

PROCEEDINGS OF THE DAY

Day and Date	Thursday and 10.01.2019
Complaint No.	44/2018 Case titled as Mr. Vijayender Narain Mittal & another Vs. M/s Emaar MGF Land Ltd.
Complainant	Mr. Vijayender Narain Mittal & another
Represented through	Complainant in person with Shri Kapil Jolly, Advocate.
Respondent	M/s Emaar MGF Land Ltd
Respondent Represented through	Shri Ketan Luthra, authorized representative on behalf of respondent-company with Shri Ishaan Dang, Advocate.
Last date of hearing	22.11.2018
Proceeding Recorded by	Naresh Kumari & S.L.Chanana

Proceedings

Project is registered with the authority.

Arguments heard.

Counsel for the respondent submits that occupation certificate dated 17.10.2018 has been received and the copy of the same has been handed over to the complainant today itself.

As per clause 14 (a) of the Builder Buyer Agreement dated 16.5.2013 for unit No.IG-08-0501, 5th floor, tower/block No.08, Imperial Gardens, Sector- 102, Gurugram, possession was to be handed over to the complainant within a period of 42 months +3 months grace period from the

date of start of construction i.e. 11.11.2013 which comes out to be **11.8.2017**. However, the respondent has not delivered the unit in time. Complainant has already paid an amount of Rs.1,48,09,263/- to the respondent against a total sale consideration of Rs.1,49,42,225/-.

It has been stated at bar by the counsel for the respondent that they have received occupation certificate of the project on 17.10.2018 and they have also offered possession of the unit on 30.10.2018. Since the occupation certificate has been issued by the competent authority as such its authenticity cannot be challenged at this stage.

Since the possession of the unit has been offered by the respondent on 30.10.2018, as such the complainant is directed to take possession of the unit within a period of one month from the date of pronouncement of the order. However, complainant is entitled for delayed possession charges at the prescribed rate of interest i.e. 10.75% per annum from 11.8.2017 to 30.10.2018. Respondent may adjust the late delivery charges against the amount due from the complainant.

The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order.

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

Samir Kumar
(Member)
10.1.2019

Subhash Chander Kush
(Member)

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

Complaint no. : 44 of 2018
First date of hearing : 11.04.2018
Date of decision : 10.01.2019

Mr. Vijayender Narain
Ms. Manju Mittal,
R/o : 102, sector 10 A,
Chandigarh- 160010

Complainants

Versus

Emaar MGF Land Limited.
Address: ECE House, 28- Kasturba Gandhi
Marg,
New Delhi- 110001

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Himanshu Raj Advocate for the complainants
Shri Ishan Dang Advocate for the respondent
Shri Kethan Luthra Authorized representative on
behalf of the respondent
company.

ORDER

1. A complaint dated 05.03.2018 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. Vijayender



Narain and Ms. Manju Mittal, against the promoter M/s Emaar MGF Land Ltd., on account of violation of the clause 14(a) of buyer's agreement executed on 16.05.2013 in respect of unit described as below for not handing over possession on the due date i.e. 11.08.2017 which is an obligation under section 11(4)(a) of the Act *ibid*. An amendment to the complaint was filed by the complainants on 17.09.2018 wherein they have stated that they are not appearing before the authority for compensation but for fulfilment of the obligations by the promoter as per provisions of the said Act and reserve their right to seek compensation from the promoter for which they shall make separate application to the adjudicating officer, if required. Now the matter is before the authority not for compensation but for fulfilment of obligation by the promoter as per section 18(1) of the Act *ibid* due to failure to give possession on the due date as per the said agreement.



2. Since, the space buyer's agreement has been executed on 16.05.2013 i.e. prior to the commencement of the Act *ibid*, therefore, the penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat the

present complaint as an application for non-compliance of contractual obligation on the part of the promoter/respondent in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016.

3. The particulars of the complaint case are as under: -

1.	Name and location of the project	"Imperial Gardens", Sector 102, Gurugram, Haryana.
2.	RERA registered/ not registered	Registered 208 of 2017 dated 15.09.2017
3.	Date of completion as per RERA registration certificate.	31.12.2018
4.	Unit no.	IG-08-0501, 5 th floor, tower/ block no. '08'.
5.	Unit measuring	2025 sq. ft.
6.	Occupation certificate	17.10.2018
7.	Buyer's agreement executed on	16.05.2013
8.	Total sale consideration amount	Rs.1,49,42,225/-
9.	Basic sale price	Rs. 1,29,60,000/-
10.	Total amount paid by the complainants till date	Rs.1,48,09,263/-
11.	Percentage of consideration amount	Approx. 94.69 percent
12.	Date of offer of possession	30.10.2018
13.	Date of delivery of possession as per clause 14(a) of buyer's agreement. (42 months from the date of start of construction plus grace period of 3 months)	11 th August 2017
14.	Date of start of construction	11 th November 2013
15.	Delay in handing over possession till date	1 year 2 months 19 days
16.	Penalty clause as per buyer's agreement dated 16.05.2013	Clause 16(a) of the agreement i.e. Rs.7.50/-



		per sq. ft. per month of the super area of unit for the period of delay
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4. 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. The possession of the said unit was to be delivered by 11.08.2017 as per the said agreement. Neither the respondent has delivered the possession of the said unit as on date to the purchaser nor they have paid any compensation @ Rs.7.50/- per sq. ft. per month of the super area of the unit for the period of delay as per clause 16(a) of the buyer's agreement dated 16.05.2013. Therefore, the promoter has not fulfilled his committed liability as on date.

5. 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 02.05.2018. The case came up for hearing on 24.05.2018, 05.07.2018, 17.07.2018, 26.07.2018, 18.09.2018, 27.09.2018 and 22.10.2018.



Brief facts of the complaint

6. Briefly stated, the facts of the complaint are that after learning about the upcoming residential project of the respondent, the complainants met the officials of the respondent at their office and the respondent convinced the complainants with their lucrative promises to provide the complainants with world class residential property in the millennium town Gurugram. The respondent prepared the provisional allotment letter for unit no. IG-08-0501, in the project named 'Imperial Gardens' of the respondent. The complainants agreed to the schedule of payment which was given to them along with the provincial allotment letter on 05.05.2013.

7. The complainants submitted that as per agreement the respondent company shall handover the possession of 2025 sq. ft. residential space in Emaar MGF within 42 months from the date of execution of agreement i.e. 16.5.2013 with grace period of 3 months, that the complainant paid all the amount through cheque/RTGS. Receipts of the instalments are annexed at C4(colly). that respondent company failed to



construct all the work of the project being mentioned in the brochure after more than 4 years

8. The complainants submitted that That the respondent company inform through E-mail dated 16.8.2017 that the completion and handing over date of said property has been moved to next year i.e. June,2018.
9. The complainants submitted that clause 14(a) of the buyer's agreement dated 16.05.2018 mentions that the respondent shall handover the possession of the unit within a period of 42 months from the date of start of construction, subject to certain limitations as may be provided in the buyers' agreement and timely compliance of the provisions of the buyer's agreement by the complainants. The complainants and the respondent also agreed to a grace period of 3 months for applying occupation certificate in respect of the unit after the said period of 42 months.
10. The complainants submitted that clause 16(a) of the buyer's agreement specifies that in the event the respondent fails to deliver the possession of the unit to the complainants within the stipulated time period and as per the terms and conditions



of the buyer's agreement, then the respondent shall pay to the complainants compensation at the rate of Rs.7.50/- per sq. ft. per month of the super area of the said unit for the period of delay.

11. The complainants submitted that the complainant vide letter dated 18.8.2017 requested to the respondent company to refund the entire amount alongwith interest (annexure C8 Colly) and the respondent company replied vide letter dated 21.8.2017 that the amount will be refunded after deducting the earnest money and other charges and other necessary adjustment. During correspondence, the respondent company stated that they are unable to cancel the property.
12. The complainants submitted that as per the buyer's agreement, the respondents were required to hand over the actual physical possession of the mentioned unit no. IG-08-0501 on or before 11.05.2017. Infact, if the additional 3 months i.e. grace period mentioned in the buyer's agreement for applying occupation certificate is taken after 42 months, the time to deliver the actual physical possession was to be on or before 11.08.2018. But due to the factual circumstances at



the site of the said project, the construction work has not completed even 50% of the total construction work. That there is a delay in completion of the mentioned project by the respondent which amounts to breach of the terms and conditions of the buyer's agreement dated 16.05.2013.

13. The complainants submitted that the actual ground reality regarding the status of the construction of the said project is absolutely shocking and strong reason to believe that the respondent has misrepresented the facts related to the construction status to the complainants and demanded the entire sale consideration illegally and fraudulently. The ground reality at the construction site is way different from what the respondent had claimed to the complainants regarding the completion of the project.

14. The complainant submitted that it is stated in the brochure that project will comprise of jogging tracks, outdoor swimming pool, kids playing area, tennis and basketball court and modern club house, amphitheatre surrounded by the gardens with lush green surrounding all over but it is been more than



4 years and none of the above mentioned facility have been materialized by the respondent.

15. The complainants submitted that they have been duped off with their hard-earned money invested in the said project and the said investment was made by the complainants with all their efforts to suffice the dream of their daughters of having their own homes and live a peaceful and secured life.

16. The complainants submitted that the respondent has committed grave deficiency on its part and adopted serious unfair trade practice with the complainants by failing to deliver the possession of the unit booked.

17. **The issues raised by the complainants are as follow:**

- i. Whether the respondent company has taken necessary clearance from the concerned authority and able to deliver the actual physical possession of the property?
- ii. Whether there was any deliberate misrepresentation by the respondent company?



- iii. Whether even after knowing that developer won't be able to complete the project in reasonable time period, knowingly did not intimate the complainants?
- iv. Whether developer's action is justified for not even laying a single brick for the construction of club house, amphitheatre etc?
- v. Whether the respondent company has registered itself as per RERA and is under legal obligation to hand over 10% of the estimated cost of the real estate project to the complainant under section 59 of the RERA Act.
- vi. Whether the respondent company has breached the flat buyer's agreement to give possession of the flat?
- vii. Whether the complainant is entitled for refund, interest and compensation?

18. Relief sought

The complainants are seeking the following reliefs:

- i) Respondent company to refund the booking with interest @ 20% PA within 90 days.



- ii) Respondent company to pay Rs.20,00,000/- for causing mental agony due to non delivery of the unit.
- iii) Respondent company to pay Rs.14,00,000/- for deficient in services for keeping the complainant in dark in regard to the progress of the project.
- iv) Respondent company to pay Rs.14,00,000/- for causing physical harassment.
- v) Respondent company to pay Rs.5,00,000/- for falsified statement projected on their website and brochure.
- vi) Respondent company to handover 10% of the estimated cost of the project. The complainant must be provided with all the details of the respondent company under section 11(1) of the RERA act.

Respondent's reply

19. The respondent has raised various preliminary objections and submissions challenging the jurisdiction of this hon'ble authority. They are as follow:



- i. The complaint for compensation and interest under section 12, 14, 18 and 19 of the Act ibid is maintainable only before the adjudicating office.
- ii. It is also submitted that complaints pertaining to compensation & refund are to be decided by the adjudicator under section 71 of the RERA r/w Rule 29 of HRERA rules & not by this Hon'ble Authority., the complaint is liable to be rejected.
- iii. The respondent submitted that the hon'ble authority has no jurisdiction to entertain the present complaint as the complainants have not come to this authority with clean hands and has concealed the material facts.
- iv. The respondent submitted that from the date of booking till the filing of the present complaint i.e. for more than 6 years, the complainants had never ever raised any issue whatsoever and on the contrary the complainants kept on making the payment of installments, though not within the time prescribed, which resulted in delay payment charges.



Reply on merits

20. The respondent submitted that the said apartment was originally allotted to Mr. Prem Kamal Sharma dated 16.05.2013 & same was purchased by the complainants from the said original allottee dated 11.04.2013. thereafter, respondent confirming the nomination of the complainants as the allottees of the apartment
21. The respondent submitted that clause 14(a) of the buyer's agreement provides that the time for handing over of the flat (42 months plus 3 months grace period), is to be reckoned from the date of start of construction and not from the date of execution of the buyer's agreement.
22. The respondent submitted that consequent to the coming into force of the Act, the date of completion of flat stands extended to 31.12.2018 which has been mentioned in the date of completion in the application for registration by the respondent.



23. The respondent submitted that the complainants being subsequent purchasers cannot have been lured by advertisements made by the respondent.
24. The respondent submitted that It is submitted that the facilities that form part of the project are in the process of being completed and the same shall be duly completed and made available to the occupants of the project, as per the time lines provided to the hon'ble authority and the complainants have omitted to state the date of the said photographs. Hence, it does not reflect the status of construction as on date & the project is expected to be completed by Dec 2018.
25. The respondent submitted that It is submitted that if the complainants are interested in exiting from the project, the respondent shall be entitled to deduct earnest money as well as other amounts as set out in the buyer's agreement.
26. The respondent submitted that there is no breach of trust on the part of the respondent as the respondent intends to offer possession of the apartment allotted to the complainants by December 2018.



27. The respondent submitted that an application for the registration of the entire project had been made by the respondent on 07.07.2017. subsequently, on 04.08.2017, the respondent sought amendment of its application dated 07.07.2017. the part of the project was sought to be registered and part to be excluded. Registration for part project was issued bearing memo no. HRERA- 140/2017/1083 dated 15.09.2017 was issued by the hon'ble authority at Panchkula.
28. The respondent denied that there is no default on the part of the complainants or that all the payments have been paid within time. It is also wrong and denied that there is any delay in possession or that the construction work has not even completed 50% or that the alleged delay amounts to breach of the terms and conditions of the buyer's agreement or that the respondent has made any misrepresentation or has demanded the sale consideration illegally or fraudulently, as alleged.



**WRITTEN ARGUMENTS ON BEHALF OF THE
COMPLAINANTS**

29. The occupation certificate issued to the respondent covers only 22.6% of the total permitted ground coverage in building

plan of the above residential project, although the minimum requirement as per Haryana Building Code, 2017 is 50% completion for residential plotted and 25 % for residential building etc.

30. The sub-code (3)(i) of code 4.10 clearly means that when the OC is issued for the first time, it must be:

- a. For completion of a minimum of 50% of the permissible ground coverage for residential plotted or 25% for all other projects, and
- b. Where one habitable room, kitchen and a toilet forming part of the submitted building is completed.

31. Therefore, 4 towers out of 9 and EWS tower only comply with the above conditions. The multi car parking and nursery school mentioned in the OC have to be excluded for this purpose, because they do not have habitable room, kitchen and toilet as per the above legal requirement. Accordingly, the actual coverage works out to 22.6% only as mentioned.

32. The site and its surroundings are full of debris and rubbish, because construction work of rest of the project is going on. The conditions of the site can be seen from the pictures



submitted. The whole place is full of pollution, prone to diseases and not livable.

33. An application for cancellation of the OC on the above grounds was submitted to the DTCP by complainants on 10.12.2018 in person followed by the more information on 13.12.2018 by complainants. A request for cancellation of the OC was also submitted the to the chief minister, Haryana on 27.12.2018.

34. The first complainants met DGTCP and DTP on 7.01.2019 in Chandigarh again and they could not defend the issuance of OC against the abovementioned provision of the code and said that they have submitted my application for examination and will revert as soon as possible. However, the abovementioned violations of the law clearly show that the OC is invalid and illegal ab initio.

35. The possession of the apartment was actually due on 11.08.2017 based on 42+3 months as per clause 14(a) of the buyer's agreement. The possession letter was issued to the complainants on 30.11.2018, though it was based on an invalid OC.

36. The complainants accept the offer of the respondent of refund and would request the hon'ble authority to direct the respondent to refund the total amount paid after deducting



10% towards earnest money, as provided in the RERA regulations

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:

37. With respect to the **sixth issue** raised by the complainants, the authority came across that as per clause 14(a) of buyer's agreement, the possession of the said apartment was to be handed over within 42 months plus grace period of 3 months from the date of start of construction. The construction commenced on 11.11.2013. Therefore, the due date of possession shall be computed from 11.11.2013. The clause regarding the possession of the said unit is reproduced below:

"14(a) Time of handing over the possession

Subject to terms of this clause and barring force majeure conditions, and subject to the allottee having complied with all the terms and condition of this agreement and not being in default under any of the provisions of this agreement and compliance with all the provisions, formalities, documentation etc. as prescribed by the company, the company proposes to handover the possession of the unit within 42 months from the date of start of construction: subject to timely compliance of the provisions of the agreement by the allottee. The allottee agrees and understands that the



company shall be entitled to a grace period of 3 (three) months after the expiry of said period of 42 months, for applying and obtaining the completion certificate/occupation certificate in respect of the unit and/or the project.”

38. Accordingly, the due date of possession was 11.08.2017 and the possession has been delayed by one year two month and nineteen days till the date of offer of the possession. The delay compensation payable by the respondent @ Rs.7.50/- per sq. ft. per month of the super area of the unit for the period of delay beyond 42 + 3 months as per clause 16(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 as also held in para 181 of **Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and ors. (W.P 2737 of 2017)**, wherein the Bombay HC bench held that:

“...Agreements entered into with individual purchasers were invariably one sided, standard-format agreements prepared by the builders/developers and which were overwhelmingly in their favour with unjust clauses on delayed delivery, time for conveyance to the society, obligations to obtain occupation/completion certificate etc. Individual purchasers had no scope or power to negotiate and had to accept these one-sided agreements.”

39. With respect to **first and fifth issue**, in respect of the clearance taken from concerned authority an application for the registration of the entire project had been made by the



respondent on 07.07.2017. subsequently, on 04.08.2017, the respondent sought amendment of its application dated 07.07.2017. Registration of project was issued bearing memo no. HRERA- **Registration no. 208 of 2017 dated 15.09.2017** was issued by the hon'ble authority. Occupation certificate dated 17.10.2018 is also granted to the project of the respondent. And respectively the possession is also offered to the complainants on 30.10.2018.

40. With respect to the **seventh issue** raised by the complainants regarding the refund, as per the RERA registration of the project in question, the respondent has undertaken to commit the project by 31.12.2018 and OC was received dated 17.10.2018 and respectively possession is also offered to the complainants on 30.10.2018. Thus, keeping in view the vicinity of the committed date, completion of the project and the interest of allottees, refund cannot be awarded. However, the complainants are entitled to interest at the prescribed rate of 10.45% on account of delayed possession from the due date of possession, i.e. 11.08.2017 till the offer of possession i.e 30.10.2018.

41. With respect to **second and third issues**, the complainant has not produced any material document and has only made



assertions in issues. Thus, without any proof or document the said issues become infructuous.

42. With respect to **fourth issue** facilities that form part of the project are in the process of being completed & the same shall be duly completed and made available to the occupants of the project, as per the time lines provided to the hon'ble authority and the complainants have omitted to state the date of the said photographs. Hence, it does not reflect the status of construction as on date & the project is complete as OC has been received and accordingly possession is also offered dated 30.10.2018. Authority is concerned with the overall completion of the project by the stipulated date. It is not monitoring the stage wise completion of the project and hence this issue is not relevant.

Findings of the authority

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



aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

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

45. The complainant made a submission before the authority under section 34(f) to ensure compliance of the obligations cast upon the promoter.

46. The complainant requested that necessary directions be issued by the authority under section 37 of the Act ibid to the promoter to comply with the provisions of the Act and to fulfil its obligations.

47. As the promoter has failed to fulfil his obligation under section 11, the promoter is liable under section 18(1) proviso to pay



interest to the complainants, at the prescribed rate, for every month of delay till the handing over of possession.

48. Counsel for the respondent submits that occupation certificate dated 17.10.2018 has been received and the copy of the same has been handed over to the complainant today itself.

49. As per clause 14 (a) of the builder buyer agreement dated 16.5.2013 for unit no. IG-08-0501, 5th floor, tower/block No.08, Imperial Gardens, Sector- 102, Gurugram, possession was to be handed over to the complainant within a period of 42 months +3 months grace period from the date of start of construction i.e. 11.11.2013 which comes out to be 11.8.2017. However, the respondent has not delivered the unit in time. Complainant has already paid an amount of Rs.1,48,09,263/- to the respondent against a total sale consideration of Rs.1,49,42,225/-.

50. It has been stated at bar by the counsel for the respondent that they have received occupation certificate of the project on 17.10.2018 and they have also offered possession of the unit on 30.10.2018. Since the occupation certificate has been



issued by the competent authority as such its authenticity cannot be challenged at this stage.

51. Since the possession of the unit has been offered by the respondent on 30.10.2018, as such the complainant is directed to take possession of the unit within a period of one month from the date of pronouncement of the order. However, complainant is entitled for delayed possession charges at the prescribed rate of interest i.e. 10.75% per annum from 11.8.2017 to 30.10.2018. Respondent may adjust the late delivery charges against the amount due from the complainant.

Decision and directions of the authority

52. 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 duty bound to pay delayed possession charges at the prescribed rate of interest



i.e. 10.75% per annum from 11.08.2017 to 30.10.2018.

(ii) Respondent may adjust the late delivery charges against the amount due from the complainant.

(iii) The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order.

53. The order is pronounced.

54. Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 10.01.2019

Judgement Uploaded on 29.01.2019

