

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

Complaint no.	3204 of 2019
Date of filing complaint	05.08.2019
First date of hearing	26.11.2019
Date of decision	20.10.2022

Mrs. Archana Aggarwal Both R/o: H.No. 794P, Sector-17A, Near IFFCO Chowk, Gurugram, Haryana	Complainant
Versus	
1. M/s BPTP Ltd. 2. M/s Countrywide Promoters Ltd. Both R/o: M-11, Middle Circle, Connaught Circus, New Delhi-110001	Respondents

CORAM:	
Shri Vijay Kumar Goyal	Member
Shri Ashok Sangwan	Member
APPEARANCE:	
Sh. Krishna Sharma	Complainant
Sh. Venkat Rao	Respondents

ORDER

1. The present complaint has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 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

2. The particulars of the project, the details of sale consideration, the amount paid by the complainant, date of proposed handing over the possession and 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.	94 of 2011 dated 24.10.2011
	Validity status	23.10.2019
	Name of licensee	COUNTRYWIDE PROMOTERS PVT LTD and 6 others
	Licensed area	19.74
7.	Unit no.	T-23-902, Tower 23
8.	Unit measuring	1691 sq. ft. [As per page no. 34 of reply]
9.	Date of execution of Flat buyer's agreement	Not executed
10	Allotment Letter	13.08.2012 (page no. 40 of reply)
11	Building Plan	21.09.2012

11. Possession clause as per Allotment Letter

E.1. Possession

Subject to force majeure conditions, as defined herein and subject to the applicant(S) having complied with all his obligations under these Terms and Conditions stated herein as well as in the Flat Buyers Agreement and the Applicant(s) not being in default under any part of these Terms and Conditions and the Flat Buyer's Agreement including but not limited to the timely payment of each and every installment of the total sale consideration including DC, Stamp Duty and other Charges, subject to the Applicant(s) having complied with all formalities and documentations as prescribed by the Company, subject to the intervention of Statutory Authorities, **the Company proposes to offer possession of the Unit to the Applicant(s) within a period of 42 months from the date of sanction of the building plans or execution of the Flat Buyer's Agreement, whichever is later("Commitment Period").** The Applicant(s) further agrees and understands that the Company shall additionally be entitled to a period of One Eighty (180) days (Grace Period") after the expiry of the said Commitment Period for making an offer of possession.

12. Due date of possession

21.03.2016

A

			(Calculated from sanctioning of building plan)
13.	Basic consideration	sale	1691 sq. ft. X 5250 per sq. ft. = Rs. 88,77,750/- [As per page no. 57 of the reply]
14.	Total amount paid by the complainant		Rs. 1,07,15,662/- (As alleged by the complainant)
15.	Occupation certificate dated		Not obtained
16.	Offer of possession		not offered
17.	Grace period		Grace period is not allowed

B. Facts of the complaint:

3. That on the basis of licenses bearing no. 83 of 2008 and 94 of 2011 dated 24.10.2011 issued by DTCP, Haryana in favour of M/s Countrywide Promoter Limited and 6 others, a project by the name of Terra situated in sector 37-D, Gurugram was being developed by the respondents. The complainants coming to know about that project booked a unit in it by paying Rs. 7,00,000/- as earnest money on 22.08.2012 for a basic sale consideration of Rs. 88,77,750/- exclusive of service tax or any other tax as applicable. A formal letter of allotment dated 07.12.2012 w.r.t. unit no. T-23-902, 3BHK having a tentative area of 1691 sq.ft. in the above mention project was issued in favour of the complainant by respondent builder and as per the payment plan attached.

4. That no buyer's agreement w.r.t. the allotted unit was executed between the parties though a copy of the same was sent to the complainant.
5. That after allotment of the subject unit, the respondent-builder started raising demands against it vide emails dated 04.10.2012 , 11.12.2012, 10.05.2013, 09.07.2013, 06.11.2013, 16.12.2013, 04.04.2014, 28.04.2014, 30.06.2014, 01.08.2014, 16.10.2015, 18.04.2016, 08.11.2016, 16.03.2017, 24.05.2017, 23.06.2017 and the same were paid on 28.10.2012 , 02.01.2013, 24.07.2013, 20.11.2013, 29.11.2014, 03.11.2015, 16.05.2016, 22.11.2016, 30.11.2017, 03.03.2018, 09.05.2018 and 31.08.2018 respectively vide different amounts. So, in this way the complainant paid a sum of Rs. 10715662/- in all as per the demands raised from time to time by the respondent.
6. That in between, the respondent-builder also sent some emails along with photographs of the ongoing construction activities about the project at the site .
7. That as per model buyer agreement supplied by the respondent-builder, the project was to be completed within 36 months with a grace period of 8 months. So, the due date of completion of the project and offer of possession of the allotted unit was fixed as 26.07.2016.
8. That despite paying the above mention amount towards the allotment of the unit, the respondent builder was unable to

complete the same and offer its possession. The complainant made a number of requests to the respondent builder to refund the paid up amount on its failure to complete the project and offer possession of the allotted unit by the due date.

9. That when despite oral reminders a number of time, the respondents failed to accede to her request and refund the paid up amount with interest , the complaint seeking a refund of the same as prayed was filed.

C. Relief sought by the complainant:

10. The complainant has sought following relief(s):
- i. Refund the entire payment i.e., Rs.1,14,37,728/- made by her to respondents along with interest @ 18% p.a. from the date of deposit till its realization.
 - ii. Impose penalty as prescribed under Section 59 & 61 of RERA on the respondents for having contravened with provisions of section 11.
 - iii. Initiate appropriate legal action against the respondents as provided under section 69 of the Act for breaching the trust of innocent persons and cheating them with intention to gain and usurp money unlawfully.
11. During the pendency of the complaint, an application dated 21.02.2022 was moved by the complainant and vide which instead of refund of the paid up amount besides interest , she sought possession of the allotted unit besides delay possession charges.

The application filed in this regard was allowed. So, now the relief sought by the complainant from the respondent is as under.

- i. Whether the complainant is entitled to possession of the allotted unit along with delay possession charges from the respondents from the due date of possession till the offer of possession on the basis of occupation certificate of the project.

D. Reply by respondents:

The respondents by way of written reply dated 16.10.2020 made the following submissions:

12. That on 13.08.2012, the complainant was allotted a unit in the project "Terra" of the respondents located at Sector-37D, Gurugram, Haryana and she opted for construction/ time linked payment plan. The respondents vide its allotment letter dated 07.12.2012 allotted unit no.T-23-902 (tentatively admeasuring 1,691 sq. ft.) to the complainant. The possession of the flat was to be handed over within 42 months from the date of sanction of building plans or execution of the FBA, whichever was later subject to force majeure circumstances and timely payment of installments. The respondents sent two copies of the agreement to the complainant. But she failed to execute the same till date.
13. That the complainant has approached this hon'ble authority for redressal of her alleged grievances with unclean hands, i.e. by not disclosing material facts pertaining to the case at hand and also, by distorting and/or misrepresenting the actual factual situation with

A

regard to several aspects. It is further submitted that the Hon'ble Apex Court in plethora of decisions 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.

- i. That the complainant falsely stated that the timely payments were made by her as and when demanded by the respondents. However, it is submitted that the complainant made several defaults in making timely payments as a result thereof, the respondents had to issue several reminder letters and despite the same, she failed to pay the outstanding dues.
- ii. That due to several defaults in payment, the respondents were left with no option but to issue a last and final opportunity letter dated 01.08.2014 requesting for payment of the outstanding dues within a period of 15 days from the date of that letter. However the complainant paid no heed to the same.
- iii. That the complainant suppressed that due to non-payment, despite issuance of a last and final opportunity letter, the respondent-builder was constrained to issue termination letter dated 19.09.2014 to her whereby her unit stood terminated. On the complainant's request for clearance of outstanding dues, the

unit in question was restored and receipt dated 29.11.2014 was issued to her.

- iv. That the complainant has concealed/ suppressed the material fact that no construction updates were provided by the respondents and that the project was nowhere near completion. In this context, it is submitted that the respondents have provided regular construction updates to the complainant vide emails dated 16.03.2017, 24.04.2017, 24.05.2017, 23.06.2017, 28.07.2017, 21.08.2017, 11.12.2017, 26.03.2018, 09.04.2018, 08.05.2018, 09.09.2018, 07.11.2018, 19.12.2018, 24.01.2019, 24.02.2019, 22.03.2019, 19.04.2019, 15.05.2019 and 01.11.2019 respectively.
14. That the respondents have based their reply on the fact that the complainant is an allottee in the project and the complaint is not maintainable against them as she herself is a defaulter and failed to abide by the terms and conditions of allotment. Thus, the authority in such a situation has no jurisdiction to proceed with the complaint.
15. All other averments made in the complaint were denied in toto.
16. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided based on these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority:

17. The plea of the respondents regarding rejection of complaint on ground of jurisdiction stands rejected. 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, 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 completed 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 allottee 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.

18. 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.

G. I Objection regarding untimely payments done by the complainant.

19. It is contended that the complainant has made defaults in making payments as a result thereof, the respondent-builder had to issue various demand letters dated 19.10.2015, 18.04.2016, 08.11.2016, 13.10.2017, 16.02.2018, 16.04.2018 and 18.08.2018 respectively. The respondents have further submitted that the complainant has still not cleared the dues. The counsel for the respondents pointed towards clause C.10 of the allotment letter 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 Timely payment of installments as per the Payment Plan shall be the essence of this transaction It shall be incumbent on the Applicant(s) to comply with the terms of payment and other terms and conditions of allotment. The Applicant(s) acknowledges failure to adhere to the payment schedule and failure to make full and timely payment impacts the Company's ability to fulfill its reciprocal promises and obligations to the Applicant(s) and other customers and consequently prejudicially affects as well as results in the waiver and extinguishment of the Applicant's rights under these Terms and Conditions and the Flat Buyer's Agreement, including but not limited to the right to claim any compensation for delay in handing over possession of the Unit, the right to require the Company to perform any of its obligations within a given timeframe and the cancellation of allotment amongst other rights Accordingly, in the event that the Applicant(s) fails to strictly adhere to these Terms and Conditions and the

A

Flat Buyer's Agreement, such action shall amount to a voluntary, conscious and intentional waiver and relinquishment of all rights and privileges of these Terms and Conditions and the Flat Buyer's Agreement and could at the option of the Company be treated as termination/cancellation of allotment and the Applicant(s) could at the option of the Company cease to have any right, title or interest whatsoever in the Unit and shall also be liable to forfeiture of earnest money deposit, non-refundable amounts in terms of clause "E" hereinbelow"

20. At the outset, it is relevant to comment on the said clause of the allotment letter wherein the payments to be made by the complainant has 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 complainant being in default in making timely payments, the respondents have not exercised the discretion to terminate the allotment letter. Though on that ground, the unit was cancelled but was restored on a request made by the allottee. The attention of authority was also drawn towards clause C.10 of the allotment letter whereby the complainant would be liable to pay the outstanding dues together with interest 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 C.10 of the allotment letter. In other words, the respondents have already charged penal interest from the complainant on account of delay in making payments as per the payment schedule. However, after the enactment of the Act of 2016,

A

the position has changed. Section 2(z a) 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 promoter would be liable to pay the allottee, in case of default. Therefore, interest on the delay payments from the complainant would be charged at the prescribed rate i.e., 10% by the respondents which is the same as is being granted to the complainant in case of delay possession charges.

F. Findings on the relief sought by the complainant.

Relief sought by the complainant: The complainant has sought following relief:

- 1) 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 complainant.

Delay Possession Charge

21. In the present complaint, though initially, the complainant sought refund of the paid up amount besides interest on the failure of the respondent builder to complete the project and offer possession of the allotted unit by the due date but now she intends 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, —

.....

12

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."

22. Clause E.1 of the allotment letter, the time period of handing over possession and the same is reproduced below:

*Subject to force majeure conditions, as defined herein and subject to the applicant(S) having complied with all his obligations under these Terms and Conditions stated herein as well as in the Flat Buyers Agreement and the Applicant(s) not being in default under any part of these Terms and Conditions and the Flat Buyer's Agreement including but not limited to the timely payment of each and every installment of the total sale consideration including DC, Stamp Duty and other Charges, subject to the Applicant(s) having complied with all formalities and documentations as prescribed by the Company, subject to the intervention of Statutory Authorities, the Company proposes to offer possession of the Unit to the Applicant(s) within a period of **42 months from the date of sanction of the building plans or execution of the Flat Buyer's Agreement, whichever is later**("Commitment Period"). The Applicant(s) further agrees and understands that the Company shall additionally be entitled to a period of One Eighty (180) days (Grace Period") after the expiry of the said Commitment Period for making an offer of possession..."*

23. At the inception, it is relevant to comment on the pre-set possession clause of the allotment letter , 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 promoter 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 a clause in the allotment letter/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 allotment letter and the allottee is left with no option but to sign on the dotted lines.

24. **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 not executed between the parties. So, the due date is calculated from the date of sanctioning of building plan i.e. 21.09.2012 and the same comes to 21.03.2016. Further, it was provided in the allotment letter 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-promoter had completed the said project within this span of 42 months and started the process of issuing offer of possession after obtaining the occupation certificate. As a matter of fact, the promoter has not obtained the occupation certificate and offered the possession within the time limit prescribed by her. 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 promoter.

25. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the

prescribed rate of interest on the amount already paid by her. However, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, she 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.

26. 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.

27. 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., 20.10.2022 is 8.25%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.25%.

28. 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;"

29. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 10.25% by the respondent/promoter which is the same as is being granted to the complainant in case of delayed possession charges.

H. Directions of the authority

30. 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 function entrusted to the authority under section 34(f):

- The respondents are directed to pay interest at the prescribed rate of 10.25% p.a. for every month of delay from the due date of possession i.e. 21.03.2016 till offer of possession of the allotted unit plus two months after obtaining occupation certificate to the complainant(s) as per section 19(10) of the Act.
- 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 within a period of 90 days from date of this order.

- The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period against their unit to be paid by the respondents
- The rate of interest chargeable from the allottee by the promoters, in case of default shall be charged at the prescribed rate i.e., 10.25% by the respondent/promoter which is the same rate of interest which the promoters would be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.
- The respondents shall not charge anything from the complainant which is not the part of the terms and conditions of allotment letter. However, holding charges shall also not be charged by the promoter at any point of time even after being part of allotment/agreement as per law settled by the Hon'ble Supreme Court in civil appeal no. 3864-3889/2020 dated 14.12.2020.

31. The complaint stands disposed of.

32. File be consigned to registry.


(Ashok Sangwan)
Member

V.1 - 
V.1 - 
(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 20.10.2022