said unit by March, 2011. The clause





regarding possession of the said unit is reproduced below:

" 14 POSSESSION

(a) Time of handing over the possession

Subject to terms of this clause and subject to the Apartment 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 the provisions, formalities, documentations etc., as prescribed by the Company, the Company proposes to hand over the possession of the Apartment/Villa/Penthouse by December 2010. The Apartment Allottee agrees and understands that the Company shall be entitled to a grace period of (90) ninety days, for applying and obtaining the completion certificate in respect of the Group Housing Complex."

Accordingly, the due date of possession was March, 2011. There has been delay of 7 years in handing over the possession. As far as the penalty clause in case of delay in possession is concerned which is Rs. 5/sq. ft. of the super area per month, 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."

As per obligations on the promoter under section 18(1) proviso, the promoter is obligated to pay the complainants, interest at the prescribed rate for every month of delay till the handing over the possession 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 complainants reserve their right to seek compensation from the promoter for which they shall make separate application to the adjudicating officer, if required.





- ii. Regarding **second issue**, the excess payment towards EDC/IDC will be paid by the respondent at the time of offer of possession.
- iii. Regarding **third issue**, account should be set off at the time of offer of possession if any amount is pending towards the complainant therefore, they will be liable to pay.
23. As the possession of the flat was to be delivered by March, 2011 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 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."

24. 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."

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.

Jurisdiction of the authority

25. The authority has complete jurisdiction to decide the complaint with 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.

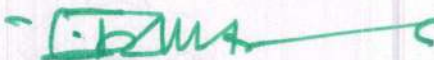
26. The authority takes suo-moto cognizance that the project is registerable and has not been registered by the promoters. The authority has decided to take suo-moto cognizance for not getting the project registered & for that separate proceeding will be initiated against the respondent u/s 59 of the Act. Decision and directions of the authority
27. The authority, exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issue directions to the respondent to give interest to the complainants at the prescribed rate of 10.45% on the amount deposited by the complainants for every month of delay from the due date of possession i.e. 31st March, 2011 till 23.02.2018 within 90 days of this order
28. The complaint is disposed of accordingly.
29. The order is pronounced.



30. 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 10.07.2018

