

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

Complaint no. : 1332 of 2018
Date of first hearing: 31.01.2019
Date of decision : 21.12.2020

1. Mr. Surender Kumar Makkar,
2. Mr. Harsh Makkar
Both R/o. C-504, Parsavnath Green Ville,
Sohna Road, Gurugram-122018

Complainants

Versus

M/s Bestech India Pvt. Ltd.
Office at: Bestech House, 124, Sector 44,
Gurugram-122002, Haryana.

Respondent

CORAM:

Dr. K.K. Khandelwal
Shri Samir Kumar

**Chairman
Member**

APPEARANCE:

Shri Venkat Rao Advocate for the complainants
Shri J.K Dang and Shri Ishaan Advocate for the respondent
Dang

ORDER

1. A complaint dated 16.10.2018 was filed under section 31 of the Real Estate (Regulation and Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 by the complainants Mr. Surender Kumar Makkar and Mr. Harsh Makkar, against the promoter

M/s Bestech India Pvt. Ltd., on account of violation of the clause 3(a) of apartment buyer's agreement executed on 11.10.2013 in respect of apartment described as below in the project "Park View Sanskruti" for not handing over possession by the due date which is an obligation of the promoter under section 11(4)(a) of the Act *ibid*.

2. Since, the apartment buyer's agreement has been executed on 11.10.2013, i.e. prior to the commencement of the Act *ibid*, 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", Sector 92, Gurugram, Haryana.
2.	Nature of the project	Group housing complex
3.	Project area	12.7875 acres
4.	Registered/ not registered	Not registered
5.	Occupation certificate granted on	19.06.2018
6.	Offer of possession [pg. 92 of complaint]	09.07.2018 (annexure C8 of complaint)

7.	DTCP license no.	13 of 2009 dated 21.05.2009, 43 of 2011 dated 13.05.2011
8.	Unit no. as per the said agreement	602, 6 th floor, tower 'H'
9.	Unit measuring as per the said agreement	1995 sq. ft.
10.	Date of buyer's agreement	11.10.2013
11.	Building plans approved on	04.05.2013
12.	Total consideration as per buyer's agreement	Rs.1,15,69,255/- Excluding taxes (Pg. 54 of complaint)
13.	Total amount paid by the complainant as per statement of account dated 09.08.2018	Rs.1,14,15,928/- (pg. 73 of reply)
14.	Payment plan	Construction linked plan
15.	Date of delivery of possession [Clause 3(a) - 36 months from date of signing of this agreement (11.10.2013) or from the date of approval of building plans (04.05.3013), whichever is later. Plus 6 months of grace period]	11.04.2017 (Being date of signing of agreement later than date of approval of building plans, the due date of possession has been calculated from the date of signing of agreement.
16.	Delay in handing over possession till the date of offer of possession	1 year 2 months 28 days

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 11.10.2013 is available on record for aforesaid unit in the project 'Park View Sanskruti'. As per clause 3(a) of the said agreement, the respondent was liable to

handover possession by 11.04.2017 and the respondent has offered the possession on 09.07.2018. However, the respondent has neither offered the possession of the subject unit in stipulated time nor paid interest for the delayed period in handing over the possession.

5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. The case came up for hearing on 31.01.2019. The reply filed on behalf of the respondent on 21.11.2018 has been perused.

Facts of the complaint

6. The complainants submitted that somewhere around November 2012, the real estate project "Park View Sanskruti", Sector 92, Gurugram, Haryana came to the knowledge of the complainants who were residents of Gurugram. That the respondent, through their sales representative, representing themselves to be builder and developer of repute, persuaded the complainants and invited them to purchase an apartment in the said project. It was represented that the project is one of the finest and the said flat is free from all encumbrances.
7. The complainants submitted that they paid an amount of Rs.5,00,000/- on 24.11.2012, Rs.5,00,000/- on 04.12.2012 and Rs.18,00,000/- on 06.02.2013 to Mr.Satya S. Panigrahi who

was employee of the respondent and was working as senior manager, sales of respondent company. This makes the respondent vicariously liable, as the payment was received by Mr. Panigrahi in the capacity of sales manager in the course of his employment with the respondent and therefore, the respondent is responsible for the actions of its employees.

8. The complainants submitted that on 01.06.2013, the complainants made a payment of Rs.1,04,750/- and Rs.2,00,000/- on 01.06.2014 and were allotted an apartment bearing no.1995 sq. ft. on 6th floor, in tower H in the said project. Hence, the total payment made by the complainant till the date of allotment of the apartment was Rs.31,04,750/-.
9. The complainants submitted that the apartment buyer's agreement was executed between the complainants and the respondent on 11.10.2013. as per clause 3(a) of the said agreement, the possession of the said apartment was to be handed over within 36 months from the date of signing of the agreement or from the date of approval of building plans whichever is later (plus grace period of 6 months). Therefore, the due date of handing over possession was October 2016 (without grace period) and April 2017 (with grace period).

10. The complainants paid all the due amount as per the demands made by the respondent from time to time. The complainants paid an amount of Rs.1,04,49,489/- during the period of 20.01.2014 to 26.09.2016.
11. The complainants submitted that the respondent raised a demand of Rs.5,20,286/- towards VAT liability as per "The Haryana Alternative Tax Compliances Scheme for Contractors, 2016" by the Government of Haryana on all the payments made prior to 31.03.2014 and on or after 01.04.2014 vide letter dated 20.06.2017. the complainants were very confused on demand made by the respondent and sent a letter dated 30.07.2017 in response to the demand letter dated 20.06.2017. In reference to clause 6(viii) of the Haryana Alternative Tax Compliances Scheme for Contractors, 2016, the demand raised is not in the form of future liability on land or building under construction. As such, the demand raised by the respondent is illegitimate.
12. The complainants submitted that the respondent sent an "offer of possession" letter to the complainants. On top of it, a demand of Rs.21,95,418/- as due payment towards the total sale consideration of the said unit was included in the letter dated 09.07.2018. The demanded amount also included VAT

amount of Rs.5,20,286/-. It is submitted that the respondent did not provide copy of occupation certificate with the said letter of offer of possession, therefore, it is not clear whether the respondent has received OC from the competent authority or not.

13. The complainants submitted that they have paid a total sum of Rs.1,40,99,239/- against the total sale consideration of Rs.1,15,69,255/-. Moreover, the respondent did not remit the VAT amount of Rs.5,20,286/- towards the VAT liability as per "The Alternative Tax Compliances Scheme for Contractors, 2016" even though they were being informed about it in letter dated 30.07.2017. The complainant on close observation realized that cash payment of Rs.28,00,000/- made by the complainants to Mr. Satya S. Panigrahi, during the time of booking of the said apartment have not been added in the statement of account by the respondent.

14. **Reliefs sought by the complainant**

- i. Direct the respondent to handover the possession with all the amenities promised to the complainants.
- ii. Direct the respondent to pay interest to the complainants for delay in handing over possession of the said apartment in terms of section 18 of the Act *ibid*.

- iii. Quash the demand of Rs.21,94,418/- and direct the respondent adjust of Rs.28,00,000/- paid in cash by the complainants at the time of booking and refund the balance amount.
- iv. Direct the respondent to remit the VAT liability as per "The Haryana Alternative Tax Compliances Scheme for Contractors, 2016".

Respondent's reply

15. 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 commercial unit in question was made on 30.06.2017, i.e. well before the notification of the Haryana Real Estate (Regulation and Development) Rules, 2017. Subsequently, the occupation certificate has been 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.

16. The respondent submitted that the complainants have filed the present complaint seeking possession, interest for alleged delay in delivering the possession of the said unit booked by the complainants. The complainants have also prayed for quashing the demand of Rs.21,94,418/- and adjustment of alleged cash payment falsely claimed to have been paid at the time of booking. Furthermore, the complainants have also sought direction to the respondent to remit VAT liability as per the Amnesty Scheme of 2016.
17. The respondent submitted that the complainants have no locus standi or cause of action to file the present complaint and are estopped by their acts, conduct, acquiescence, laches, omission etc. from filing the present complaint.
18. The respondent submitted that the complainants approached the respondent through a channel partner, M/s Aashray Real Estate and had evinced an interest in purchasing a residential unit in the duly licensed residential project promoted and developed by the respondent known as "Park View Sanskriti" located in Sector 92, Gurugram.
19. The respondent submitted that vide allotment letter dated 01.06.2013, apartment bearing number H-602, admeasuring 1995 sq. ft. super area approx. situated on the 6th floor, tower

H was provisionally allotted to the complainant. The total sale consideration of the apartment being Rs.1,15,69,255/- exclusive of taxes and other charges payable at the time of possession as per the agreed terms. The apartment buyer's agreement was executed between the complainants and the respondent on 11.10.2013.

20. The respondent submitted that right from the beginning the complainants have been extremely irregular in so far 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 complainant. The complainants have vide letter dated 18.02.2015 requested the respondent for waiver of interest levied on delayed payments. The respondent as a goodwill gesture waived off an amount of Rs.1,30,200/- outstanding towards interest.
21. The respondent submitted that regarding invoices towards VAT, the complainants vide letter dated 03.07.2017 raised objections towards levy of VAT. The said letter was duly replied vide letter dated 17.07.2017 by the respondent, explaining that VAT liability was payable by the complainants

as per the terms and conditions of the buyer's agreement executed by the parties.

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

- After issuance of the licences bearing No 13 of 2009 dated 21.5.2009 and Licence no 43 of 2011 dated 13.5.2011 for setting up of a Group Housing Complex on land measuring approximately 12.78 acres, the Town & Country Planning Department approved the combined Zoning Plan of the complex vide letter dated 3rd of September 2011 (and the combined Zoning Plan dated 3rd of September 2011 was also approved by the Department.
- 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 3rd September 2011 the Town & Country planning Department 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 22nd of November 2012 and 29th of January 2013. Building Plans with respect to the complex were sanctioned by the Town & Country planning Department vide memo bearing number ZP-577/JD(BS)/2013/38657 dated 4th of May 2013.

- That 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.
- That 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.

- That 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 30th of June 2017.
- That after approaching the Town & Country Planning Department, the Department, for issuance of Occupation Certificate, contrary to the assurance given in the beginning, directed the Respondent to get the plans revised with respect to the Complex. Thus, the Respondent first applied for revision of the building plans. That the sanction of the said revised plans was granted by Town & Country planning Department vide memo bearing number ZP-577/Vol-1/SD(BS)/2017/ 17366 site plan of the complex post revision of the building plans is

annexed herewith as. That 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.

- That it shall not be out of place to mention that vide order 08.11.2016 (Annexure R24) 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.

23. The respondent submitted that vide letter dated 26.06.2018, the respondent informed the complainants that OC had been received from the competent authority and offer of possession was made vide letter dated 09.07.2018. The complainants were called upon to clear their outstanding dues as per the statement of account attached to the letter dated 09.07.2018

and to complete the necessary formalities/documentation to take possession of the apartment.

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. The authority vide order dated 15.03.2019 directed to sort out matter w.r.t. payment of dues and late payment charges. The order is reproduced below:

"Arguments heard.

Counsel for the complainant has raised an issue w.r.t payment of Rs. 10,00,000/-, Rs. 10,00,000/- and Rs. 8,00,000/- totalling Rs. 28,00,000/- made in cash which are so called payment of receipts which is of no consequences in the eyes of law and tenable in any manner despite the facts the annexure A is being placed on record (which is only Katcha Receipt). However, it has no legal sanctity and the issue raised by the complainant does not hold any water. Both the parties are directed to sort out the matter w.r.t. payment of dues and late payment charges.

Let the file be consigned to registry."

25. An application dated 25.04.2019 was filed by the complainants to rectify the order dated 15.03.2019 in the said complaint, as the authority passed the order that both the parties will sort out the matter amicably. The complainant approached the respondent, but no solution was arrived at the meeting and the

directions w.r.t. delay possession charges have not been mentioned and be added in the order. The applicant/complainant requested to rectify the order.

26. The said application was dealt by the authority and after discussion on 11.12.2019, wherein it has been advised that the application may be registered under Misc. application and the parties be sent notice for hearing the application. Accordingly notice dated 28.01.2020 was sent to the parties for hearing of the said application on 31.01.2020 and accordingly said application was disposed off vide order dated 21.12.2020.
27. As per clause 3(a) of apartment buyer's agreement, the possession of the said unit was to be handed over within 36 months plus grace period of 6 months from the execution of the said agreement or date of approval of building plans, whichever is later. The building plans were approved on 04.05.2013 and the said agreement was signed on 11.10.2013. As the agreement was signed on later date, the due date of possession has been computed from 11.10.2013. The relevant clause is reproduced as under:

"...the developer proposes to offer the possession of the apartment within a period of thirty-six months from the date of signing of this agreement or from the date of approval of building plans by town and country planning Department, whichever is later. It is clearly understood

and agreed by the apartment allottee that the developer shall be entitled for grace period (beyond a period of 36 months) of 6 months..."

28. Accordingly, the due date of possession comes out to be 11.04.2017 and possession was offered by the respondent on 09.07.2018. The possession has been delayed by 1 year 2 months and 28 days from due date of possession till the offer of possession. 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, thus time period has been considered as zero period. Accordingly, the complainants are entitled to delayed possession charges at the prescribed rate of interest from due date of possession i.e. 11.04.2017 (1 year added to the due date, i.e. 11.04.2018) for every month of delay till the date of final offer of possession, i.e. 09.07.2018.
29. The complainants are alleging that they made cash payment of Rs.28,00,000/- and have not given any documentary proof in support of their contention. Thus, this issue is decided in negative due to lack of documents.

Findings of the authority

30. **Jurisdiction of the authority-** 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. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Department of Town and Country Planning, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District. In the present case, the project in question is situated within the planning area of Gurugram district, therefore this authority has complete territorial jurisdiction to deal with the present complaint.

Directions of the authority

31. 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. The respondent is directed to pay the interest at the prescribed rate i.e., 9.30% per annum for every month of delay on the amount paid by the complainants.
 - ii. The respondent is directed to pay interest accrued from 11.04.2018 to 09.07.2018 on account of delay in giving possession to the complainants within 90 days from the date of order.
 - iii. The respondent cannot charge anything which is not the part of BBA.
 - iv. The respondent is directed not to charge interest on Stamp Duty.
 - v. The VAT is to be charged as per the statutory provisions and not as per the BBA.
32. Complaint stand disposed of.
33. The order is pronounced.
34. Case file be consigned to the registry.



(Dr. K.K. Khandelwal)
Chairman


(Samir Kumar)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Date: 21.12.2020