

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

Complaint no. : 5297 of 2019
First date of hearing : 18.11.2019
Date of decision : 12.08.2021

Mr. Rui Salema
R/o PO Box-60783, Dubai.

Complainant

Versus

M/s Emaar MGF Land Ltd.
Address: Emaar MFG Business Park,
M.G. Road, Sector 28, Sikandarpur Chowk,
Gurugram, Haryana.

Respondent

CORAM:

Dr. K.K. Khandelwal
Shri Samir Kumar
Shri Vijay Kumar Goyal

Chairman
Member
Member

APPEARANCE:

Shri Varun Chugh
Shri J.K. Dang along with Shri Ishaan Dang

Advocate for the complainant
Advocates for the respondent

ORDER

1. The present complaint dated 11.11.2019 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. Since, the buyer's agreement has been executed on 25.05.2010 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 statutory obligation on part of the promoter/respondent in terms of section 34(f) of the Act ibid.

A. Project and unit related details

3. 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	"Emerald Estate Apartments at Emerald Estate" in Sector 65, Gurugram, Haryana.
2.	Project area	25.499 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	06 of 2008 dated 17.01.2008 Valid/renewed up to 16.01.2025
5.	Name of licensee	Active Promoters Pvt. Ltd. and 2 others C/o Emaar MGF Land Ltd.
6.	HRERA registered/ not registered	"Emerald Estate" registered vide no. 104 of 2017 dated 24.08.2017 for 82768 sq. mtrs.
	HRERA registration valid up to	23.08.2022
7.	Occupation certificate granted on	11.11.2020 [Document supplied during hearing]
8.	Provisional allotment letter dated	11.03.2010 [Page 11 of complaint]



9.	Unit no.	EEA-J-F01-03, 1 st floor, building no.] [Page 15 of complaint]
10.	Unit measuring	1020 sq. ft.
11.	Date of execution of buyer's agreement	25.05.2010 [Page 13 of complaint]
12.	Payment plan	Construction linked payment plan [Page 12 of complaint]
13.	Total consideration as per statement of account dated 21.11.2020 [Document supplied during hearing]	Rs. 46,63,990/-
14.	Total amount paid by the complainant as per statement of account dated 21.11.2020 [Document supplied during hearing]	Rs.45,42,236/-
15.	Date of start of construction as per statement of account dated 21.11.2020 [Document supplied during hearing]	26.08.2010
16.	Due date of delivery of possession as per clause 11(a) of the said agreement i.e. 36 months from the date of commencement of construction (26.08.2010) + grace period of 6 months, for applying and obtaining completion certificate/ occupation certificate in respect of the unit and/or the project. [Page 28 of complaint]	26.08.2013 [Note: Grace period is not included]
17.	Date of offer of possession to the complainant	21.11.2020 [Document supplied during hearing]
18.	Delay in handing over possession till 21.01.2021 i.e. date of offer of possession (21.11.2020) + 2 months	7 year 4 months 26 days
19.	Unit handover letter	17.07.2021 [Document supplied during hearing]

B. Facts of the complaint

4. The complainant has made the following submissions in the complaint:

- i. That the complainant was greatly influenced by the fancy brochure which depicted that the project will be developed and constructed as state of the art and one of its kind with all modern amenities and facilities, which led to the purchase of the property in question, by the complainant. That the property in question i.e. EEA-J-F01-03 (first floor) admeasuring 1020 sq. ft., in the said project was booked by the complainant in the year 2010. The same was allotted in favour of the complainant vide provisional allotment letter dated 11.03.2010. The total cost of the apartment is Rs.42,99,948/- (*Sic* Rs. 46,63,990/-) only and since it was a construction linked plan, hence the payment was to be made on the basis of schedule of payment provided by the respondent.
- ii. That thereafter, on 25.05.2010, the complainant entered into a buyer's agreement with the respondent, by virtue of which the respondent allotted apartment no. EEA-J-F01-03, having super area of 1020 sq. ft. located on the first floor, along-with car parking space in the said project.
- iii. That the complainant had made the payment towards the cost of the apartment from his own sources through various cheques of different dated and same is evident from the statement of account.

- iv. That as per clause 11(a) of the buyer's agreement dated 25.05.2010, the respondent had categorically stated that the possession of the said apartment would be handed over to the complainant within 36 months from the date of commencement of the construction i.e. 26.08.2010 with a further grace period of another 6 months.
- v. That the said buyer's agreement is totally one sided, which impose completely biased terms and conditions upon the complainant, thereby tilting the balance of power in favour of the respondent, which is further manifested from the fact that the delay in handing over the possession by the respondent would attract only a meagre penalty of Rs.5/- per sq. ft. on the super area of the apartment, on monthly basis, whereas the penalty for failure to take possession would attract holding charges of Rs.50/- per sq. ft. and 24% penal interest on the unpaid amount of instalment due to the respondent.
- vi. That, in all these years, the complainant also visited the project site and observed that there are serious qualities issues with respect to the construction carried out by respondent. The apartments were sold by representing that the same will be luxurious apartment however all such representations seem to have been made in order to lure complainant to purchase the floor at extremely high prices. The respondent has compromised with levels of quality and is guilty of mis-selling. There are various deviations from the initial representations. The respondent marketed luxury high end

apartment, but has compromised even with the basic features, designs and quality to save costs. The structure, which has been constructed on face of it is of extremely poor quality. The construction is totally unplanned, with sub-standard, low grade, defective and despicable construction quality.

- vii. That the respondent has breached the fundamental term of the contract by inordinately delaying in delivery of the possession by 69 months. The complainant was made to make advance deposit on the basis of information contained in the brochure, which is false on the face of it as is evident from the construction done at site.
- viii. That the complainant, without any default, had been paying the instalments towards the property, as and when demanded by the respondent. The balance payment was to be made at the time of offer of possession. The buyer's agreement was executed on 25.05.2010 and till date the construction is not complete, which is resulting in extreme distress, pain and agony to the complainant. The respondent had breached the fundamental term of the contract by inordinately delaying in delivery of possession and the project had been inordinately delayed. The progress of the project updated on the website of the respondent clearly shows that there is no headway, and the respondent has been misleading the customers. The respondent had committed gross violation of the provisions of section 18(1) of the Act by not handing over the timely possession of

the flat in question and not giving interest and compensation to the buyer.

C. Relief sought by the complainant

5. The complainant has filed the present complaint for seeking following relief:

- i. Direct the respondent to handover the possession of the apartment in question to the complainant in time bound manner.
- ii. Direct the respondent to pay interest @ 18% p.a. towards delay in handing over the property in question as per the provisions of the Act and the rules.
- iii. Pass such other order or further order as this hon'ble authority may deem fit and proper in the facts and circumstances of the present case.

6. 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 and to plead guilty or not to plead guilty.

D. Reply by the respondent

7. The respondent has raised certain preliminary objections and has contested the present complaint on the following grounds:

- i. That the complainant has filed the present complaint seeking, inter alia, interest and compensation for alleged delay in delivering possession of the apartment booked by the complainant. It is

respectfully submitted that such complaints 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. The present complaint is liable to be dismissed on this ground alone.

ii. That initially, apartment bearing no. EEA-M-F01-03 was allotted to the complainant vide letter dated 29.09.2009 but subsequently, the allotment was revised vide letter dated 11.03.2010 and unit bearing no. EEA-J-F01-03 was provisionally allotted to the complainant. Buyer's agreement was executed between the complainant and the respondent on 25.05.2010. The complainant had opted for a construction linked payment plan and had agreed and undertaken to make payment in accordance therewith. However, the complainant started defaulting in payments right from the very beginning. Consequently, the respondent was constrained to issue demand notices, reminders etc. calling upon the complainant to make payment of outstanding amounts payable under the payment plan opted by him. The statement of account dated 25.11.2019 reflects the payments made by the complainant and the accrued delayed payment interest so accrued.

iii. That the project got delayed on account of various reasons which were/are beyond the power and control of the respondent and hence the respondent cannot be held responsible for the same. Firstly, the respondent was constrained to terminating the contract

with one of the contractors of the project which has also contributed to delay in construction activities at the site. The contractor was unable to meet the agreed timelines for construction of the project. After termination of the contract, the respondent had filed petition before the Hon'ble High Court seeking interim protection against the contractor. Similar petition was also filed by the contractor against the respondent. The Hon'ble High Court appointed Justice A.P. Shah (Retd.) as sole arbitrator for adjudication of dispute between the respondent and contractor. The respondent had been diligently pursuing the matter with the contractor before the sole arbitrator and no fault can be attributed to the respondent in this regard and the respondent cannot be held responsible for the same. This is a force majeure situation that has arisen, and the respondent is unable to fulfil its obligation till the situation is persisting. The project has been registered under the Act and the registration of the project is valid till 23.08.2022.

- iv. That there is no default or lapse on the part of the respondent. It is evident from the entire sequence of events, that no illegality can be attributed to the respondent. The respondent is endeavouring to complete the project and offer possession of the apartment to the allottees in the project including the complainant within the period of registration of the project.

- v. That the time period of delivering possession of the apartment in question is concerned, it is submitted that the same is dependent on a number of factors including timely payment of instalments by the complainant. Clause 11(b)(iv) of the buyer's agreement states that in the case of any default/delay by the allottees in payment as per schedule of payment incorporated in the buyer's agreement, the date of handing over the possession shall be extended accordingly solely at the discretion of the respondent. Furthermore, in the event of delay due to force majeure conditions and other events beyond the control of the respondent, time taken by statutory/government authorities in according approval, permissions, sanctions, etc. such time period is also to be excluded while reckoning the time period for delivery of possession.
- vi. That it is denied that the buyer's agreement dated 25.05.2010 is one-sided or that the same imposes biased terms and conditions upon the complainant. On the contrary, the obligations that are cast upon the respondent under the buyer's agreement dated 25.05.2010 are far more onerous than the obligations of the complainant, As developer of the project, the respondent has to undertake numerous responsibilities, including but not limited to conceptualization of the project. Applying and obtaining various approvals, permissions and sanctions from the competent authorities, financial planning including collection of sale consideration of sale consideration from

allottees, payment of contractors and other professionals engaged in the development and construction of the project, obtaining loans from banks and financial institutions, making up the shortfall in the case of default in payments by allottees, are some of the obligations and responsibilities of the respondent. Thus, it is ridiculous on the part of the complainants to claim any kind of parity with the respondent. Based on the above submissions, the respondent asserted that the present complaint deserves to be dismissed at the very threshold.

8. 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.

E. Jurisdiction of the authority

9. The preliminary objections raised by the respondent regarding jurisdiction of the authority to entertain the present complaint stands rejected. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

10. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana 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.

E.II Subject-matter jurisdiction

11. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as per provisions of section 11(4)(a) of the Act leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the reliefs sought by the complainant

F.I Delay possession charges

12. **Relief sought by the complainant:** Direct the respondent to pay interest @ 18% p.a. towards delay in handing over the property in question as per the provisions of the Act and the rules.
13. In the present complaint, the complainant intends to continue with the project and is seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

"Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —

.....

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

14. Clause 11(a) of the buyer's agreement provides for time period for handing over of possession and 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 36 months from the date of commencement of construction and development of the Unit. The Allottee(s) agrees and understands that the Company shall be entitled to a grace period of six months, for applying and obtaining the completion certificate/occupation certificate in respect of the Unit and/or the Project."

15. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement, and the complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment time period for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the

builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

16. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 36 (thirty-six) months from the date of commencement of construction and further provided in agreement that promoter shall be entitled to a grace period of 6 months for applying and obtaining completion certificate/occupation certificate in respect of said unit. The date of start of construction is 26.08.2010 as per statement of account dated 21.11.2020. The period of 36 months expired on 26.08.2013. As a matter of fact, the promoter has not applied to the concerned authority for obtaining completion certificate/ occupation certificate within the grace period prescribed by the promoter in the buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 6 months cannot be allowed to the promoter at this stage.

17. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the rate of 18%. However, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

18. The legislature in its wisdom in the subordinate legislation under the rule 15 of the rules has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.
19. Taking the case from another angle, the complainant-allottee was entitled to the delayed possession charges/interest only at the rate of Rs.5/- per sq. ft. per month as per clause 13(a) of the buyer's agreement for the period of such delay; whereas, as per clause 1.2(c) of the buyer's agreement, the promoter was entitled to interest @ 24% per annum at the time of every succeeding instalment for the delayed payments. The functions of the authority are to safeguard the interest of the aggrieved person, may be the allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take undue advantage of his dominate position and to exploit the needs of the home buyers. This authority is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumers/allottees in the real estate sector. The clauses of the buyer's agreement entered into between the parties are one-sided, unfair and

unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the buyer's agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the buyer's agreement are ex-facie one-sided, unfair and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the buyer's agreement will not be final and binding.

20. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 12.08.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
21. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation. —For the purpose of this clause—

- (i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
- (ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

22. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same as is being granted to the complainant in case of delayed possession charges.
23. On consideration of the documents available on record and submissions made by the parties regarding contravention as per provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 11(a) of the buyer's agreement executed between the parties on 25.05.2010, possession of the said unit was to be delivered within a period of 36 months from the date of commencement of construction i.e. 26.08.2010. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession comes out to be 26.08.2013. In the present case, the complainant was offered possession by the respondent on 21.11.2020. Subsequently, the complainant had taken possession of the said unit vide unit handover letter dated 17.07.2021. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainant as per the terms and conditions of the buyer's agreement dated 25.05.2010 executed between the parties.
24. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation

certificate. In the present complaint, the occupation certificate was granted by the competent authority on 11.11.2020. However, the respondent offered the possession of the unit in question to the complainant only on 21.11.2020, so it can be said that the complainant came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, he should be given 2 months' time from the date of offer of possession. These 2 months' of reasonable time is being given to the complainant keeping in mind that even after intimation of possession practically he has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 26.08.2013 till the expiry of 2 months from the date of offer of possession (21.11.2020) which comes out to be 21.01.2021.

25. 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 the interest @ 9.30 % p.a. w.e.f. 26.08.2013 till 21.01.2021 as per provisions of section 18(1) of the Act read with rule 15 of the Rules.

26. Also, the amount of Rs.4,02,592/- (as per statement of account dated 21.11.2020) so paid by the respondent to the complainant towards compensation for delay in handing over possession shall be adjusted towards the delay possession charges to be paid by the respondent in terms of proviso to section 18(1) of the Act.

G. Directions of the authority

27. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

- 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. 26.08.2013 till 21.01.2021 i.e. expiry of 2 months from the date of offer of possession (21.11.2020). The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order as per rule 16(2) of the rules.
- ii. Also, the amount of Rs.4,02,592/- so paid by the respondent to the complainant towards compensation for delay in handing over possession shall be adjusted towards the delay possession charges to be paid by the respondent in terms of proviso to section 18(1) of the Act.

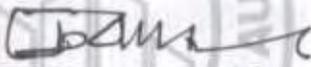
iii. The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement. The respondent is also not entitled to claim holding charges from the complainant/allottee at any point of time even after being part of the builder buyer's agreement as per law settled by hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 decided on 14.12.2020.

28. Complaint stands disposed of.

29. File be consigned to registry.


(Vijay Kumar Goyal)
Member


(Samir Kumar)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 12.08.2021

Judgement uploaded on 14.10.2021.

HARERA
GURUGRAM