

PROCEEDINGS OF THE DAY

Day and Date	Wednesday and 23.01.2019
Complaint No.	1062/2018 Case Titled As Anil Kheterpal And Anita Kheterpal V/S M/S Emaar Mgf Land Limited
Complainant	Anil Kheterpal And Anita Kheterpal
Represented through	Complainant in person with Shri Sanjeev Sharma Advocate
Respondent	M/S Emaar Mgf Land Limited
Respondent Represented through	Shri Shri Ishaan Dang Advocate for the respondent.
Last date of hearing	First hearing
Proceeding Recorded by	Naresh Kumari & S.L.Chanana

Proceedings

Project is not registered with the authority.

Since the project is not registered, as such, notice under section 59 of the Real Estate (Regulation & Development) Act, 2016, for violation of section 3(1) of the Act be issued to the respondent. Registration branch is directed to do the needful.

Arguments heard.

Occupation certificate has been granted to the respondent on 8.1.2018.

As per clause 16 (a) of the Builder Buyer Agreement dated 20.8.2010 for unit No.EPO-07-001, 7th floor, in project “Emerald Plaza” in Emerald Hills, Sector-65, Gurugram, possession was to be handed over to the complainant within a period of 30 months + 120 days grace period from the date of execution of agreement which comes out to be **20.6.2013**. However, the respondent has not delivered the unit in time. Complainant has already paid Rs.53,83,743/- to the respondent against a total sale consideration of Rs.51,43,728/- As such, complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f 20.6.2013 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.

However certain issues pertaining to the fire shaft and pillar in the office premises etc. have been raised by the counsel for the complainant in a secondary manner. Counsel for the complainant is directed to provide brief w.r.t the exact issues involved w.r.t. super area/carpet area within 3 days so that the investigation team already appointed in the matter of “Emerald Plaza” may also look into this manner in a precise manner. The report should be clubbed with all such cases for all intends and purposes. However, a separate report be given in this matter.

Complaint stands disposed of accordingly. 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. : 1062 of 2018
First date of hearing : 23.01.2019
Date of decision : 23.01.2019

1. Mr. Anil Kheterpal
2. Mrs. Anita Kheterpal

Both R/o: H.no. C-58, Soami Nagar North,
Malviya Nagar, Delhi.

Complainants

Versus

M/s Emaar MGF Land Limited.
(through its managing director)
Address: Emaar Business Park, MG Road,
Sikanderpur, Sector-28,
Gurugram-122001, Haryana.

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Sanjeev Sharma Advocate for the complainant
Shri Anil Kheterpal Complainant in person
Shri Ishaan Dang Advocate for the respondent

ORDER

1. A complaint dated 18.10.2018 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 complainants Mr. Anil Kheterpal and Mrs. Anita Kheterpal, against the promoter M/s Emaar MGF Land Limited, on account of violation of the



clause 16(a) of office space buyer's agreement executed on 20.08.2010 in respect of office space described as below in the project "Emerald Plaza" for not handing over possession by the due date which is an obligation of the promoter under section 11(4)(a) of the Act *ibid*.

2. Since, the office space buyer's agreement has been executed on 20.08.2010 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 contractual obligation on part of the promoter/respondent in terms of section 34(f) of the Act *ibid*.
3. The particulars of the complaint case are as under:

1.	Name and location of the project	"Emerald Plaza" in Emerald Hills, Sector 65, Gurugram, Haryana.
2.	Nature of the project	Commercial complex
3.	DTCP license no.	10 of 2009 dated 21.05.2009
4.	Project area	3.963 acres
5.	RERA registered/ not registered	Not registered
6.	Applied for occupation certificate on	26.05.2017
7.	Occupation certificate granted on	08.01.2018
8.	Office space/unit no.	EPO-07-001, 7 th floor
9.	Unit measuring as per the said agreement	698.4 sq. ft. (note: unit area stands revised to 736.61 sq. ft. vide letter of offer of



		possession dated 30.01.2018)
10.	Office space buyer's agreement executed on	20.08.2010
11.	Payment plan	Construction linked payment plan
12.	Basic sale consideration as per clause 1.1(a) of the said agreement	Rs.41,75,733.6/-
13.	Total cost of the property as per statement of account dated 11.10.2018 annexed with the reply.	Rs.51,43,728/-
14.	Total amount paid by the complainants till date as per statement of account dated 11.10.2018 annexed with the reply.	Rs.53,83,743/-
15.	Due date of delivery of possession as per clause 16(a). (30 months from the date of execution of this agreement i.e. 20.08.2010 + 120 days grace period)	20.06.2013
16.	Letter of offer of possession sent to the complainant on	30.01.2018
17.	Delay in handing over possession from due date of handing over of possession till offer of possession.	4 years 7 months 10 day
18.	Penalty clause as per office space buyer's agreement	Clause 18(a) of the agreement i.e. interest calculated at 9% p.a. (simple interest) on the amount(s) paid by the allottee for such period of delay.



4. The details provided above have been checked on the basis of record available in the case file which have been provided by the complainants and the respondent. As per clause 16(a) of

the office space buyer's agreement dated 20.08.2010, the due date of handing over possession was 20.06.2013 and the possession was offered to the complainants on 30.01.2018. The respondent has not paid any interest for the period he delayed in handing over the possession. Therefore, the promoter has not fulfilled their committed liability.

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 23.01.2019. The case came up for hearing on 23.01.2019. The reply filed on behalf of the respondent has been perused.

Brief facts of the complaint

6. Briefly stated, the facts of the complaint are that Emaar MGF Land Ltd. is a company incorporated under the Company's Act mainly based in middle east and UAE entered into the emerging and booming real estate market in India during the first decade of 21st Century. All the formalities laid down by the central government were fulfilled before commencing the business. Company purchased hundreds of acres of land in Gurugram and other major cities of India.
7. The complainants submitted that the respondent company was in the process of constructing and developing a residential plotted colony "Emerald Hills" to be developed on



a piece of land measuring 102.471 acres in Sector 65, urban estate, Gurugram. As a part of the main project, the respondent also planned and invited investment for sale of commercial spaces in their project by the name of “Emerald Plaza”. The Director, Town and Country Planning, Government of Haryana has granted license bearing no. 10 dated 21.05.2009 to develop the project.

8. The complainants submitted that the project was to be built with the state of art office spaces and retail shops with 3 levels of basement parking space. The complainants submitted that at present when the possession of units is being offered by the respondent it has come to light that instead of 3 level basement parking only two levels have been constructed and this fact was never ever informed to the complainants.
9. The complainants submitted that they purchased unit no. EPO-07-001 measuring super area of 698.4 sq. ft. situated on 7th floor amounting to a basic sale consideration of Rs.41,75,733.6/- on the assurance that construction shall be completed in time with and possession would be handed over in time.
10. The complainants submitted that the office space buyer’s agreement dated 20.08.2010 is signed between both the



parties on the terms and conditions as laid down by the company. As per the said agreement, the possession of the unit in question was to be handed over within 30 months from the date of the said agreement with a grace period of 120 days as provided under clause 16(a) of the agreement.

11. The complainants submitted that after an exorbitant delay of almost 5 years, they received letter for offer of possession on 30.01.2018 with respect to the unit in question. The respondent offered the possession of the unit in question after a delay of almost 5 years, however no interest as per law for the delayed period was offered by the respondent to the complainants. Further at the time of handing over possession of the unit in question, the area of the unit was increased from 698.4 sq. ft. to 736.61 sq. ft. and the area was increased without the consent of the complainants.

12. The complainants submitted that the respondent also without their consent altered the layout plan of the unit in question as they made a shaft for the fire safety equipment because of which the layout of the whole unit got changed from the initial layout plan.

13. The complainants submitted that almost after 8 months of the above said offer of possession and they received handover advice letter dated 01.08.2018 informing the



complainants that the unit in question is ready for physical possession and thus called for taking possession of the unit in question. However, even after repeated demands of the complainants, the respondent failed to give any interest on the delayed possession and thus for the same reason, the complainants did not take over the possession and approached this hon'ble authority.

Issues to be decided

14. The relevant issues raised by the complainants are as follows:

- i. Whether the respondent should have got its project "Emerald Plaza" of "Emerald Hills", Sector 65 registered with the authority up to 31.07.2017?
- ii. Whether incomplete application under sub code 4.10 of Haryana Building Code 2017 would protect the promoter company and exempt it from the definition of "on going project" as referred under rule 2(o) of the rules ibid?
- iii. Whether respondent has caused exorbitant delay in handing over possession of unit to the complainants and for which the respondent is liable to pay interest at the prescribed rate to the complainants on amount received by the respondent from the complainants?



- iv. Whether open parking space and parking in common basements be sold to the allottees as separate unit by the promoter "M/s Emaar MGF Land Ltd.", which the respondent has sold as separate units in certain cases and if not than the amount so collected be returned back to the allottees from whom charged?
- v. Whether the respondent is liable to refund the GST amount collected from the complainants as the said tax became payable only due to delay in handing over the possession by the respondent?
- vi. Whether the act of the respondent to get the plain application format signed from the allottees to join the association of owners/allottees formed by the respondent is legal?

15. Reliefs sought

The complainants are seeking the following reliefs:

- i. The respondent be ordered to make payment of interest accrued on amount collected by the respondent from the complainants, on account of delayed offer of possession from the date as and when the amount was received by the respondent from the complainants.



- ii. The amount of GST, service tax, etc. collected from the complainants, 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 than the money collected on such account shall be refunded along with interest.
- iv. The orders may be passed against the respondent in terms of section 59 of the Act *ibid* for the failure on part of the respondent to register itself with the hon'ble authority under the Act *ibid*.

Respondent's reply

16. The respondent submitted that the present complaint is not maintainable in law or on facts. The provisions of the Real Estate (Regulation and Development) Act, 2016 are not applicable to the project in question. The application for issuance of occupation certificate in respect of the commercial unit in question was made on 26.05.2017, i.e. well before the notification of the Haryana Real Estate (Regulation and Development) Rules, 2017. The occupation certificate has been thereafter issued on 08.01.2018. The respondent has applied for part completion certificate on 20.06.2017 for the project where services are complete. Thus,



the project in question is not an ‘ongoing project’ under rule 2(1)(o) of the rules. The project has not been registered under the provisions of the Act. This hon’ble authority does not have the jurisdiction to entertain and decide the present complaint. The present complaint is liable to be dismissed on this ground alone.

17. The respondent submitted that the complainants have filed the present complaint seeking interest and refund for alleged delay in delivering the possession of the said unit booked by the complainants. The respondent submitted that complaints pertaining to interest, compensation and refund are to be decided by the adjudicating officer under section 71 of the Real Estate (Regulation and Development) Act, 2016 read with rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 and not by this hon’ble authority.
18. The respondent submitted that the complainants have no locus standi or cause of action to file the present complaint. The present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the office space buyer’s agreement dated 20.08.2010.
19. The respondent submitted that the complainants have booked the office space in question, bearing no. EPO-07-001,



situated in the commercial complex developed by the respondent, known as 'Emerald Plaza Offices", Sector 65, Gurugram, Haryana. Office space buyer's agreement was executed between the parties on 20.08.2010.

20. The respondent submitted that the complainants were offered possession of the above-mentioned unit through letter of offer of possession dated 30.01.2018. The complainants were called upon to remit balance payment including delayed payment charges and to complete the necessary formalities/ documentation necessary for handover of the office space to the complainants. However, the complainants did not take any step to complete the necessary formalities or to pay the balance amount liable to be paid by them. Consequently, the respondent was constrained to issue a handover advice letter dated 01.08.2018. However, the complainants ignored the legitimate and valid requests of the respondent to remit the balance payment and complete necessary formalities for handover of the office space in question and proceeded, instead, to file the instant frivolous and misconceived complaint.

21. The respondent submitted that right from the beginning the complainants were extremely irregular as far as payment of



instalments was concerned. The respondent was compelled to issue demand notices, reminders, etc. calling upon the complainants to make payment of outstanding amounts under the payment plan/instalment plan opted by the complainants.

22. The respondent submitted that the complainants consciously and maliciously chose to ignore the payment request letters and reminders issued by the respondent and flouted in making timely payments of the instalments which was an essential and indispensable requirement under the office space buyer's agreement. Furthermore, when the proposed allottees default in their payments as per schedule agreed upon, the failure has a cascading effect on the operations and cost for proper execution of the project increases exponentially whereas the business loss of the respondent becomes incalculable.

23. The respondent submitted that only such allottees, who have complied with all the terms and conditions of the office space buyer's agreement including timely payment of instalments are entitled to receive compensation under the said agreement. In the case of the complainants, they had delayed payment of instalments and consequently they were not eligible to receive any compensation from the respondent. It



is submitted that as per clause 16 of the said agreement, dated 20.08.2010, the time period for delivery of possession was 30 months along with grace period of 120 days from the execution of the office space buyer's agreement subject to the allottee(s) having strictly complied with all terms and conditions of the office space buyer's agreement and not being in default of any provisions of the said agreement.

24. The respondent submitted that clause 18 of the said agreement provides that compensation for any delay in delivery of possession shall only be given to such allottees who are not in default of the agreement and further have not defaulted in payment as per the payment plan. The complainants, having defaulted in payment of instalments, thus are not entitled to any compensation under the said agreement.

25. The respondent submitted that the construction of the project in question stands completed and the respondent is in receipt of the occupation certificate in respect of the same. It is submitted that as soon as the balance payment is remitted by the complainants and the necessary formalities are completed by them, the respondent shall handover possession of the unit to the complainants. It is pertinent to mention that respondent has already handed over possession



to number of allottees and conveyance deeds have also been executed in their favor.

26. The respondent submitted that all the demands raised by the respondent are strictly in accordance with the terms and conditions of the said agreement duly executed between the parties. There is no default or lapse on the part of the respondent. It is the complainants who have consciously refrained from obtaining physical possession of the unit by raising false and frivolous excuses. The allegations levelled by the complainants are totally baseless. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.

27. The respondent denied that the project “Emerald Plaza Offices” was to be built with three levels of basement car parking spaces or any such representation had been proffered by the respondent at any time. The respondent submitted that the project has been constructed as per approved plans and there is an area below the second basement which is for house services and hence the milestone for third basement roof slab had been raised. It is submitted that at the time of booking the unit in question as well as at the time of execution of the said agreement, the building plans had not been sanctioned and the same were



subject to changes. The respondent submitted that no prejudice has been caused to the complainants by non-construction of 3rd level of parking. It respondent further submitted that the complainants have been allotted exclusive right to use one parking space and it is not contemplated anywhere in the entire transaction that the same would be in third level of the basement, hence no prejudice has been caused to the complainants due to non-construction of the third level of the basement.

28. The respondent denied that the complainants were entitled to demand any interest for the alleged delay in delivery of possession in the facts and circumstances of the case. Without admitting or acknowledging in any manner the allegations leveled by the complainants, it is submitted that interest if any cannot be demanded for the period prior to the commencement of the Act *ibid*. It is submitted that levy of interest being a penal consequence cannot be applied retrospectively. It is further submitted that if the interest is to be construed compensatory in nature then this hon'ble authority does not have jurisdiction to grant the aforesaid relief.

29. The respondent submitted that the complainants have executed an indemnity cum undertaking in which they have



explicitly stated that they do not have an objection to the increase in the area of the unit in question and further undertook to pay the charges for the increased area. Therefore, the complainants are liable to be estopped to challenge the revision of area of the unit in question at such a belated stage. The respondent submitted that the area of unit in question was tentative and final area was to be measured at the time of completion of construction and receipt of occupation certificate. The area of the unit has been revised in terms of the said agreement which was duly agreed to and executed by the complainants.

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:

30. With respect to the **first and second issues** raised by the complainants, the same has already been decided by the hon'ble authority in ***Simmi Sikka V/s M/s EMAAR MGF Land Ltd. (7 of 2018), on 21.08.2018.***
31. With respect to the **third issue** raised by the complainant, as per clause 16(a) of office space buyer's agreement, the possession of the said unit was to be handed over within 30 months plus grace period of 120 days from the execution of



the said agreement i.e. 20.08.2010. Therefore, due date of possession shall be computed from 20.08.2010. The clause regarding the possession of the said unit is reproduced below:

“16(a) Time of handing over the possession

- (i.) That the possession of the retail spaces in the commercial complex shall be delivered and handed over to the allottee(s) within 30 months of the execution hereof, subject however to the allottee(s) having strictly complied with all the terms and conditions of this agreement and not being in default under any provisions of this agreement and all amounts due and payable by the allottee(s) under this agreement having been paid in time to the company. The company shall give notice to the allottee(s), offering in writing, to the allottee to take possession of the retail spaces for his occupation and use (notice of possession).*
- (ii.) The allottee(s) agrees and understands that the company shall be entitled to a grace period of one hundred and twenty (120) days over and above the period more particularly specified here-in-above in sub-clause (a)(i) of clause 16, for applying and obtaining necessary approvals in respect of the commercial complex.”*

32. Accordingly, the due date of possession was 20.06.2013 and the possession has been delayed by four years three months and one day from due date of possession till the offer of possession. The promoter is liable under section 18(1) proviso read with rule 15 of the rules ibid, to pay interest to the complainants, at the prescribed rate, for every month of delay till the handing over of possession. The prayer of the complainant regarding payment of interest at the prescribed



rate for every month of delay, till handing over of possession on account of failure of the promoter to give possession in accordance with the terms of the agreement for sale as per section 18(1) proviso of the Act ibid read with rule 15 of the rules ibid is hereby allowed.

33. With respect to the **fourth issue** raised by the complainants, the authority is of the opinion that open parking spaces cannot be sold/charged by the promoter. As far as issue regarding parking in common basement is concerned, the matter is to be dealt as per the provisions of the office space buyer's agreement where the said agreement have been entered into before coming into force the Real Estate (Regulation and Development) Act, 2016. As per clause 1.3(a)(i) the following provisions have been made regarding parking space:

"1.3(a)(i) The office space allottee(s) shall have the right to park one car in the multi-level basement parking of the building, free of any usage charges.

(d) The allottee(s) agrees and understands that the parking space in the commercial complex shall not form part of the common areas and facilities of the said office space for the purpose of the declaration to be filed by the company under Haryana Apartment Ownership Act, 1983..."

34. With respect to the **fifth issue** raised by the complainants, the complainant shall be at liberty to approach any other suitable forum regarding levy of GST.



35. With respect to the **sixth issue** raised by the complainants, the pre- printed blank format signed by the allottees is legal as it is in a format form and not a blank page. Moreover, it is upon the allottees that whether they want to sign the blank application format or not, but the conditions and clauses shall have to be in conformity with law.

Findings of the authority

36. 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 complainants at a later stage. 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. 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.

37. As per clause 16 (a) of the office space buyer's agreement dated 20.8.2010 for unit no. EPO-07-001, 7th floor, in project "Emerald Plaza" in Emerald Hills, Sector-65, Gurugram,



possession was to be handed over to the complainants within a period of 30 months from the date of execution of agreement + 120 days grace period which comes out to be 20.6.2013. However, the respondent has not delivered the unit in time. Complainants have already paid Rs.53,83,743/- to the respondent against a total sale consideration of Rs.51,43,728/-. As such, complainants are entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f 20.6.2013 as per the proviso to section 18(1) of the Real Estate (Regulation and Development) Act, 2016 till the offer of possession by the respondent i.e. 30.01.2018.

38. However, certain issues pertaining to the fire shaft and pillar in the office premises etc. have been raised by the counsel for the complainants in a secondary manner. Counsel for the complainants is directed to provide brief w.r.t the exact issues involved w.r.t. super area/carpet area within 3 days so that the investigation team already appointed in the matter of “Emerald Plaza” may also look into this manner in a precise manner. The report should be clubbed with all such cases for all intends and purposes.



Directions of the authority

39. 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 on the amount paid by the complainants.
- (ii) The respondent is directed to pay interest accrued from 20.06.2013 to 30.01.2018 on account of delay in giving possession to the complainants within 90 days from the date of order.

40. As the project is registerable and has not been registered by the promoter, the authority has decided to take suo-moto cognizance for not getting the project registered and for that separate proceeding will be initiated against the respondent under section 59 of the Act *ibid*. A copy of this order be endorsed to registration branch for further action in the matter.

41. The order is pronounced.



42. Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 23.01.2019

Judgement uploaded on 13.03.2019



HARERA
GURUGRAM

