

PROCEEDINGS OF THE DAY

Day and Date	Friday and 14.12.2018
Complaint No.	675/2018 Case titled as Mrs. Jessica Sherwal & Anr. V/S M/S Emaar MGF Land Ltd.
Complainant	Mrs. Jessica Sherwal & Anr.
Represented through	Shri Sanjeev Sharma, Advocate for the complainant.
Respondent	M/S Emaar MGF Land Ltd.
Respondent Represented through	Shri Ishaan Dang, Advocate for the respondent
Last date of hearing	
Proceeding Recorded by	Naresh Kumari & H.R.Mehta

Proceedings

Arguments heard.

As per clause 14 of Builder Buyer Agreement dated 10.3.2010 for unit No.F304, 3rd floor, Tower-F, 'The Palm Drive', Sector-66, Gurugram was signed inter-se the builder M/s Emaar MGF Land Limited and buyer Ms. Jessica Sherwal and another, possession of the same was to be handed over to the complainant within a period of 24 months + 90 days grace period which comes out to be **10.6.2012**. However, the respondent has offered the possession of the unit to the complainant on **5.3.2018**. As such, complainant is entitled for delayed possession charges at the prescribed rate of interest i.e.

10.75% per annum w.e.f. **10.6.2012 to 5.3.2018**, as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016.

The respondent is directed to give delayed possession charges at the prescribed rate of interest i.e. 10.75% per annum for delayed period to the buyer by adjusting the interest amount already adjusted in the statement of account. This interest amount be paid to the complainant within a period of 90 days from today.

Complaint stands disposed of accordingly. Detailed order will follow.
File be consigned to the registry.

Samir Kumar
(Member)
14.12.2018

Subhash Chander Kush
(Member)
14.12.2018

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

Complaint no. : 675 of 2018
Date of First Hearing : 04.10.2018
Date of Decision : 14.12.2018

1. Mrs. Jessica Sherwal
2. Mr. Ajay Bansal
R/o H.No. 907, Sector-17-B, Haryana

...Complainants

Versus

1. M/s EMAAR MGF Land Limited,
EMAAR MGF Business Park, Mehrauli
Road, Sikanderpur, Sector 28, Gurugram-
122001, Haryana
2. M/s Active Promoters Pvt. Ltd.
17-B, Asaf Ali Road, New Delhi-110002
3. Conscient Infrastructure Pvt. Ltd.
K-1, Green Park, New Delhi

...Respondents

CORAM:

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

Chairman
Member
Member

APPEARANCE:

Shri Sanjeev Sharma
Shri Ishaan Dang

Advocate for the complainants
Advocate for the respondents



ORDER

1. A complaint dated 03.08.2018 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 complainants Mrs. Jessica Sherwal and Mr. Ajay Bansal against the promoters M/s EMAAR MGF Land Limited and othrs. for not giving possession by 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, Gurgaon
1.	Unit no.	F-304, 3 rd floor, tower-F
2.	Registered/Unregistered	Not registered
3.	Plan	Down payment plan
4.	Date of agreement	10.03.2010
5.	Total consideration	Rs. 94,50,732/-
6.	Total amount paid by the complainant	Rs. 94,50,732/-
7.	Date of delivery of possession.	Clause 14 within 24 months from the date of execution of buyer's agreement with grace period of 90 days i.e. 10.06.2012
8.	Date of offer of possession	05.03.2018
9.	Delay of number of months	5 years 9 months approx.
10.	Penalty clause as per builder buyer agreement dated 10.05.2010	Clause 16 (a) Rs. 5/-per sq. ft. per month till the date of notice of possession.



3. As per the details provided by the parties in the complaint and the reply, the developer/promoter was bound to deliver the possession of unit no. F-304, 3rd floor, tower-F. The promoter has failed to deliver the possession of the said unit to the complainant by the due date as per apartment buyer agreement dated 10.03.2010. 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 case came up for hearing on 04.10.2018, 05.11.2018 and 14.12.2018. The reply has been filed by the respondent dated 19.09.2018.

FACTS OF COMPLAINT

5. The complainants submitted that they purchased apartment no. TDP-F-F03-304 of 1900 sq. ft. and paid an amount of Rs. 10,00,000/- against four cheques of Rs. 2,50,000/- each drawn on ICICI bank and HSBC bank on 25.01.2010 on down payment plan. The promoter issued an allotment letter dated 20.02.2010 against the said unit in project called "The Palm Drive" in the said letter builder demanded the remaining Rs. 74,20,457/- to be paid within 45 days from the date of



booking. Complainants paid the total consideration amount as demanded by the promoter as per down payment plan.

6. The complainants submitted that at the time of booking the unit it was assured by the promoter that the project shall be delivered to the complainants within 24 months from the date of booking. Believing the representation, assurance and goodwill the promoter commands the complainants paid the booking amount on 25.01.2010 and subsequently signed buyer's agreement in March 2010, once the total payment as per the demand of promoter is paid.
7. The complainants submitted that promoter extended 10% per annum the early payment rebate to the complainants as promised at the time of payment vide letter dated 20.11.2010 till the due date of demand.
8. The complainants submitted that they were always interested to occupy the residential unit which they purchased after paying their hard earned savings on the promise and assurance given by the promoter regarding delivery of possession within 24 months. Also, submitted that on 05.03.2018 the promoter offered the handing over the possession and settlement of final dues and to utter shock the promoter demanded Rs. 11,46,483/- as balance overdue.



9. Issues raised by the complainant

- i. Whether the promoter is liable to get itself registered with this hon'ble authority under the RERA,2016 in terms of section 3(1) first proviso of the act.**
- ii. Whether incomplete application not supported by the relevant documents as envisaged under sub code 4.10 of Haryana building code 2017 would protect the promoter company & exempt it from the definition of "on going project" as referred under section 3(1) proviso of the act.**
- iii. Whether M/s Emaar MGF LTD needs to provide interest for inordinate delay of over 6 years in offer of possession at the same rate of 24 % that it has been charging the petitioners for delay in making due payments.**
- iv. Are open parking spaces and parking in common basements included in the definition common area as defined u/s 2(n) of the Act? Can these parking which are not garage (under section 2(4) of the act) be sold to the allottees as separate unit ?**
- v. Whether the respondent can sell super area in place of carpet area to the allottees. Shouldn't the promoter**



return the extra money if charged from allottees on account of selling super area for monetary consideration.

- vi. Whether structural charges made by the promoter like increase the area of carpet area of apartment to 1947 sq. ft. is illegal as per sections of the Act?
- vii. The possession was to be handed over in 24 months time i.e. maximum by March 2012 to the allottees. Goods and Service Tax which enforced and implemented from 1st of July 2017. Should allottees bear the tax burden caused because of delay in possession?
- viii. Whether the act of the respondent to get the plan application format signed from the allottees to join the association of owners/allottees formed by the respondent legal?
- ix. Whether the common area be transferred to association of owners through conveyance deed required as per the Act? And whether promoter has right to install movable and immovable goods in the common area for commercial gains or otherwise?



x. Whether interest free maintenance security be, not transferred to the account of association of owners, once conveyance deed is made in their name of the common areas.

xi. Whether the builder has obtained insurances as required under section 16 of the act.

10. Relief sought:

i. The complainant requests the authority to order refund of the money charged on account of increased unit area by 47 sq.ft. without the consent obtained and moreover the increased area is part of common area and not carpet area of the unit.

ii. The promoter has sold the super area which includes the common areas. The monetary consideration should have been only for carpet area. The excess amount on account of any area in excess of carpet area of the unit be ordered to refunded back to the complainant with interest.

iii. The promoter shall make payment of interest accrued on account of delayed offer of possession of six years @ 24 %



as charged him from the allottees on delayed payments if any.

REPLY

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

11. That the respondent submitted 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. The claims have been made in a manner unknown to the common law of contract and are specifically contrary to the text of the Indian Contract Act, 1872 itself.

12. The respondent had applied for the occupation certificate for the said project on 01.07.2017 which is prior to the date of publication of the rules i.e. 28.07.2017 and hence the said project is not an ongoing project as per rule 2(o)(i) and therefore, this hon'ble regulatory authority has no jurisdiction.

13. The respondent submitted that the present complaint raises several such issues which cannot be decided by way of the present complaint in a summary proceedings and requires



extensive evidence to be led by both the parties, examination and cross- examination of witnesses for proper adjudication. Therefore, the disputes raised in the present complaint are beyond the purview of this hon'ble authority and can only be adjudicated by a civil court and the complainant has no locus standi to file the present complaint.

14. The complainant has filed the present complaint seeking refund of the payment made to the respondent, compensation and interest for alleged delay in delivery of possession of the apartment booked by the complainant. It is respectfully submitted that complaints pertaining to compensation and refund are to be decide by the adjudicator under section 71 and section 31 of the Real Estate (Regulation and Development) Act, 2016. That further the complainants are not a consumers in terms of definition of consumer under Consumer Protection Act, 1986. That the respondent submits that the complainants are mere speculative investors having invested with a view to earn quick profit.

15. The respondent submitted that provisional allotment of subject unit in the project, namely Palm drive, Gurgaon, Haryana was made in the name of the complainants herein. When the complainants had approached the respondent



company, they were duly explained the terms and conditions of allotment. Thereafter, buyers agreement was executed between the parties.

16. That the respondent denies that there is a delay in handing over of possession of the unit to the complainants and the due date to hand over possession of the said unit to the complainants was March 2012. On the point of construction and the time line of handing over the possession of the unit, it is relevant to mention that it had been categorically conveyed to the complainant that the company would endeavour to complete the project and hand over the possession of the unit booked, as expeditiously as possible, subject to the reasons beyond the control of the company, as also subjected to the terms and condition contained in the buyer agreement. Being law abiding company, possession of a unit can only be handed over once all the statutory permission/ approvals have been obtained.



17. That the respondent submits that the project in question is a large project and such kind of projects do take reasonable time for completion. This position is fortified from the fact that the parties had envisaged a clause in the buyers agreement in case the company was not able to handover the

possession within 24 months from the date of execution of the buyer's agreement with a grace period of 3 months.

18. The respondent submits that many of the allottees of the project defaulted/delayed in making payment of the amounts which resulted in slowdown in pace of the development. It is submitted that the development of the project was dependent upon the availability of funds from the allottees who were under a contractual obligation to make payments as per the schedule of payment opted by them.

19. The respondent submitted that early payment rebate of Rs. 91,012/- stands duly extended to the statement of account of the unit in question. It is matter of record that as a goodwill gesture, a sum of Rs. 7,13,967/- has been extended with respect to offer of handover of possession.

20. Determination of issues

- i. With respect to the **first issue and second issue** raised by the complainants, the promoter is liable to get itself registered with this hon'ble authority under RERA, 2016 in terms of section 3(1) first proviso of the act which provides:

Provided that the projects that are ongoing on the date of commencement of this act and for which the completion certificate has not been issued, the promoter shall make an application to the authority for registration of the said project within a period of



three months from the date of commencement of the Act.

The Act came into force on 1 May 2017. Even though the application for OC was submitted on 01.07.2017, it was held in the landmark case of ***Simmi Sikka V/s M/s EMAAR MGF Land Ltd. (7 of 2018)***, on **21.08.2018** deliver by the hon'ble authority that incomplete application is no application in the eye of law. From the perusal of the OC, it is clear that the no objection from fire service was received on 28.12.2017 and the report from chief engineer was obtain on 16.11.2017. Therefore the promoter submitted an incomplete application for OC he cannot take benefit under the deeming provision and is not exempted from registration u/s 3 of the Act.

- ii. Regarding the **third issue** raised by the complainant, regarding payment of interest @ 24% that has been charged by the respondent cannot be allowed as 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. 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) 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 10.75% per annum on the amount deposited by the complainant with the promoter on the due date of possession i.e. 10.06.2012 upto the date of offer of possession i.e. 05.03.2018.

- iii. Regarding **fourth issue**, the authority is of the opinion that open parking spaces cannot be sold/charged by the promoter. As far as the issue regarding parking in common basement is concerned, the matter is to be dealt as per the provisions of the space buyer agreement where the said agreement have been entered into before coming into force the Real Estate (Regulation and Development) Act, 2016. The cost of parking of Rs.6,00,000/- has already been included in the sale consideration, accordingly, the promoter has no right to charge it separately from the buyer. If it has been separately charged, then the amount be returned by the promoter to the allottee.
- iv. With respect to the issues numbered as **fifth and sixth issue**, the complainant has not produced any material



document and has only made assertions in issues. Thus, without any proof or document the said issues become infructuous.

- v. With respect to **seventh issue** raised by the complainant, the complainant shall be at liberty to approach any other suitable forum regarding levy of GST.
- vi. The issues numbered as **eighth to eleventh issue**, the complainant has not pressed at the time of arguments and no relief has been claimed in the complaint regarding these issues.

Findings of authority

21. As the possession of the flat was to be delivered by 10.06.2012 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.
22. The complainant made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above. 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.



23. As per obligations on the promoter under section 18(1) proviso, in case the allottee wishes to continue with the project, the promoter is obligated to pay interest at the prescribed rate as the promoter has not fulfilled his obligation. The complainants reserve their right to seek compensation from the promoter for which she shall make separate application to the adjudicating officer, if required.

24. 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. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Department of Town and Country Planning, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District, therefore this authority has complete territorial jurisdiction to deal with the present complaint.



27. The authority is of view that as per clause 14 of builder buyer agreement dated 10.03.2010 for unit no. F304, 3rd floor, tower-F, 'The Palm Drive', Sector-66, Gurugram was signed inter-se the builder M/s Emaar MGF Land Limited and buyer Ms. Jessica Sherwal and another, possession of the same was to be handed over to the complainant within a period of 24 months + 90 days grace period which comes out to be 10.06.2012. However, the respondent has offered the possession of the unit to the complainant on 05.03.2018. As such, complainant is entitled for delayed possession charges at the prescribed rate of interest i.e. 10.75% per annum w.e.f. 10.06.2012 to 05.03.2018, as per the provisions of section 18 (1) of the Real Estate (Regulation And Development) Act, 2016.

Decision and directions of the authority

27. 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 directed to pay the interest at the prescribed rate i.e. 10.75% for every month of delay from the due date of possession i.e. 10.06.2012 till the 05.03.2018 i.e. actual date of handing over of the possession by adjusting the interest amount already adjusted in the statement of account.

(ii) The respondent is directed to pay interest accrued from 10.06.2012 to 05.03.2018 i.e. **Rs. 55,00,067/-** on account of delay in handing over of possession to the complainant within 90 days from the date of decision.

32. The order is pronounced.

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



(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 14.12.2018

Judgement Uploaded on 11.01.2019