

PROCEEDINGS OF THE DAY

Day and Date	Tuesday and 22.01.2019
Complaint No.	333/2018 Case Titled As Ms. Sandhya Rajpal V/S M/S Bestech India Private Ltd. & Ors,
Complainant	Ms. Sandhya Rajpal
Represented through	Ms. Ruchira Chaudhary Advocate for the complainant.
Respondent	M/S Bestech India Private Ltd. & Ors,
Respondent Represented through	Shri Shiveta Rana, authorized representative of respondent company with Shri Ishaan Dang, Advocate.
Last date of hearing	7.12.2018
Proceeding Recorded by	Naresh Kumari & S.L.Chanana

Proceedings

Project is not registered with the authority.

Since the project is not registered, as such notice under section 59 of the Real Estate (Regulation & Development) Act, 2016 for violation of section 3(1) of the Act be issued to the respondent. Registration branch is directed to do the needful.

Arguments heard.

It has been brought to the notice of the authority that as per the report of LC dated 3.12.2018, the flat/unit No.1803, tower-E, Bestech Park View Sanskruti”, Sector-92, Gurugram is complete in all respects. Possession letter has been issued. No where in the complaint, matter w.r.t. delayed

possession charges has been raised as the prayer was for refund. However, in view of the delay in handing over the possession, delayed possession charges are likely to be given. However, the counsel for the respondent has placed certain papers w.r.t. 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 foundation of towers in the area in accordance with approved zonal plans and building plans. At the time of excavation, the representative 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 & 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.

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 her request is declined.

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

Samir Kumar
(Member)
22.1.2019

Subhash Chander Kush
(Member)

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

Complaint no. : 333 of 2018
First date of hearing : 24.7.2018
Date of decision : 22.1.2019

Mrs. Sandhya Rajpal
R/o : A-2304, Oberoi Exquisite,
Oberoi Garden City, Goregaon (East)
Mumbai-400063

Complainant

Versus

M/s Bestech India Private Limited
Address: Unit no. 5D, 5th floor
Delhi Aerocity Hospitality District,
New Delhi-110037
Also at: Bestech House, Plot 51,
Bhagwan Mahaveer Marg,
Sector 44, Gurugram, Haryana 122002

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Smt. Ruchira Chaudhary
Smt. Shweta Rana

Advocate for the complainants
Authorized representative of
respondent company

Shri Ishaan Dang

Advocate for the respondent



ORDER

1. A complaint dated 28.5.2018 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 Mrs. Sandhya Rajpal, against M/s Bestech India Private Limited in respect of apartment/unit described below in the project 'Bestech Park View', Sector-92, Gurugram on account of violation of the section 11(4)(a) of the Act ibid for not developing the project within stipulated period.

2. Since, the apartment buyer's agreement has been executed on 5.4.2014 i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, therefore, the penal proceedings cannot initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non-compliance of contractual 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 case are as under: -

***Nature of project:** Group housing complex

***DTCP license no.:** 13 of 2009 dated 21.5.2009 and 43 of 211 dated 13.5.2011

1.	Name and location of the project	"Bestech Park View Sanskruti", Sector 92, Gurugram, Haryana.
----	----------------------------------	--



2.	RERA registered/ not registered	Not Registered
3.	Unit no.	Flat no.1803, tower E
4.	Project area	12.7875 acres
5.	Unit area	2325 sq. ft'
6.	Payment plan	Instalment linked plan
7.	Buyer's agreement executed on	5.4.2014
8.	Total consideration amount	Rs.1,46,21,925/- clause 1.2 (a)
9.	Total amount paid by the complainants till date	Rs.1,54,22,982/- (as per applicant ledger dated 7.9.2017 page-80)
10.	Percentage of consideration amount	100%
11.	Date of delivery of possession as per clause 3(a) of buyer's agreement. (36 months from the date of signing of agreement or from the date of approval of building plans, whichever is late plus grace period of 6 months)	5.10.2017 (as the date of approval of building plans is 4.5.2013 so due date shall be calculated from date of signing of agreement) annexure R-50
12.	Offer of possession	6.7.2018
13.	Delay in handing over possession till the offer of possession i.e., 6.7.2018	9 months (approx.)
14.	Penalty clause as per apartment buyer's agreement dated 5.4.2014	Clause3(c)(iii), compensation calculated @ Rs.5/- per sq. ft' per month of super area for period of delay.
15.	Occupation certificate received on	19.6.2018

4. The details provided above have been checked on the basis of record available in the case file which has been provided by the complainants and the respondent. An apartment buyer's agreement is available on record for the aforesaid unit. The possession of the said unit was to be delivered by 5.10.2017 as per the said agreement. Neither the respondent has



delivered the possession of the said unit as on date to the purchaser nor they have paid any compensation @ Rs.5/- per sq. ft. per month of the super area of the unit for the period of delay as per clause 3(c)(iii) of the apartment buyer's agreement dated 5.4.2014. 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 respondent through his counsel appeared on 24.7.2018. The case came up for hearing on 24.7.2018, 21.8.2018, 11.9.2018, 25.9.2018, 25.10.2018, 27.11.2018, 7.12.2018 and 22.1.2019. The reply has been filed on behalf of the respondent on 24.7.2018 has been perused.

Brief facts of the complaint

6. The complainant is an allottee of apartment no. 1803, tower E in "Bestech Park View Sanskruti" situated at Sector 92, Gurugram. The apartment was booked by paying an amount of Rs.10,00,000/- vide cheque dated 27.11.2012. The complainant was assured to get preferential location by paying PLC which was to be deducted from the booking amount. The complainant was promised by the respondent's



representatives that all formalities would be completed in a week.

7. The complainant paid another sum of Rs. 12,00,000/- vide cheque dated 9.2.2013 on demand of the respondent and was again assured of getting an apartment of her choice. The respondent allotted flat no. 404 in tower B vide allotment letter dated 1.6.2013 to the complainant despite having received PLC and raised further demands for instalments. The complainant raised issues with the allotment but the respondents didn't listen to her demands.
8. The respondent threatened to cancel allotment and forfeit the money if instalments weren't paid so the complainant made an application to transfer for which additional administrative charges were levied which are illegal. After this the respondent allotted E-1803 to the complainant and an application form was signed on 6.12.2013. The respondent executed apartment buyers agreement on 5.4.2014 after 18 months of receiving the advance and other monies. The complainant was assured that the apartment will be completed within 36 months of payment of advance money.
9. After this company raised demands even though stages of construction weren't complete. The husband of complainant



went to the construction site and found out that no construction activities were being carried but he was not allowed to take pictures there.

10. The complainant has paid a sum of Rs. 1,54,22,982/- till date and has requested the respondent to refund the amount on multiple occasions as the project was promised to be completed by October, 2015. But the respondent refused the demand of the complainant. The respondent had made false representations regarding approval of building plans, land title and pendency of 2 civil suits which were cleared on 27.05.2012 and 28.05.2012. The respondent company received crores of rupees from buyers without having clear title of land and requisite approvals.

11. The respondent company has revised the sanctioned plan on 15.06.2017 in contravention to section 14 of RERA Act. Also, the respondent has failed to provide registration details with Real Estate Regulation Act.

12. **The issues raised by the complainants are as follow:**

- i. Whether the respondent has contravened sections 3 and 4 of RERA Act, 2016 by failing to register with real estate regulatory authority and are they liable



for misleading the authority by filing the OC before completion of project?

- ii. Whether the respondent fraudulently received booking amount without having proper title of land and sanctioned plan of the project?
- iii. Whether the respondent is liable to pay compensation for loss suffered due to misrepresentations about the project as per section 12 of RERA Act?
- iv. Whether the respondent should be directed to refund the total amount paid by the complainant along with interest?

13. Relief sought

The complainant is seeking the following reliefs:

- i. To order the respondent to refund the entire amount deposited by the complainant i.e. Rs.1,54,22,982/- as per rule 15 of Haryana Real Estate (Regulation and Development) rules, 2017.
- ii. To order the respondent to pay an interest of 18% compounded quarterly on the said amount as has been charged by the respondent company as per



rule 15 of Haryana Real Estate (Regulation and Development) rules, 2017.

- iii. To order the respondent to pay compensation of Rs. 25,00,000/- for making false statements about the project and causing mental agony and monetary loss to the complainant.
- iv. To order the respondent to pay Rs. 5,00,000/- for litigation charges.
- v. Any other relief(s) which this hon'ble authority may deem fit and proper under the circumstances of this case.

Respondent's reply

14. The present complaint is not maintainable as the provisions of RERA Act, 2016 are not applicable to the project in question. The application for issuance of occupation certificate was made on 30.06.2017 i.e. before notification of the Haryana RERA rules, 2017. The occupation certificate was issued by the authority on 19.06.2018. Thus, this project is not an 'Ongoing Project' under rule 2(1)(o) of the rules.
15. This complaint has been filed seeking refund, interest and compensation for the delay in possession of apartment which is to be decided by the adjudicating officer under section 71



of the Act read with rule 29 of the rules and not by this authority.

16. That the complainant came to the respondent to book a flat in the project of the respondent. The complainant took an independent and informed decision after making all enquiries herself. The complainant was allotted flat no. B-404 vide letter dated 1.06.2013 in tower-B admeasuring 2120 sq. ft' but the complainant expressed interest in booking a larger flat hence the change in allotment was made through letter dated 30.11.2013 thereby allotting the complainant flat no. E-1803 admeasuring 2325 sq. ft' super area. An apartment buyer's agreement was executed on 5.04.2014 and the agreement for the previously allotted flat was returned by the complainant without executing.
17. The complainant was irregular in making payment of instalments and the respondent had to issue demand notices for the same.
18. The construction was completed on 30.06.2017 and the respondent made an application to the competent authority for issuance of the occupation certificate for the same which was granted vide memo dated 19.6.2018. The complainant



was offered possession vide letter dated 6.7.2018 after clearing of outstanding dues.

19. The respondent did not have adequate funds to pay the instalments and due to the delayed payments an interest of Rs. 1,39,539/- accrued which was waived by the respondent in good faith. The delay in possession has been due to the delay in paying of instalments by the complainant and the delay caused by the authority in according approvals, permissions and sanctions.

20. The respondent had the necessary licences issued by the Town and Country Planning Department before accepting bookings for the project and the building plans were also approved by the Town and Country Planning Department. It is denied that the respondent made any promise of providing possession within 36 months of the date of booking. Also, it is denied that Rs.10 lacs were paid towards the booking amount. The complainant was not assured of getting apartment of her choice by having PLC deducted from the said amount. Moreover, the booking amount was to be Rs.19,28,492/-.

21. For the due possession date the clause 3(a) of the apartment buyer's agreement is reproduced hereunder:



“delivery of possession within 36 months from the date of signing of agreement or from the date of approval of building plans, whichever is late plus grace period of 6 months”

So, the respondent has not made any delay going by the time of possession as provided in the buyers agreement. The contractual relationship between the buyer and the builder is governed by the buyer’s agreement.

22. It is denied by the respondent that the sanctioned plans have been revised in contravention of section 14 of the Act as it is not applicable to this project. Furthermore, the revised plans have been approved by the competent authority vide memo dated 20.07.2017. The respondent invited objections from the existing allottees through advertisement circulated in three daily newspapers.

Rejoinder filed by the complainant

23. It has been submitted by the respondent that the application for occupation certificate was made on 30.6.2017 but the occupation certificate dated 19.6.2018 as annexed by the respondent at pages 112-114 clearly state that it was applied on 22.2.2018.
24. The respondent contended that it had applied for approval of revised site plan vide letter dated 16.6.2017 but there is no



way that in such a case they would have applied for occupation certificate on 30.6.2017.

25. The respondent has not submitted any proof that flat no.404 in Tower-B was allotted to the complainant with her consent. The complainant has paid Rs.1,54,22,982/- till date and the respondent is still alleging that the complainant never had sufficient funds. If the complainant can pay such a huge sum then what problem would it have in paying the interest of Rs.1,39,539/-. The complainant was out of country so it took a little extra time to provide the payments.
26. That after receiving letter of possession, the complainant sent an intimation within 2 days for grant of visit of her apartment but the same was denied and instead a sample flat was being shown to the complainant. The officials demanded payments even before the particular stage of construction was complete as shown in conversation on pages 64-66 of complaint.
27. With regard to sharing of information in media the respondent was well aware that the complainant resides in Mumbai and would not receive the said publication still it made no efforts to share the same.



Explanatory note by the respondent

28. Although there was no delay in completing the construction of the complex the following circumstances will comprehensively establish that no lapse can be attributed to the respondent insofar implementation of the project by the respondent is concerned:

29. After issuance of licence for setting up residential project dated 3.9.2011 and combined zoning plan dated 3.09.2011, the respondent was not aware about the existence of a gas pipeline running across the project. Even the Town and Country Planning Department failed to earmark the gas pipeline. Based on the said zoning plan the respondent prepared building plans and applied for sanction vide letters dated 22.11.2012 and 29.1.2013. The building plan was sanctioned vide memo dated 4.5.2013.

30. Even till this stage the gas pipeline running through the project was not earmarked by the department of Town and Country Planning. In April/May, 2013 the officers of GAIL approached the site and raised objections with regard to the said pipeline. The respondent explored options for shifting of the pipeline in consultation with the Town and Country Planning Department and GAIL but this idea was rejected by



GAIL. The department of Town and Country Planning then advised that since only tower H was to be relocated, the construction work of other towers could be done.

31. That the process of changing the building plans and shifting of tower H took several months due to which construction work could not be carried. Despite this, respondent was able to complete construction on time and applied for occupation certificate on 30.06.2017.
32. That after application for OC was submitted, the Town and Planning Department directed the respondent to revise the building plans and the sanction of revised plans was then granted vide memo dated 20.7.2017. After this considerable time was taken by the Town and Country Planning Department to issue the occupation certificate.
33. That vide order dated 8.11.2016, Haryana State Pollution Control Board in compliance with NGT's order directed all construction activity in Delhi NCR to be stopped due to rise in pollution levels. So the construction activity was stalled for almost 7 to 10 days which led to demobilisation of labour force at site because of which construction was hampered for 1 month on the site.



Determination of issues

After considering the facts submitted by the complainants, reply by the respondent and perusal of record on file, the issue wise findings of the authority are as under:

34. With respect to the **first issue**, the promoter is liable to get itself registered with this hon'ble authority under RERA Act, 2016 in terms of section 3(1) first provisions of the Act which provides that the projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the authority for registration of the said project within a period of 3 months from the date of commencement of the Act i.e. 3 months from 1.5.2017. The promoter received the occupation certificate on 19.6.2018 and therefore cannot claim exception under this provision. The application for occupation certificate was submitted on 22.2.2018, it was held in the landmark case of ***Simmi Sikka v/s M/s EMAAR MGF Land Ltd. (7 of 2018)***, on 21.8.2018 delivered by the hon'ble authority that incomplete application is no application in the eyes of law. Therefore, the promoter submitted an incomplete application for occupation certificate he cannot be benefited under the deemed



provision and is not exempted from registration u/s 3 of the Act.

35. With regard to the **second issue** relating to licences, the respondent has provided the receipt in respect of licence bearing no. 13 of 2009 dated 21.5.2009 and licence no. 43 of 2011 dated 13.5.2011 granted by Town and Country Planning Department for setting up of a group housing complex of land measuring 12.78 acres. The building plans were approved vide memo number ZP-577/JD (BS)/2013/38651 dated 4.5.2013 by the Town and Country Planning Department.

36. With regard to the **third issue**, the complainant made a statement vide order dated 24.7.2018 that he is not appearing before this authority for compensation. Also, as held in *Simmi Sikka V/s M/s EMAAR MGF Land Ltd. (7 of 2018)*, on 21.08.2018, this authority cannot provide compensation as the adjudicating officer has the power to provide the same under this Act.

37. With regard to the **fourth issue** of refund, keeping in view the status of the project and other intervening circumstances, authority is of the view that refund will adversely affect the interest of other allottees who wish to continue with the



project. Moreover, the complainants have been offered possession vide letter dated 6.7.2018 so they shall take up the possession along with the interest for delayed possession @10.75% interest (if any).

The authority came across that as per clause 3(a) of buyer's agreement:

"possession to be provided within 36 months from the date of signing of agreement or from the date of approval of building plans, whichever is late plus grace period of 6 months"

The date of signing of agreement is 5.4.2014. Therefore, the due date of possession shall be computed from 5.10.2017 and the possession has been delayed by one year and twenty days. The delay compensation as provided under clause 3(c)(iii) of the buyer's agreement is calculated @ Rs.5/- per sq. ft' per month of super area 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 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.”

Findings of the authority

38. The application filed by the respondent for rejection of complaint raising preliminary objection regarding jurisdiction of the authority stands dismissed. 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 complainants at a later stage.
39. As the possession of the apartment was to be delivered by 5.10.2017, 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.
40. The complainants made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above.
41. The complainants 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 obligation.



42. In the present complaint, the complainants are seeking refund of the entire money paid till date i.e. 1,52,22,982/- along with interest @ 18% p.a. from the date of provisional allotment i.e. 27.2.2013 till its realization of the payment and cancel the allotment upon entire refund.
43. However, keeping in view the present status of the project and the fact that the possession has already been offered, in case refund is allowed in the present complaint, it will have adverse effect on the other allottees in the said project. Therefore, keeping in view the principles of natural justice and in public interest, the relief sought by the complainants cannot be allowed.
44. The authority is of the considered opinion that the respondent has failed to deliver the possession of the said unit to the complainants by the committed date i.e. 5.10.2017 and the possession was offered on 6.7.2018 with a delay of 9 months (approx.). However, the counsel for the respondent has placed certain papers w.r.t. 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 foundation of towers in the area in accordance with approved zonal plans and



building plans. At the time of excavation, the representative 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 & 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.

45. Vide order dated 25.10.2018, the authority appointed Mr. Sumeet Kumar Engineer to visit site and submit report. The report was submitted on 3.12.2018 as per which the project is incomplete and some internal works are pending (i.e. electrical wiring, doors, wooden flooring, modular kitchen and sanitary wares). Hence, OC is granted with incomplete work as stated in the detailed report. However, the apartment of the complainant is completed.

DECISION AND DIRECTIONS OF THE AUTHORITY

46. 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 issues



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

- (i) Since the project is not registered, as such notice under section 59 of the Real Estate (Regulation and Development) Act, 2016 for violation of section 3(1) of the Act be issued to the respondent. Registration branch is directed to do the needful.
- (ii) It has been brought to the notice of the authority that as per the report of LC dated 3.12.2018, the flat/unit no.1803, tower-E, Bestech Park View Sanskruti", Sector-92, Gurugram is complete in all respects. Possession letter has been issued. Nowhere in the complaint, matter w.r.t. delayed possession charges has been raised as the prayer was for refund. However, in view of the delay in handing over the possession, delayed possession charges are likely to be given. However, the counsel for the respondent has placed certain papers w.r.t. 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 foundation of towers in the area in accordance with approved



zonal plans and building plans. At the time of excavation, the representative 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 & 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.

- (iii) 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 her request is declined.



47. Complaint stands disposed of.
48. Detailed order will follow.
49. File be consigned to the registry.

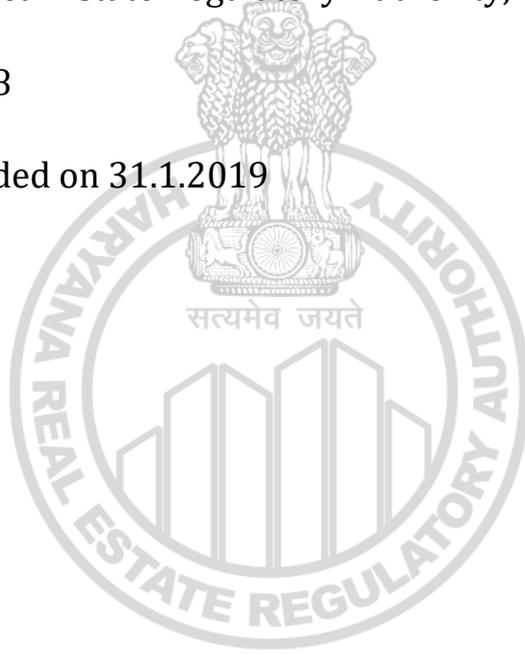
(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 22.1.2018

Judgment uploaded on 31.1.2019



HARERA
GURUGRAM

