BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**2156 of 2018**
Date of filing complaint	:	**21.12.2018**
First date of hearing	:	**06.11.2019**
Date of decision	:	**13.05.2022**

1. 2.	Atul Kapur Purnima Kapur **R/O:** - 4534, B-5&6, Vasand Kunj, New Delhi	**Complainants**
	Versus	
	M/s BPTP Limited **Regd. Office at:** - M-11, Middle Circle, Connaught Circus, New Delhi-110001	**Respondent**

CORAM:	
Dr. K.K. Khandelwal	**Chairman**
Shri Vijay Kumar Goyal	**Member**
APPEARANCE:	
Sh. Atul Kapur	Complainant in person
Sh. Venket Rao	Advocate for the respondent

ORDER

1. The present complaint has been filed by the complainant/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and

Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the allottees as per the agreement for sale executed inter se.

A. Unit and project related details

B.

2. The particulars of unit details, sale consideration, the amount paid by the complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S.no.	Heads	Information
1.	Project name and location	"Freedom Serene", Sector- 37-D, Gurugram
2.	Nature of the project	Residential
3.	a) DTCP license no	NA
	b) License valid up to	NA
	c) Name of the licensee	NA
	d) area	NA
4.	a) RERA registered/not registered	**Not Registered**
5.	Unit no.	L-104, tower-L [page no. 22 of complaint]
6.	Unit admeasuring	1788 sq. ft. [page no. 22 of complaint]
7.	Date of execution of BBA	Not executed

8.	Date of allotment letter	26.05.2008
9.	Allotment cum demand letter	09.09.2008 (page no. 22 of complaint)
10.	Total consideration	Rs. 41,92,860/- (as alleged by respondent on page no. 20 of reply)
11.	Total amount paid by the complainants	Rs. 13,99,605/- (as alleged by complainant on page no. 05 of complaint)
12.	Possession clause	**Clause 13 of Allotment letter.** the applicant(s) shall take possession of the said flat after making the full payment and get the conveyance deed executed within 30 days from the date of the notice to possession issued by the company subject to terms and conditions of the flat buyer's agreement.
13.	Due date of delivery of possession	Though the due date of possession cannot be ascertained in the absence of buyer's agreement but the same is taken as 3 years plus 2 months from the date of allotment of the unit and which comes to 26.07.2011.
14.	Occupation certificate	Not obtained
15.	Offer of possession	Not offered
16.	Reminders Letter	18.12.2008, 26.03.2009, 01.03.2011, 19.04.2011 and 28.05.2011
17.	Termination Letter	08.07.2013 (page no. 48 of reply)

C. B. **Facts of the complaint**

3. The complainants applied with the respondent for a residential flat in Park Serene, Sector 37D, Gurgaon, Haryana on 26.05.2008 and paid a sum of Rs. 4,00,000/- on 26.05.2008 towards the booking amount under the construction linked payment plan. The respondent sent a letter dated 09.09.2008 by which it allotted flat no. L-104 in tower L, tentatively measuring 1788 sq ft of super area for a basic sale price of Rs. 41,92,860/-. The complainants were required to pay Rs.8,38,572/- as 20% of the sale price. The complainants had already paid Rs.4,00,000/- as booking amount and so, the respondent demanded the balance of Rs. 4,38,572/- from them. The complainants communicated with the representative/agent of the respondent on 20.09.2008 and where by a discount of Rs.95,000/- was given to them. Thua, they were required to give a cheque of Rs. 3,43,572/- and the same were paid vide a cheque dated 18.10.2008. The respondent again sent letters dated 18.12.2008 and 26.03.2009 demanding the payment of Rs.95,000/- as balance due but acknowledged vide a receipt for Rs. 3,43,572/- after adjusting the discount confirmed to them by its representative.

4. On 04.05.2009, the respondent sent a letter to complainants informing them about the change in flat allocation i.e flat no. L-104 to K-104 since construction in Tower K was taking

place at a faster rate. The respondent demanded Rs. 7,56,962/- (Rs. 661,962/- towards the current dues along with Rs 95,000/- as previous outstanding amount). Further, if they made the payment before 03.06.2009 then, a discount of 10% of the basic sale price (Rs. 41,928.60) was to be given and thus the complainants would have to pay Rs. 715,033.40. The complainants sent an email to the respondent on 30.05.2009 and agreed to avail the prompt payment discount and made it clear in the email that there had been confusion with the representative agent/broker with respect to the broker discount. The broker through whom the flat was booked had initially agreed to give a discount for Rs 95,000/- but subsequently changed the same to Rs.59,000/-. The complainants therefore agreed to pay Rs. 6,56,033.40/- (Rs 715,033.40/- less Rs 59,000/-) to the respondent vide cheque no. 146895 on 03.06.2009.

5. The respondent sent a letter to the complainants dated 16.02.2011 where it arbitrarily and unilaterally again changed the flat of the complainants from K-104 to J-201. The respondent demanded huge amount of Rs 33,30,392/- to be paid by the complainants towards the current dues of flat J-201 along with outstanding dues of Rs.11,530/-.

6. The complainants sent an email on 24.02.2011 to the respondent objecting to the arbitrary change in allotment without their consent as well as the unjustified demand of such

a large sum to be paid within a few days. The complainants also noticed that the respondent had unilaterally charged extraneous charges such as PLC charges (landscape facing) which they had not approved as well as CPC and CMC charges which were not the same as the previous payment plan. The complainants were shocked to see that they were expected to pay such a large sum of money in one instalment whereas they had opted for a construction linked plan to prevent paying such large sums in one go. The respondent vide letter on 02.03.2011 informed the complainants that the demand of Rs. 33,30,392/- was due to the level of construction of Tower L and accordingly 57.5% of the total consideration was demanded to be paid by them in one go.

7. That on 10.06.2011, the complainants visited the office of the respondent along with a written letter and made reasonable demands such as either a phased payment schedule be accepted, or flat be shifted to a lower construction tower, or any other equitable solution as the respondent may deem fit. The complainants further wrote a letter dated 13.10.2012 asking for a reasonable payment schedule. The respondent vide letter on 23.10.2012 informed the complainants that no further payments would be accepted towards flat J-201 for lack of payments. The complainants were told to contact the

customer care but all their efforts fell on deaf ears with unsatisfactory response.

8. The complainants finally decided to exercise their legal remedies and accordingly sent a legal notice dated 26.06.2013 to the respondent asking for an amicable settlement and reply to the same was received on 01.10.2013. However, in the meanwhile, the respondent sent a letter on 08.07.2013 terminating the allotment of flat J-201 and further reiterating the same in its letter dated 19.09.2013 whereby it refused an amicable settlement with the complainants. Subsequently, the respondent sent a letter to the complainants asking them to visit its office on 15.10.2013 at 3pm to discuss an amicable settlement. In the meeting held on 15.10.2013, the complainants were asked if they were be willing to pay interest @18% pa in case, the flat would be restored. The complainants were left with no other option and to prevent the cancellation of the flat allotment, they agreed to make the payment subject to reduction in the exorbitant rate of Interest as the amount based on that interest rate was more than the market value of the property. Subsequent to the meeting, the complainants sent a letter dated 28.10.2013 to the respondent to reinstate the flat. The respondent sent an email dated 13.11.2013 to complainants stating their inability to reinstate the flat and confirming the termination of the allotment. The complainants made several efforts from the year 2013 till 2015 for restoration of their unit and payment of the

remaining dues but with no positive results . Hence, this complaint seeking refund of the amount deposited with the respondent as prayed above was filed.

D. Relief sought by the complainants:

The complainants have sought the following relief:

a). Direct the respondent to refund the entire payment made to it of Rs. 13,99,605/-

E. Reply by the respondent

The respondent by way of written reply made the following submissions.

9. That the complainants have concealed from this authority that they furnished an affidavit dated 31.12.2011 and in token of acceptance of the contents of the said affidavit, have further executed an appropriate undertaking dated 31.12.2011.

10. That the booking of the complainants was terminated on 08.11.2013 due to payment defaults in terms of the agreed payment schedule. It is submitted that despite receipt of numerous reminders letters, they did not clear the pending dues.

11. The complainants have raised dispute but did not take any step to invoke arbitration. Hence, they are in breach of the agreement between the parties. The allegation made requires proper adjudication by tending evidence, cross examination etc. and therefore cannot be adjudicated in summary proceedings.

12. That vide letter dated 23.10.2012, the complainants were informed that being a customer centric company and keeping best interest of its customers, they were allotted unit in Tower-J in order to ensure timely delivery of the flat and they never objected to the change of allotment and were satisfied with the same.

13. The complainants visited to the respondent's office on 24.07.2015 for discussion qua other alternate unit options. However, the same did not appeal to them and henceforth, no amicable settlement took place between the parties.

14. It was further pleaded that the complainants defaulted in making remaining payments leading to issuance of various reminders vide letters dated 18.12.2008, 26.03.2009, 01.03.2011, 19.04.2011 and 28.05.2011 (annexure R-3, R-5, and R-6) respectively, but with no positive results.

15. It was denied that the complainants did not agree to the terms and conditions of alternative unit allotted to them. In fact, despite a number of reminders, calls and persuasions, the complainants failed to pay the amount due resulting in cancellation of their unit. Now, when the allotted unit has been cancelled on 08.07.2013 vide letter annexure R-7, the complainants have no cause of action against the respondent and the complaint filed by them seeking refund of the deposited amount is not maintainable and is barred by limitation.

16. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority

17. The respondent has raised an objection regarding jurisdiction of authority to entertain the present complaint. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

F. E. I Territorial jurisdiction

18. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana, the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. 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.

E. II Subject-matter jurisdiction

19. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottees as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be.

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the objections raised by the respondent.

F. I Objection regarding untimely payments done by the complainants.

20. The respondent has contended that the complainants have made defaults in making various payments and as a result thereof, it had to issue reminders vide letters dated 18.12.2008, 26.03.2009, 01.03.2011, 19.04.2011 and 28.05.2011 respectively, it is further submitted that the complainants have still not cleared the dues. The counsel for the respondent referred to clause 10 of the allotment letter

dated 26.05.2008 wherein it is stated that timely payment of instalment is the essence of the transaction, and the relevant clause is reproduced below:

> *10. .....15% of the total basic sale consideration i.e., Base Price + Specification charges on the total super area of the Flat shall constitute the "Earnest Money". Timely payment of each installment of the total sale consideration-i.e: basic sale price and other charges as stated herein is the essence of this transaction/ agreement. In case payment of any installment as may be specified is delayed, then the Applicant(s) shall pay interest on the amount due 18% p.a. compounded at the time of every succeeding installment or three months, whichever is earlier. However, If the Applicant(s) falls to pay any of the installments with interest within three (3) months from the due date of the outstanding amount, the Company may at its sole option forfeit the amount of Earnest Money and other charges including late payment charges and interest deposited by the Applicant(s) and in such an event the Allotment shall stand cancelled and the Applicant(s) shall be left with no right, lien or interest on the said Flat and the Company shall have the right to sell the said Flat to any other person. Further the company shall also be entitled to terminate/ cancel this allotment in the event of defaults of any terms and conditions of this application. In case the applicant withdraws his application for the allotment for any reason whatsoever at any point of time, then the Company at its sole discretion may cancel/terminate this Agreement and after forfeiting the earnest money as stated hereinabove may refund the balance amount to the Applicant without any interest...."*

21. At the outset, it is relevant to comment on the said clause of the allotment letter i.e., "*10. TIMELY PAYMENT ESSENCE* wherein the payments to be made by the complainants have been subjected to all kinds of terms and conditions. The

drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favor of the promoter and against the allottees that even a single default by the allottees in making timely payment as per the payment plan may result in termination of the said agreement and forfeiture of the earnest money. There is nothing on the record to show as to what were the terms and conditions of allotment of the unit in favour of the complainants. Admittedly, the unit allotted to the complainants initially was changed two times by the respondent due to one reason or the other. The total sale price of the allotted unit to the complainants as per letter of allotment letter was Rs. 41,92,860/-. The complainants admittedly paid a sum of Rs. 1399605/- to the respondent from time to time. Though, no buyer agreement was executed between the parties but possession of the allotted unit changed from time to tine was to be given within a period of 3 years from the ate of allotment. The complainants admittedly made default in making payments but was the status of construction at the spot at the time when termination of the unit was made by the respondent. Moreover, if the complainants were committing default in making payments due as alleged by the respondent, then on cancellation of their unit vide letter dated

08.07.2013, it was obligatory on it to retain 15% of the basic sale price and return the remaining amount to them. There is nothing on the record to show that after deducting 15 % of the basic sale price, the respondent sent any cheque or bank draft of the remaining amount to the complainants, and which is against the settled principles of the law as laid down by the Hon'ble Apex Court of the land in cases of in ***Maula Bux V/s Union of India*** AIR 1970 SC, 1955 and ***Indian Oil Corporation Limited V/s Nilofer Siddiqui and Ors, Civil Appeal No. 7266 of 2009*** decided on 01.12.2015 and wherein it was observed that forfeiture of earnest money more than 10% of the amount is unjustified. Keeping in view the principles laid down in these cases, the authority in the year 2018 framed regulation bearing no. 11 providing forfeiture of not more than 10% of the consideration amount being bad and against the principles of natural justice. Thus, keeping in view in the above-mentioned facts, it is evident that while cancelling the allotment of unit of the complainants, the respondent did not return any amount and retained the total amount paid by the complainants.

F. II Objection regarding complainants are in breach of agreement for non-invocation of arbitration.

22. The respondent has raised an objection for not invoking arbitration proceedings as per the provisions of allotment letter which contains a provision regarding initiation of arbitration proceedings in case of breach of agreement. The following clause has been incorporated w.r.t arbitration in the buyer's agreement:

> *29. All or any disputes arising out or touching upon or in relation to the terms of this application and/or standard Flat Buyer's Agreement including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled anally by mutual discussion failing which the same shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/modifications thereof for the time being in force. The arbitration proceedings shall be held at an appropriate location in New Delhi by a sole arbitrator appointed by the Company. The Applicant(s) hereby confirms that he/she shall have or raise no objection to this appointment. The Courts at New Delhi alone and the Delhi High Court at New Delhi alone shall have the jurisdiction in all matters arising out of/touching and/or concerning this application and/or Flat Buyers Agreement regardless of the place of execution of this application which is deemed to be at New Delhi."*

23. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the allotment letter as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority or the Real

Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Section 88 of the Act also provides that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506*** and followed in case of ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force. Consequently, the authority is not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause. Therefore, by applying same analogy, the presence of arbitration clause could not be construed to take away the jurisdiction of the authority.

24. Therefore, in view of the above judgements and considering the provision of the Act, the authority is of the view that complainants are well within their rights to seek a special remedy available in a beneficial Act such as the Consumer

Protection Act,1986 and Act of 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily.

E. Findings on the relief sought by the complainants.

E. I Direct the respondent to refund the entire amount of Rs.13,99,605/- along with interest.

25. While discussing earlier it has been held that the complainants were in default in making timely payments leading to cancellation of the allotted unit by the respondent as per the term and conditions of allotment. Now, the issue for consideration arises as to whether the complainants are entitled for refund of the paid-up amount from the respondent. As per cancellation letter dated 08.07.2013 annexed on page no. 48 of reply, an earnest money deposit, accumulated interest and brokerage paid shall stand forfeited against the total amount of Rs. 41,92,860/- and paid by the complainants. As per the complaint, the said unit was booked under time linked plan and till date, a total consideration of Rs. 13,99,605/- was paid against total consideration of Rs.41,92,860/- constituting 33% of total consideration. Upon perusal of documents on

records from page no. 40-41, 44-45 of reply, various reminders for payment were issued by the respondent. It is observed that the respondent has issued various demand letters to the complainants and as per section 19 (6) & (7) of Act of 2016, the allottees were under an obligation to make timely payment as per payment plan towards consideration of the allotted unit. At this stage of time where sufficient time and opportunity has been given to the complainants to make a payment towards consideration of allotted unit, it would be violation of section 19 (6) & (7) of Act of 2016. As per section 11(5) of Act, such cancellation has been made in accordance with the terms and conditions of the allotment. The unit in question was allotted to the complainants on 09.09.2008 which was prior to coming of Act of 2016. So, the authority would calculate the earnest money according to the allotment letter and which is 15% of the total basic sale consideration and as detailed in para 20 of the order. A bare perusal of clause 10 of allotment letter makes it clear that 15% of BSP i.e. base price+ specification charges on the total super area of the flat shall constitute the earnest money. The authority observes that the complainants are not entitled to refund as due to their own defaults, the unit has been cancelled by the respondent after issuing proper

reminders. Therefore, the cancellation of the allotted unit by the respondent is valid but the respondent has contravened the provision of sec 11(5) of the Act and illegally held the monies of the complainants. Therefore, the respondent is directed to return the money after deducting 15% earnest money of the basis sale consideration as per allotment letter of the complainants along with interest @9.40% (MCLR+2%) from the date of cancellation till its realization.

E.III Direct the respondent to pay interest at the rate of atleast 10% p.a. compounded annually.

26. The complainants are claiming compensation in the above-mentioned relief. For claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainants may file a separate complaint before Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.

F. Directions of the Authority:

27. Hence, the Authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

i) The respondent /promoter is directed to return the balance amount out of Rs. 13,99,605/- after deducting 15% earnest money of the basis sale consideration as per allotment letter of the complainants alongwith interest at the rate of 9.40% p.a. from the date of cancellation i.e. 08.07.2013 till the actual date of refund of that amount.

ii) A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

28. Complaint stands disposed of.

29. File be consigned to the Registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

G. Dated: 13.05.2022