

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

Complaint no. : 1906 of 2018
First date of hearing : 14.03.2019
Date of decision : 26.03.2021

Mr. Mukesh K Sharma
R/o B-230, Kirti Nagar, Tonk Road, Jaipur

Complainant

Versus

M/s Emaar MGF Land Ltd.
Address: Emaar MGF Business Park,
M.G. Road, Sikanderpur, Sector-28,
Gurugram, Haryana -122001.

Respondent

CORAM:

Shri Samir Kumar
Shri Vijay Kumar Goyal

**Member
Member**

APPEARANCE:

Shri Sanjeev Sharma Advocate for the complainant
Shri J.K. Dang along with Shri Ishaan Dang Advocates for the respondent

ORDER

1. The present complaint dated 07.12.2018 has been filed by the complainant/allottee in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all

obligations, responsibilities and functions to the allottee as per the agreement for sale executed inter se them.

2. The particulars of the project, the details of sale consideration, the amount paid by the complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Project name and location	Palm Hills, Sector 77, Gurugram.
2.	Total licensed project area	29.34 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	a) 56 of 2009 dated 31.08.2009 Valid/renewed up to 30.08.2024 b) 62 of 2013 dated 05.08.2013 Valid/renewed up to 04.08.2019
5.	HRERA registered/ not registered	Registered vide no. 12 of 2020 dated 27.05.2020
6.	HRERA registration valid up to	As ex post facto approval valid for the period from 27.05.2020 and ending with 24.12.2019
7.	Occupation certificate granted on	24.12.2019 [Page 17 of written arguments filed by the respondent]
8.	Date of provisional allotment letter	04.08.2010 [Page 21 of complaint]
9.	Unit no.	PH3-16-0801, 8 th floor, building no. 16



		[Page 29 of complaint]
10.	Unit measuring (super area)	1450 sq. ft.
11.	Date of execution of buyer's agreement	15.09.2010 [Page 27 of complaint]
12.	Payment plan	Construction linked payment plan [Page 22 of complaint]
13.	Total consideration as per statement of account dated 07.01.2020 (Page 25 of written arguments filed by the respondent)	Rs.69,42,842/-
14.	Total amount paid by the complainant as per statement of account dated 07.01.2020 (Page 26 of written arguments filed by the respondent)	Rs.65,07,070/-
15.	Date of start of construction as per statement of account dated 07.01.2020	22.05.2011 [Page 55 of written arguments filed by the respondent]
16.	Due date of delivery of possession as per clause 11(a) of the said agreement i.e. 33 months from the date of start of construction i.e. 22.05.2011 plus grace period of 3 months for applying and obtaining the CC/OC in respect of the unit and/or the project. [Page 40 of complaint]	22.05.2014
17.	Date of offer of possession to the complainant	07.01.2020 [Page 20 of written arguments filed by the respondent]
18.	Delay in handing over possession till date of offer of possession i.e. 07.01.2020	5 years 7 months 16 days



3. As per clause 11(a) of the buyer's agreement, the possession was to be handed over within a period of 33 months from the start of the construction (22.05.2011) plus grace period of 3 months for applying and obtaining the CC/OC in respect of the unit and/or the project. Therefore, the due date of handing over possession of the subject unit comes out to be 22.05.2014.

Clause 11 of the buyer's agreement is reproduced below:

"11. POSSESSION

(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 provisions, formalities, documentation etc. as prescribed by the Company, the Company proposes to hand over the possession of the Unit within 33 months from the date of start of construction, subject to timely compliance of the provisions of the Buyer's Agreement by the Allottee. The Allottee(s) agrees and understands 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."

4. The complainant submitted that upon application of the complainant, the respondent issued provisional allotment letter dated 04.08.2010 to the complainant allotting the said apartment. The buyer's agreement dated 15.09.2010 was signed between both the parties. As per clause 11 of the buyer's agreement, the possession of the unit in question was to be handed over within 33 months i.e. possession was to be given lastly by June 2013, however at that time the



construction of the project was far from completion. All instalments were paid as demanded by the respondent time and again with no delay. The respondent has failed to handover possession of the unit in time and has also denied the lawful right of interest for delayed possession. Hence, the present complaint inter alia for the following reliefs:

- i. Direct the respondent to make payment of interest accrued on amount collected by the respondent from the respondent on account of delayed offer for possession and which interest should be @24% from the date as and when the amount was received by the respondent from the complainant.
 - ii. The amount of GST, service tax, etc. collected from the complainant, which accrued for the reason of delayed offer of possession be refunded back to the complainant.
 - iii. Any common area car parking including basement car park, which is not garage if sold then the money collected on such account shall be refunded along with interest.
5. On the date of hearing, the Authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4)(a) of the Act to plead guilty or not to plead guilty.



6. The respondent contested the complaint on the following grounds:
- i. The respondent submitted that the complainant has filed the present complaint seeking refund and interest for alleged delay in delivering possession of the unit booked by the complainant. It is submitted that complaints pertaining to refund, compensation and interest are to be decided by the adjudicating officer under section 71 of the Act read with rule 29 of the Rules and not by this hon'ble authority.
 - ii. That the complainant, in pursuance of the application form dated 10.07.2010, was allotted an independent unit bearing no. PH3-16-0801 vide provisional allotment letter dated 04.08.2010. The complainant consciously and wilfully opted for a construction linked plan for remittance of the sale consideration for the unit in question and further represented to the respondent that the complainant shall remit every instalment on time as per the payment schedule. The complainant further undertook to be bound by the terms and conditions of the application form.
 - iii. The respondent submitted that right from the beginning, the complainant was extremely irregular in payment of



instalments. The respondent was constrained to issue reminders and letters to the complainant to make payment of demanded amounts.

iv. The respondent submitted that the buyer's agreement was executed between the complainant and the respondent on 15.09.2010. As per clause 11(b)(iv) of the buyer's agreement, in event of any default or delay in payment of instalments as per schedule of payments incorporated in the buyer's agreement, the time for delivery of possession shall also stand extended. Clause 13 of the buyer's agreement further provides that compensation for any delay in delivery of possession shall only be given to such allottees who are not in default of their obligations envisaged under the agreement and who have not defaulted in payment of instalments as per the payment plan incorporated in the agreement. Complainant, having defaulted in payment of instalments, is thus not entitled to any compensation or any amount towards interest under the buyer's agreement.

v. The respondent submitted that despite there being a number of defaulters in the project, the respondent itself infused funds unto the project and has diligently developed the project in question. The respondent has



applied for occupation certificate on 24.04.2017. As and when the occupation certificate is received by the respondent, the possession of the unit in question would be delivered to the complainant, subject to the terms and conditions of the buyer's agreement.

- vi. That when the proposed allottees default in their payments as per schedule agreed upon, the failure has a cascading effect on the operations and the cost for proper execution of the project increases exponentially whereas enormous business losses befall upon the respondent. The respondent, despite default of several allottees, has diligently and earnestly pursued the development of the project in question and has constructed the project in question as expeditiously as possible. It is submitted that the construction of the tower in which the unit in question is situate is complete and the respondent has already offered possession of the unit in question on 07.01.2020. Therefore, there is no default or lapse on the part of the respondent and there is no equity in favour of the complainant.
- vii. Hence, the present complaint deserves to be dismissed at the very threshold.



7. The respondent has filed **written arguments** on 28.10.2020. The respondent has submitted that the construction of the unit/tower in question was completed in April 2017 and the respondent applied for and has been granted the occupation certificate on 24.12.2019. Upon receipt of the occupation certificate, possession of the unit has been offered to the complainant vide letter of offer of possession dated 07.01.2020. By the said letter, the complainant was called upon to make the balance payment, complete the necessary formalities and documentation so that possession of the unit could be handed over to the complainant.
8. That respondent submitted that the project has got delayed on account of following reasons which were/are beyond the power and control of the respondent. *Firstly*, the National Building Code was revised in the year 2016 and in terms of the same, all high-rise buildings (i.e. buildings having area of less than 500 sq. mtrs. and above), irrespective of area of each floor, are now required to have two staircases. The respondent has taken a decision to go ahead and construct the second staircase. Thereafter, upon issuance of the occupation certificate, possession of the apartment has been offered to the complainants. *Secondly*, the respondent had to engage the services of Mitra Guha, a reputed contractor in real estate, to



provide multi-level car parking in the project. The said contractor started raising certain false and frivolous issues with the respondent due to which the contractor slowed down the progress of work at site. Any lack of performance from a reputed cannot be attributed to the respondent as the same was beyond its control.

9. The respondent submitted that the complainant and the respondent are bound by terms and conditions of the buyer's agreement and the respondent put reliance in this regard upon various citations: **2000(1) Apex Court Journal 388, AIR 1996 SC 2508, AIR 1990 SC 699**. The respondent submitted that this hon'ble authority does not have jurisdiction and authority to legally direct levying of interest and in this regard, the respondent has put reliance on order dated **02.05.2019 passed by Justice Darshan Singh (Retd.) Chairman, Haryana Real estate Appellate Tribunal, Chandigarh.**
10. The respondent further submitted that the liability to pay interest imposed on the developer is in the nature of compensation. It has further been held that any determination of dispute pertaining to payment of interest under sections 12, 14, 18 and 19 is to be adjudicated by the adjudicating officer as per section 71 of the Act. While supporting this contention, the respondent has place reliance on **Neelkamal Realtors**



***Suburban Pvt. Ltd. and anr. Versus Union of India and ors.
[2018(1) RCR (Civil) 298].***

11. The respondent submitted that the period utilised by the competent authority for grant of occupation certificate and the period utilised by the complainant to obtain possession of the unit in question deserves to be exempted for all intents and purposes.
12. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents.
13. The authority, on the basis of information, explanation, other submissions made and the documents filed by both the parties, is of considered view that there is no need of further hearing in the complaint.
14. Arguments heard.
15. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 11(a) of the buyer's agreement executed between the parties on 15.09.2010, possession of the booked unit was to be delivered within a period of 33 months



plus 3 months grace period from the date of start of construction. As per statement of account dated 07.01.2020, the respondent has raised demand on account of "start of construction" on 22.05.2011. Both the parties have agreed to the said date. Accordingly, the date of start of construction is 22.05.2011. The grace period of 3 months is allowed to the respondent due to contingencies beyond its control. Therefore, the due date of handing over possession comes out to be 22.05.2014. The possession of the subject unit has been offered to the complainant on 07.01.2020 after receipt of occupation certificate dated 24.12.2019.

16. Accordingly, it is the failure of the promoter to fulfil its obligations and responsibilities as per the buyer's agreement dated 15.09.2010 to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainant is entitled to delay possession charges at prescribed rate of interest i.e. 9.30% p.a. w.e.f. due date of handing over possession i.e. 22.05.2014 till the handing over of possession as per provisions of section 18(1) of the Act read with rule 15 of the Rules.



Parking space

17. The authority is of the opinion that open parking spaces cannot be sold/charged by the promoter after coming into force of the Act since it is the part of basic sale price charged against the apartment. However, as far as issue regarding parking is concerned where the said agreements have been entered into before coming into force the Act, the matter is to be dealt as per the provisions of the buyer's agreement. As per clause 1.2(a) and 1.3, the following provisions have been made regarding parking space:

"1.2 Sale Price for Sale of Unit

(a) Sale Price

(i) The sale price of the Unit ("Total Consideration") payable by the Allottee(s) to the Company includes the basic sale price ("Basic Sale Price/BSP") of Rs.51,85,229.02/-, cost towards covered car park of Rs.2,00,000/-, External Development Charges ("EDC") of Rs.4,88,650/- per sq. ft...

1.3 Parking Spaces

(a) The Allottee(s) agrees and understands that the exclusively reserved car parking space assigned to the Allottee(s) shall be understood to be together with the Unit and the same shall not have any independent legal entity detached or independent from the said unit...

(b) The Allottee(s) undertakes to park his/her/their/its vehicle in the allotted car parking space and nowhere else in the project.

(c) The Allottee(s) agrees and understands that the reserved car parking spaces or any un-allotted car parking spaces in the Project shall form part of Common Areas and facilities of the said Unit for the purpose of the declaration



to be filed by the Company under Haryana Apartment Ownership Act, 1983 ("Act") as amended from time to time..."

18. The cost of parking of Rs.2,00,000/- (Rupees two lakhs only) has already been included in the sale consideration. The cost of parking of Rs.2,00,000/- has been charged as per the terms of the agreement. Accordingly, the promoter is justified in charging the same.

GST

19. With respect to relief of refund of GST amount as sought by the complainant, the complainant argued that the respondent cannot charge GST reason being the tax which has come into existence after due date of delivery should not be levied being unjustified since the same would not have fallen on the complainant had the same been delivered within the time stipulated in the buyer's agreement. The authority has already decided the issue of GST in complaint bearing no. **4031 of 2019 titled as Varun Gupta V/S Emaar MGF Land Limited** wherein it was held that for projects where due date of possession was prior to 1.4.2017 (date of coming into force of GST), the respondent was not entitled to charge GST from the allottee as the liability of GST had not become due up to the deemed date of possession as per the agreements. In the present complaint also, as per clause 10(f) of the buyer's



agreement, the complainant/allottee has agreed to pay all applicable taxes, levies, assessments, demands or charges including but not limited to sale tax, VAT, service tax if applicable, levied or leviable now or in future by Government. But this liability shall be confined only up to the deemed date of possession. The delay in delivery of possession is the default on the part of the respondent/promoter and the possession was offered on 07.01.2020 by that time the GST had become applicable. But it is settled principle of law that a person cannot take the benefit of his own wrong/default. So, the respondent/promoter was not entitled to charge GST from the complainant/allottee as the liability of GST had not become due up to the deemed date of possession as per the agreements.

20. Hence, the Authority hereby pass the following order and issue directions under section 37 read with section 34(f) of the Act:
- i. The respondent is directed to pay the interest at the prescribed rate i.e. 9.30% per annum for every month of delay on the amount paid by the complainant from due date of possession i.e. 22.05.2014 till the handing over of possession. The arrears of interest accrued so far shall be



- paid to the complainant within 90 days from the date of this order.
- ii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
 - iii. The respondent shall not charge anything from the complainant which is not part of the buyer's agreement.
 - iv. The respondent shall not charge GST from the complainant.
 - v. Interest on the delay payments from the complainant shall be charged at the prescribed rate @ 9.30% by the promoter which is the same as is being granted to the complainant in case of delay possession charges.
21. Complaint stands disposed of.
22. File be consigned to registry.

(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 26.03.2021

(Vijay Kumar Goyal)

Member

Judgement uploaded on 09.04.2021.