

PROCEEDINGS OF THE DAY

Day and Date	Wednesday and 23.01.2019
Complaint No.	1413/2018 Case Titled As Mr. Manish Kapoor V/S Ms Emaar Mgf Land
Complainant	Mr. Manish Kapoor
Represented through	Shri Devinder Singh Advocate for the complainant.
Respondent	M/S Emaar Mgf Land Ltd.
Respondent Represented through	Shri Dheeraj Kapoor Advocate for the respondent.
Last date of hearing	First hearing
Proceeding Recorded by	Naresh Kumari & S.L.Chanana

Proceedings

Project is registered with the authority.

Arguments heard

As per clause 14 (a) of the Builder Buyer Agreement dated 3.4.2013 the delivery of possession of the flat unit No.GGN-07-0602, 6th floor, building No.7, Gurgaon Greens, Sector-102, Gurugram, possession was to be handed over to the complainant within a period of 36 months + 5 months grace period (from the date of start of construction i.e. 14.6.2013) which comes out to be **14.11.2016**. It has been apprised by the counsel for the respondent that they have already applied for occupation certificate. The earlier date of delivery of possession was 31.12.2018 which has already been expired, therefore, they have applied for extension of registration with the RERA authority, as such, the possession shall be offered to the complainant as soon

as occupation certificate granted to them. However, the complainant is entitled for delayed delivery charges @ 10.75% as per section 18 (1) of the Real Estate (Regulation & Development) Act, 2016 till the handing over possession failing which the complainant is entitled to seek refund of the amount.

It has been brought to the notice of the authority that the complainant is in default in making payment to the tune of Rs.36,52,432/- , as such as per the provisions of Section 19 (6) of the Real Estate (Regulation and Development) Act 2016, the complainant is also liable to pay penal interest at the rate of 10.75% which shall be calculated at the time of delivery of possession. The amount accrued on account of delayed charges shall be adjusted in the last demand to be raised by the respondent.

Application filed on behalf of the respondent for condonation of delay in filing reply is allowed and the delay is condoned.

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

Samir Kumar
(Member)
23.1.2019

Subhash Chander Kush
(Member)

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

Complaint no. : 1413 of 2018
Date of first hearing : 23.1.2019
Date of decision : 23.1.2019

Mr. Manish Kapoor
R/o: c/o Rajinder Kumar & Brother P. Ltd.,
Kunj gali chowk, Varanasi-221001

Complainant

Versus

M/s Emaar MGF Land Limited
Office: ECE House, 28,
Kasturba Gandhi Marg, New Delhi
Also at: Emaar MGF Business Park, जयते
MG Road, Sikanderpur, Sector 28,
Gurugram, Haryana-122002

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Devinder Singh
Shri Dheeraj Kapoor

Advocate for the complainant
Advocate for the respondent

ORDER

1. A complaint dated 17.10.2018 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 Mr.



Manish Kapoor, against the promoter M/s Emaar MGF Land Limited on account of violation of clause 14(a) of the buyer's agreement executed on 3.4.2013 for unit no. GGN-07-0602, tower/building no. 7, 6th floor admeasuring super area of 1650 sq. ft' in the project "Gurgaon Greens", Sector 102, Gurugram for not giving possession on the due date which is an obligation of the promoter under section 11(4)(a) of the Act *ibid*.

2. Since, the buyer's agreement has been executed on 3.4.2013 i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, therefore, the penal proceedings cannot 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 are as under: -

1.	Name and location of the project	"Gurgaon Greens" in Sector 102, village Dhankot, Gurugram
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2.	Nature of real estate project	Group housing colony
3.	Unit no.	GGN-07-0602, 6 th floor, building no.7
4.	Project area	13.531 acres
5.	Registered/ not registered	36 (a) of 2017 dated 05.12.2017
6.	Registration valid upto	31.12.2018
7.	DTCP license	75 of 2012
8.	Date of buyer's agreement	3.4.2013
9.	Total consideration	Rs. 1,20,70,940 (as per SOA dated 1.10.2018)
10.	Total amount paid by the complainant	Rs. 82,31,711/- (SOA dated 1.10.2018)
11.	Payment plan	Construction linked plan
12.	Due date of delivery of possession Clause 14(a)- 36 months from date of start of construction + 5 months grace period. 14.6.2013 - (annexure R-3)	14.11.2016
13.	Delay of number of months/ years till date	2 years 2 months 9 days
14.	Penalty clause as per builder buyer agreement	Clause 16(a)- Rs. 7.50/- per sq. ft' per month of the super area



4. The details provided above have been checked on the basis of the record available in the case file which have been provided by the complainant and the respondent. A buyer's agreement dated 3.4.2013 is available on record for unit no. GGN-07-0602, tower/building no. 24, 9th floor, admeasuring

super area of 1650 sq. ft' according to which the possession of the aforesaid unit was to be delivered by 14.11.2016. The promoter has failed to deliver the possession of the said unit to the complainant. Therefore, the promoter has not fulfilled his committed liability till date.

5. Taking cognizance of the complaint, the authority issued notice to the respondents for filing reply and for appearance. The reply has been filed by the respondent and the same has been perused.

Facts of the complainant

6. That the respondent claims itself as a reputed builder and developer and big real estate player. The respondent gave advertisement in various leading newspapers about their forthcoming project named Project- "GURGAON GREENS", Sector 102, Gurugram promising various advantages, like world class amenities and timely completion/execution of the project etc. Relying on the promise and undertakings given by the respondent in the aforementioned advertisements, the complainant booked an apartment/flat admeasuring super area 1650 sq. ft. in aforesaid project of



the respondent for total sale consideration is Rs. 1,13,63,783/- which includes BSP, car parking, IFMS, club membership, PLC etc including taxes, and the builder buyer's agreement was executed on 3.4.2013. Out of the total sale consideration amount, the complainant made payment of Rs. 82,31,711/- to the respondent vide different cheques on different dates, the details of which are annexed with the complaint.

7. That as per the buyer's agreement the respondent had allotted a unit/flat bearing No GGN-07-0602 on 6th floor having super area of 1650 sq. ft. to the complainant.
8. That as per clause 14(a) of the builder buyer's agreement, the respondent had agreed to deliver the possession of the flat within 41 months from the date of signing of the flat buyer's agreement with an extended period of five months and accordingly the flat was to be delivered till 14.11.2016.
9. That some of the clauses in the buyer's agreement that the complainant/buyer was made to sign by the respondent were one sided. The complainant had signed already prepared documents and that some of the clauses contained



therein were totally unreasonable and in favour of the respondent only.

10. That the complainant regularly visited the site but was surprised to see that construction was very slow. It appears that respondent has played fraud upon the complainant as respondent itself was not aware that by what time possession would be granted. It is further submitted that the respondent constructed the basic structure which was linked to the payments and majority of payments were made too early. However, subsequent to this there has been very little progress in construction of the project. The only intention of the respondent was to take payments for the flat without completing the work. The structure was being erected at great speed since the structure alone was related to the vast majority of the payments in the construction linked plan. Since the respondent has received the payments linked to the floor rise. This shows respondent's mala-fide and dishonest motives and intention to cheat and defraud the complainant.



11. That despite receiving of 80% payment of all the demands raised by the respondent for the said flat and despite repeated requests and reminders over phone calls and personal visits of the complainant, the respondents has failed to deliver the possession of the allotted flat to the complainant within stipulated period.
12. That it could be seen that the construction of the project in which the complainant flat was booked with a promise by the respondents to deliver the flat by 14.11.2016 but was not completed within time for the reasons best known to the respondent, which clearly shows that ulterior motive of the respondent to extract money from the innocent people fraudulently.
13. That this omission on the part of the respondents the complainant suffered from disruption on their living arrangement, mental torture, agony and also continues to incur severe financial losses. This could be avoided if the respondent had given possession of the flat on time.
14. That the respondent company failed to complete the project constructions activities till date as the project was to be



handed over in 41 months from the date from the date of commencement of project and as per clause 14 (a) of the buyer's agreement but failed to do so.

Issues raised by the complainant

15. The relevant issues raised in the complaint are:

- I. Whether the possession of the unit has been delivered till date or not?
- II. Whether the respondent has cheated the complainant by booking the project and not completing it?

16. **Relief sought**

- I. Direct the respondents to refund the amount of Rs. 82,31,711/- to the complainant which was paid by the complainant for residential apartment bearing no. GGN-07-0602 on 6th floor, admeasuring super area of 1650 sq. ft' vide welcome letter date allotment letter dated 27.1.2013.
- II. Any other just and proper direction and relief which this hon'ble authority may deem fit.



Respondent's reply

17. At the very outset, it is most respectfully submitted that the complaint filed by the complainant is not maintainable and this hon'ble authority has no jurisdiction whatsoever to entertain the present complaint. The respondent has also separately filed an application for rejection of the complaint on the ground of jurisdiction and this reply is without prejudice to the rights and contentions of the respondent contained in the said application.
18. Complaint for compensation and interest under section 12, 14, 18 and 19 of the Act is maintainable only before the adjudicating officer. In the present case, the complaint pertains to the alleged delay in delivery of possession for which the complainant has filed the present complaint under rule-28 of the said rules and is seeking the relief of refund, interest and compensation u/s 18 of the said Act. Therefore, even though the project i.e. "Gurgaon Greens", Sector 102, Gurugram of the respondent is covered under the definition of "ongoing projects" and registered with this hon'ble authority, the complaint, if any, is still required to be



filed before the adjudicating officer under rule-29 of the said rules and not before this hon'ble authority under rule-28 as this hon'ble authority has no jurisdiction whatsoever to entertain such complaint and such complaint is liable to be rejected.

19. Without prejudice to the above, the above stated position is further substantiated by the proviso to section 71 which clearly states that even in a case where a complaint is withdrawn from a Consumer Forum/Commission/NCDRC for the purpose of filing an application under the said Act and said rules, the application, if any, can only be filed before the adjudicating officer and not before the authority.
20. It is also submitted that neither the complaint nor the affidavit is signed by the complainant and at the same time the complaint is not supported by any attested affidavit with a proper verification. In the absence of a complaint and affidavit signed by the complainant and also in the absence of a proper verified and attested affidavit supporting the complaint, the complaint is liable to be rejected.



21. It is stated that the statement of objects and reasons as well as the preamble of the said Act clearly state that the RERA is enacted for effective consumer protection and to protect the interest of consumers in the real estate sector and not the interest of investors. As the said Act has not defined the term consumer, therefore the definition of “Consumer” as provided under the Consumer Protection Act, 1986 has to be referred for adjudication of the present complaint. The complainant is an investor and not consumer and nowhere in the present complaint has the complainant pleaded as to how the complainant is a consumer as defined in the Consumer Protection Act, 1986 qua the respondent. The complainant has deliberately not pleaded the purpose for which the complainant has entered into an agreement with the respondent to purchase the apartment in question. The complainant, who is already the owners and resident of a house at 12/56, Kameshwar Katra, Kunjgali chowk, Varanasi-221001 is an investor, who never had any intention to buy the apartment for his own personal use and kept on avoiding the performance of his contractual



obligations of making timely payments and has now filed the present complaint on false and frivolous grounds. It is most respectfully submitted that this hon'ble regulatory authority has no jurisdiction to entertain the present complaint as the complainant has not come to this hon'ble authority with clean hands and has concealed the material fact that he has invested in the apartment for earning profits and the transaction, therefore is relatable to commercial purpose and the complainant not being a 'consumer' within the meaning of section 2(1)(d) of the Consumer Protection Act, 1986, the complaint itself is not maintainable under the said Act.

22. It is also most respectfully submitted that this hon'ble authority has no jurisdiction to entertain the present complaint as the complainant has not come to this hon'ble authority with clean hands and has concealed the material fact that the complainant is a defaulter, having deliberately failed to make the payment of various instalments within the time prescribed, which resulted in delay payment charges. The current outstanding amount as on 1.10.2018 is



Rs.36,52,432/-. It is clear from the above that the complainant is an investor and also a defaulter, having deliberately failed to make the payment of various instalments within the time prescribed which resulted in delay payment charges.

23. It is pertinent to mention here that from the date of booking till the filing of the present complaint i.e. for more than 6 years, the complainant has never ever raised any issue whatsoever and on the contrary the complainant kept on making the payment of instalments, though not within the time prescribed, which resulted in delay payment charges.
24. The complainant has concocted a false story to cover up his own defaults of having deliberately failed to make the payment of dues within the time prescribed which resulted in delay payment charges and has now raised false and frivolous issues and have filed the present complaint on false, frivolous and concocted grounds. This conduct of the complainant clearly indicates that the complainant is a mere speculator having invested with a view to earn quick profit and due to slowdown in the market conditions, the



complainant has failed to perform its contractual obligations of making timely payments.

25. That despite several adversities, the respondent has continued with the construction of the project and is in the process of completing the construction of the project and should be able to apply the occupation certificate for the project by 31.12.2018. However, as far as the complainant's apartment is concerned, the respondent has already applied the occupation certificate of tower-7 (wherein the complainant's apartment is situated) on 12.4.2018 and will hand over the possession of the apartment as and when the occupation certificate is granted. However, as the complainant was only a speculative investor and not interested in taking over the possession of the said apartment and because of slump in the real estate market, the complainant failed to make the payments in time. It is apparent that the complainant is a mere short term and speculative investor who had the motive and intention to make quick profit from sale of the said apartment through the process of allotment. Having failed to resell the said



apartment due to general recession, the complainant could not make the payments in time and now has developed an intention to raise false and frivolous issues to engage the respondent in unnecessary, protracted and frivolous litigation. The alleged grievance of the complainant has origin and motive in sluggish real estate market.

26. It is submitted that this hon'ble authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the buyer's agreement signed by the complainant/allotment offered to them. It is a matter of record and rather a conceded position that no such agreement, as referred to under the provisions of said Act or said rules, has been executed between the complainant and the respondent. Rather, the agreement that has been referred to, for the purpose of getting the adjudication of the complaint, is the buyer's agreement dated 3.4.2013, executed much prior to coming into force of said Act or said rules. The adjudication of the complaint for interest and compensation, as provided under sections 12, 14, 18 and 19 of said Act, has to be in reference to the



agreement for sale executed in terms of said Act and said rules and no other agreement. This submission of the respondent *inter alia*, finds support from reading of the provisions of the said Act and the said rules.

27. That no cause of action has ever accrued in favour of the complainant to file the present complainant before this hon'ble authority. The complaint being without any cause of action is liable to be dismissed at this ground alone.
28. The respondent submitted that the complainant persuaded the respondent party to allot the said apartment in question with promise to execute all documents as per format of the respondent and to make all due payments. The respondent continued with the development and construction of the said apartment and also had to incur interest liability towards its bankers. The complainant prevented the respondent from allotting the said apartment in question to any other suitable customer at the rate prevalent at that time and thus the respondent has suffered huge financial losses on account of breach of contract by the complainant.



29. The fact that till date the complainant kept on making payment as per the payment plan, though not in time; and that from the date of booking till the filing of the present complaint i.e. for more than 6 years, the complainant never raised any issue whatsoever, clearly reveals that the complainant had no issue or concern about the said apartment/agreement and terms and conditions of the said apartment buyer's agreement and are now unnecessarily raising false and frivolous issues and have filed the present complaint.

Determination of issues

After considering the facts submitted by the complainant, reply by the respondent and perusal of record on file, the authority decides seriatim the issues raised by the parties as under:

30. With respect to **first issue** raised by the complainant, the authority came across clause 14(a) of the agreement which is reproduced hereunder:

“the company proposes to handover the possession of the unit within 36 months from the date of start of construction and the company shall be entitled to



5 months grace period for obtaining completion certificate.”

The due date of possession comes out to be 14.11.2016 and there has been a delay of 2 years 2 months 9 days.

31. With respect to **second issue** raised by the complainant, the complainant has made averment without substantiating the same in material particulars. hence, the issue is decided in negative.

As the possession of the flat was to be delivered by 14.11.2016 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.

The complainant made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above.

33. 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 and fulfil obligation.



34. 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

35. **Jurisdiction of the authority-** The project Gurgaon Greens” in Sector 102, village Dhankot, Gurugram. As the project in question is situated in planning area of Gurugram, therefore the authority has complete territorial jurisdiction vide notification no.1/92/2017-1TCP issued by Principal Secretary (Town and Country Planning) dated 14.12.2017 to entertain the present complaint. As the nature of the real estate project is commercial in nature so the authority has subject matter jurisdiction along with territorial jurisdiction.

36. The preliminary objections raised by the respondent regarding jurisdiction of the authority stands rejected. The authority has complete jurisdiction to decide the complaint regarding 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.

37. During the course of arguments, the authority has observed project is registered with the authority and the registration has expired on 31.12.2018.
38. As per clause 14 (a) of the buyer's agreement dated 3.4.2013 for unit No. GGN-07-0602, 6th floor, building no.24, in "Gurgaon Greens" in Sector-102, village Dhankot, Gurugram, possession was to be handed over to the complainant within a period of 36 months from the date of start of construction i.e. 14.6.2013 + 5 months grace period which comes out to be 14.11.2016. However, the respondent has failed to fulfil its contractual obligation, hence, the respondent is liable to pay delayed charges at the prescribed rate of interest @ 10.75% p.a.



DECISION AND DIRECTIONS OF THE AUTHORITY

39. Thus, the authority exercising its under section 37 of the act hereby directs the respondent to act in accordance with the provisions of section 18 (1) of the Act ibid :-

- i. As per clause 14 (a) of the Builder Buyer agreement dated 3.4.2013 the delivery of possession of the flat unit no. GGN-07-0602, 6th floor, building no. 7, "Gurgaon Greens", Sector-102, Gurugram, possession was to be handed over to the complainant within a period of 36 months + 5 months grace period (from the date of start of construction i.e. 14.6.2013) which comes out to be **14.11.2016**. It has been apprised by the counsel for the respondent that they have already applied for occupation certificate. The earlier date of delivery of possession was 31.12.2018 which has already been expired, therefore, they have applied for extension of registration with the RERA authority, as such, the possession shall be offered to the complainant as soon as occupation certificate granted to them. However, the complainant is entitled for delayed delivery charges @ 10.75% as per section 18 (1) of the



Real Estate (Regulation & Development) Act, 2016 till the handing over possession failing which the complainant is entitled to seek refund of the amount.

- ii. It has been brought to the notice of the authority that the complainant is in default in making payment to the tune of Rs.36,52,432/- , as such as per the provisions of section 19 (6) of the Real Estate (Regulation and Development) Act 2016, the complainant is also liable to pay penal interest at the rate of 10.75% which shall be calculated at the time of delivery of possession. The amount accrued on account of delayed charges shall be adjusted in the last demand to be raised by the respondent.
- iii. Application filed on behalf of the respondent for condonation of delay in filing reply is allowed and the delay is condoned.



40. Complaint stands disposed of.
41. Detailed order will follow.
42. File be consigned to the registry.

(Samir Kumar)

Member

(Subhash Chander Kush)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Date: 23.1.2019

Judgement Uploaded on 12.02.2019



HARERA
GURUGRAM

