

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

Complaint No. : 1268 of 2018
Date of first hearing : 03.05.2019

Date of Decision : 03.05.2019

Mr. Vinayak Nandan Bharma
R/o EC 201 SFS flats, G-8,
Area Maya Enclave,
New Delhi- 110064

...Complainant

Versus

1. BPTP Limited
2. Countrywide Promoters Pvt. Ltd.
Through its managing director
Office at: M-11 Middle Circle, Connaught
Circus, New Delhi-110001

...Respondents

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Chetan Dhingra Advocate for the complainant
Shri Shanshak Bhushan Advocate for the respondent

ORDER

1. A complaint dated 22.11.2018 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. Vinayak

Nandan Bharna, against the respondent BPTP Limited and countrywide promoters Pvt. Ltd., in respect of unit described below on account of non-fulfilment of obligations of the promoter under section 11(4)(a) of the Act *ibid*.

2. Since the flat buyer agreement has been executed on 02.01.2013, 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	"Terra" in Sector 37D, Gurugram
2.	Nature of real estate project	Group housing colony
3.	Project area	19.74 acres
4.	Unit no.	T22-,1203 , tower 22
5.	Unit area	1691 sq. ft.
6.	Registered/ not registered	Registered (10.23 acres, tower T20-T25) (299 of 2017)
7.	Revised date of completion as per RERA registration certificate	12.10.2020

8.	DTCP license	83 of 2008 dated 05.04.2008 and 94 of 2011
9.	Date of flat buyers' agreement	02.01.2013
10.	Date of booking	22.08.2012(as alleged by complainant)
11.	Total consideration	Rs. 1,09,95,306.50/- (as per statement of account annex C3 Pg 66)
12.	Total amount paid by the complainant	Rs. 59,31,341.69/- (as per statement of account annex C3 Pg 66)
13.	Payment plan	construction linked plan
14.	Date of delivery of possession Clause 1.6 and 5.1 42 months + 180 days grace period from the date of sanction of building plan or execution of agreement whichever is later Calculated from the execution of agreement as no building plan is annexed	02.01.2017
15.	Delay of number of months/ years upto 03.05.2014	2 years 4 months
16.	Penalty clause as per flat buyers agreement clause 6.1	Rs. 5/- per sq. ft. per month on super area

4. Taking cognizance of the complaint, the authority issued notice to the respondents for filing reply and appearance. The respondent appeared on 03.05.2019. The case came up for

hearing on 03.05.2019. The reply has been filed by the respondent and the same has been perused.

Facts of the complaint

5. The complainant submitted that he was lured by the representations made by the respondent wherein he promised various facilities and lured the complainant with various features. The prime features as projected by the respondent company are: 60 meter wide road, high tech security, dedicated parking, modular kitchen with piped gas, wooden flooring, ultra modern toilets, eco friendly project, etc.
6. The complainant submitted that on the application being made by the complainant company, the respondent company issued the confirmation of unit selected for allotment. The details of the unit allotted to the complainant are as follows: unit no.- T-22-1203, floor- 12th, tower- T-22, admeasuring- 1691 sq. ft., BSP- Rs. 5250/- per sq. ft. total sale consideration Rs. 1,09,95,306.50/-.
7. The complainant submitted that he had chosen construction linked payment plan and made his payment on time as per the demand. It is submitted that the respondent had provided the payment plan along with allotment letter.

8. The complainant submitted that he made most payments within time as and when raised and in cases when the payments were delayed, the respondent company had charged interest on the complainant.
9. The complainant submitted that after issuance of the allotment letter the respondent entered into the flat buyer agreement. The copy of the flat buyer agreement dated 02.01.2013 is annexed with the complaint. It is submitted that respondent no.1 was the seller whereas respondent no.2 was confirming party to the said agreement.
10. The complainant submitted that respondent company had assured the complainant delivery of the flat within 42 months from the date of the execution of agreement i.e. 02.01.2013. It is submitted that the respondent company was supposed to deliver the possession of the apartment latest by 02.07.2016.
11. The complainant submitted that he made most payments on time and in cases when the payments were delayed, the respondent company had charged 18% interest, compounded quarterly. It is submitted that the complainant company, nevertheless, duly made the payments to the respondent company as and when demanded. It is submitted that at times

when the payments were delayed due to any reason the complainant made the payment of interest too as demanded.

12. The complainant submitted that despite the payment of Rs. 59,31,341.69/- by the complainant, the respondent company has failed to deliver the possession of the flat to the complainant. It is submitted that the complainant till date has already made the payment of Rs. 59,31,341.69/- to the respondent but the respondent has failed to complete the construction of the apartment and deliver the same.
13. The complainant submitted that he requested the respondent to deliver the possession of the apartment several times through emails and personally, but the respondent has failed to adhere to the request of the complainant. On the other hand, the respondent continued to issue threatening demand letters to the complainants and failed in completing construction despite being in receipt of 60% of the total sale consideration.
14. The complainant submitted that having lost all hope, the complainant requested the respondent to refund the money with the prescribed rate of interest but the respondent company neither delivered the possession of the flat nor refunded the money of the complainant.

15. The complainant submitted that it is just and fair that this hon'ble authority may be pleased to hold that the respondent was liable to deliver the possession of the apartment by 02.07.2016

16. The complainant submitted that it is only just and fair that this hon'ble authority may be pleased to direct the respondent to refund the amount paid by the complainant along with as per prescribed rate of interest.

Issues to be determined

The relevant issue raised in the complaint are:

- I. Whether there has been a failure on the part of the respondents to deliver the possession of the flat to the complainant within the stipulated time period?
- II. Whether the complainant is entitled to refund of the amount deposited by the complainant?

Relief sought

- I. Direct the respondent to refund the money paid by the complainant till date i.e. Rs. 59,31,341.69/- along with prescribed rate of interest.

Respondent's reply

17. 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.

18. The respondent submitted that the complainant 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 concealment/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). The complainant has concealed from this hon'ble authority that the complainant has been a habitual

defaulter in making payments of the installments as and when demanded by the respondent in terms of the agreed payment plan. The complainant has also concealed from this hon'ble authority about various reminder letters sent to the complainant for payment of the outstanding amount.

- (ii). The complainant has further concealed from this hon'ble authority regarding various construction updates being shared by the respondent to the complainant.
- (iii). The complainant has also concealed from this hon'ble authority that as a goodwill gesture the respondent time and again vide emails dated 04.12.2015, 05.05.2016 and 20.01.2017 provided the interest waiver to the complainant on the outstanding dues of the complainant. However, the complainant despite interest waiver has failed to clear the outstanding dues.

19. The respondent submitted that the relief(s) sought by the complainant are unjustified, baseless and beyond the scope/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 complainant has entered into the said agreement with the respondent with open eyes and is bound by the same. It is

further submitted that the relief(s) sought by the complainant travel way beyond the four walls of the agreement duly executed between the parties. It is submitted that the complainant 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.

20. The respondent submitted that the detailed relief claimed by the complainant 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 complainant.
21. The respondent submitted that the above submission implies that while entering into the agreement, the complainant had the knowledge that there may arise a situation whereby the possession could not be granted to the complainant as per the commitment period and in order to protect and/or safeguard the interest of the complainant, the respondents have provided reasonable remedy under clause-6.1, and, the complainant having accepted to the same in totality, cannot

claim anything beyond what has been reduced to in writing between the parties.

22. The respondent submitted that the 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 complainant, if at all, is only entitled to compensation under clause-6.1 of the agreement.
23. The respondent submitted that 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 complainant 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 reserve their right to refer to and rely upon decisions of the hon'ble supreme court at the time of arguments, if required.
24. Therefore, in light of the settled law, the reliefs sought by the complainant in the complaint under reply cannot be granted by this hon'ble authority.

25. The respondent submitted that parties had agreed under the flat buyer's agreement (FBA) to attempt at amicably settling the matter and if the matter is not settled amicably, to refer the matter for arbitration. Admittedly, the complainant 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 requires proper adjudication by tendering evidence, cross examination etc. and therefore cannot be adjudicated in summary proceedings.
26. The respondent 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 complainant 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 endeavor to hand over the possession at the earliest.
27. The respondent submitted 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 complainant herein. In this regard, reference may be made to the following:

- a) That 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 which is evident from the chart below-
- b) That 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 complainant, 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 shall be liable to pay to the complainant 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 complainant fail or default in making timely payment of any of the instalments, then the complainant 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.

28. In addition to the above, it is 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.

29. It is submitted that the construction of unit in question is going on at full swing and that the respondent would be offering possession of the unit shortly.

Determination of issues

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

30. With respect to the **first issue** as per clause 1.6 and 5.1 of the agreement, the due date of possession comes out to be 02.01.2017. However, the respondent failed in handing over the possession on or before the said due date, thereby breaching the terms and conditions stipulated in the agreement dated 02.01.2013. Thus, the promoter has failed to fulfil his obligation under section 11(4)(a) of the Real Estate (Regulation and Development) Act, 2016.
31. With respect to **second issue** raised by the complainant since the project is registered with the authority and the revised date of completion is 12.10.2020, so at this stage refund cannot be allowed. However, complainant is entitled to delay possession interest for every month of delay in handing over possession at the prescribes rate of interest @10.70 % per annum.
32. The complainant made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above.

33. 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

34. **Jurisdiction of the authority-** 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 group housing colony 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.

35. Keeping in view the facts and circumstances of the complaint and submissions made by the parties during arguments, the

authority has observed that project is registered with the authority vide no. 299 of 2017 and the revised date of delivery of possession is 12.10.2020.

36. As per clause 1.6 and 5.1 of the builder buyer agreement dated 2.1.2013, for unit no. T22-,1203, tower 22, 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 2.1.2017. However, the respondent has not delivered the unit in time. Keeping in view the circumstances of the case, the authority is of the considered opinion that the complainant entitled to delayed possession charges at 10.75% p.a. w.e.f. 02.01.2017 till the offer of possession.

Decision and directions of the authority

37. 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 following directions:

- i. The respondent is directed to pay delayed possession charges at prescribed rate of interest i.e. 10.70% per annum w.e.f 02.01.2017 as per the provisions of section

18 (1) of the Real Estate (Regulation and Development) Act, 2016 till the offer of possession.

- ii. Complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- iii. The promoter shall not charge anything from the complainant which is not part of the BBA.
- iv. Interest on the due payments from the complainant 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 complainant in case of delayed possession.
- v. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order and thereafter monthly payment of interest till offer of possession shall be paid on or before 10th of every subsequent month.

38. The order is pronounced.

39. Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Date: 03.05.2019

Judgement Uploaded on 28.05.2019

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