



HARYANA REAL ESTATE REGULATORY AUTHORITY PANCHKULA

Website: www.haryanarera.gov.in

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| Complaint no.: | 187 of 2022 |
| Date of filing: | 11.02.2022 |
| Date of first hearing: | 07.04.2022 |
| Date of decision: | 15.02.2023 |

Shri Nitin Gupta,
S/o Sh. Suryakant Gupta,
R/o Street No. 1, Lal Bag, GE Road,
Rajnandan Gaon, Chhattisgarh- 491441

....COMPLAINANT(S)

VERSUS

1. M/S BPTP Resort Private Limited
M-11, Middle Circle, Connaught
Circus, New Delhi- 110001

..... Respondent No. 1

2. M/s BPTP Limited
OT14, 3RD Floor, Next Door
Parklands, Sector-76,
Faridabad

..... Respondent No. 2

....RESPONDENTS(S)

CORAM:

Dr. Geeta Rathee Singh
Nadim Akhtar

Member
Member

Hearing:

5th

Present: -

Mr. Rohan Mittal, Counsel for the complainant through
VC.

Mr. Hemant Saini, Counsel for the respondents.

ORDER (NADIM AKHTAR - MEMBER)

1. Present complaint dated 11.02.2022 has been filed by complainant under Section 31 of The Real Estate (Regulation & Development) Act, 2016 (for short Act of 2016) read with Rule 28 of The Haryana Real Estate (Regulation & Development) Rules, 2017 for violation or contravention of the provisions of the Act of 2016 or the Rules and Regulations made thereunder, wherein it is inter-alia prescribed that the promoter shall be responsible to fulfil all the obligations, responsibilities and functions towards the allottee as per the terms agreed between them.

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, delay period, if any, have been detailed in the following table:

| S.No. | Particulars | Details |
|-------|--------------------------------|-----------------------------------|
| 1. | Name of the project | The Resort, Sector 75, Faridabad. |
| 2. | RERA registered/not registered | Not registered |

had

| | | |
|-----|---------------------------------|---|
| 3. | DTCP License no. | |
| | Licensed area | |
| 4. | Unit no. | X-1001, 10 TH Floor, Tower X |
| 5. | Unit area | 1300 square foot (Super Area) |
| 6. | Date of provisional allotment | 28.02.2008 |
| 7. | Date of builder buyer agreement | 19.03.2008 |
| 8. | Due date of offer of possession | 19.03.2011 |
| 9. | Basic sale price | ₹ 29,25,000/- |
| 10. | Amount paid by complainant | ₹ 11,21,250/- |
| 11. | Offer of possession | No offer |

B. FACTS OF THE COMPLAINT

3. Facts of complaint are that complainant in the year 2007 made an application to respondents' company for allotment of a residential apartment of flat on 04.12.2007 along with an advance allotment payment of ₹ 4,38,750/-. Complainant has annexed payment receipt as Annexure 2 with complaint. Vide letter dated 28.02.2008, complainant received a provisional allotment of residential flat no. X-1001, 10TH floor tentatively measuring 1300 square foot in a project named 'The Resort, BPTP Parklands, Sector 75, Faridabad being developed by



respondents. Copy of said letter is annexed with the complaint as

Annexure-3. Consequently, flat buyer agreement was executed

between the parties on 19.03.2008. It has been submitted that as per clause 2.1 of flat buyer agreement, construction of flat was to be completed within 36 months from the date of sanction of building plans of the said complex.

4. That, complainant opted for construction linked payment plan and the basic sales price of the said flat was Rs. 29,25,000/- as per clause 1.2 of the said agreement.
5. That, by August 2008, the complainant paid in total Rs. 11,21,250/- to the respondents on various dates. A table showing details of actual payments is given below for ready reference:

| Date | Amount (₹) |
|---|-------------|
| 26.12.2007 | 4,38,750/- |
| 01.07.2008 | 6,32,813/ |
| 22.08.2008 | 49,687/- |
| (as per receipt annexed as Annexure C-9 date is 26.08.2008) | |
| Total | 11,21,250/- |

6. That, the complainant did not receive any further demand notice and on visiting the project site in year 2009 he found that no construction was going on at the site. Complainant was informed by the

respondents that construction work could not be started due to bad market conditions. Said situation persisted all through the years 2009-2012 and complainant visited the respondents several times regarding construction updates but every time respondents informed him that the construction work has not yet started and would take more time. Thereafter complainant got and frustrated with the severe lapse on part of respondents in complying with their commitments as per agreement, resultantly he showed his disinterest in the flat to the respondents vide his email dated 06.1.2012 and asked for refund of the paid amount along with interest. In reply to said email respondents refused to give any interest on the paid amount. As per version of the complainant various communications by way of email were exchanged with the respondents from year 2012-2018 but at last a legal notice dated 20.02.2018 was sent to the respondents seeking possession of the flat in terms of the agreement along with interest at the rate of 18 % p.a. on the amount deposited by the complainant with the respondents for the period of delay. It is further stated that till date, the respondents have neither provided possession of the flat nor refunded the deposited amount along with interest despite complainant's innumerable requests and repeated reminders. Therefore, complainant is left with no other option but to approach this Authority. Hence the present complaint has been filed.



C. RELIEF SOUGHT

9. The complainant in his complaint has sought following reliefs:

- (i) Physical possession of the unit/flat bearing no. X-1001 admeasuring about 1300 sq ft super area in real estate project The Resort, BPTP Parklands, Sector-75, Faridabad.
- (ii) If physical possession of the said flat is not possible, physical possession of a unit/flat admeasuring about 1300 sq ft super area in any other tower of "The Resort" BPTP Parklands, Sector-75, Faridabad.
- (iii) Interest @ 18% of per annum for every month of delay till the handing over of possession of the flat/unit.
- (iv) If possession of the flat is not possible, then refund of Rs 11,21,250/- received by the respondents, alongwith interest @ 18% per annum from the date of receipt of said amount by the respondents.
- (v) ₹2,00,000/- as compensation towards mental agony and harassment caused to the complainant.

D. REPLY SUBMITTED ON BEHALF OF RESPONDENTS

Learned counsel for the respondents i.e, for respondents no. 1 and 2 filed detailed reply on 15.07.2022 pleading therein:

10. That, flat buyer agreement with complainant was executed much prior coming into force of Real Estate (Regulation and Development) Act, 2016. (RERA Act in brief). Therefore, agreement executed prior to coming into force of the Act or prior to registration of project with HRERA cannot be reopened.
11. That, the respondents in line with the terms of flat buyer's agreement dated 09.03.2008, subject to force majeure, proposed to handover the possession of the unit within a period of 36 months from the date of sanctioning of building plans along with further grace period of 180 days.
12. That, construction of the project in question has been marred by the circumstances beyond the control of the respondents such as ban on construction by Hon'ble Supreme Court of India in M.C.Mehta vs Union of India, ban on construction by the principal Bench of NGT in Vardhman Kaushik vs Union of India , ban by Environment Pollution Prevention and Control Authority due to severity air pollution in Delhi-NCR and COVID-19.
13. That, construction of the unit in question was going on in full swing and the respondents were confident to handover possession of the unit. However, due to the sudden outbreak of COVID-19 all the activities including construction of the project across the country came to halt.



14. That, contents of the legal notice dated 20.02.2018 are denied in toto.

15. That, the complainant is entitled to the interest at the current

MCLR+2% as per RERA Act,2016.

E. ARGUMENTS OF LEARNED COUNSEL FOR COMPLAINANT AND RESPONDENTS

16. During oral arguments learned counsel for the complainant apprised the Authority that though efforts were made to settle the matter amicably, however, settlement has not been arrived at between the parties. He further insisted upon refund of paid amount with interest stating that respondents are not in position to handover possession of the booked unit. He requested that present complaint be restricted to relief of paid amount with interest as specified in clause (iv) of prayer clause. In rebuttal, learned counsel for the respondents' reiterated arguments as were submitted in written statement. Learned counsel for respondents further stated that respondents are ready for allotment of any other alternative unit in the completed project.

F. JURISDICTION OF THE AUTHORITY

17. Authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint.

E.1 Territorial Jurisdiction

As per notification no. 1 /92/2017/ITCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real

Estate Regulatory Authority, Panchkula shall be entire Haryana except Gurugram District for all purpose with offices situated in Panchkula. In the present case the project in question is situated within the planning area Faridabad district. Therefore, this Authority has complete territorial jurisdiction to deal with the present complaint.

E.2 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;

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 of 2016 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 learned Adjudicating Officer if pursued by the complainant at a later stage.

G. ISSUES FOR ADJUDICATION

18. Whether the complainant is entitled to refund of amount deposited by him along with interest in terms of Section 18 of Act of 2016?

H. OBSERVATIONS AND DECISION OF THE AUTHORITY

19. The Authority has gone through the rival contentions. In light of the background of the matter as captured in this order and also the arguments submitted by both parties, Authority observes as follows:

(i) Respondents admits that construction of the project has not been completed till date. In fact, it is still going on. Further, no specific time period has been committed for its completion. In these circumstances where the flat buyer agreement was signed way back in the year 2008 and the projects are not complete nor likely to be completed within foreseeable future and extraordinary delay has already been caused from the due date of offer of possession, the complainant would be entitled to relief of refund as he cannot be forced to wait for completion of project for an endless period of time. Further, in case complainant is not keen to accept alternate unit he cannot be



forced to accept the same against his wishes. Alternate unit can be offered only with the consent of the allottee which in this case has not been met.

(ii) Arguments in respect of force majeure conditions put forth by ld. counsel for respondents cannot be accepted as there is nothing on record to justify the unreasonable delay due to which the construction works got delayed. Nothing extraordinary have taken place between the date of executing the flat buyer agreement and due date of offer of possession, and for that matter even till now has been shown to have happened.

(iii) One of the averments of respondents is that provisions of the RERA Act of 2016 will not apply on the agreements executed prior to coming into force of RERA Act, 2016. Accordingly, respondents have argued that relationship of builder and buyer in this case will be regulated by the agreement previously executed between them and same cannot be examined under the provisions of RERA Act. In this regard Authority observes that after coming into force the RERA Act, 2016, jurisdiction of the civil court is barred by Section 79 of the Act. Authority, however, is deciding disputes between builders and buyers strictly in accordance with terms of the



provisions of flat-buyer agreements. After RERA Act of 2016 coming into force the terms of agreement are not re-written, the Act of 2016 only ensure that whatever were the obligations of the promoter as per agreement for sale, same may be fulfilled by the promoter within the stipulated time agreed upon between the parties. Issue regarding opening of agreements executed prior to coming into force of the RERA Act, 2016 was already dealt in detail by this Authority in complaint no. 113 of 2018 titled as Madhu Sareen v/s BPTP Ltd. Relevant part of the order is being reproduced below:

“The RERA Act nowhere provides, nor can it be so construed, that all previous agreements will be re-written after coming into force of RERA. Therefore, the provisions of the Act, the Rules and the Agreements have to be interpreted harmoniously. However, if the Act or the Rules provides for dealing with certain specific situation in a particular manner, then that situation will be dealt with in accordance with the Act and the Rules after the date of coming into force of the Act and the Rules. However, before the date of coming into force of the Act and the Rules, the provisions of the agreement shall remain applicable. Numerous provisions of the Act saves the provisions of the agreements made between the buyers and seller.”

Further, as per recent judgement of Hon'ble Supreme court in Newtech Promoters and Developers Pvt. Ltd it has



already been held that the projects in which completion certificate has not been granted by the competent Authority, such projects are within the ambit of the definition of on-going projects and the provisions of the RERA Act, 2016 shall be applicable to such real estate projects, therefore this Authority has complete jurisdiction to entertain the captioned complaint. In the instant case, however, relief of refund has been sought. The refund in this case is admissible because respondents have failed to complete the real estate project and handover the possession of the same within the time stipulated in the agreement for sale. As on date, the complainant is an aggrieved person who has not been handed over possession of the flat as per agreement of sale. The cause of action, i.e., handing over of possession still persists even after the RERA Act, 2016 coming into force. This is a case of breach of contract by the respondents. In the case of breach of contract, argument that provisions of RERA Act, 2016 will not apply to the agreements executed prior to coming into force of the Act cannot be applied at all. Provisions of the agreement are to be considered if the agreement was to be acted upon. Here is a case of breach of contract, therefore, equities have to be settled so as to compensate a person who is a sufferer on account of breach of



contract. The general law of the land will regulate such situation and not provision of the agreement.

(iv) Factual position reveals that respondents are not in a position to deliver possession of booked unit. As per agreement for sale possession of the unit was to be handed over on 19.03.2011. Complainant had paid an amount of Rs 11,21,250/- to the respondents, out of which last payment was made in August,2008 and since then complainant is waiting for possession of unit. Complainant/allottee in exercise of his right under the provisions of this Act has demanded refund of the amount paid by him. In this regard section 18(1) provides that in case the promoter fails to hand over the possession of the apartment, plot or building, he shall be liable on demand to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest, at such rate as may be prescribed. Furthermore, respondent in his reply has not placed on record any document to show whether occupation certificate has been applied or not and if yes then what is the status of the occupation certificate application. In these circumstances it is presumed that respondent has not received occupation certificate till date.



(v) Further, Hon'ble Supreme Court in the matter of "Newtech Promoters and Developers Pvt. Ltd. versus State of Uttar Pradesh and others " has highlighted that the allottee has an unqualified right to seek refund of the deposited amount if delivery of possession is not done as per terms agreed between them. Para 25 of this judgement is reproduced below:

"25. The unqualified right of the allottee to seek refund referred under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed."

The decision of the Supreme Court settles the issue regarding the right of an aggrieved allottee such as in the present case seeking refund of the paid amount along with interest on account of delayed delivery of possession.



20. This project is already delayed by several years. It is still not complete and admittedly respondents are not in a position to complete the project in foreseeable future, therefore, Authority finds it to be fit case for allowing refund in favor of complainant. Though the complainant has sought that interest be allowed @18% however same cannot be allowed as interest can only be awarded in terms of RERA Act of 2016 and HRERA Rules of 2017. As per Section 18 of Act, interest shall be awarded at such rate as may be prescribed. Rule 15 of HRERA Rules, 2017 provides for prescribed rate of interest which is as under:

“Rule 15: Interest payable by promoter and Allottee. [Section 19] - An allottee shall be compensated by the promoter for loss or damage sustained due to incorrect or false statement in the notice, advertisement, prospectus or brochure in the terms of section 12. In case, allottee wishes to withdraw from the project due to discontinuance of promoter's business as developers on account of suspension or revocation of the registration or any other reason(s) in terms of clause (b) sub-section (I) of Section 18 or the promoter fails to give possession of the apartment/plot in accordance with terms and conditions of agreement for sale in terms of sub-section (4) of section 19. The promoter shall return the entire amount with interest as well as the compensation payable. The rate of interest payable by the promoter to the allottee or by the allottee to the promoter, as the case may be, shall be the State Bank of India highest marginal cost of lending rate plus two percent. In case, the allottee fails to pay to the promoter as per agreed terms and conditions, then in such case, the allottee shall also be liable to pay in terms of sub-section (7) of section 19:

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."

21. The legislature in its wisdom in the subordinate legislation under the provisions 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.
22. 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. 15.02.2023 is 8.70%. Accordingly, the prescribed rate of interest will be MCLR + 2% i.e., 10.70%.
23. The definition of term 'interest' is defined under Section 2(za) of the Act which is as under:

(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-

(i) 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;

(ii) 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;

Accordingly, respondents will be liable to pay the complainant interest from the date amounts were paid till the actual realization of the amount. Hence, Authority directs respondents to refund to the complainant the paid amount of ₹11,21,250 /- along with interest at the rate prescribed in Rule 15 of Haryana Real Estate (Regulation and Development) Rules, 2017 i.e. at the rate of SBI highest marginal cost of lending rate (MCLR)+ 2 % which as on date works out to 10.70% (8.70% + 2.00%) from the date amounts were paid till the actual realization of the amount. Authority has got calculated the total amount along with interest calculated at the rate of 10.70% till the date of

this order and said amount works out to ₹ 14,46,951/- as per detail given in the table below:

| Sr. No. | Principal Amount | Date of payment | Interest Accrued till 15.02.2023 |
|---------|---|-----------------|----------------------------------|
| 1. | ₹ 438750 | 26.12.2007 | 711396 |
| 2. | ₹ 632813 | 01.07.2008 | 991178 |
| 3. | ₹ 49687 | 26.08.2008 | 77009 |
| 4. | Total Payable to complainant (11,21,250/- + 17,79,583) | | ₹29,00,833 /- |

I. DIRECTIONS OF THE AUTHORITY

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

(i) Respondents is directed to refund the entire amount of ₹ 29,00,833/- to the complainant.

(ii) A period of 90 days is given to the respondents to comply with the directions given in this order as provided in Rule 16 of Haryana Real Estate (Regulation & Development) Rules, 2017 failing which legal consequences would follow.

25. **Disposed of.** File be consigned to record room and order be uploaded on the website of the Authority.



.....
Dr. GEETA RATHEE SINGH
[MEMBER]



.....
NADIM AKHTAR
[MEMBER]