HARERA
GURUGRAM

BEFORE RAJENDER KUMAR, ADJUDICATING OFFICER,
HARYANA REAL ESTATE REGULATORY AUTHORITY
GURUGRAM

Complaint no. : 62 of 2021
Date of decision : 28.04.2022

VAIBHAV KANSAL
AND NEHA KANSAL
R/O : Flat No. 304,
Guru Gram Society,
Sector-56, Gurugram
Haryana

Complainants

Versus

EMAAR MGF LAND LIMITED
ADDRESS: 306-308, 3rd Floor,
Square One, C-2, District Centre,
Saket, New Delhi-110017

Respondent

APPEARANCE:

For Complainants: Mr Abhinav Mishra Advocate
For Respondent: Mr. J. K. Dang Advocate

ORDER

1. This is a complaint filed by Vaibhav Kansal and Neha Kansal (also called as buyers) under section 31 of The Real Estate (Regulation and Development) Act, 2016 (in short, the Act of

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2016) read with rule 29 of The Haryana Real Estate (Regulation and Development) Rules,2017 (in short, the Rules) against respondent/developer.

2. As per complainants, Mr. Sanjay Chaudhary and Deepti Chaudhary booked a flat in respondent's project **Emerald Floors Premier**, situated at sector-65, Gurugram. The respondent allotted a unit EFP-31-0201, admeasuring 1650 sq. ft. total sale consideration of Rs 71,29,517.50/-. The respondent and aforesaid original allottees entered into builder buyer's agreement (BBA) on 01.02.2010. Subsequently, complainants purchased the said unit from original allottees. Same was endorsed in favour of complainants vide nomination letter dated 08.04.2015.

3. As per Clause 11 (a) of BBA, possession of said flat was to be delivered by the developer to the allottee within 36 months from the date of execution of buyer's agreement with further grace period of 3 months for applying and obtaining completion certificate/occupation certificate. Accordingly, the possession of unit ought to have been delivered by February 2013.

4. The respondent after delay of more than 6 years, sent an intimation of possession to complainants on 29.01.2020 and requested complainants to remit the balance payment and complete documentation on or before 28.02.2020 failing

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which complainant was liable to pay delayed payment charges @ 10 % p.a. on the delayed payments.

5. As per clause 5 of BBA, the cost of stamp duty, registration and other incidental charges and expenses are to be borne by the allottee, in addition to total consideration of unit as and when demanded by the company. In pursuance to said clause, amount of stamp duty was mentioned in the intimation of possession and final statement of account. An amount of Rs 3,96,600 was mentioned as stamp duty. It was included in the total demand raised by respondent in final statement of accounts. It was represented by respondent that the same is applicable to the unit as on that date. The payment of stamp duty was mentioned as pre-condition for delivery of possession.

6. Accordingly, complainants made payment of stamp duty on 19.02.2020 and a stamp duty certificate bearing No. G0S2020B276 was issued by Government of Haryana. After payment of all the demands raised by respondent through intimation of possession, they (complainants) requested respondent to execute the conveyance deed. The possession of unit was taken by complainants on 02.03.2020.

7. As per section 11(4)(f) and section 17(1) of Act of 2016, the respondent is under an obligation to execute a conveyance

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deed in favour of complainants within 3 months of the receipt of occupancy certificate. Despite regular follow up, respondent failed to execute conveyance deed for the unit within stipulated time.

8. In February 2020, the complainants were informed that they had paid incorrect stamp duty and a sum of Rs 1,28,200 has been paid in excess by complainants on the instructions of respondent as mentioned in intimation of possession.
9. The respondent in breach of its obligation under RERA and BBA made flat buyers to pay excess stamp duty. Complainants vide email dated 24.02.2020 sought clarification in this regard from the respondent. The respondent vide email dated 26.02.2020, 15.04.2020 and 16.04.2020 informed complainants that issue of payment of excess of stamp duty is being taken up internally and requested complainants to wait for some time.
10. As respondent failed to resolve the issue, complainants along with other flat buyer's served a legal notice upon respondent on 24.11.2020
11. It is submitted that respondent has committed a breach of its obligations under section 11(4)(f) section 17(1) and section 18(3) of Act of 2016, on account of which complainants are entitled to get compensation calculated in terms of section 72 of Act of 2016.

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12. The complainants have specifically sought early resolution of excess payment of stamp duty in view of statutory limitation period under section 54 of Stamp Act. They (complainants) have suffered loss to the tune of Rs1,28,200 being the excess stamp duty paid upon instructions of respondent. Same could not be refunded due to lackadaisical approach of respondent.

13. Contending that the respondent has breached provisions of Act of 2016, complainants sought direction for registration of conveyance deed, payment of Rs1,28,200 along with interest @ 10 % p.a. from 19.02.2020 till date of payment, imposition of penalty in terms of section 61 of Act of 2016 on account of violation of section 11(4)(f), 17 and 18(3) of Act of 2016, litigation cost of complaint.

14. The respondent contested the complaint by filing a reply. The respondent raised preliminary objection about maintainability of this complaint. It is averred that provisions of Act of 2016 are not applicable to the tower in question. The application for issuance of occupation certificate in respect of tower/unit in question was made on 30.06.2017 i.e. before notification of Rules of 2017. The occupation certificate was thereafter issued on 08.01.2018. However as the fire NOC was awaited for few blocks (including the unit in question), respondent vide letter dated 12.02.2018, informed DG-TCP

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Haryana that it has not acted upon OC and has not offered units of those towers for possession. The project in question is not an on-going project and the same has not been registered under provisions of Act of 2016. The forum lacks jurisdiction to entertain and decide the complaint and same is liable to be dismissed.

15. Further, complainants are seeking direction to execute conveyance deed and the same cannot be granted by Adjudication Officer. Furthermore, the present complaint involves several issues which cannot be decided in summary proceedings. The issues require extensive evidence to be led by both the parties which can only be adjudicated by civil court.

16. It is averred that as per complainants the due date of offer of possession was in the year 2013, without admitting any allegation made by complainants, it is submitted that cause of action before coming into force of Act of 2016 . the complaint is barred by limitation and is liable to be dismissed.

17. It is averred that occupation certificate for the tower in question was received on 05.03.2019 and possession was handed over to complainants on 02.03.2020.

18. Further, complainants were aware at the time of booking that building plans of the project, which were the pre-

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requirement for start of construction of the project, were yet to be sanctioned by competent authority at that time. The respondent was not aware as to when the construction would commence and consequently complainants knew at the very beginning that time was not the essence of the contract in so far as delivery of possession was concerned.

19. Moreover, complainants had entered into a settlement deed with respondents whereby the time of delivery of possession was extended and also the respondent had credited an amount of Rs 14,07,424 in the account of complainants as compensation and as a gesture of goodwill. The respondent has also credited a sum of Rs 79,790/- as benefit on account of anti-profiting. Further, an amount of Rs 4,37,625 is due and payable by the complainants.

20. That, the stamp and registration charges mentioned in annexure to offer of possession letter were as per prevailing rates and as communicated to respondent. However, later respondent came to know that stamp duty had been calculated incorrectly inadvertently. Subsequently, when error came into light, respondent immediately communicated the same to complainants and had requested the complainants to either get the conveyance deed registered on the already purchased stamp duty or in alternative get refund of excess stamp duty from concerned

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authority and offered to facilitate the same. The respondent had informed complainants that they could approach the Hon'ble Hight Court by way of writ petition to obtain refund of excess stamp duty as well as interest on same. The complainants never came forward to do the needful. The respondent had also made representation before various authorities with respect to issue of stamp duty on 25.08.2020 (annexure R14) but to of no avail. The complainants neither followed the due process of law to get refund of stamp duty from concerned authorities nor came forward for registration of conveyance deed. The excess amount towards the stamp duty is with government exchequer and not with respondent and it (respondent) could not refund the same.

21. Due to Covid 19 pandemic conveyance deed were not being registered at concerned offices of Tehsil during period from 20.03.2020 to 11.05.2020 and from 23.04.2021 to 30.05.2021. When registration resumed, respondent contacted complainants and requested them for registration of conveyance deed, but complainants refused to do so.

22. As per the terms and conditions of buyer's agreement, in case of delay by allottee in making payment or delay on account of reasons beyond the control of respondent, the time for delivery of possession stands extended automatically. The complainants have made various defaults in payment of

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instalments and accordingly the time for delivery of possession stands extended.

23. The project got delayed on account of various reasons which were beyond the control of respondent. Building plans were approved under the then applicable National Building Code (NBC) in terms of which buildings approved with single staircase. Subsequently, the NBC was revised in the year 2016 and Fire Department insisted upon construction of two staircase as per new rules. The respondent to avoid any further delay and for safety of occupants of buildings of project completed the construction of second staircase. Also, the contractor who was engaged for construction of the project delayed the construction work and was not able to meet time-line. The respondent had even filed a petition bearing No OMP. No. 100 of 2015 under section 9 of Arbitration and Conciliation Act 1996 before Hon'ble High Court. A settlement was also reached between respondent and contractor but as contractor was not able to meet the time-line, respondent had ended the contract vide termination notice dated 30.08.2018. The respondent had filed petition before Hon'ble High Court seeking interim protection against contractor, so that contractor does not disturb work at site. The Sole Arbitrator vide order dated 27.04.2019 gave liberty to respondent to appoint another

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contractor w.e.f 15.05.2019. The occupation certificate was received on 05.03.2019 and accordingly, possession was offered to complainants on 29.01.2020.

24. Complainants took possession of the unit on 02.03.2020 after certifying that the complainants did not have any claim of any nature qua respondent. They (complainants) have also executed indemnity-cum-undertaking.

25. That there is no lapse on the part of respondent and complainants themselves delayed registration of conveyance deed. Stamp duty in accordance with applicable rates prevailing upon the date of registration of conveyance deed is payable by complainants.

26. Contending all this, respondent prayed for dismissal of complaint.

27. It is contended by learned counsel for complainants that although there was delay in handing over possession of unit in question, but parties reached a settlement after the complainants filed a complaint before HRERA on 11.12.2019.

28. In terms of said settlement respondent credited an amount of Rs 14,07,424 in the account of complainants. Now, grievance of his client (complainants) is that in February 2020, complainants were informed that they had paid incorrect stamp duty and a sum of Rs. 1,28,200/- had been paid in excess. The complainants were asked to pay this amount by

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the respondent. Learned counsel explained further that after delay of more than six years, the respondents sent an intimation of possession on 29.01.2020. His clients (complainants) were called upon to make payments and to complete documentation on or before 28.02.2020. The stamp duty for registration was to be borne by his clients whenever demanded by the builder. In pursuance to said clause amount of stamp duty was mentioned in the intimation and final statement of account as Rs. 3,96,600/- In this way, due to negligence/fault of respondent his client had to pay an extra sum of Rs. 1,28,200/- same are entitled to be refunded. Apart from said amount according to learned counsel, his clients are entitled for compensation for breach of duty on the part of respondent and again for the cost of litigation.

29 . It is not denied on behalf of respondent that a sum of Rs. 1,28,200/- was paid in excess. But according to it was not deliberate but due to inadvertence same came to know that stamp duty had been calculated incorrectly. The respondent came to know later that stamp duty had been calculated incorrectly. But when said error came into light the respondent immediately communicated the same to the complainants the latter were requested either to get conveyance deed registered on already purchased stamp

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duty or in alternative to get refund of excess amount of stamp duty from the concerned authority.

30. As described above they respondent raised a preliminary issue about maintainability of complaint in hand. According to it, the provisions of Act 2016, are not applicable to tower in question. The application for issuance of occupation certificate in respect of tower in question was made on 30.06.2017, i.e before notification of Rules 2017, came into force.

31. I do not find any force in this plea. It makes no difference that application for issuance of occupancy certificate had been made before the notification about rules of 2017 was issued. Same are still applicable.

32. Similarly, it stands to no reason to claim that complaint in hands is barred by limitation as due date of offer of possession was in year 2013, as stated earlier. According to complainants, in February 2020, they were informed by respondent that they had paid incorrect stamp duty and a sum of Rs. 1,28,200/- had been paid in excess. Taking said date as a date of intimation claim of complainants does not appear barred by limitation. Needless to say, that complaint in hands is dated 05.01.2021.

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33. Again, according to respondent, present complaint seeking directions to execute conveyance deed cannot be granted by the Adjudicating Officer.

34. From Section 71 of Act 2016, it is clear that an adjudicating officer is empowered to adjudge compensation under Section 12, 14,18, and 19 of the Act.

35. Present is a complaint filed in form CAO in view of Rule 29 of the Haryana Real Estate (Regulation and Development) Rules 2017, which provides for filing of complaint/application for inquiry to adjudge quantum of compensation by Adjudication Officer in respect of compensation under Section 12, 14, 18 and 19. According to Section 18(3), if the promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations made their under or in accordance with the terms and conditions of the agreement for sale, he shall be liable to pay such compensation to the allottees, in the manner as provided under this Act.

36. Section 17 of the Act imposes liability upon the promoter to execute conveyance deed in favour of the allottee ..... the proviso added to this section says that in the absence of any local law, conveyance deed in favour of the allottee or the association of allottees or the competent authority as the case may be, under this section shall be carried out by the

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promoter within three months from the date of issue of occupancy certificate in respect of tower in question was received on 05.03.2019. In this way, the builder/respondent was liable to execute conveyance deed within three months from this date i.e. 05.03.2019. Admittedly, respondent did not ask the complainant to get conveyance deed during this period of three months. The respondent could not point out any local law which provided execution of conveyance deed in other way than as mentioned in Section 17 of the Act.

37. In this way, in view of Section 18(3) read with Section 17 of the Act of 2016, the promoter failed to discharge its obligations to execute conveyance deed within prescribed time and hence liable to pay compensation to the allottees i.e. complainants, in the manner as provided under this Act. There is no denial that complainants had to pay a sum of Rs. 1,28,200/- in excess for execution of conveyance deed and that due to negligence of respondent.

38. The latter is thus liable to refund said amount to the complainants, same is directed to refund said amount of Rs. 1,28,200/- alongwith interest @ of Rs. 9.3% per annum from the date of payment of said amount of the complainants till realization of same.

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39. However, the complainants have prayed for awarding cost of litigation. No receipt of payment about fee to lawyer has been filed but it is fact that same were represented by a lawyer. The complainants are awarded a sum of Rs. 50,000/- as litigation fee to be paid by the respondent. Although, the complainants have prayed for the penalty in terms of Section 61 of the Act of 2016. When respondent has been directed to refund the amount, which complainants were made to pay in excess alongwith interest as well as litigation charges I say no reason to impose any other penalty upon the respondent. Request in this regard is declined.

40 Even if the complainants have executed indemnity bond, at the time of taking possession of unit in question, as claimed by respondent. Same being contrary to laws of land, not binding upon the complainants.

41. A decree sheet be prepared accordingly.

42 File be consigned to the Registry.

(Rajender Kumar)
Adjudicating Officer,
Haryana Real Estate Regulatory Authority
Gurugram