

PROCEEDINGS OF THE DAY

Day and Date	Tuesday and 18.12.2018
Complaint No.	755/2018 Case Titled As Sudesh Saxena And Rakesh Saxena V/S Emaar Mgf Land Ltd
Complainant	Sudesh Saxena And Rakesh Saxena
Represented through	Shri Vaishnavi R. Iyer Advocate for the complainant.
Respondent	Emaar Mgf Land Ltd
Respondent Represented through	Shri Ketan Luthra, authorized representative on behalf of respondent with Shri Ishaan Dang Advocate.
Last date of hearing	
Proceeding Recorded by	Naresh Kumari

Proceedings

Project is registered with the authority.

Occupation certificate has been received on 3.12.2018.

Arguments heard.

As per clause 13 (a) of the Builder Buyer Agreement dated 28.12.2009, for unit No. EHF-350-A, 2rd floor, SF-083, Emerald Floor” in Emerald Hills in Revenue Estate, Sector-65 Urban Estate, Gurugram possession was to be handed over to the complainant within a period of 27 months + 3 months grace period which comes out to be 28.6.2012. However, the respondent has not delivered the unit in time. Complainant has already deposited Rs.66,49,890/- with the respondent. As such, complainant is entitled for

delayed possession charges @ 10.75% per annum w.e.f 28.6.2012 till the date of offer of possession as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016. If any amount due to the complainant, the same shall be adjusted in delayed possession charges. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order failing which the complainant is entitled to seek refund the paid amount with interest.

The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order and thereafter monthly payment of interest till handing over the possession shall be paid before 10th of subsequent month.

Complaint is disposed of accordingly. 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. : 755 of 2018
First date of hearing: 18.12.2018
Date of Decision : 18.12.2018

1. Mrs. Sudesh Saxena
2. Mr. Rakesh Saxena
R/o G-10/5, Basement Malviya Nagar New Delhi-110017 **Complainant**

Versus

M/s Emaar MGF Land Ltd.
Corporate Office at Emaar MGF Business Park,
Mehrauli Gurgaon Road, Sector-28, Sikander
Pur, Gurgaon-122001, Haryana **Respondent**

CORAM:

Shri Samir Kumar **Member**
Shri Subhash Chander Kush **Member**

APPEARANCE:

Shri Vaishvani R. Iyer Advocate for the complainant
Shri Ketan Luthra Authorized representative on
behalf of respondent
Shri Ishaan Dang Advocate for the respondent

BRIEF

1. A complaint dated 28.08.2018 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. Sudesh



Saxena and Mr. Rakesh Saxena, against the promoter M/s Emaar MGF Land Ltd., on account of violation of clause 13(a) of the builder-buyer agreement executed on 28.12.2009 for unit no. EHF-350-A-SF-083 having 350 sq. yd. approx. in the project “Emerald Floors at Emerald Hills”, Sector-65, Gurugram 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	“Emerald Floors”, at Emerald Hills in Revenue Estate, Sector 65, Urban Estate, Gurugram, Haryana.
2.	Project area	102.7412 acres
3.	DTCP license no.	10 dated 21.05.2009
4.	Registered/not registered	Registered
5.	HRERA registration no.	162 of 2017 dated 29.08.2017
6.	HRERA registration valid upto	28.08.2022
7.	Registered area as per registration certificate	55.962 acres
8.	Occupation certificate received	03.12.2018
9.	Date of execution of buyer’s agreement	28.12.2009
10.	Residential floor space/unit no.	EHF-350-A-SF-083
11.	Unit measuring	350 sq. yd.
12.	Payment plan	Construction linked payment plan



13.	Basic sale price	Rs. 66,00,000/-
14.	Total consideration amount as per statement of account dated 05.09.2018	Rs. 70,17,690/-
15.	Total amount paid by the complainant till date as per statement of account dated 17.08.2018	Rs. 66,49,890/-
16.	Percentage of consideration amount	Approx. 94.75 %
17.	Date of delivery of possession as per clause 13(a) of buyer's agreement i.e. 27 months from the execution of buyer's agreement + grace period of 3 months)	28.06.2012
18.	Delay in handing over possession till date	6 years 6 months
19.	Penalty clause as per buyer's agreement	Clause 15(a) of the agreement i.e. Rs.10/- 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 28.06.2012. Neither the respondent has delivered the possession of the said unit as on date to the complainants nor they have paid any compensation @ Rs.10/- 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..... The case came up for hearing on 18.12.2018. The reply filed on behalf of the respondent on 10.10.2018 has been perused.

Facts of the complaint

5. Briefly stated, the facts of the case as culled out from the case of complainants that they applied for a unit through an application form for provisional allotment of the unit dated 12.06.2009 and paid an booking amount of Rs.5,00,000/- vide cheque no. 213142 dated 12.06.2009 was duly acknowledged by the respondent.
6. The complainants submitted that thereafter they were allotted independent floor bearing no. EHF-350-A-SF-083, second floor having super area of 1750 sq. ft. vide allotment letter dated 05.03.2010, at "Emerald Floors at Emerald Hills", revenue estate of village nangli Umarpur, Badshahpur, Maidawas, Tehsil and District Gurgaon Sector-65, Urban estate, Haryana which is developed by the respondent.



7. The complainants submitted that they entered into apartment buyer agreement with the respondent on 28.12.2009 for purchase of the said unit for a total sale consideration of Rs.66,00,000/- with the following terms and conditions which were completely one sided and unjustified in nature:

a) Article 13 (a) of the agreement says: Subject to terms of the clause and subject to the allottee(s) having complied with all the terms and conditions of this agreement, and not being in default under any of the provisions of this agreement and compliance with all provisions, formalities, documentation etc., as prescribed by the company, the company proposes to hand over the possession of the independent floor within 27 months from the date of execution of this agreement. The allottee(s) agrees and understands that the company shall be entitled to grace period of 3 months, for applying and obtaining the occupation certificate in respect of the Independent Floor and/or the project.

b) Article 12(a) in case of delay payment by the allottee(s) to the company as per schedule of payments as stated in annexure III, the company shall have the right to terminate the agreement and forfeit the earnest money as detailed



hereinabove. The company shall also be entitled to charge interest @24% p.a. compounded monthly/quarterly at the time of every succeeding installment from the due date of installment, as per the schedule payment, till the date of payment.

- c) Article 15 (a) of this agreement, the company shall be liable to pay to the allottee, a penalty of the sum of Rs. 10/- (Rupees Ten only) per sq. ft. per month of the super area for till the date of notice of possession under the provision of clause 14 (a), provided allottee(s) have complied with all the terms and conditions of this agreement.
8. The complainants submitted that they have paid an total amount of Rs.62,44,290/- each installment paid by the complainants were duly received by the respondent and accordingly, acknowledgements thereof were duly issued to the complainant. It is pertinent to mention that more than 95% of the total sale consideration has been paid by the complainant in accordance with the payment plan.
9. The complainants submitted that they had applied for a loan from HDFC Bank for an amount of Rs.50,00,000/- (and the bank sanctioned the loan and tripartite agreement was executed



between the bank, complainants and the Respondent dated 06.05.2010. It pertinent to mention, in the tripartite agreement also the respondents had agreed to complete the unit and project as per the buyer agreement earlier executed dated 06.05.2010. Further, the complaints has to bear the EMI (principal + interest) and the rent of the present accommodation in which he is residing due to delay in project by respondent.

10. The complainants submitted that as per the agreement, the possession of the said unit was to be given by **04.04.2012** i.e. within 27 months and along with three months grace period from the date of signing of the agreement as per clause 13(a) of the apartment buyer agreement, thus, project should have been completed and possession ought to have been given to allottees including the complainant in adherence to respondent own commitments and obligations as the respondent is in obligation to hand over the vacant physical possession of the said units in the project "Emerald Floors at Emerald Hills".



11. The complainants submitted that they made regular follow-ups thorough various emails, several visits, and made numerous calls but only assurances have been, made by the respondent

that the possession of fully constructed unit as promised would be handed over soon, which has not happened till date. Further, respondent miserably failed to complete the construction of work of the project “Emerald Floors at Emerald Hills” within assured time limit, thereby grossly violating the terms and conditions of the printed agreements entered between the parties. Also, submitted that as the completion of the project was not as per the payment plan.

12. Issues raised by the complainant

- a. Whether there has been unreasonable delay in delivery of the apartment to the complainant along with delayed interest for every month of delay till the handing over the possession by the respondent?
- b. Whether the respondent is liable to pay compensation to the complainant for the delay in delivery of the apartment in total disdain of their contractual as well as legal obligations.

13. Relief sought by the complainant

- i. Direct the respondent to handover possession of independent floor bearing No. EHF-350-A-SF-083, second floor having super area of 1750 sq. ft, in the project namely project “Emerald Floors at Emerald Hills”, revenue estate of



village nangli Umarpur, Badshahpur, Maidawas, Tehsil & District Gurgaon Sector-65, Urban estate, Haryana in habitable form with all the amenities.

- ii. Issue direction/s, order/s to respondent to pay interest @ 24 % equal to what respondent charges from complainant as per the agreement and in view of definition of interest as per Section 2(z) the Act.
- iii. Direct respondent to refund the rent paid by the complainants on account of delay in delivery of the possession of the unit i.e. from 2011 till the possession of the unit is handed over to the complainants.
- iv. Refund the HVAT and other taxes paid by the complainants to the respondent due to delayed construction.
- v. Award Rs. 1, 00,000/- as the cost of the complaint in favour of the complainants and against the respondent;

Respondent reply

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

14. The respondent submitted that the above captioned complaint is pending before this authority and has been filed with respect to unit no. EHF-350 -A-SF-083 in the project namely "Emerld Floors



at Emerald Hills”, at Sector-65, Urban Estate, Gurugram, Haryana by the complainants.

15. 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.

16. The respondent submitted that the complainant has got no locus standi to file the present complaint and submitted that the said project is covered under the definition of “ongoing projects” and is registered with this hon’ble regulatory authority such that registration is valid till 28.08.2022. It is further submitted that the application for grant of occupation certificate for the unit in question will be applied very shortly. As such, the respondent shall endeavour to offer possession within the timelines given to the authority and as soon as the occupation certificate is received.

17. 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 hon'ble regulatory authority.

18. 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.



19. 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.

20. 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.



21. 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 12.06.2009 for provisional allotment of unit. Subsequently, vide letter dated 29.07.2009, the complainants were informed about the provisional allotment of unit no. EHF-350-A-SF-083. Thereafter, buyer's agreement dated 28.12.2009 was executed between the parties.

22. 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 04.04.2012. 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.

23. 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 27 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 in respect of the independent floor and/or the project, after the expiry of the said period of 27 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 27 months. It is thus apparent that the timeline mentioned in the buyer's agreement was proposed estimated time for handing over of possession.

24. 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 delay payment charges amounting to Rs. 2,06,122/- were levied on the



unit in question. 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 05.09.2018.

25. The respondent pointed out that admittedly, a tripartite agreement dated 06.05.2010 had also been signed between the parties and Housing Development Finance Corporation Ltd.(HDFC). The said agreement dated 06.05.2010 clearly shows that HDFC has a lien over the property/ subject unit and as such HDFC is a 'necessary' and 'proper' party.
26. 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. 10/- 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.



27. 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:

- i. With respect to the **first issue** raised by the complainants, as per clause 13(a) of buyer's agreement, the possession of the unit was to be handed over within 27 months plus grace period of 3 months from the date of execution of the said agreement. The buyer's agreement was executed on 28.12.2009. Therefore, the due date of possession shall be computed from 28.06.2012. The clause regarding the possession of the said unit is reproduced below:

"13(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 27 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."

Accordingly, the due date of possession was 28.06.2012 and the possession has been delayed by six years six months. The delay compensation payable by the respondent @ Rs. 10/- 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."

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. 10.75% per annum for every month of delay till the handing over of possession.

- ii. With respect to the **second issue** raised by the complainants, the complainants reserve their right to seek compensation from the promoter for which they shall make separate application to the adjudicating officer, if required.



Findings of the authority

28. 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.

29. The possession of the flat was to be delivered by 28.06.2012 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.

30. 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.

31. As per clause 13 (a) of the builder buyer agreement dated 28.12.2009, for unit no. EHF-350-A, 2rd floor, SF-083, Emerald Floor” in Emerald Hills in Revenue Estate, Sector-65 Urban Estate, Gurugram possession was to be handed over to the complainant within a period of 27 months + 3 months grace period which comes out to be 28.06.2012. However, the respondent has not delivered the unit in time. Complainant has already deposited Rs. 66,49,890/- with the respondent. As such, complainant is entitled for delayed possession charges @ 10.75% per annum w.e.f 28.06.2012 till the date of offer of possession as per the provisions of section 18 (1) of the Real Estate (Regulation And Development) Act, 2016. If any amount due to the complainant, the same shall be adjusted in delayed possession charges.



Directions of the authority

32. After taking into consideration all the material facts as adduced and produced by both the parties, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issues the following directions to the respondent in the interest of justice and fair play:

- i. The respondent is directed to handover the possession by 28.08.2022 as committed by the respondent in HRERA registration certificate.
- ii. The respondent is directed to pay interest accrued from the due date possession i.e. 28.06.2012 till the date of decision i.e. Rs. 46,29,963.14 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.
- iii. Thereafter, the monthly payment of interest @ 10.75% on the paid up amount of the complainant, amounting to **Rs. 58,755.88/-** till handing over of the possession so accrued shall be paid before 10th of subsequent month.



Principal amount paid by the complainant	Interest accrued up to date of decision	Monthly interest to be paid till handover of possession
Rs. 66,49,890/-	Rs. 46,29,963.14/-	Rs. 58,755.88/-

iv. The respondent is directed to adjust the delay payment charges amounting to Rs.2,06,122/- 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.

33. The order is pronounced.

34. Case file be consigned to the registry.

(Samir Kumar)

Member

(Haryana Real Estate Regulatory Authority, Gurugram)

(Subhash Chander Kush)

Member

Dated: 18.12.2018

Judgement uploaded on 22.01.2019

