

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

**Complaint no. : 1249 of
2018**
Date of First hearing : 23.04.2019
Date of decision : 23.04.2019

Mr. Rajesh Kapoor
Mrs. Sujata Kapoor
R/o. A-61, Defence Colony, New Delhi-
110024

Complainants

M/s BPTP Ltd.
Regd. Office: M-11, Middle Circle, Connaught
Circus, New Delhi-110001
M/s. Countrywide Promoters Pvt Ltd.
Regd. Office: M-11, Middle Circle, Connaught
Circus, New Delhi-110001

Respondent

CORAM:

Dr. K.K. Khandelwal
Shri Samir Kumar
Shri Subhash Chander Kush

**Chairman
Member
Member**

APPEARANCE:

Shri Pawan Kumar Ray and Advocate for the complainants
Shri Chetan Dhingra
Shri Shashank Bhushan Advocate for the respondent



ORDER

1. A complaint dated 00.00.2018 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. Rajesh Kapoor and Mrs. Sujata Kapoor against the promoter M/s BPTP Ltd in respect of said flat described below in the project 'Terra', on account of violation of the section 11(4)(a) of the Act *ibid*.
2. Since the flat buyer's agreement has been executed on 24.12.2012, 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	"Terra", Sector 37D, Gurugram
2.	Flat/unit No.	T21-1703, Floor no. 16 in T21 Tower



3.	Flat measuring	1998 sq. ft.
4.	RERA registered/ not registered.	Registered
5.	Registration no.	299 of 2017 dated 13.10.2017
6.	RERA Registration no.	12.10.2020
7.	Nature of real estate project	Group Housing colony
8.	Date of execution of flat buyer's agreement	24.12.2012
9.	Payment plan	Construction linked payment plan
10.	Total sales consideration	Rs. 1,33,11,226/-
11.	Total amount paid by the complainants till date	Rs. 1,04,90,109/- As alleged by the complainants
12.	Date of delivery of possession as per clause 5.1 of flat buyer's agreement Clause 5.1: the respondent to offer the possession of the unit within the commitment period with a grace period of 6 months Commitment Period: possession of the unit to the purchaser within a period of 42 months from the date of sanction of the building plan or execution of the flat buyer's agreement	24.12.2016 Note: Date calculated from the agreement
13.	Delay in handing over possession till date i.e 23.04.2019	2 years 3 months 30 days
14.	Penalty clause as per flat buyer's agreement dated 24.12.2012	Clause 6.1 of the agreement i.e. Rs.5/- per sq. ft on the super built up area per month of the said unit



3. The details provided above have been checked on the basis of the record available in the case file. A flat buyer agreement

dated is placed on record for the aforesaid unit according to which the possession of the same was to be delivered by 24.12.2016. Neither the respondent has delivered the possession of the said unit nor they have paid any compensation @ Rs.5/- per sq.ft. per month of the area of the said unit for the period of such delay as per clause 6.1 of the said agreement. Therefore, the promoter has not fulfilled his committed liability as on date.

4. Taking cognizance of the complaint, the authority issued notice to the respondents for filing reply and appearance. The respondent appeared on 23.04.2019. The reply was filed by the respondent which has been perused.

Facts of the complaint

5. Briefly stated the facts of the case the complaint, that the complainants after several representations from the respondent applied for allotment in the project of the respondent and submitted an application form along with a cheque of Rs. 70,000/- dated 30.09.2012 for a premium residential apartment in the project.
6. The complainant submitted that both the parties entered into a buyer agreement dated 24.12.2012. The complainant were



allotted flat bearing no. T21-1703, 16th floor in tower T21 with a tentative area admeasuring super built up area 1998 sq. ft. and the consideration agreed between the parties was to the tune of Rs. 1,33,11,226/-. The complainants opted for a down payment plan at the time of entering into the agreement but changed it to construction lined plan later. The respondent charged Rs. 25,773/- + Rs. 17,562/-+ Rs. 88,093= as interest for changing the down payment plan to construction linked plan.

7. The complainant submitted that the respondent specifically mentioned in the agreement that the possession of the flat will be handed over within a period of 42 months from the date of sanction of the building plan or execution of the agreement. It was submitted that the sanction plan was sanctioned on 30.05.2012 and the possession of the flat was to be delivered on 24.06.2016.

8. The complainants submitted that they made timely payments as per the demands raised by the respondent. The complainants have genuine apprehension that the fate of the project will be like other projects of the respondent on the same piece and parcel of land at sector 37D, Gurgaon, Haryana, namely Park Serene, Park Spacio and Park



Generation where the respondent failed to deliver the possession. The construction of two towers 22 and 23 in the same complex has reached only till 4/5 floor slab and it is not possible to handover the possession along with occupancy certificate within the stipulated time period.

9. It is submitted that the speed of construction seems to be very slow and the expected possession date has already lapsed. Without giving any consideration to the status of the project, the respondent is raising illegal demands and looking at the current scenario it is clear that the respondent are not in the position to handover the possession of the unit anytime soon.
10. The complainants submitted that they have already paid 85% of the total BSP and has made a total payment till date to the tune of Rs. 1,04,90,109/-. The respondent issued a demand letter dated 02.12.2015 for the stage f brick works. It is pertinent to note that the respondent skipped demands for the two stages and this shows that the respondent is indulged into malpractices of sorts and hence, the actions of the respondent needs to be restrained.
11. The complainants submitted that they served a legal notice to the respondent dated 16.12.2015 and also protested the



demand dated 02.12.2015 and undertook that they are ready to pay the demands raised by the respondent in return, the complainant requested an assurance that possession of the flat will be handed over along with the occupancy certificate and the complainants have not received any reply or written communication after serving the notice.

12. It is submitted that the complainants visited the construction site and found out that the poor quality material is being used in the construction which not only affect the aesthetics of the society but also the safety of the complainants and they no longer wish to continue with the project and interested in the refund of their money along with other relief.

13. The complainants submitted that they earlier approached the Hon'ble National Consumer Disputes Redressal Commission, New Delhi for their redressal of their grievances but the same was withdrawn by the complainants with liberty to file the present complaint.

14. Issues raised by the complainants

The relevant issues as culled out from the complaint are as follows:



- I. Whether there has been failure on the part of the respondents in the delivery of the flat to the complainants within the stipulated time period?
- II. Whether the complainants are entitled to refund of their money along with compensation and at what rate?

15. Relief sought

- I. Direct the respondent to refund the money paid by the complainants till date i.e. 1,04,90,109/- along with prescribed rate of interest from the date of payment till realization of the amount.

REPLY ON BEHALF OF RESPONDENT

10. The respondent submitted that the present complaint under reply has been filed without application of mind to the facts and circumstances and the controversy involved in the present case and is liable to be dismissed in the interest of justice. It is further submitted that the present complaint filed by the complainants is wholly misconceived, erroneous, unjustified and untenable in law besides being hasty, extraneous and have been filed in order to unlawfully gain at the expense of the respondent. The averments made in the



present complaint are denied for being false and misleading except to the extent specifically admitted herein or are in consonance with the submissions made hereunder.

11. The respondent submitted that the respondent had diligently applied for registration of the project in question i.e. "Terra" located at Sector-37D, Gurugram including towers-T-20 to T-25 & EWS before this Hon'ble Authority and accordingly, registration certificate dated 13.10.2017 was issued by this hon'ble Authority wherein the registration for the said project is valid for a period commencing from 13.10.2017 to 12.10.2020.

12. It is submitted that the complainants has approached this hon'ble authority with unclean hands i.e. by concealing and misrepresenting facts material to the present purported complaint. It is submitted that the hon'ble Supreme Court in a plethora of cases has held that anyone approaching court must come with clean hands as any misrepresentation of facts amount to fraud not only on the respondent but also on the court and as such, the complaint warrants dismissal without



any further adjudication. In this regard, reference may be made to the following:

- (i). It is submitted that the complainants has failed to disclose before this hon'ble authority that complainants is the proprietor of one golden properties in the garb whereof the Complainants after conducting due diligence, analysing the real estate market in the relevant geographical area and upon satisfying themselves about the projects in its entirety and considering the same fruitful for his investment, approached the Respondents for applying for booking of a unit in the project, named "Terra" located at Sector-37D, Gurgaon.
- (ii). The complainants had concealed from this hon'ble authority at the time of booking of the unit in question, the complainants had opted for sub-vention payment plan and thereafter, upon request from the complainants the same was converted to possession linked payment plan and thereafter, upon request being made by the complainants, the same changed to construction linked payment plan.



(iii). The complainants falsely stated that the timely payments were made by the complainants as and when demanded by the respondent, however, as detailed in the reply to list of dates, it is submitted that the complainants made several defaults in making timely payments as a result thereof, the respondent had to issue several reminder letters for payment of the outstanding amount and was compelled to issue a final and last opportunity demand notice dated 25.08.2015, however the complainants failed to pay the outstanding dues.

(iv). The complainants has concealed the fact that he himself committed defaults in making timely payments of various instalments within the stipulated time despite having clearly agreed that timely payment is the essence of the agreement between the parties as is evident from the following

“Clause C (10) of the booking application form is as under:

“Timely payment of installments as per the Payment Plan shall be the essence of this transaction. It shall be incumbent



on the Applicant(s) to comply with the terms of payment and other terms and conditions of allotment. The Applicant(s) acknowledges failure to adhere to the payment schedule and failure to make full and timely payment impacts the Company's ability to fulfill its reciprocal promises and obligations to the Applicant(s) and other customers and consequently prejudicially affects as well as results in the waiver and extinguishment of the Applicant's rights under these Terms and Conditions and the Flat Buyer's Agreement, including but not limited to the right to claim any compensation for delay in handing over possession of the Unit, the right to require the Company to perform any of its obligations within a given time frame and the cancellation of allotment amongst other rights. Accordingly, in the event that the Applicant(s) fails to strictly adhere to these Terms and Conditions and the Flat Buyer's Agreement, such action shall amount to a voluntary, conscious and intentional waiver and relinquishment of all rights and privileges of these Terms and Conditions and the



Flat Buyer's Agreement and could at the option of the Company be treated as termination/cancellation of allotment and the Applicant(s) could at the option of the Company cease to have any right, title or interest whatsoever in the Unit and shall also be liable to forfeiture of earnest money deposit, non-refundable amounts in terms of clause E herein below."

The said understanding was reproduced in the Flat Buyer's Agreement as well wherein vide Clause 7.1 of the Agreement it was agreed as under:

"The timely payment of each installment of the Total Sale Consideration i.e., COP and other charges as stated herein is the essence of this transaction/Agreement. In case the Purchaser(s) neglects, omits, ignores, defaults, delays or fails, for any reason whatsoever, to pay in time any of the installments or other amounts and charges due and payable by the Purchaser(s) as per the payment schedule opted or if the Purchaser(s) in any other way fails to perform, comply or observe any of the terms and conditions



on his/her part under this Agreement or commits any breach of the undertakings and covenants contained herein, the Seller/Confirming Party may at its sole discretion be entitled to terminate this Agreement forthwith and forfeit the amount of Earnest Money and Non-Refundable Amounts and other amounts of such nature. In the event the Seller/Confirming Party exercises its right to terminate the present agreement, the Purchaser(s):

- a) Shall be left with no right or interest on the said unit and the Seller/Confirming Party shall have the absolute right to sell the said unit to any other third party.*
- b) Shall approach the Seller/Confirming Party for the refund, if any, and the Seller/Confirming Party shall refund the balance amount, if any, to the Purchaser(s) without any interest within (120) One Hundred Twenty Days from the date of sale of the Unit by the Seller/Confirming Party to any third Party.”*



13.The respondent submitted that, the complainants made inordinate delay in making timely payments of instalments

and the delay is continuing further since the complainants has still not cleared the dues. This act of not making timely payments is in breach of the agreement which also affects the cash flow projections and hence, impacts the projected timelines for possession. Hence, the projected timelines for possession got diluted due to the defaults committed by various allottees including the complainants in making timely payments.

14. The respondent submitted that the complainants in the entire complaint concealed the fact that no updates regarding the status of the project were provided to him by the respondent. However, complainants was constantly provided construction updates by the respondent vide emails dated 11.12.2017, 26.03.2018, 09.04.2018, 08.05.2018, 15.06.2018, 09.09.2018, 07.11.2018, 19.12.2018 and 20.01.2019.

15. The respondent submitted that the reliefs sought by the complainants are unjustified, baseless and beyond the ambit of the agreement duly executed between the parties, which forms a basis for the subsisting relationship between the



parties. It is further submitted that the complainants has entered into the said agreement with the respondent with open eyes and is bound by the same. It is further submitted that the reliefs sought by the complainants travel way beyond the four walls of the agreement duly executed between the parties. It is submitted that the complainants while entering into the agreement has accepted and is bound by each and every clause of the said agreement, including Clause-6.1 which provides for delayed penalty in case of delay in delivery of possession of the said flat by the respondent. The detailed relief claimed by the complainants goes beyond the jurisdiction of this hon'ble authority under the Real Estate (Regulation and Development) Act, 2016 and therefore the present complaint is not maintainable qua the reliefs claimed by the complainants.



16. The respondent submitted that, the above submission implies that while entering into the agreement, the complainants had the knowledge that there may arise a situation whereby the possession could not be granted to the complainants as per

the commitment period and in order to protect and/or safeguard the interest of the complainants, the respondents have provided reasonable remedy under clause-6.1, and, the complainants having accepted to the same in totality, cannot claim anything beyond what has been reduced to in writing between the parties. In this regard, reference may be made to section-74 of the Indian Contracts Act, 1872, which clearly spells out the law regarding sanctity and binding nature of the ascertained amount of compensation provided in the agreement and further specifies that any party is not entitled to anything beyond the same. Therefore, the complainants, if at all, is only entitled to compensation under Clause-6.1 of the agreement.

17. The respondent submitted that having agreed to the above, at the stage of entering into the agreement, and raising vague allegations and seeking baseless reliefs beyond the ambit of the agreement, the complainants is blowing hot and cold at the same time which is not permissible under law as the same is in violation of the 'Doctrine of Aprobate & Reprobate'. In



this regard, the respondents reserves their right to refer to and rely upon decisions of the Hon'ble Supreme Court at the time of arguments, if required.

18. The respondent submitted that the parties had agreed under the flat buyer's agreement to attempt at amicably settling the matter and if the matter is not settled amicably, to refer the matter for arbitration. Clause-17 of the FBA is reproduced below for ready reference-

"17. Dispute Resolution: All or any disputes arising out of or touching upon or in relation to the terms or formation of this Agreement or its termination, including the interpretation and validity thereof and the respective rights and obligations of the Parties shall be settled amicably by mutual discussion, failing which the same shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration & Conciliation Act, 1996 or any statutory amendments, modifications or re-enactment thereof for the time being in force. A Sole Arbitrator, who shall be nominated by the



Seller/Confirming Party's Managing Director, shall hold the arbitration proceedings at Gurgaon. The Purchaser(s) hereby confirms that he shall have no doubts as to the independence or impartiality of the said Arbitrator and shall not challenge the same. The arbitration proceedings shall be held in English language and decision of the Arbitrator including but not limited to costs of the proceedings/award shall be final and binding on the parties."

Admittedly, the complainants has raised dispute but did not take any steps to invoke arbitration. Hence, is in breach of the agreement between the parties. The allegations made require proper adjudication by tendering evidence, cross examination etc. and therefore cannot be adjudicated in summary proceedings.

19. It is submitted that the proposed timelines for possession being within 42 months from the date of sanction of building plans or execution of FBA, whichever is later, along with 180 days of grace period was subject to *force majeure* circumstances and circumstances beyond control of the



respondent. However, the complainants has indulged in selective reading of the clauses of the FBA whereas the FBA ought to be read as a whole. It is further submitted that the construction is going on in full swing and the respondent is making every endeavour to hand over the possession at the earliest.

20. The respondent contended that the proposed timelines for possession have been diluted due to defaults in making timely payment of instalments by various allottees of the project Terra including the complainants herein. In this regard, reference may be made to the following:

- a) The project in question was launched by the respondent in August' 2012. It is submitted that while the total number of flats sold in the Project "Terra" is 401, for non- payment of dues, 78 bookings/ allotments have since been cancelled. Further, the number of customers of the Project "Terra" who are in default of making payments for more than 365 days are 125. Hence, there have been huge defaults in making



payments of various instalments by large number of applicants in the project.

- b) It is well known fact that the projected timelines for possession are based on the cash flow. It was not in the contemplation of the respondent that the allottees would hugely default in making payments and hence, cause cash flow crunch in the project.
- c) That vide clause 7.3 of the FBA, an option to cancel the allotment is available to the complainants, however, acceptance of the same is on discretion of the respondent. It is pertinent to mention herein that the project in question is at advance stage of construction. It is submitted that the respondent shall stand by its commitment as per the terms of FBA. It is further submitted that the respondent has already invested huge money and at this stage cancelling the allotment is not acceptable.
- d) That vide Clause-G.2 of the application for allotment, which was later reiterated vide Clause 6.1 of the FBA, it was duly agreed between the parties that subject to the conditions



mentioned therein, in case the respondent fails to hand over possession within 42 months from the date of sanctioning of the building plans or execution of FBA, whichever is later along with 180 days of grace period, the respondent will be liable to pay to the complainants compensation calculated @ Rs.5 per sq. ft. for every month of delay. It is further submitted that the parties had agreed the penalty in case of delay in offering possession prior to entering into the transaction. Prior to entering into the transaction, the parties had further agreed vide clause G.2 of the booking application that in case the Complainants fail or default in making timely payment of any of the instalments, then the complainants would not be eligible for delay compensation and the said understanding was also reiterated in clause 6.1 of the FBA. Thus, the understanding between the parties regarding compensation for delay in offering of possession had been agreed and accepted prior to entering into the transaction.



16. It is submitted that with regard to the construction of the tower in which the unit in question is located, work such as structure, brick work, door frames, internal and external plaster, IPS Flooring have been completed. Around 70% of the construction with regard to Tower T-21 in the project Terra is complete and for the remaining construction work is going at full pace at the site and the respondent will be handing over the possession shortly.

Determination of issues

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

17. With respect to the **first issue** raised by the complainants, as per clause 5.1 of the flat buyer's agreement dated 24.12.2012, the possession was stipulated to be handed over within the commitment period i.e. by 30.05.2016. Thus, the respondent failed in handing over the possession on or before the said due date, nor paid the compensation stipulated under clause 6.1 of the agreement, thereby committing a breach of the said agreement. However, the complainant is entitled to



delayed possession interest @ 10.75% p.a. from the due date of possession till the actual handing over of possession.

18. With respect to the **second issue** raised by the complainants, however, no refund cannot be allowed at this stage. The respondent contended in his reply that around 70% of the construction with regard to tower T-21 in the project is complete and for the remaining construction work is at full pace and the respondent will hand over the possession shortly. Thus, the respondent at this stage would constrain the construction activity and also hamper the interest of other allottees.

The authority is of the view that if the respondent fails to deliver the possession on the revised date of handing over the possession i.e 12.10.2020, in that eventuality, the complainant is entitled for refund of the deposited amount along with interest.

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



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

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

Findings of the authority:

21. **Jurisdiction of the authority-** The project “Terra” is located in Sector 37D, Gurugram, thus the authority has complete territorial jurisdiction to entertain the present complaint. 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.

22. 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.

23. As per clause 5.1 of the flat buyer's agreement dated 24.12.2012 for unit No.T-21, 1703, in tower T-21, in project "Terra" Sector-37D, Gurugram, possession was to be handed over to the complainant within a period of 42 months from the date of execution of BBA + 6 months grace period which comes out to be 24.12.2016. However, the respondent has not delivered the unit in time. The complainant has already paid Rs.1,04,90,109/- to the respondent against a total sale consideration of Rs.1,33,11,226/-. As such, complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.70% per annum w.e.f 24.12.2016 as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016 till offer of possession. An issue has been raised that actual physical possession should be on ground of providing all the facilities as promised in BBA failing which partial completion will not be treated as actual physical possession.

24. The authority is of the view that if the respondent fails to deliver the possession on the revised date of handing over the



possession i.e 12.10.2020, in that eventuality, the complainant is entitled for refund of the deposited amount along with interest.

Decision and directions of the authority:

25. The authority, exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issue the following directions to the respondent:

- (i) The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period. The promoter shall not charge anything from the complainant which is not part of the BBA.
- (ii) The interest on the due payments from the complainants shall be charged at the prescribed rate of interest i.e. 10.70% by the promoter which is the same as is being granted to the complainants in case of delayed possession.
- (iii) The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order and thereafter monthly payment of interest till offer of possession shall be paid before 10th of subsequent month.



26. The complaint is disposed of accordingly.
27. The order is pronounced.
28. Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Date:23.04.2019

Judgement Uploaded on 28.05.2019



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