

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

Complaint No. : 224 of 2018
Date of first hearing : 05.06.2018
Date of Decision : 19.03.2019

Mr. Shakti Singh s/o Sh. Avtar Singh, R/o
B-4/132-a, Block-B4, Keshav Puram, Delhi **Complainant**

Versus

M/s Bestech India Pvt. Limited, 124, Sector-
44, Gurugram-122001, through its
authorised person/ signatory/ director **Respondent**

CORAM:

Shri Samir Kumar **Member**
Shri Subhash Chander Kush **Member**

APPEARANCE:

Shri Arun Shokeen Advocate for the complainant
Shri Ishaan Dang Advocate for the respondent

ORDER

1. A complaint dated 03.05.2018 was filed under section 31 of the Real Estate (Regulation and Development) Act, 2016 read with Rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 by the complainant (Mr. Shakti Singh) against the promoter (M/s Bestech India Pvt. Limited)



on account of violation of clause 1(L) of the apartment buyer's agreement executed on 10.10.2013 for flat no. 1004, tower B, 10th floor in the project "Park view Sanskruti" for not refunding balance amount after forfeiting earnest money even after cancellation of unit vide letter dated 01.07.2016 or to enforce all the payments and seek specific performance of the agreement.

2. Since the builder buyer's agreement dated 10.10.2013 was executed prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, so penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat this complaint as an application under section 34(f) of the Act ibid for non-compliance of obligation on the part of the respondent.

The particulars of the complaint are as under: -

1.	Name and location of the Project	Park view Sanskruti, Sector-92, Gurugram, Gurgaon
2.	Flat/Apartment/Unit No.	1004, Tower B, 10 th floor
3.	Flat measuring	2120 sq.ft.
4.	RERA Registered/ Not registered.	Not registered
5.	Booking date	27.11.2012



6.	Date of execution of apartment buyer's agreement	10.10.2013
7.	Payment plan	Instalment linked payment plan
8.	Total sale consideration	Rs. 1,41,11,080/-
9.	Total amount paid by the complainant till date	Rs. 39,51,638/-
10.	Date of cancellation of allotment	01.07.2016
11.	Percentage of consideration amount	Approx. 28 %
12.	Date of delivery of possession as per clause 3(a) of apartment buyer's agreement. (36 months + 6 months grace period from the date of execution of agreement or from date of approval building plan whichever is later.) Date of approval of building plan: 04.05.2013. Date of execution of agreement is later.	10.04.2017
13.	Delay of number of years / months / days till date	1 year 10 months and 2 days
14.	Penalty Clause as per apartment buyer's agreement	Clause (3)(a)(c)(iii) i.e. Rs.5/- sq. ft. of the super area.

3. As per the details provided above, which have been checked as per record of the case file, an apartment buyer agreement is available on record for unit no. 1004, Tower B, 10th floor according to which the possession of the aforesaid unit was to be delivered by 10.04.2017. The respondent has violated the clause 3(L) of the agreement by not refunding balance amount after forfeiting earnest money even after cancellation of unit



vide letter dated 01.07.2016 or to enforce all the payments and seek specific performance of the agreement.

4. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. Accordingly, the respondent appeared on 05.06.2018. The case came up for hearing on 05.06.2018, 12.07.2018, 25.07.2018, 16.08.2018, 12.09.2018, 03.10.2018, 13.11.2018 and 14.02.2019. The reply has been filed on behalf of the respondent on 05.06.2018.

FACTS OF COMPLAINT

5. The complainant submitted that the respondent advertised itself as a very ethical business group that lives onto its commitments in delivering its housing projects as per promised quality standards and agreed timelines. The respondent while launching and advertising any new housing project always commit and promise to the targeted consumer that their dream home will be completed and delivered to them within the time agreed initially in the agreement while selling the dwelling apartment to them.



6. The complainant submitted that the respondent is very well aware of the fact that in today's scenario looking at the status of the construction of housing projects in India, especially in NCR, the key factor to sell any dwelling apartment is the delivery of completed house within the agreed timeline and that is the prime factor which a consumer would see while purchasing his dream home. Respondent, therefore used this tool, which is directly connected to emotions of gullible consumers, in its marketing plan and always represented and warranted to the consumers that their dream home will be delivered within the agreed timelines.
7. The complainant submitted that upon making enquiry by the complainant in respect of purchase of a dwelling apartment in one of the project namely "Parkview Sanskruti" in Sector-92, Gurugram, the respondent and its representatives promised and represented to the complainant that its project will be completed and delivered to the end user within the timeline to be agreed in the apartment buyer agreement executed by the respondent with the allottee.



8. The complainant submitted that relying upon representations made by the respondent and believing those to be true, complainant was very much induced to buy a dwelling apartment bearing No. 1004, tower-B in Parkview Sanskruti, Sector-92, Gurugram consisting of three bedrooms, admeasuring 2120 sq.ft. on 10th Floor. Accordingly, the complainant had booked the aforesaid apartment on 27.11.2012 and the complainant paid an amount of Rs. 10,00,000/- as booking amount. The total cost of the flat was Rs. 1,41,11,080/- out of which the complainant has paid total amounting to Rs. 39,51,638/- to the respondent company.
9. The complainant submitted that at the time of booking of aforesaid apartment it was duly assured, represented and promised by the respondent that the said apartment and real estate project will be ready to be occupied by the complaint within a period of three years from the date of start of foundation of a particular tower, in which the apartment is located with a grace period of six (6) months.
10. The complainant submitted that at the instance and motivation of the respondent company at the time of booking of the



aforesaid apartment that the construction of the project will start soon, the complainant booked the flat.

11. The complainant submitted that since the date of booking, the complainant has been visiting at so called proposed site, but has found that the progress of the development was very slow and was not as per the terms and conditions of the agreement to sell and as such all claims made by the respondent came out to be untrue and false.
12. That thus, the respondent had cheated and played fraud upon the complainant by booking the flat in the so called project and thus the respondent have committed criminal offence of breach of trust and other offences.
13. That the respondent had issued letter for cancellation to the complainant for non-payment by the complainant. However, the demands were illegal and unlawful as the demand were not in consonance with the development of work. Therefore, the complainant requested the respondent company for refund of the entire payment made by the complainant.



14. That as per clause (3)(a)(c)(iii) of the apartment buyer's agreement, i.e. in case of delay in completion of construction, it states that in case, the developers fails to complete the construction within the agreed period of 36 months + six months (6) grace period, the developer would pay the buyer compensation @ Rs.5/- sq. ft. of the super area of the apartment per month for the period of delay.
15. That the complainant, thereafter had tried his level best to reach the representatives of respondent to seek a satisfactory reply in respect of the said dwelling apartment but all in vain. The complainant had requested the respondent to refund the above said amount but the respondent has failed to refund the above said amount.

ISSUES RAISED BY THE COMPLAINANT:

- (I) Whether the apartment has not been handed over to the petitioner and there is no reasonable justification for the delay?
- (II) Whether the quality of construction is sub-standard and not in accordance with the provisions of the agreement?



(III) Whether the facilities and amenities as agreed upon/approved in the layout plan have not been provided?

(IV) Whether the petitioners/complainant are entitled for refund of the entire amount alongwith interest and compensation?

(V) Whether the developer has violated the terms and conditions of apartment buyer's agreement?

(VI) Whether the builder has received 35% amount from the buyers?

RELIEF SOUGHT:

- I. To direct the respondent to refund total consideration of Rs. 39,51,638/- along with interest @ 18% per annum from the date of payment till is actual realization.
- II. Compensation of Rs. 10,00,000/- as compensation towards mental trauma, agony and harassment suffered by the complainant.
- III. To direct the respondent to pay Rs. 5/- per sq.ft. as penalty for delaying of delivering the possession to the complainant well within prescribed limit.



REPLY ON BEHALF OF RESPONDENT

16. The respondent has raised various preliminary objections and submissions challenging the jurisdiction of this Hon'ble authority. They are as follows:

- I. The project of the respondent is not an ongoing project as per rule 2(o). In the present case, the respondent had applied for occupation certificate for the said project on 30.06.2017 which is prior to the date of publication of the rules.
- II. The complaint for compensation and interest under section 12,14,18 and 19 of the RERA act is maintainable only before the adjudicating officer.

REPLY ON MERITS

17. The respondent has foremost contended that the complainant took an independent and informed decision, uninfluenced in any manner by the respondent to book the said apartment. The complainant himself had approached the respondent after making independent enquiries.

18. The complainant was given the application form containing all terms and conditions to familiarize him and as per clause 11 of the terms of the agreement, the complainant was bound to



make timely payment of instalments and the same was the essence of the contract.

19. The terms of apartment buyer agreement are binding on both the parties. The complainant has opted for construction linked payment plan and all the demands raised by the respondent are strictly in accordance with the BBA.

20. The respondent contended that as per clause 1.2. (k) of BBA, in case the allottee fails/ delay in making payment, the allottee shall be liable to pay interest @ 18% per annum to be compounded quarterly and in the event of delay in payment of outstanding amount along with interest, the allotment shall be liable to be cancelled and earnest money was liable to be forfeited. Therefore, the interest charged on delay payments are totally justified in terms of BBA.

21. The respondent raised numerous demands, but the complainant chose to ignore all the said demand notices and reminders. Eventually, after affording innumerable opportunities to the complainant to pay his outstanding dues, the respondent cancelled the allotment vide letter dated 01.07.2016.



22. The complainant was further informed that the amount paid by the complainant stood forfeited as per terms of BBA and an amount of Rs.15,73,378/- had accrued towards interest on delayed payments. Despite the aforesaid cancellation notice, the complainant did not bother to get in touch with the respondent and after an unexplained delay of almost 2 years, the complainant has proceeded to file the present complaint. Also, the conduct of complainant shows that he never had sufficient funds to make payments.

23. The respondent has further contended that there has been no delay in so far as the construction of the project is concerned. The respondent has also applied for the occupation certificate to the competent authority.

DETERMINATION ON THE ISSUES:

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

24. With respect to the **first, fourth and fifth issues** from perusal of record it is found that the respondent had issued notice for cancellation of the allotment of unit in question on 01.07.2016.



but even after the said notice the respondent has neither refunded the balance amount after deduction according to BBA nor has sought the specific performance of the agreement as per clause 3(L) of the agreement dated 10.10.2013. the relevant clause is reproduced as under:

“In the event the APARTMENT ALLOTTEE(s) fails to pay any instalment(s) with interest within 75 days, from the due date, the Developer shall have the right to forfeit the entire amount of earnest/registration money paid by the APARTMENT ALLOTTEE(s) and in such an event the allotment of the Said Apartment shall stand cancelled and the APARTMENT ALLOTTEE(s) shall left with no right, claim or lien on the said apartment and the Developer at its sole discretion would be free to allot the Apartment to a third party. The amount paid, over and above the Registration/Earnest Money, if any, shall be refunded by the Developer without interest after adjustment of interest accrued on the delayed payment(s), processing fees, brokerage, if any, and/or any other charges, due from the APARTMENT ALLOTTEE(s) under this Agreement.....”

GURUGRAM



25. Hence the respondent has violated the above mention clause which is in violation of section 11 of the act ibid.
26. With respect of the **second and third issues** regarding sub-standard construction facilities complainants as per section 101 of Indian evidence act burden of proof is on the person

who raised the issue and complainant have not adduced any evidence but has made only assertion and the same has been denied by the respondent. Thus, the said issue becomes superfluous.

27. As per the statement account furnished by the respondent, the complainant has paid Rs. 39,51,638/-. The allottee is bound to make timely payments as per the payment plan annexed with the apartment buyer agreement. Hence, the complainant is required to clear all the dues against the said unit to the promoter.
28. With respect of the **sixth issue** raised by the complainant the builder has not received 35% amount from the buyer.
29. It is evident from the records, that the complainant has defaulted in making payments of instalment despite repeated demand notices on 19.08.2014, 18.10.2014, 20.10.2014, 16.12.2014 and 13.01.2015 from the respondent and due to default of the complainant, the respondent has cancelled the allotment of apartment vide letter dated 01.07.2016 on account of non-payment of outstanding dues. But the respondent cannot be justified in retaining the entire amount



after forfeiting the amount as per the terms and conditions of the agreement on cancellation.

Findings of the authority: -

30. The authority has complete jurisdiction to decide the complaint in regard to non-compliance of obligations by the promoter as held in Simmi Sikka V/s M/s EMAAR MGF Land Ltd. leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

31. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. 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.

33. The complainants made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above.



34. As the respondent has obtained OC dated 19.06.2018, it is implied that the project is complete and fit for occupation. In view of this, the respondent is directed to withdraw the cancellation letter dated 01.07.2016 issued to the complainant and complainant should pay the balance amount due towards the respondent. The respondent is further directed not to levy any interest on delayed payment to be made by the complainant and offer the possession of said unit.

Decision and direction of the authority :-

Keeping in view all the facts on record, the authority exercising its power under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issues following directions to the both the parties –

- i. The complainant is given an option to pay the balance amount due towards the respondent and the respondent shall withdraw the cancellation letter dated 01.07.2016 issued to the complainant and offer possession without charging any interest on delay payment to be made by the complainant during the period of cancellation of unit.



- ii. Alternatively, option may be given to the complainant, in case refund is to be given, then respondent shall be allowed to retain 10% of the total sales consideration as earnest money, along with processing fees, delayed payment charges, brokerage charges and other taxes paid to the government. The balance amount remained, if any after deducting the above mentioned amount and other statutory dues, be refunded to the complainant as per terms and conditions of the builder buyer's agreement.
- iii. The project is registerable but the respondent has failed to get the project registered which is in violation of section 3(1) of the Real Estate (Regulation and Development) Act, 2016. Hence, the authority has decided to take suo moto cognizance for initiating penal proceedings under section 59 of the Act ibid against the respondent.



36. The order is pronounced.

37. Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 19.03.2019

Judgement uploaded on 20.03.2019



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