

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

Complaint No. : 245 of 2018
First date of Hearing : 16.05.2018
Date of Decision : 29.10.2018

Kish Exports Ltd.
R/o 6315/C-6/7, Vasant Kunj New ...**Complainant**
Delhi-110070

Versus

1. Spaze Towers Private Ltd.
R/o A-307, Ansal Chambers-1,3,
Bikaji Cama Place, New Delhi-110066
2. Hometrust Realty Private Ltd.
R/o G-208, Palam Vihar, Gurugram,
Haryana-122017 ...**Respondents**

CORAM:

Dr. K.K. Khandelwal
Shri Samir Kumar
Shri Subhash Chander Kush

Chairman
Member
Member

APPEARANCE:

Shri Sukhbir Yadav
Shri Ishaan Dang

Advocate for the complainant
Advocate for the respondents

ORDER

1. A complaint dated 10.05.2018 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 Kish



Exports Ltd., against the promoters Spaze Towers Private Ltd. and Hometryst Realty Private Ltd.,

2. The particulars of the complaint are as under: -

1.	Name and location of the project	"Tristaar" Sector-92, Gurugram
2.	Registered/ unregistered	Registered
3.	HRERA registration certificate valid upto	30.06.2020
4.	Unit no.	072
5.	Total cost	Rs. 71,87,257/-
6.	Total amount paid by the complainant	Rs. 18,68,475/-
7.	Date of BBA agreement	10.12.2014
8.	Percentage of consideration amount	25.9% Approx.
9.	Date of delivery of possession.	Clause 1.2/ 11(a) the expiry of 60 months from the date of agreement i.e. 09.12.2019 (Premature complaint)
10.	Cause of delay in delivery of possession	Due to force majeure



3. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. Accordingly, the respondent appeared on 06.06.2018. The case came up for hearing on 06.06.2018, 12.07.2018, 19.07.2018, 26.07.2018, 16.08.2018, 12.09.2018, 03.10.2018 and 29.10.2018. The reply has been filed on

behalf of the respondent no. 1 vide dated 30.06.2018 and respondent no. 2 dated 29.06.2018.

FACTS OF COMPLAINT

4. The complainant submitted that on date 24.03.2014 received a call from Mr. Himmat Singh introducing himself from Hometrust Realty Pvt. Ltd. (a real estate broker firm). Respondent no. 2 marketed about the commercial project of respondent no.1 at prime location of Sector-92, Gurugram. Respondent no.2 shows rosy picture of project, and praised about builder and offered a special price on booking.
5. That the complainant applied for a retail shop space in commercial project of respondent namely "TRISTAAR" at sector-92, Gurgaon for a shop at ground floor with area 524 sq. ft. vide shop no. 072. Till date 25.07.2014, the complainant has paid Rs. 18,68,475/- out of total sale consideration Rs. 71,87,257/- to the respondent no.1.
6. The complainant submitted that on 19.05.2014, complainant meets office bearer of builder and asked for development of project. The office bearer of respondent no.1 stated that



excavation of project has been started and will deliver the project in thirty months.

7. The complainant submitted that on date 26.11.2014 builder issued an allotment letter. Further, submitted that he asked to both the respondents to add the clause of time period of handing over the possession and compensation, but both respondents did not pay any heed to resolve the issues. Thereafter, the shop buyer agreement was executed between respondent no.1 and the complainant dated 10.12.2014.
8. The complainant submitted that he informed to respondent no.2 about the agreement and asked to add the clauses for specific time of possession of project and penalty clause in case builder default in given possession on time. But respondent no.2 backed out from his responsibility and stated that "we are helpless". Further, the complainant lodged his grievance to builder, but staff of builder stated that if you will not execute the said agreement, we will forfeit 15 % of total sale consideration.



9. The complainant submitted that due to not satisfactory progress in the said project complainant wishes to withdraw from project and asked for refund. A legal notice was served by the advocate of complainant demanding refund of money with interest on account of delay in handover the project. But builder refused to refund the amount.

10. The complainant submitted that since 2016 he has been visiting at the office of respondent party as well as construction site of project and found that only 8-12 workers were present on site and till date construction has not been completed.

11. That the complainant had purchased the shop with intention that after possession, he will get rental income from shop, but as on date builder is not giving any concrete date of possession.

12. **Issues raised by the complainant**

- i. Whether the developer has forced the complainant to accept the arbitrary terms and conditions of one sided shop buyer agreement?



- ii. Whether the respondents have any reasonable justification for delay in handing over possession?
- iii. Whether the complainant is entitled for refund of all money paid to respondent no.1 along with interest @ 18 % per annum from the date of booking to till date and compensation?

13. **Relief sought**

Direct the respondents to refund the amount of Rs. 18,68,475/- paid by the complainant to the respondent towards purchase of shop along with interest @ 18% per annum from the date of deposit.

Reply on behalf of respondent no.1 to the complainant

Preliminary Objection:

14. The respondent is emphasising that the construction activities of the project were to be completed by the respondent within a period of 60 months from the date of execution of the shop buyer agreement dated 10.12.2014.

Clause 1.2 of SBA "Escalation charges shall be computed at the expiry of 60 months from the date of this agreement or at



the time of offer of possession (permissive or otherwise), whichever is earlier. The RBI indexes for the month of execution of this agreement and for the month at the expiry of 60 months from the date of this agreement/ month of offer of possession (permissive or otherwise), whichever is earlier, shall be taken as the opening and closing indexes respectively to compute the Escalation Charges”.

15. The complainant is a defaulter in making payment of instalments. The complainant had opted for construction linked payment plan. However, the complainant has refrained from making payment of agreed instalments of sale consideration despite repeated demands.

Reply parawise:

16. The buyer’s agreement dated 10th December 2014 had been executed between the complainant and respondent no.1 in respect of the aforesaid apartment. So far as delivery of physical possession of the commercial unit was specifically mentioned in clause 11(a) of BBA that respondent no.1 would endeavour to complete the construction of the



project in terms of approvals within a period of 60 months from the date of execution of the BBA.

(**Note:** In the said clause the time period for handing over possession is not mentioned and from the said fact it can be seen that the shop buyer agreement is signed blindly and without understanding.)

17. The respondent denied that there was any occasion for the complainant to have served any notice to respondent no.1 about the alleged one-sided clauses in the buyer's agreement dated 10.12.2014 were never incorporated in the notice got served by the complainant. Further, submitted that notice dated 26.06.2016 had been duly responded by the respondent no.1 vide reply dated 15.07.2016.

18. The respondents submitted that the respondents had always assured that they expect to complete the construction of the project within a period of 60 months from the date of execution of the builder buyer agreement.

19. As on date a sum of Rs. 53,18,781/- is outstanding and payable by the complainant to respondent no.1 in respect of



the commercial unit referred to above. The respondent submitted that aforesaid agreement was voluntarily executed by the complainant after fully understanding the contents and implications of the recitals incorporated in the aforesaid contract.

20. The respondents submitted that the complainant was in financial constraint and could not continue with the booking of the unit in the respondents project and wanted to delay the payments of the instalments demanded by the respondents on one account and had raised issues just to wriggle out his obligations of paying dues for a period of more than 2 years.

Reply on behalf of respondent no. 2

Preliminary objection and submissions:

21. The respondent submitted that the answering respondent is registered with the hon'ble authority as real estate agent and not as promoter.
22. That the complainant for compensation and interest under section 12,14, 18 and 19 of the Act is maintainable only



before the adjudicating officer under rule-29 of the HRERA r/w section 31 and section 71, rule-28 and rule-29 and these provisions do not have any application on Real estate agent (broker).

23. The respondent submitted that RERA has been enacted for effective consumer protection and to protect the interest of consumers in the real estate sector. RERA has not been enacted to protect the interest of investors. The complainant is an investor and not a consumer. The complainant has booked alleged shop as an investment and to gain profit from its resale.
24. The respondent submitted that respondent no.2 never facilitated the sale of project of respondent no.1 to the complainant and never asked the complainant to purchase any of the product of the respondent no.1 whether commercial or residential and the allegation made by the complainant against answering respondent are false and respondent no.2 was not a party to the agreement between complainant and respondent no.1, therefore, the present complaint is not maintainable against respondent no.2 in



the present case as there is no privity of contract between complainant and answering respondent. Therefore, answering respondent is not liable to pay any compensation, refund, interest or penalty to the complainant in the present case.

25. That the complainant has failed to place on record any BBA or other document executed by him with respondent no.2 in respect of the alleged commercial space, therefore, respondent no.2 does not have any knowledge or information regarding the alleged transaction of complainant with respondent no.1.
26. The answering respondent submits that from a bare perusal of the complaint it can be seen that the complainant has miserably failed to make a case against the respondent. It is submitted that the complainant has merely alleged he received a call from Mr. Himmat singh as Director of respondent no.2 and respondent no.2 has marketed about the said project but the complainant has miserably failed to place any substantive proof in support of his allegations. Further respondent no.2 submitted that it never facilitated



the sale of project of respondent no.1 to the complainant and never persuaded or asked the complainant to purchase any of the products of respondent no.1.

27. It is further submitted that the respondent no.2 never received any amount from complainant in any manner for his alleged booking of commercial space with respondent no.1 and has no knowledge about its transaction with respondent no.1. Respondent no.2 specifically denied that the complainant informed to respondent no.2 about the arbitrary agreement and asked to add the terms/ clauses for a) specific time of possession of project and b) penalty clause in case builder defaulted in giving possession on time.

28. **Determination of issues**

- i. Regarding **first and second issue** raised by the complainant, that as per clause 11(a) of the shop buyer agreement, the company states schedule for possession of the said unit but the said clause nowhere states the specific proposed date of handing over the possession of the said unit. The clause regarding possession of the said unit is reproduced below:



11(a) Schedule for possession of the said unit“

The developer based on its present plans and estimates and subject to all just exceptions endeavours to complete construction of the said Building/ said unit in terms of the approvals (including the renewal/extended period described therein) and in accordance with the terms of this Agreement unless there shall be delay or failure due to department delay or due to any circumstances beyond the power and control of the Developer or Force Majeure conditions including but not limited to reasons mentioned in Clause 11(b) and 11(c) or due to failure of the Allottee(s) to pay in time the Total consideration or any part thereof and other charges and dues/payments mentioned in this Agreement or any failure on the part of the Allottee(s) to abide by all or any of the terms and conditions of this Agreement”.

Accordingly, as per the aforesaid clause that the respondents have failed to mention a specified time period within which it will be able to handover the possession of the said unit. Also, the respondents have not stated the penalty clause in case of delay in handing over possession. It is evident from the aforesaid clause that the shop buyer agreement has been signed blindly and without giving thorough reading. The same has been held to be unilateral and one sided as also held in para 181 of the judgment in **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.”

- ii. Regarding **fourth issue**, the respondents have mentioned that they will adhere to the due date as mentioned in the BBA and will hand over the possession by 09.12.2019. At this stage refund shall not be granted as the same would hamper the construction of the project and will affect the interest of the other allottee who wish to continue with the project.

The complainant reserves his right to seek compensation from the promoter for which he shall make separate application to the adjudicating officer, if required. Also, during the proceedings dated 12.07.2018 the counsel for the complainant had made a statement that he is not appearing before the authority for compensation but for the fulfilment of



the obligations by the promoter as per the Act. Therefore, the relief sought by the complainant regarding compensation becomes superfluous.

29. During hearings, oral arguments have been advanced by the parties in order to prove their contentions. The counsel of the complainant said that on 01.11.2013, the complainant applied for registration of shop space in upcoming project of the respondents. Building plan was sanctioned on 05.03.2014 and as per condition of license, License holder can't advertise or sale the project before approval of building plans. That respondent no.2 is the agent of respondent no.1 and both respondents are liable for their acts and conduct and responsible towards complainant. Both are jointly and severally liable for their wrongful acts. Respondent no.2 was a beneficiary party. It is pertinent to mention that environment clearance certificate was issued to respondent no.1 on date 06.08.2014, hence excavation can't start before the environment clearance. As per reply along with provided document and declaration in RERA, the due date of possession is 30.06.2020.



30. The authority is of the view that the promoter has violated section 11(4)(a) of the Haryana Real Estate (Regulation and Development) Act, 2016, which is reproduced as under:

“11.4 The promoter shall—

(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be:

Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed.”

31. The complainant made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above. Section 34(f) is reproduced below:

“34 (f) Function of Authority -

To ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.”

It has been requested that necessary directions be issued to the promoter to comply with the provisions and fulfil



obligation under section 37 of the Act which is reproduced below:

37. Powers of Authority to issue directions

The Authority may, for the purpose of discharging its functions under the provisions of this Act or rules or regulations made thereunder, issue such directions from time to time, to the promoters or allottees or real estate agents, as the case may be, as it may consider necessary and such directions shall be binding on all concerned.

32. As per obligations on the promoter under section 18(1) proviso, in case the allottee wishes to withdraw from the project, the promoter is obligated to refund the amount paid by the complainant along with interest at the prescribed rate as the promoter has not fulfilled his obligation. **Section 18(1) is reproduced below:**

“18.(1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,— (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or (b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason, he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act



Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

The complainant reserve his right to seek compensation from the promoter for which he shall make separate application to the adjudicating officer, if required.

33. 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.
34. Keeping in the view of the authority as per clause 11(a) of the builder buyer agreement which clearly mentions/gives a due date of delivery of possession as 60 months from the date of signing of agreement which was signed on 10.12.2014 and the due date of delivery comes out to be 09.12.2019. Complainant has expressed fears/apprehensions which are not well founded at this juncture. Since RERA Act has come into force and it ensures transparency as well as efficiency in relationship between both the builder and the buyer in a responsible manner.



35. Thus, the authority, exercising powers vested in it under section 37 of the Haryana Real Estate (Regulation and Development) Act, 2016 hereby issue direction to the respondents that if the respondents fails to deliver the possession on due date of commitment i.e. 09.12.2019, the respondents will be liable to pay prescribed rate of interest @ 10.45% under the provisions of section 18 (1) of the Real Estate (Regulation And Development) Act, 2016. The project is registered and due date of possession has been mentioned in the registration certificate is 30.06.2020. However, the builder promises that he will adhere to the due date as mentioned in the B.B.A and will hand over the possession by 09.12.2019. As on date, the complaint is pre-mature. As such, the complainant is advised to wait till he gets possession on due date.

36. The order is pronounced.

37. Case file be consigned to the registry.



(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Dated :29.10.2018

PROCEEDINGS OF THE DAY	
Day and Date	Monday and 29.10.2018
Complaint No.	245/2018 case titled as Kish Exports Limited V/s M/s Spaze Tower Pvt. Ltd. & another
Complainant	Kish Exports Limited
Represented through	Shri Sukhbir Yadav Advocate for the complainant.
Respondent	M/s Spaze Tower Pvt. Ltd. & another
Respondent Represented through	Shri Ashish Bhandari, authorized representative on behalf of respondent No.2. S/Shri J.K.Dang and Ishaan Dang Advocates for respondent No.1 and Shri Vijender Parmar, Advocate for respondent No.2
Last date of hearing	3.10.2018
Proceeding Recorded by	Naresh Kumari & S.L.Chanana

Proceedings

Arguments heard in detail.

Written arguments filed by respondent No.1 placed on record.

As per clause 11(a) of the Builder Buyer Agreement which clearly mentions/gives a due date of delivery of possession as 60 months from the date of signing of agreement which was signed on 10.12.2014 and the due date of delivery comes out to be 9.12.2019. Complainant has expressed fears/apprehensions which are not well founded at this juncture. Since RERA Act has come into force and it ensures transparency as well as efficiency in

relationship between both the builder and the buyer in a responsible manner. As such, if the respondent fails to deliver the possession on due date of commitment, the respondent will be liable to pay prescribed rate of interest @ 10.45% under the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016. The project is registered and due date of possession has been mentioned in the registration certificate is 30.6.2020. However, the builder promises that he will adhere to the due date as mentioned in the B.B.A and will hand over the possession by 9.12.2019. As on date, the complaint is pre-mature. As such, the complainant is advised to wait till he gets possession on due date.

Complaint stands disposed off. Detailed order will follow. File be consigned to the registry.

Samir Kumar
(Member)

Subhash Chander Kush
(Member)