BEFORE S.C. GOYAL, ADJUDICATING OFFICER,
HARYANA REAL ESTATE REGULATORY AUTHORITY
GURUGRAM

Complaint No. : 1440/2019
Date of Decision : 22.02.2021

M/s Dulari Exports Pvt Ltd.
D-14/4,Okhla Industrial Area,
Phase-2, New Delhi-110020

Complainant

V/s

M/s EMAAR MGF Land Ltd.
306-308, 3rd Floor, Square One
C-2, District Centre, Saket,
New Delhi-110017

Respondent

Complaint under section 31 of the Real Estate(Regulation and Development) Act, 2016

Argued by:

For Complainant: **Shri K K Kohli, Advocate**
For Respondent: **Shri Ishaan Dang, Advocate**

ORDER

This is a complaint under section 31 of the Real Estate(Regulation and Development) Act, 2016 (hereinafter referred to Act of 2016) read with rule 29 of the Haryana Real Estate(Regulation and Development) Rules, 2017

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(hereinafter referred as the Rules of 2017) filed by M/s Dulari Exports Pvt Ltd through its authorised representative seeking refund of Rs.2,87,32,416/- deposited with the respondent-company for booking a unit measuring 1003 sq ft bearing No. CT-1, GF-016, Tower- 1 in its project known as Capital Towers situated in Sector 26, Village Sikandarpur Ghosi, Gurugram for a total sum of Rs.3,45,33,241.83p. besides taxes on account of violation of obligations of the respondent-promoter under section 11(4) of the Real Estate(Regulation & Development) Act, 2016. Before taking up the case of the complainant, the reproduction of the following details is must and which are as under:

Project related details		
I.	Name of the project	"Capital Towers I Sector 26, Gurugram
II.	Location of the project	-do-
III.	Nature of the project	Commercial
Unit related details		
IV.	Unit No. / Plot No.	CT-1 GF, 016
V.	Tower No. / Block No.	1
VI	Size of the unit (super area)	Measuring 1003 sq ft
VII	Size of the unit (carpet area)	-DO-
VIII	Ratio of carpet area and super area	-DO-
IX	Category of the unit/ plot	Commercial
X	Date of booking(original)	09.09.2013
XI	Date of Allotment(original)	25.09.2013

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XII	Date of execution of Buyer Agreement (copy of BA is enclosed as annexure-C/3)	13.11.2013
XIII	Due date of possession as per BA	01.01.2017 plus four months of grace period
XIV	Delay in handing over possession till date	More than two years
XV	Penalty to be paid by the respondent in case of delay of handing over possession as per the said ABA	**As per clause 19(a) of Buyer Agreement @ Rs.50/- per sq. ft. per month for the period of delay**

Payment details		
XVI	Total sale consideration	Rs.3,45,33,241.83p.
XVII	Total amount paid by the complainant	Rs.2,87,32,416/-

2. Brief facts of the case can be detailed as under:

A project known by the name of Capital Towers situated in Sector 26, Gurugram was to be developed by the respondent. The complainant coming to know about the same decided to book a unit in it for total sum of Rs. Rs.3,45,33,241.83p. on 09.09.2013 by paying a sum of Rs.25,00,000/-. A welcome letter Annexure C/2 was issued in this regard by the respondent. It led to signing of Buyer's Agreement Annexure C/3 between the parties on 13.11.2013. The allotted unit was to be completed within a period of 36 months from the date of start of construction i.e. on 01.02.2014 with a grace period of 4 months. So, in pursuant to that the complainant started depositing various amounts w.e.f. 09.12.2013 to 03.08.2018 vide Annexures C/4 to C/5 respectively. So, in this way, it deposited a sum of Rs.2,87,32,416/- upto 03.08.2018 with the respondent-company. It is the

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case of the complainant that despite the due date of completion of the project and to offer the possession of the allotted unit expired, the respondent failed to hand over its possession to it. So, on account of that it suffered a huge loss as the unit was booked for commercial purposes. So, on these broad averments, it filed a complaint seeking refund of the deposited amount to the tune of Rs.,2,87,32,416/- besides interest and compensation from the respondent-company.

3. But the case of the respondent-builder as set up in the written reply is otherwise and who took a plea that though the complainant booked a commercial unit in its project mentioned above and it also deposited various amount upto August, 2018 but the construction of the project could not be completed due some unforeseen reasons/circumstances. In fact, it was due to de-merger of the respondent and a scheme in this regard being filed before the High Court of Delhi on 16.05.2016. It took about more than a year and the project came back to it in September, 2017. So, after the de-merger scheme was approved by the National Company Law Tribunal vide its order dated 08.01.2018 and 16.07.2018, the construction of the project commenced in full swing. After September, 2017, the construction work was expedited with full force and the same was completed and which led to applying for occupation certificate on 29.03.2019 and the same was received on 11.09.2019. So, in pursuant to that the complainant was offered possession of the allotted unit on 31.12.2019. It was denied that there was any intentional delay in not completing the project and the respondent was at fault at any time. It was however, pleaded that the complainant executed various documents at the time of booking of the unit and these are binding upon it. It was denied that any illegal demand against the complainant was raised and it is not liable to pay the same. It was also pleaded that the

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complainant did not suffer any loss and the respondent is not at all liable to compensate it in any manner.

4. I have heard the learned counsel for both the parties and have also perused the case file.

5. Some of the admitted facts of the case are that on 09.09.2013 , the complainant booked the unit in question with the respondent-company by paying Rs.25,00,000/- for a total sum of Rs.3,45,33,241.83p. A Buyer Agreement Annexure C/3 was executed between the parties and wherein the area of the unit allotted to the complainant was mentioned as 93.18 sq mtrs(1003 sq ft) approximately bearing No.CT-1-GF-016, Tower-1 located in Capital Towers in its project in Sector 26, Gurugram. It is provided under clause 17 of that document that the possession of the allotted unit would be handed over to the allottee within 36 months from the date of start of construction with a grace period of 120 days. A reference in this regard may be made to clause 17 of buyer's agreement which provides as under:

17. ***Possession***

(a) Time of handing over the possession

i. The company shall endeavour to handover possession of the unit to the allottee within 36 (thirty six) months from the date of start of construction, subject, however, to the force majeure conditions as stated in clause 34 of this Agreement and further subject to the allottee having strictly complied with all the terms and conditions of this agreement and not being in default under any provisions of this agreement and all amounts due and payable by the allottee under this agreement having been paid in time to the company. The company shall give notice to the allottee, offering in writing, to the allottee to take possession of the unit for his occupation and use ("Notice of Possession").

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ii. The allottee agrees and understand that the company shall be entitled to a grace period of 120 days over and above the period more particularly specified here-in-above in clause 17 (a) (i), for applying and obtaining necessary approvals in respect of the complex.

The construction of the project in which the unit was allotted to the complainant commenced on 01.02.2014. So, calculated from that time, the due date for offer of possession of the allotted unit comes to June, 2017. It is a fact on record that before filing the complaint seeking refund in March 2019, the complainant sent a notice Annexure C/6 to the respondent and which was admittedly received by the latter. After completion of the construction of the project, the respondent applied for occupation certificate vide Annexure R/4 on 29.03.2019 and the same was received on 11.09.2019 vide Annexure R/5. It also led the respondent-company for issuance of an offer of possession of the allotted unit to the complainant on 31.12.2019 vide Annexure R/6. Keeping in view the facts detailed above, two issues arise for consideration namely, whether there was delay in completion of the project of the allotted unit and the complainant is entitled in such a situation to seek refund of the deposited amount and compensation. Secondly, whether the respondent-company is legally entitled to claim charges of access area as well as PLC of the allotted unit from the complainant besides various other charges consequent thereto.

6. The unit in question bearing No.CT-1-GF-016 having a super area 93.19 sq. mtr(1003 st ft) approximately and located in Tower-1 on ground floor of Capital Towers of Sector 26, Gurugram was allotted to the complainant on 09.09.2013 for a total sale consideration of Rs.3,45,33,241.83p. The due date for offer of possession of the allotted unit as per Buyer's Agreement

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Annexure C/3 was 36 months with a grace period of 120 days from the date of start of construction as is evident from clause 17 of that document. The construction of the project commenced on 01.02.2014. So, taking into consideration these facts, the due date for offer of possession of the allotted unit comes to June, 2017. It is a fact on record that upto August 2018, the complainant had already deposited Rs.2,86,99,389/- against the total sale price of the allotted unit. There were some issues with regard to certain demands raised by the respondent and which led the complainant to send a legal notice Annexure C/6 on 17.08.2018. The complainant is seeking refund of the amount deposited with the respondent and compensation on the grounds of delay in handing over allotted unit by due date i.e. June, 2017 and suffering loss as well as damages due to non-handing over of possession. The plea of the respondent is that when the project has been completed and its possession has already been offered on 31.12.2019, then the complainant is entitled to delayed possession charges and not refund. A reference in this regard has been made to the ratio of law laid down in case of in case of **Ireo Grace Real Tech Pvt Ltd**. Vs **Abhishek Khanna & Others, Civil Appeal No. 5785 of 2019** decided on 11.01.2021 and wherein it was held by the Hon'ble Apex Court that when after completion of the project, the possession of the allotted has been offered, then the allottee is obligated to take possession. However, the developer is also obligated to pay delayed possession charges for the period of delay which occurred from the due date of possession till the date of offer of possession. The contention of the learned counsel for the complainant is that when the respondent failed to offer possession of the allotted unit within the stipulated period, then it is not obliged to take possession and is entitled to seek refund. But the plea advanced in this regard is devoid of merit. Section 18 of Real Estate(Regulation and Development) Act, 2016 provides for return of the

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amount with interest and compensation to allottee when the developer fails to complete the construction and give possession as per agreement of sale. But when after completion of construction, possession has been offered to the allottee including others of the allotted units, then refund of the deposited amount cannot be allowed in view of ratio of law laid down in cases of **Ireo Grace Real Tech Pvt Ltd**. Vs **Abhishek Khanna & Others,** (supra) and **DLF Universal Ltd & Anr** Vs **Capital Greens Flat Buyers Association** etc. Civil Appeal No. 3864-3889 of 2020 decided on 14.12.2020. So, the plea of the complainant with regard to refund of the deposited amount with the respondent cannot be entertained on this ground and may be available on some different grounds.

7. The second, plea advanced on behalf of the respondent/builder is that though there was delay in completion of the project but that was due to various reasons, such as, de-merger, pendency of litigation before the National Company Law Tribunal etc. But whether these factors are sufficient to condone delay in completion of the project and disallowing delayed possession charges to the complainant. The answer is in the negative in view of ratio of law laid down in DLF Homes Buyers(supra) and wherein some of the allottees withdrew from the project and construction activities could not be carried out for a sufficient period due to some incident resulting in delay in completion of the project. However, the Hon'ble Apex Court of the land did not agree with the submissions of the builder to take these factors into consideration for delay in completion of the project and allowed compensation to the flat buyers @ 6% p.a. Since the due date for handing over possession of the allotted unit to the complainant was June, 2017 and the possession of the same was offered to it on 31.12.2019, so, the respondent is liable to pay compensation by way of interest to the

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complainant for this period @ 9.3.% p.a. on the amount deposited by it from the due date i.e. 01.06.2017 to 30.12.2019.

8. After completion of the project, the possession of the allotted unit was offered to the complainant on 31.12.2019 vide letter Annexure R/6. While booking, the complainant was offered unit No.CR-1/GF-016 measuring (1003 st ft) approximately for a sum of Rs.3,45,99,389/- by the respondent. Admittedly, the allottee paid a sum of Rs.2,86,99,389/- upto August, 2018. The possession of the allotted unit was not offered to the complainant by the due date and the same was offered only on 31.12.2019. A perusal of letter Annexure R/6 shows that besides changing the number of the allotted unit CR-GF-016to CT-GF-022, its area was revised and increased from 93.18 sq. mtr to 127.87 sq. mtr. i.e. 30%. Similarly, a perusal of Annexure I attached with this letter shows that revised payments against additional area basic to the tune of Rs.1,22,94,986/- and additional area PLC to the tune of Rs.12,54,590/- were raised and to be paid by the allottee within 30 days from the issuance of that letter. So, the moot question arises for consideration is as to whether the respondent unilaterally could have increased the super are of the allotted unit and its number without informing the complainant/allottee. For this, a reference is to be made to the relevant clauses of Buyer Agreement in 2.1, 2.2(d) and 7(b) and (d) and which provides as under:

2.1. Description of the Unit

In consideration of the Allottee complying with the terms and conditions of this Agreement, completing various requisite formalities, as may be required herein and agreeing to make timely and complete payments of the total consideration as per the payment plan, the company hereby agrees to sell, convey and transfer and the allottee hereby agrees to purchase the unit

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bearing no. CT1-GF-016, located on Ground floor having a Super Area of 93.18 sq. mtrs. (1003 sq. ft.) (approx..) in the said Complex.

2.2 Total Consideration of Unit.

(d) Preferential Location Charges

i. .....

ii. The allottee understands that if due to change in layout plan, the location of the Unit, whether preferentially located or otherwise is changed to any other preferential location, where the PLC is higher than the rate as mentioned hereinabove, then in such a case the allottee shall be liable to pay the PLC as per the revised PLC decided by the Company within thirty (30) days of any such communication received by the allottee in this regard. However, if due to the change in the layout plan the Unit cases to be preferentially located, then in such an event the Company shall be liable to refund only the amount of PLC paid by the Allottee without any interest and/or compensation and/or damages and/or costs of any nature whatsoever and such refund shall be adjusted in the following instalment for the unit.

7. Alterations/Modifications in the layout plans and designs.

a. .....

b. If as a result of such changes, alterations, modifications etc. there is any change in the location, preferential location, number, boundary or area of the Unit, the Company shall intimate the same to the allottee who shall not raise any objection to the same, provided that such changes in the area shall inter alia entail proportionate increase of decrease in the total consideration of the unit based on the original rate at which the unit was booked.

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d. In case of any alteration/ modification resulting in any increase or decrease in the Super Area of the Unit at any time prior to and upon the grant of occupation certificate, the Company shall intimate the allottee in writing of such increase or decrease in super area thereof and the resultant change, if any in the total consideration at the original rate for the unit. Further, the company shall raise additional demand in case of an increase in the super area of the unit, and the allottee shall be liable to pay the same within thirty (30) days of raising such demand by the company, failing which, the allottee shall, without prejudice to any other right of the company, be liable to pay delayed payment charges as per the terms set out in clause 16(i) and clause 16 (ii). For any decrease in the super area, the said reduced amount shall stand adjusted in the final instalment payable by the allottee, as set forth in the payment plan appended in Annexure II.

9. Admittedly, except issuance of an offer of possession on 31.12.2019 vide Annexure R/6, the complainant was neither informed in-between with regard to change in the super area of the allotted unit or its number or with regard to charge of excess PLC by the respondent. No doubt, the respondent-builder relied upon the terms and conditions as mentioned in BA wherein the allottee agreed to the changes in the layout plan and not to raise any objection later on but now, it is well settled that these one sided clauses are not binding on an allottee as the same do not maintain a level platform between the developer and the allottee. A reference in this regard may be made to the ratio of law laid down in cases of **Pioneer Urban Land & Infrastructure Ltd** vs **Govindan Raghvan(2019) 5, SCC, 725** and followed in **Wg Cdr. Ariful Rahman Khan & Others** Vs **DLF Southern Homes Pvt Ltd. 2020, SCC online SC 667** and wherein it was held that the terms of a contract will not be final and binding if it shown that the purchaser had no option but to sign on the dotted lines of a contract framed by the builder.

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The contractual terms of the agreement dated 13.11.2013 are ex-facie one sided, unfair and unreasonable. Even the same were not adhered to by the builder. So, it cannot be said that terms and conditions with regard to change of super area of the allotted unit and its number leading to raising of demand for access area and PLC are legal and valid. Moreover, after coming into force of RERA 2016, a provision has been made under section14 and wherein the promoter is bound to adhere to sanctioned plans and project specification and the same cannot be changed without the previous consent of the 2/3rd allottees. Neither, the respondent/builder placed on file any copy of sanctioned site plan of the project while getting licence of Capital Towers from the DTCP, Haryana nor the total built up area by it. It is evident from the occupation certificate R/5 that the licence for developing the project was given for an area measuring 3.833 acres and the sanctioned FAR was allowed as 27124.366 sq mtrs. However, the FAR achieved after completion of the project was 27121.218 sq mtrs. Thus, when it is clear that achieved FAR of the project is less than the sanctioned FAR, then how the area of out of the allotted unit increased almost 34.69 sq mtrs i.e. 30% and that too without a notice of the complainant as per clause 7 of the Buyer Agreement and Section 14 of Real Estate(Regulation and Development) Act, 2016 and the project being on going one. The best evidence in this regard has been withheld by the respondent/builder. It might have been filing quarterly progress reports of the project with the Hon'ble Authority and wherein it might have mentioned about the sanctioned area of the project alongwith approved site plan filed with DTCP, Haryana, Chandigarh. But neither of these documents were produced nor shown the light of the day and were withheld for the reasons best known to the respondent. The respondent-builder would have been allowed an increase or decrease in the super area of the unit but only after a notice in this regard would have been

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given to the allottees and not otherwise. Even nothing has been brought on the record to show as to how the increase in the super area was calculated, the total increase in the super area and the formula to divide the same between the different allottees. A similar situation arose in this regard before the Hon'ble Panchkula Authority in case bearing complaint no.607 of 2018 -titled as Vivek Kadyan Vs TDI Infrastructure Pvt Ltd. and the claim of the builder with regard to charge for an excess area was declined. Then, this issues also arose before the Hon'ble Haryana Real Estate Appellate Tribunal, Chandigarh in case No.21 of 2019 titled as M/s Pivotal Infrastructure Pvt Ltd. Vs Prakash Chand Arohi and wherein it was observed as under vide judgement dated 20.05.2020.

"..... During the proceedings, the learned Authority has directed for the production of the 60 Appeal No. 21 of 2019 building plan. The learned Authority after perusal of the building plan and hearing the parties observed as under in para No. 7 of the impugned order: -

> *The Authority on appraisal of the building plan today produced by the respondent in pursuant to its previous order and after hearing the parties has however found that the respondent for the purpose of calculating increase in super area of complainant's apartment has divided the common area of the floor at which said apartment situates by the number of flats construed on that floor instead of calculating the increase in the super area on lpro-rata basis by dividing the entire commonly useable area of the project with the number of total apartments existing therein. The criteria adopted by the respondent is apparently wrong because the common area on the floor at which complainant's flat situates will not be used by the complainant alone and it will rather be useable even by other allottees fo the project. So, the entire common area of the project deserves to be proportionately*

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divided by the total number of allottees in order to assess the increase in the super area of the complainant's flat. Accordingly, the respondent is directed to calculate the increase in this manner and supply its copy to the complainant so that he is assured that the increase in his super area has been calculated by dividing the overall common area of the project with the total number of apartments in the project. At this stage, the authority further observes that the respondent has added that area of water tanks installed on terrace and mumty built on staircase and machine rooms of lifts in calculating super area. The area occupied by common utility services cannot be considered a part of super area because the rest on a space which already has been counted towards common utility area. So, the respondent is directed to exclude from adding any such structure which has been laid or raised on a space already counted in determination of the super area.

We do not find any illegality in the direction given by the learned Authority in order to determine the increase in the super area."

10. So, keeping in view all these facts, it is clear that an increase in super area is permissible only when a prior notice has been given to the complainant and not otherwise. Thus, the demand raised by the respondent while issuing an offer of possession on 31.12.2019 vide Annexure R/6 and mentioned in Annexure 1 as additional area basic and additional PLC and consequently other charges are not sustainable in the eyes of law and are ordered to be set aside.

11. Thus, in view my discussion above and taking into consideration all the material facts brought on the record by both the parties, the complaint filed by the complainant is hereby ordered to be accepted. Consequently, the following directions are hereby ordered to be issued to the respondent:

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i) The respondent-builder is directed to issue a fresh offer of possession of the allotted unit to the complainant having an area of 93.18 st mtr(1003 st ft)approximately besides amount due against the basic and PLC, if any minus delayed possession charges to be calculated at the rate 9.3.% p.a. w.e.f. 01.06.2017 to 30.12.2019 in the same location. If it is not available, then in any other location of the same project within a period of 30 days.

ii) After issuance of fresh offer of possession of the allotted unit and its receipt, the complainant would be obligated to accept the same within a further period of 30 days by paying remaining charges against the allotted unit having an area 1003 st ft and to take possession after paying the remaining amount due with interest @ 9.30%p.a, if any, minus delayed possession charges to be calculated @ 9.3.% p.a. from 01.06.2017 to 30.12.2019.

iii) In case, the respondent fails to adhere to the above mentioned directions contained at Sr No. (i) within the stipulated period, then the complainant would be entitled to the refund of the entire amount deposited with it to the tune of Rs.2,87,32,416/- besides interest @ 9.3.% p.a. from the date of each payment till the date of actual payment.

iv) If the complainant fails to accept the offer of possession of the allotted unit or the alternative in the same project made by the respondent within the stipulated period as detailed at Sr. No.(ii), then it would be at liberty to proceed against the former as per law of the land.

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12. This order be complied with by the parties within the period mentioned above and failing which legal consequences would follow.

13. Hence, in view of my discussion detailed above, the complaint filed by the complainant against the respondent is ordered to be disposed off accordingly.

14. File be consigned to the Registry.

(S.C. Goyal)
Adjudicating Officer,
Haryana Real Estate Regulatory Authority
Gurugram

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Judgement uploaded on 06.03.2021