

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

Complaint no. : 2051 of 2018
First date of hearing : 02.04.2019
Date of decision : 17.05.2019

1. Mr. Dharmender Kumar Phogat
2. Ms. Jyoti
Both R/o. House no. 2126, HUDA Colony,
Sector 4, Gurugram, Haryana.

.....Complainants

Versus

BPTP Ltd and Countrywide Promoters Pvt.
Ltd.
Office : M-11, First floor, Middle Circle,
Connaught Circus, New Delhi-110001

.....Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Sukhbir Yadav Advocate for the complainants
Shri Shashank Bhushan Advocate for respondent

ORDER

1. A complaint dated 04.12.2018 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. Dharmender Kumar Phogat and Ms. Jyoti against the promoter BPTP Ltd. on account of violation of clause 3.1 of flat buyer's agreement executed on 29.11.2012 in respect of the unit described below 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 flat buyer's agreement was executed on 29.11.2012 i.e prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, so the penal proceedings cannot be initiated retrospectively. Therefore, the authority has decided to treat this complaint as an application for non- compliance of statutory obligation on the part of the respondent in terms of the provision of section 34(f) of the Act *ibid*.

3. The particulars of the complaint are as under: -

- **Nature of the project** : Group housing complex
 - **DTCP license no.** : 83 of 2008 and 94 of 2011
 - **RERA Registered/ un registered** : Registered

1.	Name and location of the project	"Park Generations", Sector 37D, Gurugram
2.	Nature of real estate project	Group housing complex
3.	DTCP license no.	83 of 2008 94 of 2011
4.	Unit no.	T5-103, 1 st floor, tower T5
5.	Unit area	1470 sq. ft
6.	RERA registration status	Registered
7.	RERA registration no.	07 of 2018
8.	Completion date as per RERA registration certificate	30.04.2018 (expired)
9.	Date of flat buyer's agreement	29.11.2012
10.	Payment Plan	Construction linked payment plan
11.	Total consideration amount as per statement of account dated 16.10.2018 (page 109 of complaint)	Rs. 67,67,104/-
12.	Total amount paid by the complainant as per statement of account dated 16.10.2018 (page 109 of complaint)	Rs. 67,53,093/-
13.	Due date of delivery (as per clause 3.1 : 36 months + 180 days grace period from the date of execution of flat buyer's agreement)	29.05.2016
14.	Delay in handing over possession till date	2 years 11 months 19 days

4. The details provided above have been checked as per record available in the case file which has been provided by the

complainants. Flat buyer's agreement dated 29.11.2012 is available on record for the aforesaid unit. As per clause 3.1 of the flat buyer's agreement, the due date of handing over possession was 29.05.2016. The respondent has not paid any interest for the period it delayed in handing over the possession. Therefore the promoter has not fulfilled its committed liability as on date.

5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. The reply filed by the respondent has been perused.

FACTS OF THE COMPLAINT:

6. The complainants submitted that complainants got to know about BPTP Park Generations project situated at Sector-37D, Gurugram promoted by reputed BPTP Limited i.e. the respondents.
7. The complainants submitted that the complainants along with their family members and real estate agent of respondent visited the site. The location was excellent

and they consulted the local representative of the developer. The local representative of developer allured the complainants with attractive brochure and special characteristics of finishing of flat.

8. The complainants submitted that on 30.08.2011, complainants namely Mr. Dharmender Kumar Phogat and Ms. Jyoti booked a 3 BHK flat admeasuring 1470 sq. ft. bearing flat no. T5-103 in BPTP Park Generations, Sector-37D, Gurugram and paid Rs. 5,00,000/- as booking amount along with application form. Flat was purchased under the construction link payment plan for sale consideration of Rs. 67,67,104/-.
9. The complainants submitted that on 14.11.2011, respondent raised a demand of Rs. 5,73,396/- and complainants paid the said demand on 25.11.2011 vide cheque no. 082090 drawn in Oriental Bank of commerce. Respondent issued payment receipt on 25.11.2011.
10. The complainants submitted that a pre-printed flat buyer's agreement was executed between complaints and respondent. As per clause 3 of flat buyer's agreement,

respondent had to give the possession of flat “within a period of thirty six (36) months from the date of execution of flat buyer’s agreement, inter alia due date of possession was 29.11. 2015. An addendum was also executed between the parties on 29.11.2015.

11. The complainants submitted that on 07.01.2013, respondent issued an allotment letter in favor of complainants, by allotting unit no. T5-103, admeasuring 1470 sq. ft.
12. The complainants submitted that on 21.01.2013, complainants have taken a home loan of Rs. 45,00,000/- from State Bank of India against the said flat. Respondent issued permission to mortgage and signed on tripartite agreement on 22.01.2018. Since 25.01.2018 complainants are paying interest on housing loan.
13. The complainants submitted that on 25.06.2013, respondent raised a demand of Rs. 8,52,045/- as per payment plan on stage “on casting of ground floor slab”. Complainants paid the said demand and respondent issued payment receipts on 06.07.2013.13.

14. The complainants submitted that on 09.02.2015, respondent raised a demand of Rs. 6,84,902/- as per payment plan on stage “on completion of top floor slab”. Complainants paid the said demand and respondent issued payment receipts on 24.02.2015.
15. The complainants submitted that on 24.07.2015, respondent sent a statement of account of subject flat, which shows that till date 24.07.2015, respondent called Rs. 61,24,698/- i.e. more than 90% of total sale consideration and same has been paid by complainants.
16. The complainants submitted that on 17.11.2016, respondent raised a demand of Rs. 43,678/- against VAT Amnesty Scheme. Complainants paid the said demand and respondent issued payment receipt.
17. The complainants submitted that on 19.06.2017, respondent raised a demand of Rs. 6,17,641/- as per payment plan on stage “on start of cladding”. Complainants paid the said demand and respondent issued payment receipts on 01.07.2017.

18. The complainants submitted that on 23.06.2017 & 09.07.2017, complainants sent a grievance email to respondent and highlighted the issue of raising and collecting wrong demand “on start of cladding”. Complainants visited on project site on 08.07.2017, and thereafter complainants send another grievance email alleging raising wrong demand (without achieving particular stage of construction). Particular stage of construction could be achieved only after more than 2 months from date of site visit.
19. The complainants submitted that on 16.10.2018, respondent sent a statement of account of subject flat, which shows that till date 16.10.2018, respondent called Rs. 67,47,506/- i.e. more than 99% of total sale consideration and complainants had paid Rs. 67,53,093/-
20. The complainants submitted that as per the payment schedule of the flat buyer’s agreement, allottee has already paid the more than 99% amount i.e Rs. 67,53,093/- along with car parking and other allied charges of actual purchase price, but when complainants

observed that there is no progress in construction of subject flat for a long time, they raised their grievance to respondent. Though complainants was always ready and willing to pay the remaining installments provided that there is progress in the construction of flat.

21. The complainants submitted that since December,2015 complainants are regularly visiting to the office of respondent as well as construction site and making efforts to get the possession of allotted flats, but all in vain, in spite of several visits by the complainants.
22. The complainants submitted that the complainants sent several grievance emails to respondent to know the firm date of possession of flat and asked for compensation on account of delay in handing over the possession. On 24.10.2018 & 25.10.2018, complainants sent another grievance email to respondent and asked for firm date of possession and quantum of compensation on delay in possession.
23. The complainants submitted that the main grievance of the complainants in the present complaint is that in spite

of complainants paid more than 99% of the actual amounts of flats and ready and willing to pay the remaining amount, the respondent party has failed to deliver the possession of flat.

24. The complainants submitted that the complainants had purchased the flat with intention that after purchase, his family will live in own flat. That it was promised by the respondent party at the time of receiving payment for the flat that the possession of fully constructed flat along like basement and surface parking, landscaped lawns, club/ pool, school, EWS etc. as shown in brochure at the time of sale, would be handed over to the complainants as soon as construction work is complete i.e. by September, 2014. Thereafter respondent assured to complainants that physical possession flat will be handed over by November, 2015.

25. The complainants submitted that the work on other amenities, like external, internal MEP yet not completed. Now it is more than 8 years from the date of booking and

even the constructions of towers are not completed, it clearly shows the negligence towards the builder.

26. The complainants submitted that the facts and circumstances as enumerated above would lead to the only conclusion that there is a deficiency of service on the part of the respondent and as such they are liable to be punished and compensate the complainants .

27. The complainants submitted that due to above acts of the respondents and of the terms and conditions of the builder buyer agreement, the complainants have been unnecessarily harassed mentally as well as financially, therefore the opposite party is liable to compensate the complainants on account of the aforesaid act of unfair trade practice. It is pertinent to mention here that respondent never told the actual reason behind delay in completion of project and handing over the possession of flat.

28. The complainants submitted that for the first time cause of action for the present complaint arose in November, 2012, when the unilateral, arbitrary and one sided terms

and conditions were imposed on complainants. Second time cause of action arose in November, 2015, when the respondent failed to handover the possession of the flat as per the buyer agreement. Further the cause of action arose in December, 2016 when the respondent failed to handover the possession of flat as per promise. Further the cause of action again arose on various occasions, including on: a) February, 2017; b) Jan. 2018; c) June, 2018, and on many time till date, when the protests were lodged with the respondent about its failure to deliver the project and the assurances were given by them that the possession would be delivered by a certain time. The cause of action is alive and continuing and will continue to subsist till such time as this Hon'ble Authority restrains the respondent party by an order of injunction and/or passes the necessary orders.

29. The complainants submitted that the complainants being an aggrieved person filing the present complaint under section 31 with the Authority for violation/contravention of provisions of this Act.

ISSUES RAISED BY THE COMPLAINANTS :

30. The following issues are raised by the complainants :

- i. Whether or not the respondents has violated the terms and conditions of the flat buyer agreement thereby delaying possession?
- ii. Whether the respondent can levy excess GST, VAT?
- iii. Whether or not the complainants are entitled to refund of the amount invested by them?

RELIEF SOUGHT:

31. In view of the above, complainants seeks the following relief :

- (i) Pass an appropriate award directing the respondent to pay interest at the prescribed rate for every month of delay from due date of possession till the handing over the possession on paid amount.
- (ii) Respondent party may kindly be directed to complete and seek necessary governmental clearances regarding infrastructural and other facilities including road, water, sewerage, electricity, environmental etc.

before handing over the physical possession of the flats.

RESPONDENT REPLY:

32. The respondent submitted that the respondent had diligently applied for registration of the project in question i.e. "Park Generations" located at Sector-37D, Gurugram before this Hon'ble Authority and accordingly, registration certificate dated 03.01.2018 was issued by this Hon'ble Authority wherein the registration for the said project is valid for a period till 30.11.2018. It is further submitted that the respondent had already applied for the extension of the registration on 30.11.2018 before this Hon'ble Authority.

33. The respondent submitted that the complainants approached the respondent through a broker, namely "IIFL Realty Ltd" after conducting due diligence of the relevant real estate geographical market and after ascertaining the financial viability of the same. It is further submitted that complainants are investor and has booked the unit in question to yield gainful returns by

selling the same in the open market, however, due to the ongoing slump in the real estate market, the complainants has filed the present purported complaint to wriggle out of the agreement.

34. The respondent submitted that the complainants have also concealed from this Hon'ble Authority that with the motive to encourage the complainants to make payment of the dues within the stipulated time, the respondent also gave additional incentive in the form of Timely Payment Discount (TPD) to the complainants and in fact, till date, the complainants have availed TPD of Rs.2,04,249.81/-.

35. 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, complainant was constantly provided construction updates by the respondent vide emails dated 25.10.2017, 11.12.2017, 09.04.2018, 08.05.2018, 15.06.2018, 15.08.2018 and 09.09.2018.

36. The respondent submitted that the reliefs sought by the complainants 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 complainants 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 further 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 floor by the respondent.
37. 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 respondent has provided reasonable remedy under Clause-3.3, and, the complainant having accepted to the same in totality, cannot claim anything beyond what has been reduced to in writing between the parties.

38. The respondent submitted that the complainants vide flat buyer's agreement dated 29.11.2012 duly agreed that subject to force majeure, the respondent proposes to hand over possession of the flat to the complainants within 36 months from the date of the execution of the flat buyer's agreement along with a further grace period of 180 days. The remedy in case of delay in offering possession of the unit was also agreed to between the parties as also extension of time for offering possession of the floors. It is pertinent to point out that the said understanding had been achieved between the parties at the stage of entering into the transaction in as much as similar clauses, being clause no. 18 (proposed timelines for possession), Clause 19 (Penalty for delay in offering

possession), clause 42 (force majeure) had been agreed upon between the parties under the application for allotment also.

39. The respondent submitted that possession of the unit in question has been delayed on account of reasons beyond the control of the respondent. It is submitted that the construction was affected on account of the NGT order prohibiting construction (structural) activity of any kind in the entire NCR by any person, private or government authority. It is submitted that vide its order NGT placed sudden ban on the entry of diesel trucks more than ten years old and said that no vehicle from outside or within Delhi will be permitted to transport any construction material. Since the construction activity was suddenly stopped, after the lifting of the ban it took some time for mobilization of the work by various agencies employed with the respondents.

40. The respondent submitted that it is submitted that although the plumbing work is partly complete, majority of fire-fighting work and structure work is complete

while finishing work under the civil works is partly complete, however, the balance work could not be completed, since, delivery of the materials used in the said works were abysmally affected on account of Goods and Service Tax (GST) implications by the Government authority. It is submitted that the concerned agency, supplying the said material started the said works only in November, 2017 and this was on account of non-availability/ shortage of raw material.

41. The respondent submitted that it is submitted that the construction of the unit is at full swing and the construction is nearing completion. It is further submitted that the construction of tower 1, 2 and 3 has been completed and the occupancy certificate for the same has also been received where after, the respondent has already offered possession to more than 200 customers in the project in question. It is further submitted that the construction of the balance towers including the tower where the unit in question is located,

is going on at full swing at site and that the respondent would be offering possession of the unit shortly.

42. The respondent submitted that it is submitted that the respondent has been regularly updating the complainants about the status of construction. It is further submitted that the major construction work of the unit in question is completed. All the structure, brick work, plaster work Internal as well as external is completed and the possession will be handed over shortly. Thus, the contention raised by the complainants regarding possession is baseless and misleading. Further, since the complainants are investor and does not wish to take possession as the real estate market is down and there are no sales in secondary market, therefore has initiated the present frivolous litigation.

DETERMINATION OF ISSUES:

43. After considering the facts submitted by the complainants and perusal of record on file, the issue wise findings are as hereunder:

44. With respect to **first issue** raised by the complainants as per clause 3.1 of the flat buyer's agreement dated 29.11.2012, the possession of the unit was to be handed over within 36 months plus grace period of 180 days from the date of execution of agreement. In the present case, the flat buyer's agreement was executed on 29.11.2012. Therefore, the due date of handing over the possession shall be computed from 29.11.2012. Grace period of 180 days has been allowed to the respondent for the delay caused due to exigencies beyond control of respondent.

Accordingly, the due date of possession was 29.05.2016 and hence, the period of delay in delivery of possession is computed as 2 years 11 months 19 days till the date of offer of possession. The delay compensation payable by the respondent @ Rs.5/- per sq. ft. per month of super area for any delay in offering possession of the unit as per clause 3.4 of flat buyer's agreement is held to be unjust. The terms of the agreement have been drafted mischievously by the respondent and are completely one sided. It has also been

observed in para 181 of *Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)*, wherein the Bombay HC bench held that:

“...Agreements entered into with individual purchasers were invariably one sided, standard-format agreements prepared by the builders/developers and which were overwhelmingly in their favour with unjust clauses on delayed delivery, time for conveyance to the society, obligations to obtain occupation/completion certificate etc. Individual purchasers had no scope or power to negotiate and had to accept these one-sided agreements.”

The possession of the apartment was to be delivered by 29.05.2016, the authority is of the view that the promoter has failed to fulfil his obligation under section 11(4)(a) of the Real Estate (Regulation and Development) Act, 2016. As the promoter has failed to fulfil his obligation under section 11(4)(a), the promoter is liable under section 18(1) proviso to pay interest to the complainants, at the prescribed rate, for every month of delay till the date of offer of possession. Therefore, as per section 18(1) proviso read with rule 15 of the Rules *ibid*, the complainants are entitled to prescribed rate of interest i.e. 10.65% per annum.

45. With respect to **second issue** raised by the complainants, the authority is of the view that this present issue is not within the purview of the authority and that the complainants may approach appropriate authority regarding the same.

46. With respect to **third issue** raised by the complainants, the authority is of the view that no documents have been produced on record based on which the status of the project can be ascertained. However it is noted that the project is registered vide registration no. 07 of 2018 which has expired on 30.04.2018. Whether or not refund to be given shall be ascertained after proceedings.

FINDINGS OF THE AUTHORITY

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

48. 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 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.

49. An amendment to the complaint was filed by the complainant along with the complaint wherein he has stated that he is not appearing before the authority for compensation but for fulfilment of the obligations by the promoter as per provisions of the said Act and reserves his right to seek compensation from the promoter for which he shall make separate application to the adjudicating officer, if required.

50. The complainant made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter. 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.

Arguments Heard:

51. As per clause 3.1 of the flat buyer's agreement dated 29.11.2012 for unit no. T5-103, 1st floor, tower T5, in project "Park Generations" Sector-37D, Gurugram, possession was to be handed over to the complainant within a period of 36 months from the date of execution of flat buyer's agreement + 180 days grace period which come out to be 29.05.2016.

However, the respondent has not delivered the unit in time. Complainant has already paid Rs. 67,53,093/- to the respondent against a total sale consideration of Rs. 67,67,104/-. As such, complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.65% per annum w.e.f 29.05.2016 as per the

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

DECISION AND DIRECTIONS OF THE AUTHORITY:

52. 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 parties in the interest of justice and fair play:

- i. The respondent is directed to pay delay interest at the prescribed rate of 10.65% per annum on the amount deposited by the complainants with the promoter from the due date of possession i.e. 29.05.2016 till offer of possession.
- ii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- iii. The respondent is directed not to charge anything from the complainant which is not the part of the flat buyer's agreement.

- iv. The arrears of interest so accrued @ 10.65% per annum 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.
53. The order is pronounced.
54. Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated:17.05.2019

Judgement uploaded on 29.05.2019

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GURUGRAM