

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

Complaint no. : 662 of 2018
First date of hearing : 04.10.2018
Date of decision : 05.11.2018

1. Mr. Kiran Rai Khatri
2. Ms. Ramni Khatri

Both R/o. Flat No.1001, Tower-3,
Uniworld Garden, Sohna Road,
Gurugram-122018.

Complainants

Versus

M/s Emaar MGF Land Ltd.
Regd. Office: 306-308, 3rd floor,
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 Garv Malhotra
Shri Ishaan Dang

Advocate for the complainant
Advocate for the respondent

ORDER

1. A complaint dated 02.08.2018 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 Mr. Kiran Rai Khatri and Ms. Ramni Khatri, against the promoter M/s



Emaar MGF Land Ltd., on account of violation of the clause 11(a) of buyer's agreement executed on 22.01.2010 in respect of unit described as below for not handing over 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	"Emerald Floors Premier", Emerald Estate, Sector 65, Urban Estate, Gurugram, Haryana.
2.	Project area	25.49 acres
3.	DTCP license no.	06 dated 17.01.2008
4.	Registered/not registered	Registered
5.	HRERA registration no.	104 of 2017 dated 24.08.2017
6.	HRERA registration valid upto	23.08.2022
7.	Registered area as per registration certificate	82768 sq. mtrs. (20.45 acres)
8.	Date of execution of buyer's agreement	22.01.2010
9.	Residential floor space/unit no.	EPF-17-0401, 4 th floor.
10.	Unit measuring	1975 sq. ft.
11.	Payment plan	Construction linked payment plan
12.	Basic sale price	Rs.71,08,025/-
13.	Total consideration amount as per statement of account dated 17.08.2018	Rs.86,75,555/-



14.	Total amount paid by the complainant till date as per statement of account dated 17.08.2018	Rs.82,50,855/-
15.	Percentage of consideration amount	Approx. 95.10 percent
16.	Date of delivery of possession as per clause 11(a) of buyer's agreement i.e. 36 months from the execution of buyer's agreement + grace period of 3 months)	22.04.2013
17.	Delay in handing over possession till date	5 years 6 months 15 days
18.	Penalty clause as per buyer's agreement	Clause 13(a) of the agreement i.e. Rs.5/- per sq. ft. per month of the super area till the notice of possession.

3. The details provided above have been checked on the basis of record available in the case file which has been provided by the complainants and the respondent. A buyer's agreement is available on record for the aforesaid unit according to which the possession of the same was to be delivered by 22.04.2013. Neither the respondent has delivered the possession of the said unit as on date to the complainants nor they have paid any compensation @ Rs.5/- per sq. ft per month of the super area of till the notice of possession as per clause 13(a) of the buyer's 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. The respondent through his counsel appeared on 05.11.2018. The case came up for hearing on 04.10.2018 and 05.11.2018. The reply filed on behalf of the respondent on 17.09.2018 has been perused.

Brief facts

5. Briefly stated, the facts of the complaint are that the complainants made a booking of a residential apartment measuring 1975 sq. ft. in the project 'Emerald Floors Premier' in Emerald Estate at Sector-65, Urban Estate, Gurugram, being developed by M/s E maar MGF Land Ltd. by making an advance payment of Rs.5,00,000/- vide cheque dated 22.09.2009.
6. The complainants submitted that on 21.10.2009, the respondent made provisional allotment of flat no. EFP-17-401 located at the 4th Floor. The complainants submitted that more than 27.5% of the total cost of Rs.83,21,676/- was demanded by the respondent even before the execution of buyer's agreement.
7. The complainants submitted that a buyer's agreement was executed on 22.01.2010. As per clause 11 of the said





agreement, the possession was to be handed over within 36 months from the date of execution of the agreement i.e. 22.01.2010.

8. The complainants submitted that the respondent demanded an interest @24% p.a. amounting to Rs.1,62,585/- on the delayed payment. Thereafter the complainants met the executives of the respondent and protested that it is unfair and illegal to demand payments and even before the agreement is signed and hence no interest is payable. Finally, the respondent agreed to waive off the interest on the condition that the complainants give an undertaking cum indemnity. The complainants agreed to the same and gave the above indemnity on 12.09.2014 as the company promised the possession in less than 6 months.
9. The complainants submitted that on 21.10.2014, the respondent sent an email confirming that they shall apply for occupation certificate in the 4th quarter of 2014. Subsequently all the payments were made as and when demanded in time.
10. The complainants submitted that after making more than 90% payment, vide an email dated 26.06.2017, the respondent informed that in line with RERA, delayed



payment charges will be levied @ 10 % per annum effective from 01.05.2017. after several emails enquiring about the eligibility for receiving delayed possession compensation, on 20.06.2018, the complainants were informed that they are not entitled for delayed possession charges which is in total violation of buyer's agreement, indemnity dated 12.09.2014 and norms of natural justice.

11. Issues raised by the complainants are as follow:

- i. Whether the respondent is justified in delaying the possession by more than 5 years and 5 months?
- ii. Whether the complainants are entitled to receive interest @ 24 % p.a. as charged by the developer for period of delay in handing over the possession and subsequently receiving monthly interest till the possession is given?
- iii. Whether the respondent has violated section 13 of the Act ibid by demanding more than 27.5% of the total cost without signing a contract with the buyer?



Relief sought

12. The complainants are seeking the following reliefs:

- i. The complainants are seeking interest @ 24% per annum on the amount paid by the complainants till the

alleged date of possession or on subsequent instalments paid.

- ii. The complainants are seeking interest @ 24% on the entire amount paid till date to be paid on monthly basis till the possession is given to the complainants.

Respondent's reply:

13. The preliminary objections and submissions raised by the respondent challenging the jurisdiction of this hon'ble authority. The respondent submitted that the present complaint raises several issues which cannot be decided by way of the present complaint in summary proceedings and requires extensive evidence to be led by both the parties, examination and cross-examination of witnesses for proper adjudication. Therefore, the dispute raised in the present complaint are beyond the purview of this hon'ble authority and can only be adjudicated by a civil court.



14. The respondent submitted that as per section 31 read with section 71 of the Act, the complaint pertaining to compensation and interest under section 12, 14, 18 and 19 of the Act ibid is maintainable only before the adjudicating

office. The complaint for payment of interest is maintainable only before the adjudicating officer. Thus, it is submitted that the complaint, if any, is required to be filed before the adjudicating officer and not before this honorable regulatory authority.

15. The respondent submitted that the complainants have no locus standi to file the present complaint. Also, it is submitted that as per applicable Act and Rules, a complaint may be filed by a person only if the respondent has committed any act in violation of the Act/Rules *ibid.* It is submitted that the complainants herein have failed to bring on record any document, evidence etc. which may even allude let alone prove that the respondent has violated the provisions of the Act or the Rules.

16. The complainants submitted that section 19(3) of the said Act provides that an allottee shall be entitled to claim the possession of the apartment, plot or building, as the case may be as per the declaration given by the promoter under section 4(2)(l)(c). It is submitted that the project herein namely 'Emerald Floors Premier' at Sector 65, Gurugram, Haryana is





covered under the definition of 'ongoing project' and is registered with this hon'ble regulatory authority. The project is at an advanced stage of completion and the project shall endeavour to offer possession within the timelines given to the authority i.e. 23.08.2022. Thus, no cause of action can be said to have arisen to the complainants in any event to claim interest on the amount paid till the alleged date of possession or on subsequent instalments paid; or interest on the alleged entire amount paid till date as claimed in the complaint. Thus, no relief, as sought can be granted to the complainants.

17. The respondent submitted that till date the buyer's agreement stands valid and forms a final and concluded contract, the terms of which are fully binding on parties. Any challenge to the buyer's agreement for rescission lies only before the civil court in terms of the Specific Relief Act, 1963 and that too only on the ground that 'the contract is either voidable or terminable by the plaintiff or that the contract is unlawful', which is not the case of the complainants herein or in terms of section 31 of the Specific Relief Act, 1963, which



provides for cancellation of an instrument. Thus, the present complaint needs to be dismissed on this ground alone.

18. The respondent submitted that the claim of the complainants for interest @24% is barred by law in terms of section 74 of the Indian Contract Act. The complainants are not entitled to any interest on the amounts deposited by them. Rather the respondent company is entitled to forfeit the money paid by the complainants as per the settled terms and conditions, in case the complainants seek to wriggle out of the binding terms of the buyer's agreement.
19. The respondent submitted that the complainants are not consumers in terms of the definition of consumer under the Consumer Protection Act, 1986. The Act does not provide any definition for the consumer so the same has to be derived from the Consumer Protection Act, 1986. The statement of objects and reasons as well as the preamble of the said Act clearly states that the RERA is enacted for effective consumer protection and to protect the interest of consumer in the real estate sector. It is further submitted that the complainants are mere speculative investors having invested with a view to



earn quick profit. But due to slowdown in the market conditions and having failed to resell the said unit, complainants had apparently developed an intention to raise false and frivolous issues to engage the respondent in unnecessary and false litigation.

20. The respondent submitted that the complainants approached the respondent and sought provisional allotment of a unit in the said project. The complainants were duly explained the terms and conditions of allotment. They submitted an application dated 22.09.2009 for provisional allotment of unit. Subsequently, vide letter dated 21.10.2009, the complainants were informed about the provisional allotment of unit no. EPF-17-0401 admeasuring 1975 sq. ft. in the said project. Thereafter, buyer's agreement dated 22.01.2010 was executed between the parties. Vide an e-mail dated 04.07.2017, addressed to the complainants, this buyer's agreement dated 22.01.2010 was further amended and the applicable delayed payment charges which are levied on remitting the payment/instalments after the due date were





reduced to 10% per annum. The buyer's agreement thus stood superseded and modified to that effect.

21. The respondent denied that there is any delay in giving possession of the unit to the complainants and that the due date to handover possession of the unit to the complainants was 21.01.2013. On the point of construction and the time line of handing over of possession of the unit, it was conveyed to the complainants that the company would endeavour to complete the project and hand over possession of the unit booked, as expeditiously as possible, subject to the reasons beyond the control of the company, as subject to the terms and conditions contained in the buyer's agreement. Being a law-abiding company, possession of a unit can only be handed over once all the statutory permissions/approvals have been obtained.



22. The respondent submitted that the project in question is a large project and such kind of projects do take reasonable time for completion. This position is forfeited from the fact that the parties had envisaged a clause in the buyer's agreement that in case the company was not able to handover

the possession within a period of 36 months from the date of execution of the buyer's agreement (with a grace period of 3 months for applying and obtaining the completion/ occupation certificate, after the expiry of the said period of 36 months). Such a clause would not have been agreed to by the parties, had the parties not envisaged a situation wherein possession was offered beyond 36 months. It is thus apparent that the timeline mentioned in the buyer's agreement was proposed estimated time for handing over of possession.

23. The respondent submitted 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 opted by them. Delayed payments such as by the complainants have an adverse impact on the project deliverables. It is specifically pointed out that the complainants are defaulters, having deliberately failed to make the payment of instalments within the time prescribed, which resulted in delay payment



charges, as reflected in the statement of account dated 17.08.2018.

24. The respondent submitted that the complainants have executed/signed an undertaking-cum-indemnity dated 12.09.2014 whereby the complainants undertook to not raise any claim/compensation against the respondent company in lieu of being exempted from their default in payment to the respondent company and them being in default under the buyer's agreement. The said waiver was granted to the complainants as a goodwill gesture by the company.
25. The respondent submitted that as per the buyer's agreement, in case there is no delay in handing over of possession, the agreement envisages payment of compensation of Rs.5/- per sq. ft. per month of the super area of the unit till the date of possession, subject to other terms and conditions contained in the buyer's agreement. It is submitted that this hon'ble authority cannot in any event travel beyond the express terms and conditions agreed between the parties.
26. The respondent submitted that the complainants were required to make payment in accordance with the schedule of





payment which was conveyed to them at the time of submission of application form and was also attached to provisional allotment letter dated 22.10.2009. The demands were raised strictly in accordance with the agreed schedule of payment.

27. The respondent submitted that it is matter of record that the respondent informed the complainants vide e-mail dated 04.07.2017 that the buyer's agreement has been amended and the applicable delayed payment charges which are levied on remitting the payment/instalments after the due date have been reduced to 10% per annum.

Determination of issues

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

28. With respect to the **first issue** raised by the complainants, as per clause 11(a) of buyer's agreement, the possession of the unit was to be handed over within 36 months plus grace period of 3 months from the date of execution of the said agreement. The buyer's agreement was executed on 22.01.2010. Therefore, the due date of possession shall be





computed from 22.01.2010. The clause regarding the possession of the said unit is reproduced below:

"11(a) Time of handing over the Possession

Subject to terms of this clause and subject to the allottee(s) having complied with all the terms and conditions of this Buyer's agreement and not being in default under any of the provisions of this Buyer's agreement and compliance with all the provisions, formalities, documentation, etc. as prescribed by the company, the company proposes to hand over the possession of the unit within 36 months from the date of execution of Buyer's Agreement. The allottee(s) agrees and understand that the company shall be entitled to a grace period of 3 months, for applying and obtaining the completion certificate/occupation certificate in respect of the unit and/or the Project."

29. Accordingly, the due date of possession was 22.04.2013 and the possession has been delayed by five years six month and fifteen days till the date of decision. The delay compensation payable by the respondent @ Rs. 5/- per sq. ft. per month of the super area till the date of notice of possession as per clause 13(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 and unilateral. It has also been observed 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."

30. With respect to the **second issue** raised by the complainants, as the respondent has failed to fulfil his obligation under section 11(4)(a), therefore the promoter is liable under section 18(1) proviso read with rule 15 of the Rules ibid, to pay interest to the complainants at prescribed rate i.e. 10.45% per annum for every month of delay till the handing over of possession. However, compensatory interest @ 24% p.a. cannot be allowed and the complainants reserve their right to seek compensation from the promoter for which they shall make separate application to the adjudicating officer, if required.

31. With respect to the **third issue** raised by the complainants, section 13 of the Act ibid does not apply to the retrospective transactions.

Findings of the authority

32. 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 complainants at a later stage. As per notification no. 1/92/2017-1TCP dated 14.12.2018 issued by Town and Country Planning Department, 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.

33. The counsel for the respondent has raised certain pertinent questions while apprising that the project is registered with the authority and the revised date of delivery of possession is 23.8.2022. He emphasized that the provisions of the BBA are still applicable and both the parties are bound by their contractual obligations, as a result of which equitable playground should be provided to both the parties. He has given certain case laws which are placed on record. There are certain judgments of Hon'ble Apex Court in this context





on contractual obligations. However, Real Estate (Regulation and Development) Act, 2016 came into being on 01.05.2016 which is a Central Act and sovereignty of parliament, the courts can interpret the provisions of law/statue. However, the provisions of the Act will prevail as described in landmark judgement titled as **Neelkamal Realtors Suburban Pvt Ltd Vs. UOI and ors. (W.P 2737 of 2017)** by the Bombay High Court on the ascent of Hon'ble Supreme Court which enables RERA authority all over India to interpret the provisions of RERA Act, in a lucid manner. The builder is certainly in a dominating position and is entitled as per the provisions of the BBA to extract as much as he can from the buyer who is in a weak and meek position.

34. The possession of the flat was to be delivered by 22.04.2013 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 Haryana Real Estate (Regulation and Development) Act, 2016. As the promoter has failed to fulfil his obligation under section 11, the promoter is liable under section 18(1) proviso of the Act *ibid*, to pay to the complainants interest, at the prescribed rate, for every month of delay till the handing over of possession.



35. The complainants made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above. The complainants requested that necessary directions be issued to the promoter to comply with the provisions and fulfil obligation under section 37 of the Act.

Directions of the authority

36. 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 handover the possession to hand over the possession of the said unit by 23.08.2022 as committed by the respondent in HRERA registration certificate.
- ii. 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. 22.04.2013 till the actual date of handing over of the possession.





Corrected vide order dated 16/01/2019.

- iii. The respondent is directed to pay interest accrued from the due date possession i.e. ~~22.04.2018~~ ^{22.04.2013} till the date of decision, on account of delay in handing over of possession to the complainants within 90 days from the date of decision and subsequent interest to be paid by 10th of every succeeding month.
- iv. The respondent is directed to adjust the delay payment charges amounting to Rs.1,62,585/- waived off by the respondent towards the balance payment to be paid* by the complainants may also be deducted from the prescribed rate of interest awarded to the complainants.
37. The order is pronounced.
38. Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 05.11.2018

Corrected Judgement uploaded on 18.01.2019



Prepared by: Poornima Rao

Checked by : Shreya Gupta

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3. The details provided above have been checked on the basis of record available in the case file which has been provided by the complainants and the respondent. A buyer's agreement is available on record for the aforesaid unit according to which the possession of the same was to be delivered by 22.04.2013. Neither the respondent has delivered the possession of the said unit as on date to the complainants nor they have paid any compensation @ Rs.5/- per sq. ft per month of the super area of till the notice of possession as per clause 13(a) of the buyer's agreement. Therefore, the promoter has not fulfilled his committed liability as on date.



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Brief facts

5. Briefly stated, the facts of the complaint are that the complainants made a booking of a residential apartment measuring 1975 sq. ft. in the project 'Emerald Floors Premier' in Emerald Estate at Sector-65, Urban Estate, Gurugram, being developed by M/s E maar MGF Land Ltd. by making an advance payment of Rs.5,00,000/- vide cheque dated 22.09.2009.
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Relief sought

12. The complainants are seeking the following reliefs:

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provides for cancellation of an instrument. Thus, the present complaint needs to be dismissed on this ground alone.

18. The respondent submitted that the claim of the complainants for interest @24% is barred by law in terms of section 74 of the Indian Contract Act. The complainants are not entitled to any interest on the amounts deposited by them. Rather the respondent company is entitled to forfeit the money paid by the complainants as per the settled terms and conditions, in case the complainants seek to wriggle out of the binding terms of the buyer's agreement.
19. The respondent submitted that the complainants are not consumers in terms of the definition of consumer under the Consumer Protection Act, 1986. The Act does not provide any definition for the consumer so the same has to be derived from the Consumer Protection Act, 1986. The statement of objects and reasons as well as the preamble of the said Act clearly states that the RERA is enacted for effective consumer protection and to protect the interest of consumer in the real estate sector. It is further submitted that the complainants are mere speculative investors having invested with a view to



earn quick profit. But due to slowdown in the market conditions and having failed to resell the said unit, complainants had apparently developed an intention to raise false and frivolous issues to engage the respondent in unnecessary and false litigation.

20. The respondent submitted that the complainants approached the respondent and sought provisional allotment of a unit in the said project. The complainants were duly explained the terms and conditions of allotment. They submitted an application dated 22.09.2009 for provisional allotment of unit. Subsequently, vide letter dated 21.10.2009, the complainants were informed about the provisional allotment of unit no. EPF-17-0401 admeasuring 1975 sq. ft. in the said project. Thereafter, buyer's agreement dated 22.01.2010 was executed between the parties. Vide an e-mail dated 04.07.2017, addressed to the complainants, this buyer's agreement dated 22.01.2010 was further amended and the applicable delayed payment charges which are levied on remitting the payment/instalments after the due date were



reduced to 10% per annum. The buyer's agreement thus stood superseded and modified to that effect.

21. The respondent denied that there is any delay in giving possession of the unit to the complainants and that the due date to handover possession of the unit to the complainants was 21.01.2013. On the point of construction and the time line of handing over of possession of the unit, it was conveyed to the complainants that the company would endeavour to complete the project and hand over possession of the unit booked, as expeditiously as possible, subject to the reasons beyond the control of the company, as subject to the terms and conditions contained in the buyer's agreement. Being a law-abiding company, possession of a unit can only be handed over once all the statutory permissions/approvals have been obtained.

22. The respondent submitted that the project in question is a large project and such kind of projects do take reasonable time for completion. This position is forfeited from the fact that the parties had envisaged a clause in the buyer's agreement that in case the company was not able to handover



the possession within a period of 36 months from the date of execution of the buyer's agreement (with a grace period of 3 months for applying and obtaining the completion/ occupation certificate, after the expiry of the said period of 36 months). Such a clause would not have been agreed to by the parties, had the parties not envisaged a situation wherein possession was offered beyond 36 months. It is thus apparent that the timeline mentioned in the buyer's agreement was proposed estimated time for handing over of possession.

23. The respondent submitted 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 opted by them. Delayed payments such as by the complainants have an adverse impact on the project deliverables. It is specifically pointed out that the complainants are defaulters, having deliberately failed to make the payment of instalments within the time prescribed, which resulted in delay payment



charges, as reflected in the statement of account dated 17.08.2018.

24. The respondent submitted that the complainants have executed/signed an undertaking-cum-indemnity dated 12.09.2014 whereby the complainants undertook to not raise any claim/compensation against the respondent company in lieu of being exempted from their default in payment to the respondent company and them being in default under the buyer's agreement. The said waiver was granted to the complainants as a goodwill gesture by the company.

25. The respondent submitted that as per the buyer's agreement, in case there is no delay in handing over of possession, the agreement envisages payment of compensation of Rs.5/- per sq. ft. per month of the super area of the unit till the date of possession, subject to other terms and conditions contained in the buyer's agreement. It is submitted that this hon'ble authority cannot in any event travel beyond the express terms and conditions agreed between the parties.

26. The respondent submitted that the complainants were required to make payment in accordance with the schedule of



payment which was conveyed to them at the time of submission of application form and was also attached to provisional allotment letter dated 22.10.2009. The demands were raised strictly in accordance with the agreed schedule of payment.

27. The respondent submitted that it is matter of record that the respondent informed the complainants vide e-mail dated 04.07.2017 that the buyer's agreement has been amended and the applicable delayed payment charges which are levied on remitting the payment/instalments after the due date have been reduced to 10% per annum.

Determination of issues

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

28. With respect to the **first issue** raised by the complainants, as per clause 11(a) of buyer's agreement, the possession of the unit was to be handed over within 36 months plus grace period of 3 months from the date of execution of the said agreement. The buyer's agreement was executed on 22.01.2010. Therefore, the due date of possession shall be



computed from 22.01.2010. The clause regarding the possession of the said unit is reproduced below:

“11(a) Time of handing over the Possession

Subject to terms of this clause and subject to the allottee(s) having complied with all the terms and conditions of this Buyer’s agreement and not being in default under any of the provisions of this Buyer’s agreement and compliance with all the provisions, formalities, documentation, etc. as prescribed by the company, the company proposes to hand over the possession of the unit within 36 months from the date of execution of Buyer’s Agreement. The allottee(s) agrees and understand that the company shall be entitled to a grace period of 3 months, for applying and obtaining the completion certificate/occupation certificate in respect of the unit and/or the Project.”

29. Accordingly, the due date of possession was 22.04.2013 and the possession has been delayed by five years six month and fifteen days till the date of decision. The delay compensation payable by the respondent @ Rs. 5/- per sq. ft. per month of the super area till the date of notice of possession as per clause 13(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 and unilateral. It has also been observed 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.”

30. With respect to the **second issue** raised by the complainants, as the respondent has failed to fulfil his obligation under section 11(4)(a), therefore the promoter is liable under section 18(1) proviso read with rule 15 of the Rules ibid, to pay interest to the complainants at prescribed rate i.e. 10.45% per annum for every month of delay till the handing over of possession. However, compensatory interest @ 24% p.a. cannot be allowed and the complainants reserve their right to seek compensation from the promoter for which they shall make separate application to the adjudicating officer, if required.

31. With respect to the **third issue** raised by the complainants, section 13 of the Act ibid does not apply to the retrospective transactions.

Findings of the authority

32. 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 complainants at a later stage. As per notification no. 1/92/2017-1TCP dated 14.12.2018 issued by Town and Country Planning Department, 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.

33. The counsel for the respondent has raised certain pertinent questions while apprising that the project is registered with the authority and the revised date of delivery of possession is 23.8.2022. He emphasized that the provisions of the BBA are still applicable and both the parties are bound by their contractual obligations, as a result of which equitable playground should be provided to both the parties. He has given certain case laws which are placed on record. There are certain judgments of Hon'ble Apex Court in this context



on contractual obligations. However, Real Estate (Regulation and Development) Act, 2016 came into being on 01.05.2016 which is a Central Act and sovereignty of parliament, the courts can interpret the provisions of law/statue. However, the provisions of the Act will prevail as described in landmark judgement titled as ***Neelkamal Realtors Suburban Pvt Ltd Vs. UOI and ors. (W.P 2737 of 2017)*** by the Bombay High Court on the ascent of Hon'ble Supreme Court which enables RERA authority all over India to interpret the provisions of RERA Act, in a lucid manner. The builder is certainly in a dominating position and is entitled as per the provisions of the BBA to extract as much as he can from the buyer who is in a weak and meek position.

34. The possession of the flat was to be delivered by 22.04.2013 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 Haryana Real Estate (Regulation and Development) Act, 2016. As the promoter has failed to fulfil his obligation under section 11, the promoter is liable under section 18(1) proviso of the Act *ibid*, to pay to the complainants interest, at the prescribed rate, for every month of delay till the handing over of possession.



35. The complainants made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above. The complainants requested that necessary directions be issued to the promoter to comply with the provisions and fulfil obligation under section 37 of the Act.

Directions of the authority

36. 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 handover the possession to hand over the possession of the said unit by 23.08.2022 as committed by the respondent in HRERA registration certificate.
- ii. 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. 22.04.2013 till the actual date of handing over of the possession.



- iii. The respondent is directed to pay interest accrued from the due date possession i.e. 22.04.2018 till the date of decision, on account of delay in handing over of possession to the complainants within 90 days from the date of decision and subsequent interest to be paid by 10th of every succeeding month.
- iv. The respondent is directed to adjust the delay payment charges amounting to Rs.1,62,585/- waived off by the respondent towards the balance payment to be paid* by the complainants may also be deducted from the prescribed rate of interest awarded to the complainants.
37. The order is pronounced.
38. Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Dated: 05.11.2018



PROCEEDINGS OF THE DAY

Day and Date	Monday and 05.11.2018
Complaint No.	662/2018 case titled as Mr. Kiran Rai Khatri & Anr V/S M/S Emaar MGF Land Ltd.
Complainant	Mr. Kiran Rai Khatri & anr
Represented through	Complainant in person
Respondent	M/S Emaar MGF Land Ltd.
Respondent Represented through	Shri Ishaan Dang Advocate for the respondent
Last date of hearing	4.10.2018
Proceeding Recorded by	Naresh Kumari and S.L.Chanana

Proceedings

Shri Ishaan Dang Advocate has appeared on behalf of the respondent and filed fresh power of attorney.

Arguments heard.

Complainant has raised the issue that he had booked a flat with the respondent in project "Emerald Floors Premier, Emerald Estate, Sector 65, Urban Estate, Gurugram. As per clause 11 (a) of Builder Buyer Agreement executed inter se the parties on 22.1.2010 and the possession of the flat was delivered to be complainant on 22.4.2013. However, the builder has failed to deliver the possession till date. Complainant has already paid an amount of Rs.82,50,855/- till date. Counsel for the respondent has raised certain pertinent questions while apprising that the project is registered with the

authority and the revised date of delivery of possession is 23.8.2022. He emphasized that the provisions of the BBA are still applicable and both the parties are bound by their contractual obligations, as a result of which equitable play ground should be provided to both the parties. He has given certain case laws which are placed on record. There are certain judgments of Hon'ble Apex Court in this context on contractual obligations. However, Real Estate (Regulation & Development) Act, 2016 came into being on 25.3.2016 which is a Central Act and sovereignty of Parliament, the courts can interpret the provisions of law/statue. However, the final verdict remains with the Parliament. As such, on that date, the provisions of the Act will prevail a landmark judgement in the form of **Neel Kamal V/s Union of India and others** have come into being by the Maharashtra High Court on the ascent of Hon'ble Supreme Court which enables RERA authority all over India to interpret the provisions of RERA Act, in a lucid manner. The builder is certainly in a dominating position and is entitled as per the provisions of the BBA to extract as much as he can from the buyer who is in a weak and meek position. The fact remains that the builder has not given the possession of the unit as per his committed date of delivery of possession. Since this fact has come on record, as such the buyer is entitled for late charges as per section 18(1) of the RERA Act @ prescribed rate of interest @ 10.75 %. The builder is directed to pay the cumulative delayed possession charges till date within a period of 90 days. The buyer shall be entitled to receive the delayed possession charges by 10th of every month till the final delivery of possession, failing which the buyer shall at liberty to seek refund. To be more equitable w.r.t waiver charges of Rs.1,61,590/- received by the respondent and

adjusted by the builder towards the balance payment to be made by the complainant may also be deducted from the prescribed rate of interest awarded to the complainant.

Complaint is disposed off. Detailed order will follow. File be consigned to the registry.

Samir Kumar
(Member)

Subhash Chander Kush
(Member)