

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

Complaint No. : 464 of 2018
Date of first hearing : 20.06.2018
Date of Decision : 16.10.2018

Smt. Pushpa Saraogi Anr. R/o H.No. 2-A-
175 Azad Nagar Kanpur. 208002. Uttar
Pardesh

...Complainant

Versus

M/s Emaar MGF Land Pvt. Ltd.
Regd office: No 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:

Shri Kartik Nagarkatti
Shri Dheeraj Kapoor

Advocate for the complainant
Advocate for the respondent

ORDER

1. A complaint dated 26.06.2018 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 Smt. Pushpa



Saraogi Anr against the promoter (M/s Emaar MGF Land Pvt. Ltd.) on account of violation of clause 16(a)(i) of the office space buyer's agreement executed on 2.05.2013 for unit no. IG-05-1603, 16th 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: -

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| 1. | Name and location of the project | Imperial gardens Sector-102, Gurgaon |
| 2. | Nature of real estate project | Residential |
| 3. | Unit no. | IG- 05-1603, 16 th floor |
| 4. | Unit admeasuring | 2025 sq. ft |
| 5. | Registered/ not registered | Registered |
| 6. | RERA Registration No | 208 of 2017 |
| 7. | Date of booking | 28.02.2013 |
| 8. | Date of buyer agreement | 02.05.2013 |
| 9. | Total consideration | Rs. 1,58,81,825/- |
| 10. | Total amount paid by the complainant | Rs. 1,57,75,817/- |
| 11. | Payment plan | Instalment Linked Plan |
| 12. | Date of delivery of possession. | Clause 14 (a) - 42 months from the date of applying & obtaining OC/CC d i.e. 11.05.2017 +3MONTHS 11.08.2017 |
| 13. | Delay of number of months/ years upto 16.10.2018 | 1 year 5months 5 days |



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|-----|--|---|
| 14. | Penalty clause as per builder buyer agreement dated 01.05.2013 | Clause16 (a)- Rs 7.50 per sq ft per month |
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3. As an office space buyer agreement is available on record for Unit No. IG- 05-1603, 16th floor according to which the possession of the aforesaid unit was to be delivered by 2.02.2017. The promoter has failed to deliver the possession of the said unit to the complainant by the due date as per office space buyer agreement. 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 21.08.2018. The case came up for hearing on 21.08.2018, 19.09.2018 and 16.10.2018. The reply has been filed on behalf of the respondent has been perused.



FACTS OF COMPLAINT

5. The complainant submitted that the respondent company is in the business of development of real estate project, with the

flagship company Emaar based in Dubai, having its corporate office in Delhi and is competent to defend the complaint.

6. The complainant submitted that the complainant is the allottee in respect of the apartment bearing Unit No. IG-05-1603 consisting of 3 bedrooms, 3 bathrooms, living room, dining room, lounge, kitchen and store room, and having a purported "super area" of 188.13 square metres (approximately 2025 square feet) situated on the 16th floor of Tower/Building No.05 (hereinafter referred to as the "Apartment") in the group housing colony known as "Imperial Gardens" which is being constructed, developed and promoted on land admeasuring approximately 12 acres situated at Sector — 102, Village Khekri Majra Dhankot, Tehsil and District Gurgaon, Haryana.

7. The complainant submitted that as per information published by the respondent in the public domain, the respondent has obtained registration under the provisions of section 3, 4 and 5 of the Real Estate (Regulation and Development Act), 2016 (hereinafter called the "Act") and the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter



referred to as the "Rules"), in respect of towers 3, 4, 5, 6 and 7 of the Project, vide Registration No. 208 of 2017 dated 15.09.2017. The parties are, thus, subject to all obligations and liabilities specified under the Act and the Rules.

8. The complainant submitted that they being induced by the said advertisements published by the respondent, made an application for allotment of the apartment on 26.02.2013, pursuant where to, the respondent allotted the apartment in favour of the complainant vide letter dated 28.02.2013 buyer's agreement dated 02.05.2013 (hereinafter referred to as 'Agreement for Sale'), was executed between the complainants and the respondent, for purchase of apartment. As per the terms of the agreement for sale, the total sale consideration of the said apartment was fixed as Rs, ,825/ (Rupees One Crore Fifty-Eight Lacs Eighty-One Thousand Eight Hundred and Twenty-Five Only),

9. The complainant submitted that in terms of clause 14 of the agreement for Sale, the respondent was required to handover the possession of the apartment to the complainants within 42 (forty-two) months of the start date of construction with a



further grace period of 3 (three) months after expiry of the said 42 months for applying and obtaining completion certificate in respect of the said unit or project.

10. The complainant submitted that as per information received from the respondent, the construction of the project commenced on 11.11.2013 and as such the period of 45 months (42 months + 3 months grace period) expired on 10.05.2017, despite which the respondent has till date failed to hand over possession of the completed apartment to the complainant. Complainant has made a total payment of Rs. 1,57,75,817/- (Rupees One Crore Fifty-Seven Lacs Seventy-Five Thousand Eight Hundred and Seventeen Only) being more than 99% (ninety-nine percent) of the total sale consideration i.e. Rs. 1,58,81,825/- (Rupees One Crore Fifty-Eight Lacs Eighty-One Thousand Eight Hundred and TwentyFive Only) to the respondent.

11. The complainant submitted that respondent sent a completely concocted and vexatious payment request reminder /demand notice to the complainant vide letter bearing no. 1/717246 dated 03.10.2017, demanding the Complainant to make



payment of Rs. 8,25,555/- (Rupees Eight Lakhs Twenty-Five Thousand Five Hundred and Fifty-Five Only) demand for the instalment in respect of the apartment, and there was, as such no question of any delay on the part of the complainant in making such payment, and consequently, no question of the complainant having to pay delayed payment charges in respect thereof while legitimately denying and disputing their liability towards payment of any purported delayed payment charges. As such, the complainant has made a total payment of Rs. 15,75,817

12. The complainant submitted that it may be mentioned that as per the construction status published by the respondent on their website as on April 2018, the expected date for application for occupancy certificate in respect of tower 5 of the project, i.e. the tower in which the apartment is situated, is mentioned as September 2018. It furthermore appears from the actual status of construction of the project, that the respondent will be unable to meet the said grossly delayed and extended timeline as well and handover the possession of the apartment, duly complete in all respects, even by the



purported date published on their website. 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.1,57,75,817/(Rupees One Crore Fifty-Seven Lacs Seventy-Five Thousand Eight Hundred and Seventeen Only) paid by them to the respondent along with interest, as provided under Section 18(1) read with section 19(4) of the Act and Rule 15 of the Rules.

13. The complainant submitted that copy of the "completion schedule" of the project as on April 2018, as published by the respondent on their website is annexed herewith and marked as annexure P-7.
14. The complainant through their advocate, has already issued a demand notice dated 09.11.2017 calling upon the respondent, inter alia, to refund the entire amount paid by the complainant, along with interest thereupon.
15. The complainant submitted that it is thus clear that the respondent is in gross sustained and continuing violation and contravention of the provisions of the Act including but not limited to the express provisions of Sections 18 and 19 thereof,



as well as the provisions of Rules 15 and 16 of the Rules. The complainant is as such aggrieved thereby, and have 20 causes of action to file the present complaint before this hon'ble authority, under Section 31 of the Act read with Rules 15, 16, 28 and 29 of the Rules.

16. It is submitted that the complainant has suffered severe financial losses on account of aforesaid undue, unjustified and gross delay in completion of construction and delivery of possession of the apartment by the respondent.
17. Thus, the complainants 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 10.05.2017. Thus, the complainant has, as on date, suffered a loss of at least Rs.2,46,000/-.



ISSUES RAISED BY THE COMPLAINANT:

- i. Whether the respondent/promoter has violated the provisions of the Act, including but not limited to the express provisions of sections 18 and 19 thereof, as well

as the provisions of rules 15 and 16 of the Rules, by failing to deliver possession of the apartment, duly completed in all respects within the time stipulated in the agreement for sell?

- ii. Whether the respondent is liable to refund the entire amount of Rs.1, 57, 75,817 paid by the complainant along with interest at the statutory rates from the date of each payment till the date of actual refund/payment?

RELIEF SOUGHT:

- i. Direct the respondent to refund the amount of Rs 1, 57, 75,817/- along with interest @ 10.45% for every month of delay till the handing over of possession.
- ii. Direct the respondent to pay the complainant interest amount of Rs 2, 46,000/- in terms of loss of rental income calculated from June, 2017 until April 2018 and furthermore at the said rate of Rs 20,500/- .



RESPONDENT'S REPLY

18. The respondent has raised various preliminary objections and submissions challenging the jurisdiction of this hon'ble authority. They are as follows:
19. The respondent stated that the present complaint is not maintainable in law or facts. The respondent submitted that the present complaint is not maintainable before this hon'ble authority. The hon'ble authority has no jurisdiction to entertain the present complaint. The respondent had filed a separate application for rejection of the complaint on the ground of jurisdiction.
20. The respondent submitted that according to section 17 of the Act, the complaint pertaining to compensation and interest under section 12,14,18 and section 19 of the The Real Estate (Regulation and Development) Act,2016 is maintainable only before the adjudicating officer
21. The respondent submitted that the project is covered under the definition of the ongoing project as partly registered in the authority.



22. The respondent submitted that without prejudice to the above , stated position is further vindicated by the proviso section 71 which clearly states that even in a case where a complaint is withdrawn from a consumer forum for the the purpose of filing an application under the said Act and said Rules, the application if any can be filed only before the adjudicating officer and not before the regulatory authority.
23. Further, the complainant being an investor cannot urge before this authority any relief provided under the act as the objects and preamble of the RERA Act clearly state that RERA has been enacted for effective protection of consumers and to protect their interests. Thus, RERA has not been enacted to protect the interest of investors. The complainant has only bought the said unit for speculative investment and does not intend to stay in the unit. since, the complainant is not an allottee under the Act but an investor, the authority does not have jurisdiction to decide this complaint.
24. The complaint is not supported by any proper affidavit with a proper verification.



25. The respondent has stated that the complainant has defaulted in making the payments of the instalments within the time prescribed which resulted in delay payment charges.
26. The respondent submitted that respondent has continue with the construction despite of several advertises and in the 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.

DETERMINATION ON THE ISSUES:

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

27. With respect to the **First issues** raised by the complainant, the authority is of the view that as per clause 14(a) of flat buyer agreement, possession of flat was to be handover within 42 months from the date of commencement of construction (with a grace period of 3 months) upon receipt of all project related approvals. In the present case construction began on 11.11.2013. Therefore, the due date of handing over



possession will be computed from. 11.11.2013. Therefore, the due date of handing over possession will be 11.08.2017.


28. Accordingly, the due date of possession was 11.08.2017 and the possession has been delayed by one year five months and five days till the date of decision. 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.”



29. As the possession of the flat was to be delivered by 11.05.2017 as per the clause referred above, 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.”

30. With respect to **second issue** Keeping in view that the project is to be completed, and the respondent is going to apply for the occupation certificate of the said unit to the complainant by 31.12.2018, the authority is of the view that in case refund is allowed in the present complaint, it will have adverse effect on



the other allottees. Therefore, the refund cannot be allowed in the present complaint

Finding of the Authority

31. After taking into consideration all the material facts as adduced and produced by both the parties, the below noted directions are being issued in the interest of justice and fair play. The preliminary objections raised by the respondent regarding jurisdiction of the authority stands rejected. 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.

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 pay the interest at the prescribed rate i.e. 10.45% for every month of delay from the due date of possession i.e. November 31,2013 till the actual date of handing over of the possession i.e. 30.01.2018. the respondent is directed to pay interest accrued from to November 31,2013 to January 30,2018 on account of delay in handing over of possession which shall be paid to the complainant within 90 days from the date of decision.
 - ii. As per clause 14(a) the respondent company was bound to deliver the possession of the said unit within 42 months with a grace period of 3 months to the complainant which comes to 11.05.2017 thereby delaying the possession by 1 years and 5months. Thus, the complainant is entitled to interest at prescribed rate for every month of delay till the handing over of the possession.
33. Keeping in view that the project is to be completed, and the respondent is going to apply for the occupation certificate of the said unit to the complainant by 31.12.2018, the authority



is of the view that in case refund is allowed in the present complaint, it will have adverse effect on the other allottees. Therefore, the refund cannot be allowed in the present complaint

34. 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 & Development) Act, 2016. If the builder fails to deliver the possession on the tentative date i.e. 31.12.2018, in that case, the complainant can seek refund alongwith prescribed rate of interest w.e.f. 11.8.2017 till the actual date of handing over the possession. 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 paid before 10th of subsequent month till handing over the possession. The project is not registered at the moment. The complaint is disposed of accordingly



35. The order is pronounced.

36. Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member



Haryana Real Estate Regulatory Authority, Gurugram

Dated: 16.10.2018



HARERA
GURUGRAM



PROCEEDINGS OF THE DAY

| | |
|--------------------------------|--|
| Day and Date | Tuesday and 16.10.2018 |
| Complaint No. | 464/2018 Case titled as Ms. Pushpa Saraogi V/S M/S Emaar MGF Land Ltd. |
| Complainant | Ms. Pushpa Saraogi |
| Represented through | Shri Kartik Nagarkatti, Advocate for the complainant. |
| Respondent | M/s Emaar MGF Land Ltd. |
| Respondent Represented through | Shri Dheeraj Kapoor, Advocate for the respondent. |
| Last date of hearing | 19.9.2018 |
| Proceeding Recorded by | Naresh Kumari |

Proceedings

Rejoinder filed by the counsel for the complainant. Copy given to the counsel for the respondent.

Arguments advanced by both the counsel for the parties heard. Counsel for the complainant stated that the flat was booked on 28.2.2013 and the BBA was executed inter-se the parties on 2.5.2013.

As per the statement of counsel for respondent, project is almost complete. The builder has already applied for registration with the authority and as per registration application, the due date of possession is 31.12.2018. It is submitted that the builder shall apply for occupation certificate by 31.12.2018. 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 & Development) Act, 2016. If the builder fails to deliver possession on the tentative date i.e. 31.12.2018, in that case, the complainant can seek refund alongwith prescribed rate of interest. 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. The project is not registered at the moment. The complaint is disposed of accordingly. Detailed order shall follow. File be consigned to the Registry.

Samir Kumar
(Member)

Subhash Chander Kush
(Member)