

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

Complaint no. : 4958 of 2019
First date of hearing : 08.01.2020
Date of decision : 27.10.2020

Mr. Mayank Aggarwal
Address: - House No. 952,
Prem Nagar Street No. 1,
Yamuna Nagar Haryana

Complainant

Versus

M/s Supertech Limited.
Office at: 1114, 11th floor
Hamkunt Chambers, 89,
Nehru Place, New Delhi- 110019

Respondent

CORAM:

Shri K.K. Khandelwal
Shri Subhash Chander Kush

**Chairman
Member**

APPEARANCE:

Sh. Nakul Chaudhary
Sh. Bhigu Dhani

Advocate for the Complainant
Advocate for the respondent

ORDER

1. The present complaint dated 18.11.2019 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed



that the promoter shall be responsible for all obligations, responsibilities and functions as provided under the provision of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se them.

2. The particulars of the project, the details of sale consideration, the amount paid by the complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Project name and location	"Supertech Hues", Sector- 68, Gurugram.
2.	Project area	32.83 acres (as per the RERA Registration)
3.	Nature of the project	Group Housing Project
4.	DTCP license no. and validity status	106 of 2013 and 107 of 2013 dated 26.12.2013 valid till 25.12.2017
5.	Name of licensee	Sarv Realtors Private Limited
6.	RERA Registered/ not registered	Registered vide no. 182 of 2017 dated 04.09.2017 (Tower No. A to H, K, M to P and T, V, W)
7.	RERA registration valid up to	31.12.2021
8.	Unit no.	403, 4 th floor, Tower T/76 CANVAS
9.	Unit measuring	1180 sq. ft.



		[super area]
10.	Date of execution of Buyer Developer Agreement	Not executed
11.	Date of execution of booking from	25.02.2015 [Page 20 of complaint]
12.	Date of execution of Memorandum of Understanding	14.05.2015 [Page 28 of complaint]
13.	Date of execution of tripartite agreement	20.05.2015 [Page 32 of complaint]
14.	Payment plan	Subvention Payment Plan [Page 21 of complaint]
15.	Date of execution of Home Loan agreement	20.05.2015 [Page 32 of complaint]
16.	Total consideration as per payment plan	Rs.74,24,136/- (excluding tax) [Page 21 of complaint]
17.	Total Home Loan amount sanctioned by HDFC bank	Rs.56,00,000/- [Page 32 of complaint]
18.	Total amount paid by the complainant at the time of booking (as per alleged by complaint)	Rs.7,64,640/- [Page 9 of complaint]
	Amount disbursed by HDFC bank till the date of filing of complaint against total amount (as alleged by the complaint)	RS. 45,87,843/- [Page 15 of complaint]
	Amount paid by the allottee i.e. Pre EMIs (as alleged by the complaint)	Rs.5,03,525/- [Page 16-17 of complaint]
	Total amount paid by the complainant	Rs.58,56,006/- [Page 18 of complaint]
19.	Due date of delivery of possession as per Memorandum of Understanding (36 months) [Page 29 of complaint]	14.05.2018

20.	Delay in handing over possession till date to till this order i.e. 27.10.2020	2 years 5 months and 13 days
21.	Status of the project	Ongoing

3. As per the Memorandum of Understanding, the possession was to be handed over by 14.05.2018. But the promoter/respondent failed to handover the possession to the complainant within the stipulated time.
4. The complainant has submitted that he was in need for a dwelling house and therefore, applied for a flat in the said project of the Respondent as mentioned above consisting of 2 BHK and 2 TOI admeasuring 1180 square feet under the subvention scheme.
5. The complainant further submitted that a tripartite agreement (under subvention scheme) executed between the respondent and HDFC bank date 20.05.2015, and HDFC bank has disbursed a total loan of Rs. 45,87,843/- out of the total sanctioned loan of Rs. 56,00,000/-
6. The complainant submitted that the Respondent reimbursed the installments up to the month of September 2018 and after that stopped paying/reimbursing the amount of installments to the Complainant which is a clear breach of clause (b) of the Memorandum of understanding dated 14.05.2015.

7. The Complainant submitted that on visiting the site of the project he found that there is no progress in the construction work and therefore lost all the hopes for getting his home in the near future.

Hence, this complaint inter alia praying the Authority

- (i) To direct the respondent to reimburse the amount paid by the complainant towards the loan EMIs to the HDFC Bank from February 2018 onwards and continue to pay /reimburse the same to the complainant till the final possession of the unit.

8. On the date of hearing, the Authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4)(a) of the Act to plead guilty or not to plead guilty.

9. The respondent contested the complaint on the following grounds. The submission made therein, in brief is as under: -

- I. that Complainant booked an apartment being number no. 0403, in Tower T/76 Canvas, 4th floor having a super area of 1180 sq. ft. (approx.) for a total consideration of Rs. 74,24,136/- vide a booking form;
- II. that owing to financial constraints the complainant opted for a Home Loan Scheme and executed a loan



agreement with Housing Development Finance Corporation Ltd. (HDFC). The complainant was sanctioned a loan amount of Rs.56,00,000/-.

III. the complainant and respondent company entered into a Memorandum of Understanding dated 14.05.2015. whereby certain terms governing the subvention scheme were agreed to by the parties.

IV. that complainant, respondent and HDFC entered into a Tripartite agreement (TPA) dated 20.05.2015. relevant clause of the TPA are reproduce herein;

a) clause '8' of the TPA records as, "he borrower hereby subrogates all his rights for refund with respect to the said residential apartment in favour of HDFC.

b) clause '8' of the TPA records as, "that the borrower agrees that it unconditionally and irrevocably subrogates its rights to receive any amount payable by the builder to the borrower in the event of cancellation in favour of HDFC and that the act of payment by the builder to HDFC under this clause shall amount to a valid discharge of the builder of its obligation to pay borrower such cancellation amount.



- V. that as per the admitted case of the complainant out of the total sale consideration of Rs.74,24,136/- the complainant had paid an amount of Rs.58,56,006/- which is much below the prescribed percentage of 90% as stipulated under clause (c) of the MOU. He has not fulfilled his contractual obligations under the MOU he is not entitled to the benefits of the same.
- VI. That in interregnum, the pandemic of covid19 gripped the entire nation since March 2020. The Government of India has itself categorized the said event as a 'Force Majeure' condition, which automatically extends the timeline of handing over possession of the apartment to the complainant. Thereafter, it would be apposite to note that the construction of the Project is in full swing, and the delay if at all, has been due to the government-imposed lockdowns which stalled any sort of construction activity. Till date, there are several embargos qua construction at full operational level.
- VII. that the said project is registered with this Hon'ble Authority vide registration no. 182 of 2017 dated 04.09.2017 and the completion date as per the said Registration is December 2021;



VIII. that the delay if at all, has been beyond the control of the respondents and as such extraneous circumstances would be categorized as 'Force Majeure', and would extend the timeline of handing over the possession of the unit, and completion the project.

IX. that the timeline stipulated under the flat buyer agreement was only tentative, subject to force majeure reasons which are beyond the control of the respondent. The respondent in an endeavor to finish the construction within the stipulated time, had from time to time obtained various licenses, approvals, sanctions, permits including extensions, as and when required. Evidently, the respondent had availed all the licenses and permits in time before starting the construction;

X. that apart from the defaults on the part of the allottee, like the Complainant herein, the delay in completion of project was on account of the following reasons/circumstances that were above and beyond the control of the Respondent:

- shortage of labour/ workforce in the real estate market as the available labour had to return to their respective states due to guaranteed employment by the Central/ State Government under NREGA and JNNURM Schemes;



➤ that such acute shortage of labour, water and other raw materials or the additional permits, licenses, sanctions by different departments were not in control of the respondent and were not at all foreseeable at the time of launching of the project and commencement of construction of the complex. The respondent cannot be held solely responsible for things that are not in control of the respondent.

XI. that compounding all these extraneous considerations, the Hon'ble Supreme Court vide order dated 04.11.2019, imposed a blanket stay on all construction activity in the Delhi- NCR region. It would be apposite to note that the 'Hues' project of the Respondent was under the ambit of the stay order, and accordingly, there was next to no construction activity for a considerable period. It is pertinent to note that similar stay Orders have been passed during winter period in the preceding years as well, i.e. 2017-2018 and 2018-2019. Further, a complete ban on construction activity at site invariably results in a long-term halt in construction activities. As with a complete ban the concerned labor was let off and they traveled to their native villages or look for work in other



states, the resumption of work at site became a slow process and a steady pace of construction as realized after long period of time..

10. The Authority vide order dated 07.10.2020 directed the respondent and his counsel to file reply within two weeks with an advance copy to the complainant subject to payment of cost of Rs.5,000/-to be paid to the complainant. The cost has been submitted on 27.10.2020 vide cheque no. 443526 dated 16.10.2020 to the authority.
11. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.
12. The Authority on the basis of information and explanation and other submissions made and the documents filed by the parties is of considered view that there is no need of further hearing in the complaint.
13. Arguments heard.
14. The authority has complete 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 complainant at a later



stage. The same has been upheld by the Hon'ble Punjab and Haryana High Court in CWP bearing no. 38144 of 2018 titled as ***Experion Developers Pvt. Ltd. Vs State of Haryana & Others*** decided on 16.10.2020.

15. On consideration of the documents, and submissions made by both the parties regarding contravention of provisions of the Act, the Authority is satisfied that the respondent is in contravention of the provisions of the Act. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainant as per the terms and conditions of the memorandum of understanding dated 14.05.2015 executed between the parties. Further no OC/part OC has been granted to this project. Hence, this project is to be treated as on-going project and the provisions of the Act shall be applicable equally to the builder as well as allottee.

16. The Authority in the ***complaint No. 2145 (earlier 2031) of 2020 titled as Deepak Choudhary Vs PNB Housing Finance Limited & others.*** filed by the complainant to safeguard his interest as an allottee in the event the project is auctioned and transferred to a 3rd party, vide order dated 11.09.2020 has casted a clean and unequivocal statutory responsibility on the promoter i.e. M/s Supertech Limited even after transfer of the



physical possession of the Real Estate project; that the erstwhile promoter will continue to pay outgoing and penal charges which were outstanding against the promoter at the time of transfer. Therefore, Supertech Limited will continue to be held liable in respect of its outstanding liabilities by virtue of Section 11(4)(a) of the Act and the incumbent promoter will be responsible for all the obligation under the Act. Hence, the above stated order dated 11.09.2020 should be read along with the order passed in this complaint for brevity and clarity.

17. Under the subvention scheme there is a tri-partite agreement between the allottee, financial institution and developer wherein the financial institution is required to release the loan amount sanctioned in favour of the allottee to the builder as per the schedule of construction. It is an obligation on the part of the builder to pay the pre-EMI interest till the date of offer of possession to the financial institution on behalf of the allottee. Also, an MOU is entered between the buyer and the builder.

18. In the instant complaint, the allottee and the developer entered into an MOU dated 14.05.2015 whereby the developer as per clause (b) has undertaken to pay the Pre-EMI till offer of possession with regard to the booked unit/flat issued to the buyer. The said clause is reproduced as under:



“(b) That the tenure of this subvention scheme as approved by housing Development Finance Corporation Limited is 36 months. The developer expects to offer of possession of the booked unit to the buyer by that time. However, if due to any reason, the possession offer of the booked unit gets delayed, then the Developer undertakes to pay the pre-EMI only to the buyer even after 36 months. The payment of Pre EMI shall continue till offer of possession with regards to the booked flat is issued to the buyer”

Further, clause (e) of the MoU provides that from the date of offer of possession letter the subvention scheme shall be treated as closed and the buyer shall be solely liable to pay the entire EMI of his bank. Also, clause (f) of the said MoU states as under:

“(f) That the present Memorandum of Understanding is in addition to the Allotment Letter executed between the parties and all other conditions/situations not covered under this MOU shall be governed by the terms and of the Allotment Letter and company policies.”



19. Subsequently a tri-partite agreement dated 20.05.2015 has been entered into between the allottee, the developer and the bank whereby in view of clause (3); the developer/builder has undertaken to have assumed the liability of payments under the loan agreement as payable by the borrower from the date of first disbursement till 28.02.2017 (liability period).
20. The Authority observes that no doubt, it is the duty of the allottee to make necessary payments in the manner and within the time specified in the agreement for sale as per the obligations u/s 19(6) and 19(7) of the Act, reduced in writing or as mutually agreed to between the promoter and allottee. But the MoU and Tri-partite agreement both stipulate that the payments are subject to handing over of the possession of the unit within stipulated period as per the agreement to sell. Therefore, the said documents being supplementary or incidental thereto are legally enforceable against the promoter. Hence, it cannot absolve himself from its liability from paying the pre-EMI's.
21. That in the ***National Consumer Disputes Redressal Forum, New Delhi in the case of IDBI Bank Ltd. Vs. Prakash Chand Sharma & Ors., 2018***; it was held that under the special payment plan, the buyer has no liability whatsoever towards paying any interest or pre EMIs till the offer of possession and



all interest amount accrued during the period till the time of possession would stand waived of with respect to the buyer if it is proved that the builder violated the terms and conditions of contractual obligations contained in the BBA/Tri-partite agreement/ MoU respectively.

Further, in the case of ***Bikram Chatterji vs. Union of India & Ors. Before the Hon'ble Apex court in Writ Petition no. 940 of 2017 wherein vide order dated 23.07.2019 (known as Amrapali Judgment)*** it was held that when the builder fails to fulfil his obligations under the subvention scheme, thereby causing a double loss to the allottee then the court can intervene and the builder has to comply with the same when it is proved that there was diversion of funds.

22. Therefore, the terms and conditions of allotment and/or the BBA, MoU and Tri-partite agreement clearly shows that the developer is under liability to pay the pre- EMIs or interest part of the loan amount received and any non-compliance shall be in violation of Section 11(4) of the Act in the event promoters fails to keep its obligations under subvention scheme. In such cases the allottee has all the right to seek relief under the RERA Act under Section 31 which states that any



aggrieved person may file a complaint with the authority or adjudicating officer for any violation or contravention of the provisions of RERA or the rules and regulations framed thereunder against any promoter or real estate agent.

23. Since the substantial part of the payment to the tune of Rs. 56,00,000/- has been raised by the developer on behalf of the complainant from HDFC, the HDFC bank has disbursed the loan amount of Rs.45,87,843/- out of the total loan amount, despite the fact that the pre-EMI are being paid by the complainant, however, interest liability along with the principal amount is that of the promoter till the offer of possession. In such type of cases, the builder/developer who has paid EMIs for a particular period of 36 months that principal amount shall not be the part of the interest. However, the complainant/allottee is entitled for delayed possession charges after obtaining of occupation certificate by the respondent on the rest of the amount which he paid from his pocket on account of raising loan.

24. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainant is entitled to delay possession charges at rate of the prescribed




interest @ 9.30% p.a. w.e.f. 14.05.2018 till the actual offer of possession.

25. Hence, the Authority hereby passes this order and issues the following directions under section 34(f) of the Act:

- i. the respondent is directed to pay delayed possession interest at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e. 14.05.2018 till the actual offer of possession after obtaining the Occupation Certificate by the respondent; on the rest of the amount which the complainant has paid from the pocket on amount of raising of loan as per provisions of section 18(1) of the Act, 2016.
- ii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period;
- iii. The respondent is directed to pay interest accrued from 14.05.2018 till the date of order to the complainant within 90 days from the date of order and subsequent interest to be paid on or before the 10th of each succeeding month;
- iv. The respondent shall not charge anything from the complainant which is not the part of the MOU.

- v. The existing promoter shall continue to be liable in respect to the outstanding payable by it to the complainants;
- vi. The incoming promoter whosoever it may be shall be responsible for all the obligations as a promoter as per the provision of the Act
26. Complaint stands disposed of.
27. File be consigned to registry.


(Subhash Chander Kush)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated:27.10.2020


(Dr. K.K. Khandelwal)

Chairman

Judgement Uploaded on 01.12.2020.

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