

PROCEEDINGS OF THE DAY

Day and Date	Thursday and 10.01.2019
Complaint No.	686/2018 Case titled as Ms. Krishna Agarwalla Vs. M/s Emaar MGF Land Ltd.
Complainant	Ms. Krishna Agarwalla
Represented through	Shri Vaibhav Joshi Advocate for the complainant.
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	14.12.2018
Proceeding Recorded by	Naresh Kumari & S.L.Chanana

Proceedings

Arguments heard.

Project was registered with the authority which has already been expired on 31.12.2018. Counsel for the respondent stated that they have applied for extension of registration which is pending with the authority.

As per clause 14 (a) of the Builder Buyer Agreement dated 10.6.2013 for unit No. IG-07-1002, 10th floor, tower-7, Imperial Gardens, Sector-102, Gurugram, possession was to be handed over to the complainant within a period of 42 months from the date of start of construction i.e. 11.11.2013 + 3 months grace period which comes out to be 11.8.2017. It was a construction linked plan. However, the respondent has not delivered the unit in time. Complainant has already paid Rs.1,28,39,931/- to the

respondent against a total sale consideration of Rs.1,51,68,619/-. As such, complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f **11.8.2017** as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016 till the handing over possession failing which the complainant is entitled to refund the amount.

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

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. : 686 of 2018
First date of hearing : 14.12.2018
Date of Decision : 10.01.2019

Ms. Krishna Agarwalla
R/o. House no. 1052, Sector 40,
near Unitech cyber park, Gurugram,
Haryana -122002.

Complainant

Versus

M/s Emaar MGF Land Ltd.,
(through its Directors)
Address: MG road, Sikanderpur,
Sector -28, Gurugram - 122002
Regd. Office: Emaar MGF Business Park,
ECE House, 28 Kasturba Gandhi Marg,
New Delhi- 110001.

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Vaibhav Joshi
Shri Ketan Luthra
Shri Ishaan Dang

Advocate for the complainant
Authorised representative of
behalf of the respondent
Advocate for the respondent.

ORDER

1. A complaint dated 07.08.2018 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 complainant, Ms. Krishna Agarwalla, against the promoter, Emaar MGF Land Ltd. on account of violation of clause 14(a) of buyer's agreement dated 10.06.2013 for the delay in handing over the possession, which is an obligation under section 11(4)(a) of the Act *ibid*, in respect of residential unit no. IG-07-1002 on 10th floor, in tower 07, admeasuring 2000 sq. ft. super area of the project, namely 'imperial gardens' at Sector 102, village kherki, Gurgaon, Haryana.

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

1.	Name and location of the Project (Pg. 82)	'Imperial gardens' at Sector 102, Gurgaon, Haryana
2.	Total area of the project	12 acres.
3.	Apartment/Unit No.	IG-07-1002, 10 th floor in tower 7
4.	Nature of real estate project	Group housing colony
5.	Admeasuring area of the unit	2000 sq. ft. super area
6.	DTCP license no.	107 of 2012 dated 15.10.2012
7.	RERA registered/unregistered.	Registered vide no. 208 of 2017
8.	Date of execution of apartment buyer's agreement	10.06.2013 (Annx R/3)
9.	Payment plan	Construction linked payment plan
10.	Total consideration as per the statement of account	Rs.1,51,68,619/- (Annx R/4)



11.	Total amount paid by the complainant till date (Annx 2)	Rs.1,28,39,931/-
12.	Date of commencement of construction as per statement of accounts	11.11.2013
13.	Due date of delivery of possession as per clause 14(a) of the buyer's agreement dated 10.06.2013 Note: Date of start of construction as per SOA is 11.11.2013	11.08.2017 (42 months+ 3 months' grace period from the date of start of construction)
14.	Total delay in offer of possession till date	one year and 4 months
15.	Penalty Clause 16(a) as per apartment buyer's agreement dated 10.06.2013	Compensation at the rate of Rs. 7.50/- per sq. ft. per month of super area till notice of possession.
16.	Revised date of delivery of possession as per RERA certificate	31.12.2018 (expired but the respondent has applied for extension)

3. The details provided above have been checked on the basis of record available in the case file which has been provided by the complainant and the respondent. A buyer's agreement dated 10.06.2013 is executed between the parties as per which the possession of the unit was to be delivered by 11.08.2017. However, the respondent has neither delivered the possession within stipulated period nor paid the compensation for delay in terms of agreement.



Thus, the respondent has failed to fulfil its contractual obligation till date.

4. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and appearance. The respondent appeared on 14.12.2018. The case came up for hearing on 14.12.2018 and 10.01.2019. The reply filed on behalf of the respondent on 17.09.2018 and perused.

Facts of the Complaint

5. Briefly stated facts relevant for the disposal of the present complaint are that on 26.02.2013, the complainant booked a residential unit in the respondent's project, namely 'imperial gardens' situated at sector 102, village Kherki, District Gurgaon. Pursuant to the aforesaid booking of the complainant, the respondent allotted unit no. IG-07-1002, admeasuring 2000 sq. ft. super area on 10th floor, tower 7 of the project to the complainant.
6. On 10.06.2013 buyer's agreement for the allotted unit was executed between the parties. The total consideration of the unit was agreed at Rs. 14,39,70,000/- as against which



the complainant has made total payment of Rs. 1,28,39,931/- under construction linked payment plan on various dates.

7. The complainant stated that as per clause 14(a) of the buyer's agreement, possession of the unit was to be delivered within 42 months plus 3 months' grace period from the date of start of construction. It was further stated by the complainant that the construction of the project was commenced on 11.11.2013 and therefore, the respondent was under obligation to deliver the possession of the unit by 11.08.2017, however, the respondent has failed to deliver the possession till date despite repeated reminders from the complainant.
8. The complainant stated that losing all its hopes, she served a legal notice 06.04.2018 to the respondent seeking refund of the paid amount, but the respondent did not pay any heed to the complainant's request. Therefore, the complainant was constrained to file the present complaint.



Issue to be decided: -

Whether the respondent is liable to refund the deposited amount alongwith prescribed interest to the complainant?

Relief sought: -

Direct the respondent to refund Rs. 1,28,39,931/- alongwith interest as applicable under HRERA law.

Respondent's Reply: -

17. The respondent has raised certain preliminary objections. Firstly, that the complaint is not maintainable on the ground of jurisdiction. Secondly, complicated question of law and facts raised by the complainant in her complaint which cannot be adjudicated in a summary manner. Thirdly, the complainant has no locus standi to present this complaint. A conjoint reading section 19(3) read with section 4(2)(C)(1) of the Act says that the allottee is entitled for claim of possession or refund only once the possession has not been handed over as per the declaration given by the promoters under sub clause (c) of clause (1) of section 4(2) of the Act.



18. The respondent submitted that in the present case, they have already applied for occupation certificate of few towers in the project. In the balance towers including the tower where the subject unit is located, the structure work is complete and finishing works are going on. The respondent shall endeavour to offer possession within the timelines given to the authority.
19. The respondent contended that the complainants have filed the complaint seeking refund of the paid amount with interest. As per section 31 read with section 71 of the Act, complaint pertaining to compensation and interest under section 12,14, 18 and section 19 of RERA is required to be filed before adjudicating officer and the authority has no jurisdiction to order for award of compensation. The complaint is liable to be dismissed on this ground alone.
20. The respondent further contended that as per the terms of agreement, any challenge to the buyer's agreement for recession only lies before the civil court in terms of the specific relief Act, 1963, hence, the complaint is liable to be dismissed.
21. The respondent contended that the complainant has purchased the subject residential unit for investment purpose,



therefore, they are not covered under the definition of consumer as per the provisions of consumer protection Act, 1986.

22. The respondent submitted that possession of the unit was linked with timely payment of instalments of the consideration amount. 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 was further submitted by the respondent that the complainant has defaulted in making payments within the prescribed time which resulted in delay payment charges.

23. The respondent submitted that the complainant has executed an undertaking cum indemnity dated 14.07.2016 whereby the complainant has undertaken not to raise any claim/compensation against the respondent in lieu of being exempted from their default in payment to the respondent and being in default under the buyer's agreement. The said waiver was granted to the complainants as a gesture of goodwill by the company. Hence, in view of the terms of undertaking cum indemnity dated 14.07.2016, the complainant is estopped from preferring the present complaint before the authority. The



respondent is well within its rights to revoke the waiver of delayed payment charges.

24. The respondent submitted that the present complaint is premature. Assuming there is a delay in completing the project, the complainant is entitled for payment of compensation of Rs. 7.50/- per sq. ft. per month of the unit for the period of delay beyond 42 + 3 months, subject to other terms and conditions as contained in the buyer's agreement. Thus, the compensation, if any (and if the subject unit is eligible for the same as per the terms and conditions of the buyer's agreement), is adjusted only at the stage of last instalment.

Determination of issues: -

- i. As regards **the issue** raised by the complainant, it is evident from clause 14(a) of the buyer's agreement dated 01.07.2010, the respondent was liable to deliver the possession of the residential unit within 42 months plus 3 months' grace period from the date of start of construction which is 11.11.2013 as per the statement of accounts given on record. So, on calculation the due date of delivery of possession comes out to be 11.08.2017. Hence, there is a delay of one year and 4



months. The delay compensation payable by the respondent @ Rs.7.50/- per sq. ft. per month of the carpet area of the said flat as per clause 16(a) of the 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."

As the possession of the flat was to be delivered by 11.08.2017 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. Hence, the respondent is liable to pay interest to the complainant, at the prescribed rate for every month of delay till the handing over of possession.



The complainant reserves his right to seek compensation from the promoter for which he shall make separate application to the adjudicating officer, if required.

Findings of the authority

25. 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.

26. Project was registered with the authority which has already been expired on 31.12.2018. Counsel for the respondent stated that they have applied for extension of registration which is pending with the authority.

27. As per clause 14(a) of the builder buyer agreement dated 10.06.2013 for unit no. IG-07-1002, 10th floor, tower 7, Imperial Gardens, Sector 102, Gurugram, possession was to be handed over to the complainant within a period of 42 days from the date of start of construction i.e. 11.12.2013 plus 3 months' grace



period which comes out to be 11.08.2017. it was a construction linked plan. However, the respondent has not delivered the unit on time. Complainant has already paid Rs.1,28,39,931/- to the respondent against a total sale consideration of Rs.1,51,68,619/-. As such, complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f 11.08.2017 as per the provisions of section 18(1) of the Real Estate (Regulation and Development) Act, 2016 till the handing over possession failing which the complainant is entitled to refund the amount.

Decision and directions of the authority

28. 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 pay the interest at the prescribed rate i.e. 10.75% for every month of delay from the due date of possession i.e. 11.08.2017 till



the actual date of handing over of the possession on the amount paid by the complainant.

- (ii) The arrears of interest accrued so far shall be paid to the complainant by the respondent within 90 days from the date of order and thereafter monthly payment of interest till handing over of the possession shall be paid before 10th of subsequent moth. Respondent may adjust the late delivery charges against the amount due from the complainant.

29. The order is pronounced.

30. Case file be consigned to the registry.

(Samir Kumar)

Member

(Subhash Chander Kush)

Member

Haryana Real Estate Regulatory Authority, Gurugram



Dated :

Judgement Uploaded on 08.02.2019