

PROCEEDINGS OF THE DAY

Day and Date	Tuesday and 29.01.2019
Complaint No.	787/2018 Case titled as Mr. Suresh Kumar V/S M/S Bestech India Pvt Ltd
Complainant	Mr. Suresh Kumar
Represented through	Shri Deepak Arora on behalf of respondent with Shri K.P. Pandey Advocate.
Respondent	M/S Bestech India Pvt Ltd
Respondent Represented through	Ms. Shiveta Raina, authorized representative on behalf of respondent company with Shri Ishaan Dang Advocate for the respondent.
Last date of hearing	19.12.2018
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.

Written submissions filed by the counsel for the respondent are taken on record.

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.B-902, 9th floor, tower-B, in

project "Park View Sanskruti", Sector-92, Gurugram is complete in all respects. Possession letter has been issued. 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. However, the complainant is entitled for delayed possession charges @ 10.75% p.a. w.e.f. 17.01.2018 till the date of final offer possession i.e. 14.07.2018 and the amount shall be paid within a period of 90 days from the date of this order.

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 accordingly. Detailed order will follow. File be consigned to the registry.

Samir Kumar
(Member)
29.01.2019

Subhash Chander Kush
(Member)

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

Complaint No. : 787 of 2018
Date of first hearing : 19.12.2018
Date of Decision : 29.01.2019

1. Sh. Suresh Kumar
2. Sh. Deepak Kumar
Both R/o C-24, Dayanand Colony,
Lajpat Nagar, New Delhi-110024

...Complainants

Versus

M/s Bestech India Pvt. Ltd.
Office at: 1/2873, Ram Nagar, Loni Road,
Shahdara, New Delhi-110032
Corporate office: 124, Sector-44, Gurugram,
Haryana

...Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Deepak Arora with Shri
K.P. Pandey Advocate
Ms. Shiveta Raina
Shri Ishaan Dang

Advocate for the complainants
Authorized representative on
behalf of respondent company
Advocate for the respondent



ORDER

1. A complaint dated 29.08.2018 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 Sh. Suresh Kumar and Sh. Deepak Kumar, 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 17.07.2013 for unit no. B902 on 9th floor, B tower, admeasuring super area of 1995 sq. ft. in the project "Park View Sanskruti" for not giving possession on the due date which is an obligation of the promoter under section 11(4)(a) of the Act *ibid*. However, the unit was offered to the complainants for possession vide letter dated 14.07.2018.

2. Since the apartment buyer's agreement has been executed on 17.07.2013, i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, therefore, the penal proceedings cannot be 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 are as under: -

1.	Name and location of the project	"Park View Sanskruti" in Sector 92, Gurugram
2.	Nature of real estate project	Group housing colony
3.	Unit no.	B-902, 9 th floor, tower



		no. B
4.	Project area	12.7875 acres
5.	Registered/ not registered	Not registered
6.	DTCP license	13 of 2009 dated 21.05.2009, 43 of 2011 dated 13.05.2011
7.	Date of booking	10.05.2013 (as per agreement, pg 29 of the complaint)
8.	Date of apartment buyer's agreement	17.07.2013
9.	Total consideration	BSP- Rs. 1,28,46,055/- (as per payment plan, pg 52 of the complaint)
10.	Total amount paid by the complainant	Rs. 1,29,26,099/- (as per interest ledger dated 19.10.2018, annexure R-49 of the reply)
11.	Payment plan	Instalment payment plan
12.	Date of delivery of possession	17.01.2017 Clause 3(a) - 36 months from date of signing of agreement (17.07.2013) or approval of building plans (04.05.2013), whichever is later, i.e. 17.07.2016 + 6 months grace period i.e. 17.01.2017
13.	Date of approval of building plans	04.05.2013
14.	Date of occupation certificate	19.06.2018
15.	Offer of possession	14.07.2018
16.	Date of revised site/building plan	20.07.2017
17.	Delay of number of months/ years upto 14.07.2018	1 year 5 months
18.	Penalty clause as per apartment	Clause 3(c)(iii)- Rs. 5/-



	buyer's agreement dated 17.07.2013	per sq. ft. per month of the super area
--	---------------------------------------	--

4. The details provided above have been checked on the basis of the record available in the case file which have been provided by the complainants and the respondent. An apartment buyer's agreement dated 17.07.2013 is available on record for unit no. B902 on 9th floor, B tower, admeasuring super area of 1995 sq. ft. according to which the possession of the aforesaid unit was to be delivered by 17.01.2017. However, the respondent has offered the possession on 14.07.2018.
5. Taking cognizance of the complaint, the authority issued notice to the respondents for filing reply and for appearance. The case came up for hearing on 19.12.2018 and 29.01.2019. The reply has been filed on behalf of the respondent and has been perused. Written arguments have been filed by the respondent wherein he re-asserted the submissions made in the reply.



Facts of the complaint

6. On 10.05.2013, the complainants booked a unit in the project named "Park View Sanskruti" in Sector 92, Gurugram by paying an advance amount of Rs. 9,64,246/- to the

respondent. Accordingly, the complainants were allotted a unit bearing no. B902 on 9th floor, B tower.

7. On 17.07.2013, apartment buyer's agreement was entered into between the parties wherein as per clause 3(a), the possession should have been offered within 36 months from date of signing of agreement or approval of building plans, whichever is later + 6 months grace period i.e. by 17.01.2017. The complainants made payments of all instalments demanded by the respondent amounting to a total of Rs. 1,29,26,099/-.
8. The complainants submitted that vide letter dated 14.07.2018, the respondent informed the complainants that the respondent is in receipt of occupation certificate. The respondent asked the complainants to pay Rs.22,28,646/- on different heads. The respondent further stated in the letter that he will take another 10 weeks time to make the flat ready. From the perusal of this letter, it is crystal clear that the flat booked by the complainants is not ready till date and the respondent is not in position to deliver the booked flat to the complainants.
9. The complainants submitted that the respondent has not



completed the construction work at site and the apartment booked by the complainants is still not complete. Seeing the development work in the project, the complainants have no hope that the respondent will be able to handover possession of the booked apartment to the complainants in near future. There is already delay of more than 25 months in delivery of booked apartment. Under these circumstances the complainants are filing the present complaint before this hon'ble authority seeking refund of entire deposited amount with interest @ 18% per annum as per provisions of RERA, 2016.

10. Issues raised by the complainants

The relevant issues raised in the complaint are:

- I. Whether the respondent has violated the terms of apartment buyer's agreement dated 17.07.2013 and as such, the complainants are entitled to get their entire amount refunded with interest @ 18% per annum?

11. Relief sought

- I. Direct the respondent to refund a sum of Rs. 1,29,26,099/-



along with interest @ 18% per annum from the date when payments were made till realisation on prorata basis.

Respondent's reply

12. The respondent submitted that the present complaint is not maintainable in law or on facts. The provisions of the Real Estate (Regulation and Development) Act, 2016 are not applicable to the project in question. The 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. The occupation certificate in respect of the project was issued by the competent authority on 19.06.2018. 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. The present complaint is liable to be dismissed on this ground alone.



13. The respondent submitted that the allegations of the complainants that possession was to be given on or before 17.07.2016 are wrong, malafide and result of afterthought in view of the fact that the complainants have made several

payments to respondent even after 17.07.2016. Infact, the last payment was received from the complainants on 18.05.2017. In case the respondent had violated the terms and conditions of apartment buyer's agreement by not offering the possession to complainant on or before 17.07.2016 as alleged by complainants, in that event complainants would not have made several payments even after 17.07.2016.

14. The respondent submitted that the complainants have no locus standi or cause of action to file the present complaint. The complainants are estopped by their own acts, conduct, acquiescence, laches, omissions etc. from filing the present complaint.
15. The respondent submitted that prior to making the booking, the complainants had made elaborate and detailed enquiries with regard to the nature of sanctions/permissions obtained by the respondent for the purpose of undertaking the development/implementation of the residential project referred to above. The complainants took an independent and informed decision, uninfluenced in any manner by the respondent to book the apartment in question, after making independent enquiries and duly satisfying themselves



regarding the viability and suitability of the aforesaid project as per the complainant's needs and requirements as well as the capability of the respondent to undertake the project.

16. The respondent submitted that right from the beginning, the complainants were extremely irregular as far as payment of instalments was concerned. 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. The demand notice dated 01.06.2013, reminder dated 16.08.2013, second reminder dated 07.09.2013, demand notice dated 19.08.2014, first reminder dated 06.10.2014, second reminder dated 20.10.2014, demand notice dated 16.12.2014, first reminder dated 04.02.2015, second reminder dated 19.02.2015, final notice dated 09.03.2015, demand notice dated 19.03.2015, first reminder dated 07.05.2015, second reminder dated 21.05.2015, final notice dated 05.06.2015, demand notice dated 17.06.2015, first reminder dated 03.08.2015, second reminder dated 17.08.2015, demand notice dated 19.09.2015, first reminder dated 04.11.2015, demand notice dated 03.02.2016, first reminder dated 17.03.2016, demand



notice dated 20.04.2016, first reminder dated 04.06.2016, demand notice dated 10.11.2016, demand notice dated 20.02.2017 , first reminder dated 20.02.2017, second reminder dated 26.04.2017, final notice dated 12.05.2017 were sent by the respondent to the complainants.

17. The respondent submitted that the construction of the project was completed on 30.06.2017 and the respondent made an application to the competent authority for issuance of occupation certificate in respect of the same. Occupation certificate was granted by the office of DTCP, Haryana on 19.06.2018.

18. The respondent further submitted that by letter dated 26.06.2018, the complainants were informed about grant of occupation certificate by appropriate authority to the respondent. Vide this letter dated 26.06.2018, the complainants, inter alia, were asked to intimate the respondent about his timeline to move into the apartment so that apartment could be handed over after giving final finishing/touch accordingly. The complainants failed to respond the letter dated 26.06.2018.



19. The respondent submitted that it needs to be appreciated that for the purpose of conceptualisation, construction and implementation of a residential group housing project of such large magnitude, a large number of permissions/sanctions are required to be obtained by the respondent from various statutory authorities. The respondent has got absolutely no control over the functioning of the said authorities. It is precisely for this reason that delay which can occasion on account of belated grant of sanctions was taken into reckoning and duly incorporated in clause number 3 b)(i) and 3 b)(ii) of buyers agreement dated 17.07.2013. Therefore, the aforesaid span of time is contractually and legally liable to be excluded for the purpose of computation of span of time utilised by the respondent in proceeding to undertake the construction/development/implementation of the residential group housing project referred to above.

20. The respondent submitted that the following circumstances (which were beyond the reasonable control of the respondent) will comprehensively establish that no lapse can be attributed to the respondent insofar implementation of the aforesaid project by the respondent is concerned: –



(i) After issuance of the licences bearing no 13 of 2009 dated 21.5.2009 and license no. 43 of 2011 dated 13.5.2011 for setting up of a group housing complex on land measuring approximately 12.78 acres, the DTCP approved the combined zoning plan of the complex vide letter dated 03.09.2011. It shall not be out of place to mention that at that stage the respondent was unaware of the existence of gas pipeline running across the project. Even said combined zoning plan dated 03.09.2011 the DTCP failed to earmark the gas pipeline running through the land forming part of the complex. 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 22.11.2012 and 29.01.2013. Building plans with respect to the complex were sanctioned by the DTCP dated 04.05.2013.

(ii) It is pertinent to mention that even till this stage the gas pipeline running through the complex was not earmarked by the Town & Country Planning Department in the said site plan forming part of the building plans approved by the Town and country Planning Department Haryana.

(iii) 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. 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. With this assurance the respondent commenced the construction of the complex.



- (iv) The process of planning for changing/revising/modifying the building plans/soil testing and shifting of the location of tower H and services/ basement entry etc. of the complex took several months due to which the construction could not be carried. Despite this, the respondent was able to complete the construction and applied for occupation certificate on 30.06.2017.
- (v) After application for grant of occupation certificate was submitted before Town & Country Planning Department, the department, contrary to the assurance given in the beginning, directed the respondent to get the plans revised with respect to the complex. Thus, the respondent applied for revision of the building plans.
- (vi) The sanction of the said revised plans was granted by Town & Country planning Department vide memo bearing number ZP-577/Vol-I/SD(BS)/2017/ 17366 dated 20th of July 2017.
- (vii) Though the building plans with respect to the complex were revised in July 2017, considerable time was taken by Town & Country Planning Department to issue occupation certificate with respect to the complex.



(viii) It shall not be out of place to mention that vide order 08.11.2016, Haryana State Pollution Control Board, in compliance of order dated 08.11.2016 of Hon'ble National Green Tribunal, directed all construction activity in Delhi NCR to be stopped due to rise in pollution levels. The construction activity was stalled for almost 7 to 10 days which led to demobilisation of the labour force at site due to which the construction activities almost came to stand still for a period of almost 1 month.

21. The respondent submitted that due to delayed payments made by the complainants, interest had accrued to the tune of Rs. 2,67,665/- However, due to requests being made by the complainants, the respondent in good faith had waived off the interest amount.

22. The respondent further submitted that the total price of the apartment as per payment plan was Rs. 1,28,46,055/- excluding stamp duty and other applicable charges. It is submitted that vide letter dated 26.06.2018, the complainants were asked to intimate the respondent about their timeline to move into the apartment so that the so that apartment could be handed over after giving final finishing/touch accordingly. Since the complainants failed to



respond the letter dated 26.06.2018, hence respondent vide its letter dated 14.07.2018 asked the complainants that respondent will require 10 weeks' time to make the flat ready for handover after making of due payments and submission of required documents by complainants. It is submitted that after receipt of OC and before handover of flat, final finishing/touch is given to apartment and obviously some time is required for the same. However, the complainants are misinterpreting this 10 weeks' time as if the flat is to be developed within 10 weeks. It is wrong and denied that flat is not ready or respondent is not in position to deliver the flat to the complainants as alleged. It is submitted that apartment/flat will be handed over after giving final finishing/ touch to the apartment after receipt of due payments and required documents by respondent from the complainants.



23. It is wrong and denied that the amounts demanded by respondent vide letter dated 14.07.2018 are against the agreement. It is wrong and denied that complainant is not liable to pay the amounts mentioned in para under reply. It is submitted that: -

- (i) External facade charges have been demanded under clause 4(d) of the apartment buyer's agreement.
- (ii) Miscellaneous charges for registration have been demanded under clause 3(c)(iv) of the apartment buyer's agreement and the same are payable before possession.
- (iii) Interest free maintenance security has been demanded under clause 4(c) of the apartment buyer's agreement and the same are payable at the time of offer of possession that has been made vide letter dated 14.07.2018
- (iv) FTTH charges as demanded are usage charges demanded @ Rs. 200/- p.m. These charges have been demanded by M/s Parkview Facilities Pvt. Ltd., the nominated maintenance agency carrying out the maintenance and upkeep of the complex.
- (v) Club charges have been demanded under clause 1.2(m) of the apartment buyer's agreement and are payable as and when demanded by developer.
- (vi) Advance maintenance charges have been demanded under clause 4(a) of the apartment buyer's agreement and are liable to be paid as per letter of offer of possession.
- (vii) VAT has been demanded under clauses 1.2(n) and 6(viii) of the apartment buyer's agreement. It is



submitted that complainants have paid service tax with installments while VAT is different from service tax.

- (viii) Stamp duty has been demanded under clause 3(c)(iv) of the apartment buyer's agreement and the same are payable before possession.

Determination of issues

After considering the facts submitted by the complainants, reply by the respondent and perusal of record on file, the authority decides seriatim the issues raised by the parties as under:

24. In respect of the **sole issue** raised by the complainants, as per clause 3(a) of the agreement executed on 17.07.2013, the due date of possession was 17.01.2017. However, the possession was offered by the respondent on 14.07.2018 which is around 1 year 5 months after the due date of possession. Thus, the respondent made a violation of the agreement by not delivering the possession of the apartment in question on time. However, keeping in view the fact that occupation certificate has been received on 19.06.2018 and offer of possession was made on 14.07.2018, the project is complete and thus, refund cannot be allowed at this stage. Further, during the proceedings dated 29.01.2018, the counsel for the respondent placed certain papers w.r.t. the passing of the gas



pipeline underneath the project site on account of which delay has been occurred. This process took about an year and since the process of re-approval of zonal plans and building plans was beyond their control, this time period has been considered as zero period. Accordingly, the complainants are entitled to delayed possession interest at the prescribed rate from the date of 17.01.2018(1 year added to the due date, i.e. 17.01.2017) for every month of delay till the date of final offer of possession, i.e. 14.07.2018.

25. The terms of the agreement are drafted mischievously by the respondents as in this case 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.”



26. The complainants made a submission before the authority

under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above.

The complainants requested that necessary directions be issued to the promoter to comply with the provisions and fulfil obligation under section 37 of the Act.

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

Findings of the authority

28. **Jurisdiction of the authority-** The project “Park View Sanskruti” is located in sector 92, Gurugram. As the project in question is situated in planning area of Gurugram, therefore the authority has complete territorial jurisdiction vide notification no.1/92/2017-1TCP issued by Principal Secretary (Town and Country Planning) dated 14.12.2017 to entertain the present complaint. As the nature of the real estate project is commercial in nature so the authority has subject matter jurisdiction along with territorial jurisdiction.

The preliminary objections raised by the respondent regarding subject matter jurisdiction of the authority stands rejected. 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.

29. During the proceedings dated 29.01.2019, it has been brought to the notice of the authority that as per the report of LC dated 03.12.2018, the flat/unit no.B-902, 9th floor, tower-B, in project "Park View Sanskruti", sector-92, Gurugram is complete in all respects. Possession letter has been issued on 14.07.2018. 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 and 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 DTCP



Haryana. This process took about an 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. However, the complainants are entitled for delayed possession charges @ 10.75% p.a. w.e.f. 17.01.2018 till the date of final offer possession i.e. 14.07.2018 and the amount shall be paid within a period of 90 days from the date of this order. Further, the counsel for the complainants 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.

Decision and directions of the authority

30. 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:

- (i) The respondent is directed to pay the interest at the prescribed rate i.e. 10.75% per annum for every month of delay on the amount paid by the complainant from



17.01.2018 till the date of final offer of possession, i.e. 14.07.2018.

(ii) The respondent is directed to pay interest accrued from 17.01.2018 to 14.07.2018 (date of offer of possession) on account of delay in handing over of possession to the complainants within 90 days from the date of this order.

31. As the project is registerable and has not been registered by the promoter thereby violating section 3(1) of the Act, the authority has decided to take suo-moto cognizance for not getting the project registered and for that separate proceeding will be initiated against the respondent under section 59 of the Act *ibid*. A copy of this order be endorsed to registration branch for further action in the matter.

32. The complaint is disposed of accordingly.

33. The order is pronounced.

34. Case file be consigned to the registry.



(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram

(Subhash Chander Kush)

Member

Date: 29.01.2019

Judgement uploaded on 25.02.2019