

PROCEEDINGS OF THE DAY

Day and Date	Tuesday and 20.11.2018
Complaint No.	109/2018 case titled as M/s Investors Home Solutions Pvt. Ltd. Vs. M/s Emaar MGF Land Ltd
Complainant	M/s Investors Home Solutions Pvt. Ltd.
Represented through	Shri Shashikant Sharma, 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	23.10.2018
Proceeding Recorded by	Naresh Kumari & S.L.Chanana

Proceedings

Arguments heard.

As per clause 14 (a) of the BBA executed inter se the parties on 09.05.2013, the unit/flat No.IG-09-0101-1st floor booked by the complainant was to be delivered to the complainant within 42 months plus 3 months grace period which comes out to be 11.8.2017. It has been stated by the counsel for respondent that they have applied for registration of 4 towers including Tower No.9 in which the unit of the complainant is situated and the due date of delivery of possession is 31.12.2018. It has further been stated by the counsel for the respondent that they have received the 'occupation certificate' of tower in which the flat is situated. However, the

complainant/buyer is stating that he had applied with the builder for cancellation of his unit after forfeiting his earnest money in the year 2016. However, his request remained under consideration and no conclusive decision has been taken by the respondent/builder. Since the project is complete and the OC dated 17.10.2018 has been received, as such there is no choice with the complainant not to take possession of his unit. Possession letter shall be issued by the respondent/builder within 20 days. As per OC, dated 17.10.2018, issued by DTCP, Haryana, the application filed by the respondent for seeking occupation certificate is incomplete as is evident from the endorsement on the occupation certificate dated 17.10.2018, therefore, the registration branch is directed to initiate penalty proceedings against the respondent/promoter for non-registration of left out part of this project under section 59 of the Real Estate (Regulation & Development) Act 2016 for violation of Section 3(1) of the Act ibid. However, keeping in view the facts and circumstances of the case, complainant/buyer is entitled for prescribed rate of interest @ 10.75% for delayed possession charges as per the provisions of Section 18 (1) of the Act ibid till he actually receive the offer of possession.

Accordingly, it is directed that respondent to pay prescribed rate of interest @10.75p.a. to the complainant on account of delayed possession charges till the actual possession is handed over to the complainant within a period of 90 days from the date of issuance of this order.

Complaint is disposed of in above terms. Detailed order will follow.

File be consigned to the registry.

Samir Kumar
(Member)

Subhash Chander Kush
(Member)

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

Complaint No. : 109 of 2018
**Date of First
Hearing : 19.04.2018**
Date of Decision : 20.11.2018

M/s. Investors Home Solutions Pvt. Ltd.
Regd. Office: C-1562, Ansal Palam Vihar,
Gurugram

Complainant

Versus

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

Respondent

CORAM:

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

Chairman
Member
Member

APPEARANCE:

Shri. Sandeep Vashisht Advocate for the complainant
Shri Ketan Luthra, Authorised Advocate for the respondent
Representative on behalf of
the respondent with Shri
Dheeraj Kapoor



ORDER

1. A complaint dated 15.03.2018 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 complainant M/s. Investors Home Solutions Pvt. Ltd, against the promoter M/s Emaar MGF Land Ltd, on account of violation of clause 14(a) of buyer agreement executed on 09.05.2013, in respect of unit no. IG-09-0101, 1st floor in the project "IMPERIAL GARDENS" with a super area of 2025 sq.ft. described as below for not handing over the possession on due date i.e 11.08.2017 which is an obligation 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-09-0101, 1 st floor
3.	Unit area admeasuring	2025 sq.ft.
4.	Registered/ not registered	Registered
5.	RERA Registration no.	208/2017
6.	Revised date	31.12.2018
7.	Nature of the project	Group housing colony
8.	Date of booking	28.02.2013
9.	Payment Plan	Construction linked



		payment plan (As per the statement of account- Instalment Payment Plan)
10.	Date of buyer agreement	09.05.2013
11.	Total consideration amount as per agreement dated 09.05.2013	Rs. 1,53,48,863/-
12.	Total amount paid by the complainant	Rs. 1,29,31,925/-
13.	Status of the project	OC Received (17.10.2018)
14.	Date of delivery of possession from the date of execution of buyer agreement	11.08.2017 Clause 14(a)- 42 months months including a grace period of 3 months from the start of the construction. Date of start of construction- 11.11.2013
15.	Delay for number of months/ years upto date 20.11.2018	1 years 3 months 9 days
16.	Penalty clause as per buyer agreement dated 09.05.2013	Clause 16(a) of BA i.e. Rs. 7.50/- per sq.ft. per month of the super area of the unit for the period of delay beyond 45



		months or such extended period as permitted under the agreement.
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3. The details provided above have been checked on the basis of the record available in the case file which have been provided by the complainant and the respondent. A buyer agreement dated 09.05.2013 is available on record for the aforementioned unit according to which the possession of the aforesaid unit was to be delivered on 11.08.2017. The promoter has not fulfilled his committed liability by not giving possession as per the terms of the buyer agreement.
4. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. The respondent appeared on 19.04.2018. The case came up for hearing on 19.04.2018, 16.05.2018, 05.07.2018, 25.07.2018, 16.08.2018, 12.09.2018, 23.10.2018 and 20.11.2018.



Facts of the complaint

5. Briefly stating the facts of the complainant, the complainant submitted that Mr. Kanwar Pal Singh is one of the said director of the company was in look for a residential flat for personal

use and after gone through the details of the respondent project decided to go in for purchase of a suitable flat.

6. The complainant was told by the sales representative of the respondent that all the units have been sold and there is no immediate unit available for sale.
7. The apartment unit bearing no. IG-09-0101 admeasuring 2025 sq. ft. located on 1st floor along with one parking in sector-102, Gurugram in project “Imperial Gardens”, the complainant showed his willingness and interest for purchase for of the unit which is in the name of Mrs. Asha Devi w/o of Mr. Suraj Bhan, and accordingly all the formalities regarding transfer the flat had been completed between the complainant and Asha Devi.
8. After carrying out all the necessary formalities the complainant carried out necessary changes and endorsement on the buyers agreement on dated 07.03.2014 and on 21.03.2014 respondent also issued nomination letter in favour of complainant.
9. The respondent represented and assured the complainant that the said project would be completed and the possession of the apartment would be given to the complainant by 11.08.2017.



10. The representations made by the respondent the complainant agreed to re-purchase a residential flat for personal use in the project in total sale consideration of Rs.1,52,800,47/- out of which complainant made a payment of Rs.1,29,31,925/- up to date against which the respondent issued receipts as well as statement of account.

11. The complainant had drawn a housing loan from ICICI bank of Rs. 92,84,552/- on dated 23.08.2014 which was required to be repaid @ Rs.72,000 approximately per month EMI.

12. The complainant have continued to pay EMI for the financed amount till date and have also had to bear the burden of rental accommodation.

13. The complainant as per the agreed terms with ICICI bank started paying to the bank, the EMI beginning from the date of the loan sanctioned and credit to the account of complainant. The loan amount of Rs. 92,84,552 has become payable even though the complainant has not received the possession till today.

14. The complainant submitted that in the month of August 2016, that he was given written request by the respondent for cancellation of unit and refund the entire amount along with



the interest and same request was received by the respondent on 30.08.2016. The request by the complainant was considered by the respondent and was assured that the refund will be done within short period of time.

15. On 29.09.2016, the respondent sent a mail regarding refund of amount after deductions of necessary charges, i.e brokerage, late payments charges etc. The respondent submitted that refund of amount will be done after re-sold of the unit.

16. The complainant enquired the status of completion of the said project in January 2018, they were informed that the project will be completed only by the mid of 2019.

17. Issues raised by the complainant

- I. Whether the complainant made all the payments in time?
- II. Whether the promoter/respondent handed respondent over the possession of the flat to the complainant in duly time period stipulated as per clause 14(a) in term of the builder buyer agreement?
- III. Whether the promoter/respondent has completed the entire project?



18. Relief sought

- I. Direct the respondent for an immediate 100% refund of the total amount Rs. 1,29,31,925/- paid by the complainant, along with penal interest of 18% per annum from the date of the receipt of the payments made to the opposite party.
- II. Direct the respondent to pay compensation of Rs. 5,00,000/- to the complainant for mental agony, harassment, discomfort and undue hardships caused to the complainant as a result of the above acts and omissions on the part of the opposite party.

Respondent's reply

19. The respondent submitted preliminary objections upon the maintainability of the complaint and also filed an application for rejection of the complaint on the ground of jurisdiction. The respondent stated that the present complaint is not maintainable in law or facts and the Hon'ble Regulatory authority has no jurisdiction whatsoever to entertain the present complaint. The complaints pertaining to compensation and interest for a grievance under sections 12,14,18 and section 19 of the Real Estate (Regulation and Development) Act, 2016 are required to be filed before the adjudicating



officer under rule 29 of the Haryana Real Estate (Regulation & Development) Rules, 2017 read with section 31 and section 71 of the said Act and not before this hon'ble regulatory authority under rule 28.

20. The respondent submitted that even though the project of the respondent is covered under the definition of "ongoing projects" u/r 2(1)(o) of HARERA rules, 2017 and the respondent has already applied for the registration of the project with RERA vide application dated 23.04.2018, and as per the disclosure in the said application for grant of RERA certificate the project wherein the present tower is situated will be completed within the time specified therein or granted by the authority. The complaint, if any, is still required to be filed before the adjudicating officer under rule 29 of the said rules and not before the hon'ble authority under rule 28.

21. The respondent submitted that the statement of objects and reasons of the said Act clearly states that the RERA is enacted for effective consumer protection. The RERA is not enacted to protect the interest of investors. As the said Act has not defined the term consumer, therefore the definition of "consumer" u/s 2(d) as provided under the Consumer Protection Act, 1986 has to be referred for adjudication of the



present complaint. The complainant is an investor and not a consumer. The complainant, who is already the owner and resident of C-1562, Ansal Palam Vihar, Guragon is an investor, having admittedly invested in 13 apartments in the Imperial Gardens project of the respondent and never had any intention to buy the apartment for its own personal use and kept on avoiding the performance of its contractual obligations of making timely payments and has now filed the present complaint on frivolous grounds.

22. It is submitted by the respondent that the original allotment was in default of payments which resulted in cancellation of the allotment of the apartment, vide cancellation letter dated 28.12.2013. The complainant turned out to be a defaulter, having deliberately failed to make the payment of various instalments as and when it became or upon the demand raised as per the payment schedule.

23. The respondent submitted that while making the request for transfer of allotment in its name, the complainant also executed an affidavit and an undertaking-cum-indemnity bond dated 07.03.2014, in favour of the respondent, wherein the complainant undertook not only to make the balance payment of all the charges but also to abide by the terms and



conditions of the apartment buyer agreement and indemnify the respondent in case of any legal action.

24. The respondent submitted that the basic sale price was mentioned as Rs. 6600/- per sq. ft. However, at the request of the complainant who was the broker in the said booking, a discount of 1.5% i.e Rs.99/- per sq.ft (being 50% of the broker fees) was credited to the original allottee and the revised BSP was Rs. 6501/- per sq. feet (Rs. 1,33,65,000/-). The total sale consideration was Rs. 1,51,81,726.28/-

25. The respondent submitted that the original allottee turned out to be a defaulter and failed to pay the 2nd, 3rd, 4th allotment which resulted in cancellation of the allotment letter, vide cancellation letter dated 28.12.2013.

26. It was submitted by the respondent that the complainant who was also the broker for the same unit, purchased it from the original allottee but after the apartment was transferred in its name, the complainant also turned out to be a defaulter, having deliberately failed to make the payment of various instalments within the time prescribed.

27. The respondent submitted that the respondent has continued with the construction of the project and is in the process of



completing the project and will be able to apply the occupation certificate for the apartment in question by 31.12.2018.

Determination of issues

28. With respect to the **first issue** raised by the complainant the statement of account dated 08.05.2018 shows that the complainant has clearly defaulted in payments. The statement of account shows that the delayed payment charge upto 08.05.2018 is Rs. 1,52,718/-.

29. In regard to the **second issue** raised by the complainant, the promoters have violated the agreement by not giving the possession on the due date as per the agreement i.e 11.08.2017, thus, the authority is of the view that the promoter has failed to fulfil his obligation under 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.”

30. Regarding the **third issue** in the complaint, the respondent hasn't completed the project but respondent has continued with the construction of the project and is in the process of completing the project and will be able to apply the occupation certificate for the apartment in question by 31.12.2018.

31. As the promoter has failed to fulfil his obligation under section 11, the promoter is liable under section 18(1) proviso to pay to the complainant interest, at the prescribed rate of 10.45%, for every month of delay till the actual 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.

32. The complainant made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above.

“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.”

33. The complainant 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.”



Findings of the authority

34. The respondent admitted the fact that the project Imperial Gardens is situated in Sector-102, Gurugram, therefore, the hon'ble authority has territorial jurisdiction to try the present complaint. As the project in question is situated in planning area of Gurugram, therefore the authority has complete territorial jurisdiction vide notification no.1/92/2017-1TCP issued by Arun Kumar Gupta, Principal Secretary (Town and Country Planning) dated 14.12.2017 to entertain the present complaint.

35. **Jurisdiction of the authority-** The preliminary objections raised by the respondent regarding jurisdiction of the authority stands rejected. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as held in *Simmi Sikka V/s M/s EMAAR MGF Land Ltd.*

36. 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 45 months or such extended period as permitted under the said agreement for the period of delay as per clause 16(a) of the buyer 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.”

37. Keeping in view the present status of the project and intervening circumstances, the authority is of the considered opinion that the respondent has failed to deliver the possession of the apartment number IG-09-0101, 1st floor, to the complainant by the committed date i.e. 11.08.2017 as per the said agreement and the possession has been delayed by 1 year 3 months 9 days till the date of decision i.e. 20.11.2018. The respondent have received the occupation certificate of tower in which the flat is situated. The project is complete and OC dated 17.10.2018 has been received, as there is no choice with the complainant not to take the possession. The possession letter will be issued by the respondent within 20 days. As per OC, dated 17.10.2018, issued by DTCP, Haryana,



the application filed by the respondent for seeking occupation certificate is incomplete as is evident from the endorsement on the occupation certificate dated 17.10.2018, therefore, the registration branch is directed to initiate penalty proceedings against the respondent for non-registration of left out part of the project under section 59 of the Real Estate(Regulation & Development) Act, 2016 for violation of section 3(1) of the Act ibid. The complainant is entitled for prescribed rate of interest for delayed possession charges.

Decision and directions of the authority

38. The authority, exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issue the following directions to the respondent:

- (i) The respondent is directed to give the physical possession of the said flat to the complainant on the date committed by the respondent for handing over the possession.
- (ii) The respondent is directed to give interest to the complainant at the prescribed rate of 10.75% on the amount deposited by the complainant for every month of delay from the due date of possession till



20.11.2018 within 90 days of this order and thereafter on 10th of every month of delay till the offer of possession in their application for registration with Haryana Real Estate Regulatory Authority.

- (iii) If the possession is not given on the date committed by the respondent then the complainant shall be at liberty to further approach the authority for the remedy as provided under the provisions, i.e. section 19(4) of the Act *ibid*.

39. The complaint is disposed of accordingly.

40. The order is pronounced.

41. Case file be consigned to the registry. Copy of this order be endorsed to the registration branch.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member



Date: 20.11.2018