

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

Complaint no. : 2402 of 2018
Date of first hearing : 27.03.2019
Date of decision : 27.03.2019

1. Mr. Girish Hemrajani
2. Ms Deepa Hemrajani
Both R/o House no. 5627, Orchid Crescent,
DLF Phase-IV, Galleria, Gurugram,
Haryana 122002

Complainants

Versus

M/s Bestech India Pvt. Ltd.
Corporate office: Bestech House,
51, Sector-44, Gurugram 122002, Haryana
Regd. office: Bestech India,
5D,5th floor, Aria signature office,
JW Marriot hotel Delhi aerocity,
Hospitality district 110037

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri. Girish Hemrajani, Complainants in person
Ms. Deepa Hemrajani
Shri Varun Budhraj, Advocate for the complainant
Shri Ishaan Dang, Advocate for the respondent

BRIEF

1. A complaint dated 27.12.2018 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. Girish Hemrajani and Ms. Deepa Hemrajani, against the promoter M/s Bestech India Pvt. Ltd., on account of violation of clause 3(a) of the apartment buyer's agreement executed on 30.09.2013 for apartment no.1004, 10th floor, in the project "Park View Sanskruti" for not giving possession by the due date which is an obligation of the promoter under section 11 (4) (a) of the Act *ibid*.

2. Since the apartment buyer's agreement dated 30.09.2013 was executed prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, so, penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat this complaint as an application for non-compliance of statutory obligation on the part of the promoter/respondent in terms of 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	Park View Sanskruti, Sector 92, Gurugram
2.	Flat/apartment/unit no.	E-1004, 10 th floor, tower E
3.	Nature of real estate project	Group housing complex
3.	DTCP licence no.	13 of 2009 dated 21.05.2009 and 43 of 2011 dated 13.05.2011.

4.	Project area	12.7875 acres
5.	Unit area	2475 sq. ft.
6.	RERA registered/ Not registered.	Not registered
7.	Date of execution of apartment buyer's agreement	30.09.2013
8.	Payment plan	Instalment linked payment plan
9.	Total sale consideration	Rs. 1,56,23,200/-
10.	Total amount paid by the complainant as per applicant ledger dated 29.12.2018	Rs. 1,79,20,043/-
11.	Due date of delivery of possession as per clause 3(a) of the apartment buyer's agreement (36 months from the date of signing of this agreement or from the date of approval of building plans by town and country planning department which + 6 months grace period)	30.03.2017 (Due date as calculated on the basis of date of agreement)
12.	Offer of possession	26.06.2018
13.	Occupation certificate	19.06.2018
14.	Delay of number of years / months/ days till offer of possession	01 year 2 months 27 days
15.	Penalty clause 3(c)(iii) as per apartment buyer's agreement	Rs. 5/-per sq. ft.

4. As per the details provided above, which have been checked as per record of the case file an apartment buyer's agreement is available on record for apartment no. E-1004 on 10th floor in group housing colony namely 'Park View Sanskruti', according to which the possession of the aforesaid unit was to be delivered by 30.03.2017. The promoter has failed to deliver the possession of the said unit to the complainants by the due

date as per apartment buyer's agreement. 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. The case came up for hearing on 27.03.2019. Accordingly, the respondent appeared on 27.03.2019. the reply filed on behalf of the respondent has been perused by the authority.

Facts of the complaint

6. The complainants submitted that they had booked and purchased a unit apartment no. 1004 on 10th floor in tower-E, Sector 92, Gurugram, Haryana, through an allotment letter dated 10.05.2013, in pursuance to which the complainants had made all payments on time to the respondent.
7. The complainants submitted that the respondent promised which is duly mentioned in clause 3 of the apartment buyer's agreement that the apartment possession will be delivered to the buyers within 36+6 months from the date of execution of the agreement. But the respondent failed to deliver the possession and also failed to fulfil the agreement violated the law of contract along with the Act and their rules and regulations. Thus, the possession has been delayed.

8. The complainants submitted that they had made several calls and conversations along with several visits to the offices of the respondent but as the intention of respondent was not good and they had plans to cheat the buyer/investor thus they did not respond in good manner and always tried to fool the complainants by giving various excuses and false promises. The respondent had also deducted an amount of Rs. 41,000/- on 30.12.2013 towards interest charge by them on late payment. Whereas, the fault was from the respondent side as they did not send any demand notice or any reminder call to the complainants and upon a call from the complainants they themselves collected the payment very late. The complainants requested for proof of delivery of demand notice from respondent but the respondent has not been able to furnish the same till date. Thus, the interest charged is unlawful, illogical and unethical.

9. The complainants submitted that they had taken loan of Rs. 66,92,815/- in October 2013. Due to the delayed possession the complainants are paying monthly EMIs alongwith interest and also suffered a heavy rental income just because of delayed possession. The complainants submitted that the respondent had forcibly made them to sign the letter that they are agreeing for waiver of Rs. 72,072/- towards delay

payment interest as full and final settlement of any delays in handing over the possession. The interest of Rs. 72,072/- was incorrectly charged and the complainants were threatened by the respondent that their apartment will be cancelled and possession will not be given if the letter is not signed.

10. The complainants further submitted that GST should not have been charged on the final payment, if the builder has received completion certificate and that the VAT of Rs. 6,17,179/- was charged only from contractors and not from the customers as VAT on sale of flats amounts to be doubled taxed, as taxes are already paid for when buying material for construction.

11. Issues raised by the complainants

- i. Whether the respondent/promoter has delayed the possession of the said apartment?
- ii. Whether the respondent is liable to charge club maintenance charges despite the club being not operational?
- iii. Whether the respondent is liable to charge GST on the final payment made by the complainants?
- iv. Whether the respondent is liable to charge VAT from the complainants?

12. Relief sought

- I. To direct the respondent to give interest on the invested amount for delayed possession at the prescribed rate of interest.
- II. To direct the respondent to refund the amount of Rs. 41000/- the amount charged by the respondent from the complainants.

Respondent's reply

13. The respondent submitted that an application for issuance of occupation certificate in respect of the apartment in question was made on 30.06.2017, i.e. well before the notification of the Haryana Real Estate (Regulation and Development) Rules 2017 (hereinafter referred to as the 'rules'). Subsequently occupation certificate has also been issued by the competent authority on 19.6.2018. Thus, the project in question is not an 'ongoing project' under rule 2(1)(o) of the rules. This hon'ble authority does not have the jurisdiction to entertain and decide the present complaint.
14. The respondent submitted that the complainants have filed the present complaint seeking, inter alia, compensation, refund, interest for alleged delay in delivery of possession of the apartment booked by the complainants. It is respectfully submitted that complaints pertaining to refund, compensation and interest are to be decided by the

adjudicating officer under section 71 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as “the Act” for short) read with rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017, (hereinafter referred to as “the Rules”) and not by this hon’ble authority. The present complaint is liable to be dismissed on this ground alone.

15. The respondent submitted that complainants are speculators in real estate, who have purchased the apartment in question as an investment. Admittedly, the complainants never intended to reside in the apartment and have purchased the same only for the purposes of earning rental income. The complainants are investors and not “aggrieved persons” under the Act. The complainants vide email dated 07.12.2014 had inter alia asked the respondent whether the company was willing to buy back the unit at the current prevailing rate or whether the respondent can help in selling the apartment at a higher rate. From this, it is evident that the complainants had booked the apartment as a speculative investment hoping to sell the unit for a quick profit. However due to slump in the real estate market the complainants are trying to generate needless controversies by raising frivolous issues.

16. The respondent submitted that clause 11 of the terms and conditions of booking was specifically brought to the complainant’s notice which provided that timely payment of instalments/balance sale consideration/security deposits/charges,

shall be the essence of the contract. It was specifically emphasized by the officials of the respondent that interest @ 18% per annum, compounded annually shall be levied on delayed payments and that in the event of delay in payment of outstanding amount along with interest, the allotment was liable to be cancelled and earnest money was liable to be forfeited. As per clause 12 of the terms and conditions of booking that specifically provided that possession of the apartment was proposed to be offered by the respondent, within 42 months (including grace period of 6 months) from the date of approval of building plans or date of execution of the buyer's agreement, *whichever is later*, subject to timely payment of the sale price and other charges. While the complainants had been extremely irregular in payment of installments right from the very beginning. The respondent was compelled to issue demand notices, reminders etc, calling upon the complainants to make payment of outstanding amounts payable by the complainants under the payment plan opted by the complainants.

17. The respondent submitted that as per the terms and conditions of the apartment buyer's agreement dated 30.09.2013, the complainants were liable to make payment of Rs. 140260/- as interest towards delayed payments. However, on the request of the complainants, amount of Rs. 99260/- was waived of by the respondent as a gesture of goodwill.
18. The respondent submitted that the complainants have vide letter dated 30.08.2018 clearly mentioned that they have taken

possession of the apartment and have waived all their rights pertaining to realisation of amount from the respondent for any delayed implementation of the project. Similarly, as per letter dated 13.11.2018, the complainant confirmed that all financial claims with respect to the apartment stand settled and the complainant had signed the acceptance of possession letter whereby they have stated that they have no claim against the respondent with respect to the apartment.

19. The respondent submitted that nonawareness of the existence of gas pipeline running across the project. Even said combined Zoning Plan dated 3rd September 2011 the Town and Country Planning Department failed to earmark the gas pipeline running through the land forming part of the complex.
20. Based on said zoning plan the respondent prepared the building plans for the complex and subsequently applied for sanction of the building plans vide letters dated 22nd of November 2012 and 29th of January 2013. It is only when the respondent started excavations of the site for the purpose of carrying out the construction of the complex, somewhere in the month of April/May 2013, the officers of GAIL approached the site and raised objections and apprised the respondent with regard to existence of the gas pipeline running through the complex. The respondent made enquiries from GAIL as well as Town and Country Planning Department and explored options for possibility of shifting of the said gas pipeline.

21. It was conveyed by GAIL that the shifting of gas pipeline was not possible. It is pertinent to mention that at this stage the respondent once again approached the Town and Country Planning Department for revision of site plan of the complex. The Town and Country Planning Department advised the respondent that since location of only one tower was to be realigned, the respondent could safely commence construction of the complex in its entirety after shifting the location of tower H so as to build it beyond the prohibited distance from the gas pipeline. The respondent was further intimated by Town and country Planning Department Haryana, that after completing the construction of the complex the respondent could apply for occupation certificate and at that stage necessary modifications shall be incorporated in the competition drawings of the complex.

Determination of issues

22. With respect to **first issue** raised by the complainant, as per clause 3(a), the possession of the apartment was to be delivered within 36 months from the date of execution of the apartment buyer's agreement dated 30.09.2013 or from the date of approval of building plans by town and country planning department, whichever is later +6 months grace period. Grace period of 6 months is given to the respondent due to exigencies beyond the control of respondent. Clause 3(a) is reproduced below for ready reference:

“3 (a) Offer of possession:

...the developer proposed to offer the possession of the APARTMENT within a period of Thirty-Six (36) months from the date of signing of this Agreement or from the date of approval of Building Plans by Town and Country Planning Department, which ever is later. It is clearly understood and agreed by the APARTMENT ALLOTTEE(S) that the Developer shall be entitled for grace period (beyond a period of 36 months) of Six (6) months.”

23. Therefore, the due date of possession comes out to be 30.03.2017 therefore the possession has been delayed by one year, two months and twenty-seven days till the offer of possession. The delay compensation payable by the respondent @ Rs.5/- per sq. ft. per month of the super area of the unit for the period of delay beyond 36+6 months as per clause 3(c)(iii) of apartment 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.”

24. With respect to **second issue** as per clause 1(2)(m) of the apartment buyer's agreement which is reproduced below:

"On the club becoming functional, depending upon requirements of the members, the facilities available in the club and other related matters regarding running and maintenance of the club, the apartment allottee shall pay charges as prescribed".

The clause clearly mentions that the charges will be applicable only after the club is functional. As the club is not operational, yet, the respondent is not liable to charge club maintenance charges.

25. With respect to **third and fourth clause** raised by the complainants, the present authority has no jurisdiction to entertain the same the complainants are advised, to approach appropriate forum regarding the same.

Findings of the authority

26. 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.

27. It has been brought to the notice of the authority that as per the report of local commission dated 03.12.2018, the flat/unit

No. E-1004, 10th floor, in project “Park View Sanskruti”, Sector-92, Gurugram is complete in all respects. Occupation certificate has already been received by the respondent on 19.06.2018. However, in view of the delay in handing over the possession, delayed possession charges are to be given. However, the counsel for the respondent has placed certain papers with respect to the passing of the gas pipe line underneath the project site on account of which delay has been occurred. This fact came into the notice of respondent at the time of excavation of foundation of towers in the area in accordance with approved zonal plans and building plans. At the time of excavation, the representatives of GAIL restricted the promoter not to excavate the land without their permission. Accordingly, they were forced to get their plans as well as building plans re-approved from the Director Town and Country Planning Haryana. This process took about a year. Since this process of re-approval of zonal plans and building plans was beyond their control, this time period has been considered as zero period while calculating the date of completion of project. Accordingly, the prayer for refund of deposited amount is declined.

28. As per clause 3(a) of the apartment buyer agreement dated 30.09.2013 for unit no. E-1004, 10th floor, in project “Park

View Sanskruti”, Sector-92, Gurugram, possession was to be handed over to the complainant within a period of 36 months from the date of signing of apartment buyer’s agreement or from the date of approvals of building plans +6 months grace period which comes out to be 30.03.2017. However, the respondent has not delivered the unit in time. Complainant has already paid Rs. 1,56,23,200/- to the respondent against a total sale consideration of Rs. 1,79,20,043/-. As such complainant is entitled for delayed possession charge at prescribed rate of interest i.e. 10.75% per annum w.e.f. 30.03.2017 (excluding the period in which the respondent was prohibited to start the construction work till the approvals of GAIL) as per the provisions of section 18(1) of the Real Estate (Regulation and Development) Act, 2016 till offer of possession.

29. Counsel for the complainant requested not to consider grace period while calculating the date for handing over possession. Since this authority has allowed grace period in all cases in the past, therefore, request of the complainant’s counsel cannot be considered and his request is declined.

Decision and directions of the authority

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 issue the following directions to the respondent in the interest of justice and fair play:

- i. The respondent is directed to pay delayed possession charges at the prescribed rate i.e. 10.75% from the due date possession i.e. 30.03.2017 (excluding the period in which the respondent was prohibited to start the construction work till the approval of GAIL) till the offer of possession i.e. 26.06.2018. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order.

30. As the project is registrable and has not been registered by the promoter, the authority has decided to take suo motu cognizance for not getting the project registered and for that separate proceedings will be initiated against the respondent by the registration branch. A copy of this order be endorsed to registration branch for further action in the matter.

31. The order is pronounced.

32. Case file be consigned to the registry.

(Samir Kumar)

Member

(Subhash Chander Kush)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 27.03.2019

Judgement Uploaded on 29.05.2019



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