

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

Complaint No. : 463 of 2018
Date of Institution : 20.06. 2018
Date of Decision : 16.10.2018

Mr. Ajay Kumar Saraogi
R/o 2A-175, Azad Nagar, Kanpur, U.P.
208002

...Complainant

Versus

M/s Emaar MGF Land Limited
Office at: 306-308, Square One, C-2, district
Centre, Saket-110017

...Respondent

CORAM:

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

Chairman
Member
Member

APPEARANCE:

Shri Kartik Nagarkatti Advocate for the complainant
Shri Dheeraj Kapoor Advocate for the respondent



ORDER

1. A complaint dated 20.6.2018 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 Mr. Ajay Kumar

Saraogi, against the promoter M/s Emaar MGF land limited on account of violation of clause 14 (a) of the buyer's agreement executed on 02.05.2013 for unit no. IG-05-1402, 14th Floor in the project "Imperial Gardens" 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	"Imperial Gardens" Sector 102, Gurugram
2.	Unit no.	IG-05-1402, 14 th Floor
3.	Project area	12 Acres
4.	Registered/ not registered	Registered
5.	DTCP license	107 of 2012
6.	Date of booking	28.02.2013
7.	Date of builder buyer agreement	02.05.2013
8.	Total consideration	Rs. 1,60,65,628/-
9.	Total amount paid by the complainant	Rs. 1,53,60,705/-
10.	Percentage of amount paid	95.61%
11.	Payment plan	Instalment Linked Plan
12.	Date of delivery of possession. (Clause 14(a) i.e. 42 months from the date of start of construction + 3 months' grace period)	11.8.2017
13.	Delay of number of months/ years upto 19.09.2018	1 year 1 month 8 days
14.	Penalty clause as per buyer agreement dated 2.5.2013	Clause 16(a)- Rs. 7.50/- per sq. ft. per month of the super area



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. IG-05 1402 according to which the possession of the aforesaid unit was to be delivered by 10.8.2017. The promoter has failed to deliver the possession of the said unit to the complainant. Therefore, the promoter has not fulfilled his committed liability till 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 the first hearing dated 21.8.2018. The reply has been filed on behalf of the respondent on 21.8.2018.

FACTS OF THE CASE

5. The complainant is the allottee in respect of the apartment bearing unit no. IG-05-1402 with a super area of 2000 Sq. ft. situated on the 14th floor of tower, building no. 05 in the group housing colony known as “Imperial Gardens” which is being developed on land admeasuring 12 acres in Sector 102, Gurugram.
6. The complainant stated that as per information provided by the respondent, the respondent company has obtained



registration under the provisions of section 3, 4 and 5 of the RERA Act, 2016 in respect of towers 3, 4, 5, 6 and 7 of the project vide registration no. 208 of 2017 dated 15.09.2017.

7. The complainant was allotted the apartment vide letter dated 28.2.2013. On 2.5.2013, buyer's Agreement was entered into between the parties wherein as per clause 14 (a), the possession was to be handed over to the complainant within a period of 42 months from the date of start of construction plus 3 months of grace period after expiry of the said 42 months for applying and obtaining completion certificate in respect of the said unit. The construction was commenced on 11.11.2013. Thus the possession date would be 10.8.2017. However, till date the possession of the said unit has not been handed over to the complainant despite making all requisite payments as per the demands raised by the respondent. The complainant made payments of all instalments demanded by the respondent amounting to a total of Rs 1,53,60,705/- which is 99% of the total sale consideration.

8. The complainant wrote a letter dated 25.9.2017 to the respondent, calling upon the respondent to handover the possession of the apartment within 15 days from receipt of the said letter dated 25.9.2017.



9. The complainant has throughout been fulfilling their contractual obligations, including timely payment of the instalments to the respondent. The complainants had made the payment of the 13th instalment as per the demand raised by the respondent on 31.8.2017 vide cheque no. 029457 dated 31.8.2017 drawn on Central Bank of India, Kanpur City for a sum of Rs 8,03,600/-. The cheque returned due to the technical error and not attributable to complainant's mistake.
10. The complainants stated that as per the construction status published by the respondent on their website as on April 2018, the expected date for application for OC in respect of tower 5 of the project i.e. the tower in which the apartment is situated, is mentioned as September 2018.
11. The complainant as such have completely lost faith in the respondent and are desirous of withdrawing from the project and seeking refund of the entire amount of Rs 1,53,60,705/- paid by them to the respondent along with interest as provided u/s 18(1) r/w section 19(4) of the Act and Rule 15 of the Rules, 2017.
12. The complainant could have reasonably expected an average rental income of Rs 20,500/- per month in respect of the apartment, had the respondent delivered possession thereof



in terms of the agreement for sale i.e. on or before 10.5.2017. Thus, the complainant has as on date suffered a loss of at least Rs 2,46,000/- in terms of loss of rental income calculated from the month of June 2017 until May 2018, which they are entitled to recover from the respondent.

13. As per clause 14 (a) of the buyer's agreement, the company proposed to hand over the possession of the said unit by 10.8.2017. The clause regarding possession of the said unit is reproduced below:

"14(a) Possession

11(a)- "..... the company proposes to handover the possession of the said unit within 42 months from date of start of construction, subject to timely compliance of the provisions of the agreement by the allottee. The allottee(s) agrees and understands that the company shall be entitled to a grace period of 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."

14. **ISSUES RAISED BY THE COMPLAINANT**

- I. Whether the respondent has violated the provisions of the Act, including but not limited to the express provisions of section 18 and 19 thereof, as well as the provisions of Rule 15 and 16 of the rules, 2017 by failing to deliver possession of the apartment, duly



completed in all respects within the time stipulated in the agreement for sale?

- II. Whether the respondent is liable to refund the entire amount of Rs1,53,60,705/- paid by the complainant along with interest at the statutory rates from the date of each payment till the date of actual refund/payment?

15. RELIEF SOUGHT

- I. To fully refund the amount paid by the complainant amounting to Rs 1,53,60,705/- along with interest @ 10.45% p.a.
- II. To direct the respondent to pay compensation of Rs 2,46,000/- in terms of loss of rental income calculated from the month of June 2017 until May 2018 and furthermore at the rate of Rs 20,500/- per month, for every month until such time as the respondent does not refund the entire amount paid by them along with interest, as prescribed under the Act and rules.
- III. Such other relief as the authority deems fit and proper.

RESPONDENT'S REPLY



16. The respondent submitted that the present complaint for compensation and interest u/s 12, 14, 18 and 19 will lie only before the adjudicating officer and not before the hon'ble authority under Rule 29 of the Haryana Rules, 2017 and thus the present complaint is not maintainable in law or facts.
17. The respondent submitted that the complaint is not signed by the complainant and is also 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.
18. The respondent submitted that RERA is enacted to protect the interests of consumers in the real estate sector and not the interest of investors. The complainant in the present case are investors and not consumers as per Consumer Protection Act, 1986. This is supported by the fact that the complainant in the present case have also invested in other unit i.e. IG-05-1603 apart from the aforesaid unit, for which a separate complaint has been filed bearing no. 464/2018 before the authority for adjudication.
19. The respondent further submitted that the complainant is a defaulter having deliberately failed to make the payment of various instalments within the time prescribed, which



resulted in delay payment charges, as reflected in the statement of account dated 26.6.2018. The current outstanding amount as on 26.6.2018 is Rs 2,42,712/-.

20. The respondent further submits that from the date of booking till their notice in 2017 i.e. for more than 4 years, the complainant has never ever raised any issue whatsoever and on the contrary the complainant kept on making the payment of instalments, though not within the time prescribed, which resulted in delay payment charges.
21. The respondent submits that they are in the process of completing the construction of the project and should be able to apply the OC for the apartment in question by 31.12.2018.
22. The respondent submits that it is a matter of record that no agreement has been executed between the complainant and the respondent. Rather the agreement that has been executed is only the apartment buyer's agreement dated 2.5.2013, executed much prior to coming into force of said Act or Rules, so there can be no relief granted to the complainant under the RERA Act, 2016.



DETERMINATION OF ISSUES

After considering the facts submitted by the complainant, reply by the respondent and perusal of record on file, the issue wise findings of the authority are as under:

23. With respect to the **first and second issue**, the authority came across clause 14(a) of buyer's agreement. The clause regarding the possession of the said unit is reproduced below:

"14(a) Possession

42 months from the date of start of construction + 3 months' grace period.

Accordingly, the due date of possession was 11.8.2017 and the possession has been delayed by 1 year 1 month 9 days. 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 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.”

The respondent is not liable to refund the entire amount but liable to pay interest for the delayed period on the amount of Rs 1,53,60,705/- @ 10.45% for every month of delay as the complainant has paid 95% of the amount demanded by the respondent, thus he is liable to get interest at the prescribed rate.

24. The promoter is liable under section 18(1)(a) proviso to pay interest to the complainants, at the prescribed rate, for every month of delay till the handing over of possession. The prayer of the complainant regarding payment of interest at the prescribed rate for every month of delay, till handing over of possession on account of failure of the promoter to give possession in accordance with the terms of the agreement for sale as per provisions of section 18(1)(a) is hereby allowed. The authority issues directions to the respondent u/s 37 of the Real Estate (Regulation and Development) Act, 2016 to pay interest at the prescribed rate of 10.45% per annum on the amount deposited by the complainant with the promoter on the due date of possession i.e. 11.8.2017 till the date of actual realisation.



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 complainant at a later stage.
26. As the possession of the apartment was to be delivered by 11.8.2017, 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.
27. The complainants made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above. The complainant 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.



28. However, keeping in view 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 interest of other allottees as the project is on the verge of completion. 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 complainant cannot be allowed.

29. 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 complainant, at the prescribed rate, for every month of delay till the handing over of possession.

The authority is of the considered opinion that the respondent has failed to deliver the possession of the said unit to the complainant by the committed date i.e. 11.8.2017 and the possession has been delayed by 1 year 1 month. Thus, the complainant is entitled to interest at prescribed rate for every month of delay till the handing over of the possession.

Decision and directions of the authority

30. 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 project has already been delayed for more than one year, as such, the builder is liable for payment of interest at the prescribed rate i.e. 10.45% to the buyer w.e.f. 11.8.2017, as per the provisions of Section 18 (1) of the Real Estate (Regulation and Development) Act, 2016. If the builder fails to deliver possession on the committed date i.e. 31.12.2018, in that case, the complainant can seek refund along with prescribed rate of interest.
- (ii) The arrears of interest accrued so far shall be paid within 90 days from the issuance of this order and thereafter monthly payment of interest shall be made before 10th of subsequent month till handing over the possession.
- (iii) The complainant is directed to take possession of the unit within a week time failing which he shall too be liable for all the obligations as per the provisions of section 19 (a) of the Real Estate (Regulation and Development) Act, 2016.



- (iv) The complainant is eligible for prescribed rate of interest i.e. 10.45% per annum for delayed period of handing over the possession as per the provisions of section 18 (1) of the Act *ibid*.
- (v) If complainant is not satisfied with this decision, he is at liberty to file an appeal before the appropriate forum. Accordingly, the respondent is directed to pay interest at the prescribed rate @10.45p.a. for delayed period within a period of 90 days from the issuance of this order

31. The order is pronounced.

32. Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

HARERA
GURUGRAM



Haryana Real Estate Regulatory Authority, Gurugram
Dated: 16.10.2018