

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

**Complaint no. : 1521 of
2018**
Date of first hearing: 08.02.2019
Date of decision : 19.03.2019

Sheja Ehtesham
R/o V.C. Lodge, Jamia Hamdard
Hamdard Nagar, Tughakabad,
New Delhi: 110062.

Complainant

versus

M/s Eminence Townships (India) Pvt. Ltd.
H-3/157, 2nd floor, Vikaspuri: 110018,
New Delhi.

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

**Member
Member**

APPEARANCE:

Shri Siddharth Aggarwal Advocate for the complainant
Ms. Aanchal Bharti Advocate for the respondent

ORDER

1. A complaint dated 26.10.2018 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 Sheja Ehtesham against the promoter M/s Eminence Townships (India) Pvt.



Ltd., on account of violation of clause 27 of buyers agreement dated 17.10.2013 in respect of apartment/unit described below in the project "Eminence Kimberly Suites" for not handing over possession by due date which is in violation of section 11(4)(a) of the Act *ibid*.

2. Since the buyers agreement has been executed on 17.10.2013 i.e. prior to the coming into force of the Real Estate (Regulation and Development) Act, 2016, so the penal proceedings cannot be initiated retrospectively for contravention of any legal provision. Hence, keeping in view the facts of the case and submissions made by both the parties, the authority has decided to treat this complaint as an application for non-compliance of obligations by the promoters under 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	Eminence Kimberly Suites, Sector 112, Gurugram
2.	Nature of project	Commercial colony
3.	DTCP License number	35 dated 22.04.2012
4.	RERA Registered/ unregistered	Registered



		74 of 2017
5.	Project area	2.875 acres
6.	RERA registration expired on	30.12.2018
7.	Unit no.	C-1206, 12 th floor
8.	Unit area	601 sq. ft.
9.	Date of buyer's agreement	17.10.2013
10.	Total consideration as per customer ledger dated 22.08.2018	Rs. 37,29,322/-
11.	Total amount paid by the complainant as per customer ledger dated 22.08.2018	Rs. 36,62,992/-
12.	Payment plan	Construction linked
13.	Date of start of the ground floor roof slab of the tower in which the booking is made	01.06.2014
14.	Date of delivery of possession As per clause 27: Within 36 months + 6 months grace period from the date of start of the ground floor roof slab of the tower in which the booking is made	01.12.2017
15.	Delay in handing over possession till date of decision	1 year 3 months 18 days
16.	Penalty as per clause 33	Rs 15/- per sq. ft. of the super area



4. The details provided above have been checked on the basis of the record available in the case file which has been provided by the complainant and the respondent. Buyers agreement is available on record for unit no. C-1206, 12th

floor, according to which the possession of the aforesaid unit was to be delivered by 01.12.2017. Therefore, the promoter has not fulfilled his committed liability as on date.

5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. However the respondent has neither appeared nor filed their reply despite service of notice on 29.10.2018, 22.11.2018 and 04.12.2018. A final notice dated 31.01.2019 by way of email was sent to both the parties to appear before the authority on 08.02.2019. Reply was filed by the respondent and was taken on record.

FACTS OF THE COMPLAINT:

5. The complainant submitted that he booked an apartment in the project of the respondent namely "Eminence Kimberly Suites" at Sector 112, Village Bajghera, Gurugram.
6. The complainant submitted that he was induced to book the above flat by showing brochures and advertisement materials depicting that the project will be developed as a state-of-art project and shall be one of its kind. It was stated that Eminence



Kimberly Suites are exclusive studio apartment being raised on picturesque landscape along-side a tailor-made commercial hub. The respondent/promoter induced the complainant by stating that the project shall have unmatched facilities from world class swimming pool to a power yoga centre. It was also represented that all necessary sanctions and approvals had been obtained to complete the same within the promised time frame.

7. The complainant submitted that he was induced by the assurances and promises made by the respondent/promoter and accordingly, he booked an apartment with the respondent in the project in question. The complainant was induced to sign a pre-printed buyer's agreement dated 17.10.2013. The respondent/promoter by way of aforesaid application form allotted apartment bearing no. C-1206 on 12th floor in tower no. C, admeasuring super area of 601 sq. ft. to the complainant.
8. The complainant has paid a total sum of Rs. 36,62,992/- towards the aforesaid apartment from October 2013 as and when demanded by the respondent. It is pertinent to mention that the respondent collected 99% of the sale consideration



amount as per the payment schedule annexed with the buyer's agreement, however still the respondent has failed to handover the possession of the booked unit, thereby violating the very fundamental term of the buyer's agreement.

9. The complainant submitted that the respondent/promoter had accepted the booking from the complainant and other innocent purchasers in year 2013, however the respondent deliberately and with mala-fide intentions delayed the execution of the buyer's agreement. Furthermore the respondent very slyly has stated in clause 32 of the buyer's agreement that the period of handing over of possession shall being from the date when the demand for laying of ground floor roof slab shall be raised by the respondent. However neither any such demand was ever raised nor any such demand is mentioned in the payment schedule annexed with the buyer's agreement and rather demand for construction of stilt floor was raised by the respondent on 02.01.2014.

10. The respondent had promised to complete the project within a period of 36 months from the date of laying ground floor slab with a further grace period of six months. The buyer's



agreement was executed on 17.10.2013 and till date the construction is not complete. Furthermore the respondent/promoter had collected more than 99% of the sale consideration within three years of the booking and as such the gross delay in completion of the project is solely attributable to the respondent/promoter. It is further submitted that the respondent has delayed execution of the buyer's agreement in order to safeguard itself from the compensation clause as enshrined under the buyer's agreement and hence the delay in execution of the agreement is solely attributable upon the respondent. Thus, the period of 36 months should begin from the date of first payment.

11. The complainant submitted that respondent has failed to complete the project in time, resulting in extreme mental distress, pain and agony to the complainants. The respondent has deliberately delayed the execution of the said agreement as it is only the builder buyers agreement which contains the possession delivery clause and also the compensation clause and hence to safeguard itself from the liabilities and future



litigation, the respondent delayed the execution of the buyers agreement.

12. The intention of the respondent was dishonest right from the beginning and that is why, it drafted unilateral terms and conditions of the buyer's agreement. The said terms and conditions are entirely unfair, unjust, unconscionable, oppressive and one sided. Moreover, a perusal of the terms and conditions makes it abundantly clear that they are, in fact, a reflection of the wide disparity between the bargaining power and status of the parties involved.

13. The complainant has made visits at the site and observed that there are serious quality issues with respect to the construction carried out by respondent till now. 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 apartments at extremely high prices. The respondent has compromised with levels of quality and are guilty of mis-selling. There are various deviations from the initial representations. The construction is totally unplanned, with



sub-standard low grade defective and despicable construction quality.

14. The complainant submitted that the respondent/ promoter in the year 2017 invited objections from all the allottees in order to comply with the directions of DTCP in regard to change in sanctioned plan. It is respectfully submitted that the complainant submitted his objections to the DTCP giving his 'no-objection' with regard to the change in the sanctioned plan. However till date, the complainant has neither heard a single word from the respondent nor the respondent has informed the complainant about the change in plan and its consequences on the complainant. The respondent has breached the fundamental term of the contract by inordinately delaying delivery of the possession.

15. The respondent has not provided the complainant with status of the project. The complainant is entitled for interest @ 18% p.a. for every month of delay till the possession of the apartment is handed over to the complainant, complete in all respects. The original date of possession ought to be counted on expiry of three years from date of first payment.



ISSUE TO BE DECIDED:

6. Following issues have been raised by the complainant:

- i. Whether or not the respondent has violated the terms and conditions of the buyers agreement by delaying construction of the project and thereby delaying possession of unit in question?
- ii. Whether the respondent is liable to pay the delay interest at prescribed rate till the time possession is handed over to the complaint?

RELIEFS SOUGHT:

7. Following reliefs have been sought by the complainant:

- i. Direct the respondent to award delay interest at prescribed interest for every month of delay, till the handing over of possession of the apartment complete in all respect, to the complainant.
- ii. Direct the respondent to provide the schedule of construction and also to inform the complainant about the consequences of change in sanction plan.



- iii. Pass such order or further order as this hon'ble authority may deem fit and proper in the facts and circumstances of the present case.

REPLY BY RESPONDENT:

8. The respondent submitted that the averments made in the complaint under the present reply may be considered to have been replied to and all the allegations contained therein may be considered to have been specifically denied and controverted unless specifically admitted hereinafter.
9. The respondent submitted that the complaint filed before the present authority is false, vexatious and based on distorted facts and thus needs to be dismissed at the threshold.
10. The respondent submitted that the complainant has not come with clean hands and has suppressed material facts before the authority. The complainant has allegedly submitted that he had paid the due instalments in time but it is stated that the entire project of the respondent is dependent upon the timely payments by all the investors. It is pertinent to state here that the respondent company has diligently invested all the money



collected from the investors in the project itself and has never diverted any funds on any account and the construction has got jeopardized, if any, is purely on account of non timely payments by all the investors.

10. The respondent submitted that the request of the complainant is untenable as the entire money from all the investors have already been spent towards construction activity of the said project. The respondent submitted that the construction has been completed and project is already due for handover of the possession to the complainant and is awaiting final approvals.
11. The respondent submitted that any delay, if so has been caused in delivering the possession of the property as stated by the complainant was purely due to the strict orders of National Green Tribunal on banning construction activity on various occasions and thus on every occasion the green body ordered the civil bodies to set up teams to ensure there is no burning of waste in Delhi-NCR and asked them to inspect places where construction material were lying in the open uncovered and take appropriate action including levy of environment compensation.



12. The respondent further submitted that there have been several unforeseeable events in the intervening periods which has materially and adversely affected the project and were beyond the control of the respondent.

13. The respondent submitted in the month of 19.03.2018 the respondent applied for renewal of license for the said project and it was only after a period of 6 months i.e. on 03.08.2018, the DTCP reverted back to the respondent company with erroneous demand and further after efforts of the respondent company, the demand was rectified and was notified back to the respondent on 01.02.2019, only and the said demand has been paid along with future due demands by the respondent company, acting under its bonafide. The respondent stated that the occupancy certificate which is to be obtained before offer of possession couldn't not be obtained due to delays on part of the government.



14. The respondent submitted that the period of the said unit as per the builder buyers agreement is to be counted from the date of laying of ground floor slab i.e. 01.06.2014. In terms of the builder buyer agreement, the respondent stated that the due

date for possession was 31.10.2017, subject to force majeure.

In the light of the above stated force majeure, the possession of the said unit is to be offered on or before May 2019.

15. The respondent submitted that the complaint filed by the complainant is not maintainable as the same is devoid of true facts and thus is liable to be dismissed at the very threshold, as the due date for possession is 31.05.2019 and the complaint is pre mature. The respondent submitted that despite delayed payments from the complainant the respondent has never charged any interest on delayed payments as per the buyers agreement.

DETERMINATION OF ISSUE:

16. After considering the facts submitted by the complainant and perusal of record on file, the authority decides the issue raised as under:

With respect to the **first and second issues** raised by the complainant the authority came across that as per clause 27 of the buyer's agreement, the possession of the said apartment was to be handed over within 36 months plus grace period of



6 months from the date of start of the ground floor roof slab of the tower in which the booking is made. The date of start of the ground floor roof slab of the tower in which the booking is made was started on 01.06.2014. Therefore, the due date of possession shall be computed from the said date i.e. 01.06.2014. The clause regarding the possession of the said unit is reproduced below:

“Clause 27: Schedule for possession of the said unit

The company based on its present plans and estimates and subject to all exceptions shall endeavour to complete the construction of the said project within 36 months plus 6 months grace period from the date of start of the ground floor roof slab of the particular tower in which the booking is made...”

Accordingly, the due date of possession was 01.12.2017 and the possession has been delayed by one year three months and eighteen days till the date of decision thereby violating terms of the said agreement. The delay compensation payable by the respondent @ Rs.15 /- per sq. ft. per month of the super area of the unit for the period of delay beyond 36 + 6 months as per clause 33 of 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 others.*
(*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 promoter has failed to fulfil its obligation under section 11(4)(a) of the Act *ibid.* The complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f. 01.12.2017 till 19.03.2019 as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016.

FINDINGS OF THE AUTHORITY:

17. 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. As per **notification no. 1/92/2017-1TCP dated**



14.12.2017 issued by Town and Country Planning Department, 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 i.e. in sector 68, Gurugram, therefore this authority has complete territorial jurisdiction to deal with the present complaint.

18. The project is registered and the date of registration has expired on 30.12.2018 and the counsel of the respondent has stated at bar that they are applying for occupation certificate and they will offer the possession in 2-3 months i.e. by May,2019.

19. The complainant booked a unit no.C-1206,12th floor in Éminence Kimberly Suites, Sector 112, Gurugram and as per clause 27 of the buyer agreement dated 17.10.2013, the possession was to be handed over within 36 months plus 6 months grace period which comes out to be 01.12.2017.The complainant has paid Rs.36,62,992/- against total sale consideration of Rs.37,29,322/-. There is delay of 1 year 3 months and 18 days up to handing over the possession.



DECISION AND DIRECTIONS OF THE AUTHORITY:

20. Keeping in view the facts, documents as adduced by the parties and after hearing the arguments of both the parties, the authority exercising its power under section 37 of the Real Estate (Regulation and Development) Act, 2016 issues the following directions to the respondent in the interest of justice:-

- i. As per the RERA registration, the respondent was duty bound to hand over the possession of the said unit by 30.12.2018 as committed by the respondent and as per the buyers agreement the due date was 01.12.2017 and the respondent has failed to give possession of the unit in due time.
- ii. The respondent is directed to give interest to the complainant at the prescribed rate of 10.75% on the amount deposited by the complainant for every month of delay w.e.f. due date of possession i.e. 01.12.2017 as per section 18 of the Act ibid till offer of possession.
- iii. The arrears of interest accrued so far shall be paid to the complainant within 90 days of this order and thereafter



on 10th of every month of delay till the handing over of possession.

21. The order is pronounced.

22. The case file be consigned to registry.

(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram

(Subhash Chander Kush)

Member

Date: 19.03.2019

Judgment Uploaded on 10.04.2019



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