

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

Complaint No. : 1218 of 2018
First date of hearing: 26.03.2019
Date of Decision : 26.03.2019

1. Mr. Altaf Ahmed Lal
2. Ms. Renu Bansal Lal
R/o 24, Jeelana Abad, Peerbagh,
Srinagar

Complainants

Versus

M/s Eminence Townships(india) Pvt. Ltd.
(through its managing director and other
director)
H-3, 157, Second floor, Vikaspuri,
New Delhi -110018

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Medhya Ahluwalia
Sri Sumit Mehta

Advocate for the complainant
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 Mr. Altaf Ahmed Lal and Ms. Renu Bansal Lal against the promoter M/s Eminence Townships(india) Pvt. Ltd. (through its managing director and other directors), on account of violation of



clause 27 of the buyer agreement executed on 24.09.2013 for unit no. C-1505 as described below in the project “Eminence Kimberly Suites”, sector 112, Gurugram for non-fulfilment of obligation of promoter under section 11(4)(a) of the Act *ibid*.

2. Since the buyer’s agreement dated 24.09.2013 was executed prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, so the penal proceedings cannot be initiated retrospectively. Therefore, the authority has decided to treat this complaint as an application for non-compliance of contractual obligation on the part of the respondent in terms of the provision 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	Eminence Kimberly Suites, sector 112, Gurugram
2.	Apartment/unit no.	C-1505, 15 th floor,
3.	DTCP license no.	35 of 2012 dated 22.04.2012
4.	Project area	2.875 acres
5.	Unit measuring	601 sq.ft.
6.	RERA registered/ not registered.	Registered (74 of 2017)
7.	Revised date of completion as per registration certificate	30.12.2018
8.	Date of execution of buyer’s agreement	24.09.2013
9.	Payment plan	Construction linked payment plan
10.	Total consideration	Rs. 47,39,587/- (as per agreement ,pg 56 of the complaint)



11.	Total amount paid by the complainant till date	Rs. 44,12,023/- (as alleged by complainant)
12.	Date of delivery of possession as per clause 27 - 36 months + 6 months grace period from the start of ground floor slab Date of start of ground floor slab i.e. 01.06.2014 (as per stated in the reply by the respondent)	01.12.2017
13.	Delay in handing over possession till 26.03.2019	1 year 3 months approx.
14.	Penalty clause as per buyer's agreement	Clause 33 -Rs. 15/- per sq. ft. of super area of the said unit per month

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. A buyer agreement dated 24.09.2013 is available on record for the aforesaid unit according to which the possession of the same was to be delivered by 01.12.2017. the promoter has failed to deliver the possession of the said unit to the complainants. 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 appearance. The case came up for hearing on 26.03.2019. The reply has been filed by the respondent and the same has been perused.



Facts of the complaint

6. The complainant submitted that they booked an apartment in the project of the respondent namely “Eminence Kimberly Suites” at Sector 112, Village Bajghera, Gurgaon Tehsil, Gurgaon, Haryana (“the project”).
7. The complainant submitted that they were induced to book the above flat by showing brochures and advertisements material 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 complainants 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.
8. The complainant submitted that they were induced by the assurances and promises made by the respondent/ promoter and accordingly the complainants booked an apartment with the respondent in the project in question. The complainants



were induced to sign a pre-printed buyer's agreement dated 24.09.2013. The respondent/ promoter by way of aforesaid application form allotted apartment bearing no. C-1505 on 15th floor in tower-C, admeasuring super area of 601 sq. ft. to the complainants.

9. The complainant submitted that they have paid a total sum of Rs. 44,12,023/- towards the aforesaid apartment from October 2012 as and when demanded by the respondent. It is pertinent to mention that the respondent collected 95% 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.

10. The complainants submitted that the respondent/ promoter had accepted the booking from them and other innocent purchasers in year 2012, however the respondent deliberately and with mala-fide intentions delayed the execution of the buyer's agreement. Furthermore the respondent has stated in clause 32 of the buyer's agreement



that the period of handing over of possession shall begin from the date when the demand for laying of ground floor roof slab shall be raised by the respondent, however no such demand was ever raised or mentioned in the payment plan by the builder and rather demand for construction of stilt floor was raised by the respondent on 02.01.2014.

11. The complainants submitted that 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 flat buyer's agreement was executed on 24.09.2013 and till date, the construction is not complete. Furthermore, the respondent/promoter had collected more than 95% 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 most humbly submitted that the respondent has delayed the 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 and thus the period of 36 months should begin from the date of first payment.

12. The complainants submitted that the 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 BBA as it is only the builder buyer 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 BBA.

13. The complainants submitted that 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. It is clearly evident that the respondent has



imposed completely biased terms and conditions upon the complainant, thereby tilting the balance of power in its favour.

14. The complainants submitted that the bare reading of the clauses in the buyer's agreement, for example clause 9,17,21,24,25,26,31,32 etc. show the unfairness and arbitrariness of the terms imposed upon the buyers. The respondent exercised arbitrary power and highhanded approach and unfair attitude is apparent on face of record, thereby imposing all liabilities on buyers and conveniently relieving itself from the obligations on its part.

15. The complainants submitted that they have 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 complainants 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 respondent marketed luxury high end apartments, but, they have 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.

16. The complainants submitted that the respondent/ promoter in the year 2017 invited objections from the 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 complainants submitted their objections to the DTCP giving their no-objection with regard to the change in the sanctioned plan, however till date the complainants have neither heard a single word from the respondent nor the respondent has informed the complainants about the change in plan and its consequences on the complainants.



17. The complainants submitted that the respondent has sold the project stating that it will be next landmark in luxury housing and will redefine the meaning of luxury, but the respondent

has converted the project into a concrete jungle. There are no visible signs of alleged luxuries.

18. The complainants submitted that the respondent has breached the fundamental term of the contract by inordinately delaying in delivery of the possession. The respondent has committed various acts of omission and commission by making incorrect and false statement in the advertisement material as well as by committing other serious acts as mentioned in preceding paragraph. The project has been inordinately delayed.

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



Issues raised :

- i. Whether the respondent has deliberately delayed the execution of the buyer's agreement?

- ii. Whether the respondent/ promoter has unjustifiably delayed the construction and development of the project in question?
- iii. Whether the respondent/ promoter is liable to pay the delay interest @18% p.a., till the time possession is handed over to the complainant?

Relief sought:

The complainants are seeking the following relief:

- i. Direct the respondent to award delay interest @ 18% p.a. 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 complainants 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.



Respondent's reply

20. 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.

21. The respondent submitted that the complainants have not come with clean hands and has suppressed material facts before the authority and the present complaint should be dismissed on the ground of '*Supressio Veri*'. It is stated that the complainants them self have defaulted on timely payments of installment and have suppressed the said fact from the hon'ble authority.

22. The respondent submitted that the complainants have allegedly submitted in the present complaint that they had paid the due installments in time but it is stated that the entire project of the respondent company 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.

23. 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. It is stated that the project is on the verge of completion and even the works related to external plaster, internal roads, internal sewerage system, internal flooring, firefighting system, unit outer façade, overhead tanks, underground water tanks, plumbing connections, internal and external electricity wires, installation of lifts, installation of electrical components and even gen-set installation for power supply and back-up, has been completed and project is already due for handover of the possession, to the complainant and is awaiting final approvals.

24. The respondent submitted that furthermore, 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 (NGT) on banning the construction activity on various occasions and thus on every occasion the green body ordered the civic 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. That as per the matter titled as “*Vardhaman Kaushik vs Union of India & Ors; Sanjay Kulshrestha vs Union of India & Ors; Supreme Court Women Lawyers’ Association vs Union of India & Ors; Diya Kapur & Ors vs Union of India & Ors, and Mahendra Pandey vs Govt of NCT of Delhi & Ors*”, the respondent was forced to take the adequate steps and thus, the following period, is covered under the provision of the force majeure i.e. clause 53 of the builder buyer agreement.

25. The respondent submitted that there have also been several unforeseeable events in the intervening periods which has materially and adversely affected the project and were beyond the control of the respondent, are being set out herein under: -

- a. It is stated that on account of every halt due to the ban on construction activities, following the order of National Green Tribunal and Pollution Control Board, the entire machinery of the respondent used to suffer adversely, and it took long periods, for the respondent to remobilize the entire construction activity and increased cost of construction.



b. It is submitted that the demonetization of currency notes of Rs. 500 & Rs. 100 announced vide executive order dated 08th November 2016, has also affected the pace and the development of the project. Due to this policy change by the central government, the pace of construction of the project greatly and adversely affected the construction work since the withdrawal of the money was restricted by Reserve Bank of India as the availability of new currency was limited and unavailable with the banks. It is well known that the real estate sectors deploy maximum number of construction workers who are paid in cash and hence the said sector requires cash in hand to offer such employment of the work force to carry out the works. All the workers, labourers at the construction sites are paid their wages in cash keeping in view their nature of employment as the daily wages labourers. The effect of such demonetization was that the labourers were not paid and consequently they had stopped working on the project and had left the project site / NCR which led in huge labour crisis which was widely reported in various



newspapers/ various media. Capping on withdrawal and non-availability of adequate funds with the banks and further escalated this problem many folds.

- c. That further 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 06 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 said demand was rectified and was notified back to the respondent on 01-02-2019, only and the said demand has already been paid along with future due demands by the respondent company, acting under its Bonafide. It is stated that the occupancy certificate, which is to be obtained before offer of possession could not be obtained due to the delays on the party of government.

- d. That even otherwise the period of possession of the said unit, as per the builder buyer's agreement is to be counted from the date of laying of the ground floor slab i.e. 01st June 2014. That in the terms of the builder buyer agreement, it is stated that the due date for possession



was 31-10-2017, subject to force majeure. And in the light of the above stated force majeure, the possession of the said unit is to be offered on or before May 2019. And the respondent is confident that it shall deliver the possession of the said unit before time, in terms of builder buyer agreement.

26. The respondent submitted that the complaint, filed by the complainants 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.
27. The respondent submitted that it is pertinent to mention here, that despite delayed payments from the complainant, the above-named respondent has never charged any interest on delayed payments as per the buyer's agreement.



Determination of issues

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

29. With respect to the **first issue** raised by the complainant as they has failed to prove that the respondent has deliberately delayed the execution of buyer's agreement .

30. With respect to **second and third issue** as per clause 27 of the agreement, the possession was to be delivered within 36 month plus 6 month grace period from the date of ground floor slab and the date of start of ground floor slab i.e. 01.06.2014. Thus, the due date of possession comes out to be 01.12.2017. However, the respondent failed in handing over the possession on or before the said due date, thereby breaching the terms and conditions stipulated in the agreement dated 24.09.2013. Further, the authority is of the view that the promoter has failed to fulfil his obligation under section 11(4)(a) of the Real Estate (Regulation and Development) Act, 2016. The authority is of the view that the delay compensation payable by the respondent @ Rs.15/- per sq. ft. per month of the super area is very nominal and terms of the agreement is drafted mischievously by the respondent is completely one sided as **Neelkamal Realtors Suburban Pvt Ltd Vs. UOI and ors. (W.P 2737 of 2017)**, wherein the Bombay HC bench held that:

"...Agreements entered into with individual purchasers were invariably one sided, standard-format agreements prepared by the builders/developers and which were overwhelmingly in their favour with unjust



clauses on delayed delivery, time for conveyance to the society, obligations to obtain occupation/completion certificate etc. Individual purchasers had no scope or power to negotiate and had to accept these one-sided agreements.”

However, on account of failure in handing over possession on the due date, the respondent is liable to pay delayed possession charges at the prescribed rate of interest i.e. 10.75% per annum.

Findings of the authority

31. Jurisdiction of the authority- The authority has complete subject matter 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 complainants at a later stage. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town & Country Planning Department, 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.

32. The complainant made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as per section 11(4)(a) of the Act *ibid*.

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 obligations.

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

35. Keeping in view the facts and circumstances of the complaint and submissions made by the parties during arguments, the authority has observed that the project is registered but registration has expired and the counsel for respondent stated that they have applied for extension of registration and the revised date of delivery of possession is 15.08.2019. It has stated at bar by counsel for the respondent that they shall be getting occupation certificate for which they have already



applied. Project is almost complete. However ,outer paints are yet to be completed.

36. As per clause 27 of the builder buyer agreement dated 24.09.2013 for unit no. C-1505, in project “Eminence Kimberly Suites”, sector 112, Gurugram, possession was to be handed over to complainant within a period of 36 month from the date of start of ground floor slab i.e. 01.06.2014 plus 6 months grace period which comes out to be 01.12.2017. however, the respondent has not delivered the unit in time.

Decision and directions of the authority

35. Thus, the authority, exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issue the following directions to the respondent:

- (i) The respondent is directed to give interest @ 10.75% for every month of delay from the due date of possession i.e. 01.12.2017 as per provision of proviso to section 18 (1) of the Real Estate (Regulation and Development) Act,2016 till offer of possession.
- (ii) 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 offer of



possession shall be paid before 10th of subsequent month.

36. The order is pronounced.

37. Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Dated : 26.03.2019

Judgement uploaded on 12.04.2019



HARERA
GURUGRAM

