

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

Complaint no. : 2927 of 2019
Date of filing complaint : 07.08.2019
First date of hearing : 26.11.2019
Date of decision : 09.12.2022

1. Shikha Jhingan 2. Amit Jhingan Both R/O: - 19-C, Phase-V, Udyog Vihar, Gurgaon Haryana 122016.	Complainants
Versus	
1. M/s BPTP Limited 2. M/s Countrywide Promoters Private Limited M/s Precision Infrastructure Private Limited. 3. M/s Durzba Overseas Private Limited. Regd. Office at: - M-11, Middle Circle, Connaught Circus, New Delhi-110001 4. M/s Visual Builders Private Limited. Regd. Office At: I-202, 2nd floor, Parsvanath Gardenia, Sector-61,Noida (U.P)-201305.	Respondents

CORAM:	
Shri Ashok Sangwan	Member
Shri Sanjeev Kumar Arora	Member
APPEARANCE:	
Sh. Ashish Budhiraja	Advocate for the complainants
Sh. Pankaj Chandola	Advocate for the respondents

ORDER

- 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 allottee as per the agreement for sale executed inter se.

A. Unit and project related details

- 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.N.	Particulars	Details	
1.	Name of the project	"Terra", Sector- 37-D, Gurugram	
2.	Nature of project	Group Housing Towers	
3.	RERA registered/not registered	Registered 299 of 2017 dated 13.10.2017	
4.	DTPC License no.	83 of 2008 dated 05.04.2008	94 of 2011 dated 24.10.2011
	Validity status	04.04.2025	23.10.2019
	Name of licensee	SUPER BELTS PVT. LTD and 3 others	COUNTRYWIDE PROMOTERS PVT LTD and 6 others
	Licensed area	23.18 acres	19.74



7.	Unit no.	T-23-1601, Tower 23 [As per page no. 53 of complaint]
8.	Unit measuring	1691 sq. ft. [As per page no. 53 of complaint]
9	Building plan	21.09.2012
10.	Date of execution of Floor buyer's agreement	21.01.2013 (Page no. 48 of complaint)
11.	Possession clause	<p>5. Possession</p> <p>5.1 The Seller/Confirming Party proposes to offer possession of the Unit to the Purchaser(s) within e Commitment Period. The Seller/Confirming Party shall be additionally entitled to a Grace Period of 10 days after the expiry of the said Commitment Period for making offer of possession of the said Unit.</p> <p>1.6 "Commitment Period" shall mean, subject to, Force Majeure circumstances; intervention of statutory authorities and Purchaser(s) having timely complied with all its obligations, formalities or documentation, as prescribed/requested by Seller/Confirming Party, under this Agreement and not being in default under any part of this Agreement, including but not limited to the timely payment of instalments of the sale consideration as per the payment plan opted, Development Charges (DC). Stamp duty and</p>

		other charges, the Seller/Confirming Party shall offer the possession of the Unit to the Purchaser(s) within a period of 42 months from the date of sanction of the building plan or execution of Flat Buyer's Agreement, whichever is later.
12.	Due date of possession	21.07.2016 (calculated from the execution of BBA being later)
13.	Basic Sale price	Rs. 88,77,750/- [As per BBA]
14.	Total amount paid by the complainants	Rs. 99,07,150/- (as alleged by the complainants)
15.	Occupation certificate dated	Not obtained
16.	Offer of possession	Not offered

B. Facts of the complaint

3. That the complainants booked the unit with the respondents in their project "TERRA" T23-1601 by paying the amount of Rs. 6 lacs on 03.09.2012 and also paid an amount of Rs. 12,30,414/- on 11.10.2012. Further agreement was executed on 21.01.2013 between the parties and as per clause 1.6 of the BBA, the respondents had to deliver the possession of the above noted flat to the complainants within 42 months + 180 days as the grace period as enumerated in clause 1.18 of the buyer's agreement.

4. That the complainants entered into a tripartite agreement with the Indiabulls Housing Finance Limited and the respondents mortgaging the allotted flat with IHFL, for a loan of Rs. 50,48,140/- and as per the terms of tripartite agreement the IHFL had to make the periodic loan disbursement directed to respondents, on basis of state of construction as assessed by IHFL.
5. That till disbursement of full loan amount to the respondents by IHFL, the complainants had to pay Pre-EMI, which is the simple interest on the loan amount disturbed on the given date and till date IHFL has disburse a total sum of RS. 40,37,114/-.
6. That the complainants as well as IHFL had made all timely payments as and when demanded by the respondents and only last two instalments(5% of BSP &+FF+PBIC+IFMS) as per the payment schedule is the balance to be paid, which were to be paid on ' Start of Cladding' & " At the time of possession" respectively and till date complainants have made a total payment of Rs. 99,07,150/- including all the necessary taxes.
7. That the complainants being aggrieved against the respondents for not completing the project and for not delivering the possession of apartments, the complainants paid number of visits to the site and requested the respondents to hand over the possession but all in vain and this shows that the respondents are not able to hand over the possession of the flat which they have already delayed and therefore, it is clear that the respondents are not able to hand over the possession in near future.
8. That the complainants have at all times made payments against the demands of the respondents and as per payment schedule of the agreement pertaining to has flat, therefore the fraudulent act and

conduct of the respondents needs to be penalized in accordance with the provisions of the Real Estate (Regulation and Development) Act, 2016 (Hereinafter being referred as "the act"),

C. Relief sought by the complainants.

9. The complainants have sought following relief:

- I. Direct the respondents to pay the penalty for delaying in delivering the possession of the allotted unit to the complainant and handover the physical possession of the allotted unit to the complainants.

D. Reply by the respondents.

10. It is submitted that the complainant has approached this Authority for redressal of the alleged grievances with unclean hands, i.e., by not disclosing material facts pertaining to the case at hand and, by distorting and/or misrepresenting the actual factual situation with regard to several aspects. It is further submitted that the Hon'ble Apex Court in plethora of cases has laid down strictly, that a party approaching the court for any relief, must come with clean hands, without concealment and/or misrepresentation of material facts, as the same amounts to fraud not only against the respondents but also against the court and in such situation, the complaint is liable to be dismissed at the threshold without any further adjudication.

- That the complainants falsely stated that the timely payments were made by the complainants as and when demanded by the respondents. It is further submitted that complainants made several defaults in making timely payments as a result thereof,

respondents had to issue reminders letter for payment of the outstanding amounts.

- That the complainants have also concealed from the hon'ble Authority that as a goodwill gesture the respondents have granted a special credit discount amounting to Rs. 51,306/- towards unit in question.

11. It is further submitted that having agreed to the above, at the stage of entering into the FBA, and raising vague allegations and seeking baseless reliefs beyond the ambit of the FBA, the complainants are 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.
12. That the project in question was launched by the respondents in August 2012. It 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.
13. All other averments made in the complaint were denied in toto.
14. 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

The respondents have 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.

E. I Territorial jurisdiction

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

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.

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.

G. Findings on the objections raised by the respondents.

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

15. It is contended that the complainants have made defaults in making payments as a result thereof and so the respondents had to issue various reminder letters. The respondents has further submitted that the complainants have still not cleared the dues. The counsel for the respondents pointed towards clause 7.1 of the buyer's agreement wherein it is stated that timely payment of instalment is the essence of the transaction, and the relevant clause is reproduced below:

"7. TIMELY PAYMENT ESSENCE OF CONTRACT. TERMINATION, CANCELLATION AND FORFEITURE"

7.1 The timely payment of each instalment 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 instalments 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..."

16. At the outset, it is relevant to comment on the said clause of the agreement i.e., *"7. TIMELY PAYMENT ESSENCE OF CONTRACT. TERMINATION, CANCELLATION AND FORFEITURE"* 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 allottee that even a single default by the allottee in making timely payment as per the payment plan may result in termination of the said agreement and forfeiture of the earnest money. Moreover, the authority observes that despite complainants being in default in making timely payments, the respondents have not exercised discretion to terminate the buyer's agreement. The attention of authority was also drawn towards clause 7.2 of the flat buyer's agreement whereby the complainants would be liable to pay the outstanding dues together with interest @ 18% p.a. compounded quarterly or such higher rate as may be mentioned in the notice for the period of delay in making payments. In fact, the respondents have charged delay payment interest as per clause 7.2 of the buyer's agreement and has not terminated the agreement in terms of clause 7.1 of the buyer's agreement. In other words, the respondents have already charged penal interest from the complainants on account of delay in making payments as per the payment schedule. However, after the enactment of the Act of 2016, the position has changed. Section 2(z) of the Act provides that the rate of interest chargeable from the allottees by the promoters, in case of default, shall be equal to the rate of interest which the promoters would be liable to pay the allottee, in case of default. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 10.35% by the respondents which is the same as is being granted to the complainants in case of delay possession charges.

F. Findings on the relief sought by the complainants.

Relief sought by the complainants: The complainants have sought following relief:

- Direct the respondents to pay the penalty for delaying in delivering the possession of the allotted unit to the complainants and handover the physical possession of the allotted unit to the complainants.

Note: A dispute arises between the complainants and the respondents whether they want refund or delay possession charges. But on 09.12.2022, the counsel for the complainants clarifies at bar that the complainants are seeking delayed possession charges.

Delay Possession Charge

17. The complainants intend to continue with the project and is seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building,

.....
Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

18. Clause 5.1 read with clause 1.6 of the flat buyer's agreement provides the time period of handing over possession and the same is reproduced below:

"Clause 5.1- The Seller/Confirming Party proposes to offer possession of the unit to the Purchaser(s) within the Commitment period. The Seller/Confirming Party shall be additionally entitled to a Grace period of 180 days after the expiry of the said Commitment Period for making offer of possession of the said unit.

Clause 1.6 "Commitment Period" shall mean, subject to, Force Majeure circumstances; intervention of statutory authorities and Purchaser(s) having timely complied with all its obligations, formalities or documentation, as prescribed/requested by Seller/Confirming Party, under this Agreement and not being in default under any part of this Agreement, including but not limited to the timely payment of instalments of the sale consideration as per the payment plan opted, Development Charges (DC), Stamp duty and other charges, the Seller/Confirming Party shall offer the possession of the Unit to the Purchaser(s) within a period of 42 months from the date of sanction of the building plan or execution of Flat Buyer's Agreement, whichever is later.."

19. At the inception, it is relevant to comment on the pre-set possession clause of the buyer's agreement wherein the possession has been subjected to numerous terms and conditions and force majeure circumstances. The drafting of this clause is not only vague but so heavily loaded in favour of the promoters that even a single default by the allottee in fulfilling obligations, formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottees and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

20. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the unit within a period of 42 months from the date of sanction of the building plan or execution of Flat Buyer's Agreement, whichever is later, the flat buyer's agreement was executed on 21.01.2013. So, the due date is calculated from the date of execution of flat buyer's agreement i.e. 21.07.2016 being later. Further it was provided in the buyer's agreement that promoter shall be entitled to a grace period of 180 days after the expiry of the said committed period for making offer of possession of the said unit. In other words, the respondents are claiming this grace period of 180 days for making offer of possession of the said unit. There is no material evidence on record that the respondent-promoters had completed the said project within this span of 42 months and had started the process of issuing offer of possession after obtaining the occupation certificate. As a matter of fact, the promoters have not obtained the occupation certificate and offered the possession within the time limit prescribed by them in the buyer's agreement. As per the settled law, one cannot be allowed to take advantage of his own wrongs. Accordingly, this grace period of 180 days cannot be allowed to the promoters.
21. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at the prescribed rate of interest on the amount already paid by him. However, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

22. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.
23. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 09.12.2022 is 8.35%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.35%.
24. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottees by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottees, in case of default. The relevant section is reproduced below:

*"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.
Explanation. —For the purpose of this clause—
the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the*

*rate of interest which the promoter shall be liable to pay the allottee, in case of default.
the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

25. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 10.35% by the respondents/promoters which is the same as is being granted to the complainants in case of delayed possession charges.

H. Directions of the authority


26. 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 promoters as per the function entrusted to the authority under section 34(f):
- I. The respondents are directed to pay interest at the prescribed rate of 10.35% p.a. for every month of delay from the due date of possession i.e. 21.07.2016 till the offer of possession plus two months to the complainant(s) as per section 19(10) of the Act.
 - II. The arrears of such interest accrued from due date of possession till its admissibility as per direction (i) above shall be paid by the promoter to the allottee respectively from date of this order as per rule 16(2) of the rules.



- III. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period against their unit to be paid by the respondents.
- IV. The rate of interest chargeable from the allottees by the promoters, in case of default shall be charged at the prescribed rate i.e., 10.35% by the respondent/promoters which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.
- V. The respondents shall not charge anything from the complainants which is not the part of the agreement. However, holding charges shall also not be charged by the promoter at any point of time even after being part of agreement as per law settled by the Hon'ble Supreme Court in civil appeal no. 3864-3889/2020 dated 14.12.2020.

27. Complaint stands disposed of.

28. File be consigned to registry.


(Sanjeev Kumar Arora)
Member


(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 09.12.2022