

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

Complaint no. : 1530 of 2018  
First date of hearing : 26.03.2019  
Date of decision : 29.08.2019

Mr. Prem Sharma  
R/o Emilia 5, Flat no. 81, Vatika City,  
Sector 49, Gurugram

**Complainant**

Versus

1. M/s BPTP Ltd.  
2. M/s Countrywide Promoters Private Ltd.  
**Address:** M-11, Middle Circle, Connaught  
Circus, New Delhi 110001

**Respondents**

**CORAM:**

Shri Subhash Chander Kush  
Shri Samir Kumar

**Member  
Member**

**APPEARANCE:**

Shri Prem Sharma  
Ms. Sakshi Khatter

Ms. Meena Hooda

Complainant in person  
Authorised representative  
on behalf of respondent  
Advocate for respondents

**ORDER**

1. A complaint dated 17.11.2018 was filed under section 31 of the Real Estate (Regulation and Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 by the complainant Mr. Prem Sharma against the respondents M/s BPTP Ltd and M/s Countrywide Promoters Private Ltd. in respect of unit

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describe below in the project "Park Serene" on account of violation of obligations of the promoter under section 11(4)(a) of the Act *ibid*.

2. Since, the flat buyer's agreement was executed on 23.06.2009 i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, so the penal proceedings cannot be initiated retrospectively. Therefore, the authority has decided to treat this complaint as an application for non-compliance of statutory obligation on part of the respondent in terms of the provision of section 34(f) of the Act *ibid*.
3. The particulars of the complaint are as under: -

1.	Name and location of the project	"Park Serene", Sector 37D, Gurugram
2.	Nature of real estate project	Group housing colony
3.	Project area	23.814 acres
4.	Current status of the project	Occupation granted on 07.08.2017
5.	DTCP license no.	83 of 2008 dated 05.04.2008 94 of 2011 dated 24.10.2011 (as per page 65 of the complaint) and same is also given in occupation certificate
6.	Unit no.	E-202, 2 <sup>nd</sup> floor, E-tower
7.	Unit area	1788 sq. ft
8.	RERA registration status	<b>Not Registered</b>
9.	Date of flat buyer's agreement	23.06.2009



10.	Payment Plan	Construction linked payment plan
11.	Total consideration amount	Rs. 58,22,228.90/- (as SOA pg. 87 of the complaint dated 08.03.2018)
12.	Total amount paid by the complainant	Rs. 53,56,455.97/- (as per SOA dated 08.03.2018 pg. 87 of the complaint)
13.	Due date of delivery (as per clause 2.1: 36 months from the date of issuance of the sanction letter of the building plans+ 180 days grace period, after expiry of 36 months)	<b>21.03.2016</b> <b>Note: Building plan approved on 21.09.2012 as mentioned in newspaper advertisement by respondent. Annx P/4 ( pg. 65 of complaint)</b>
14.	Delay in handing over possession till date of decision 29.08.2019	3 years 05 months and 08 days
15.	Penalty clause as per flat buyer's agreement dated 23.06.2009	Clause 2.3 of the agreement i.e. Rs.5/- per sq. ft for every month of the delay

4. The details provided above have been checked as per record available in the case file which has been provided by the complainant and the respondent. Flat buyer's agreement dated 23.06.2009 is available on record for the aforesaid unit, according to which the possession of the unit was to be delivered by 21.03.2016. The respondent has not delivered

the possession by the due date therefore, the promoter has not fulfilled his committed liability as on date.

5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. The case came up for hearing on 26.03.2019, 14.05.2019, 17.08.2019 and 29.08.2019 and the respondent appeared before the authority on 26.03.2019. The reply filed on behalf of the respondent on 07.08.2019 has been perused by the authority.

#### **Facts of the complaint**

6. The complainant submitted that he booked a unit in the project of the respondent namely "Park Serene", located at Sector 37, Gurugram, Haryana by paying a booking amount of Rs. 1,00,000/- and same was acknowledged vide receipt dated 09.07.2008.
7. The complainant submitted that the respondents subsequently sent a copy of the flat buyer's agreement dated 23.06.2009 to him for the allotment of flat no. E-202, 2<sup>nd</sup> floor, tower-E in Park Serene, Sector 37-D, Gurugram, Haryana for a basic sale price of Rs. 36,29,640/-.
8. The complainant submitted that as per the terms and conditions mentioned in clause 2.1 of the flat buyer's agreement, the respondents were under an obligation to deliver the possession of the said unit to him within the period of 36 months from the date of issuance of the sanction

letter of the building plan of the aforesaid project, with an additional grace period of 180 days. This provision of the flat buyer's agreement dated 23.06.2009 allowed the respondents a total time of 42 months i.e. 36months +180 days from the date of issuance of the sanction letter of the building plans.

9. The complainant submitted that the above said flat buyer's agreement dated 23.06.2009 also provides in clause no. 2.3 that if the respondents fail to offer the possession of the said flat within a period of total time of 42 months of grace period, from the date of issuance of the sanction letter of the building plans, then they shall be liable to pay to the complainant compensation amount of Rs. 5 per sq. ft. for every month of delay thereafter until the actual date of offer of possession of the flat/residential units to the complainant.
10. The complainant submitted that as per the disclosures made by the respondents in a newspaper advertisement in Times of India, Gurugram, on 12.08.2018 they were in receipt of the approval of the building plan on 21.09.2012. The said newspaper advertisement reads as under-

*... "the DGTCP Haryana has granted M/s Countrywide Promoters Pvt. Ltd., license no 83 of 2008, dated 05.04.2008 and 94 of 2011 dated 24.10.2011, for developing a group housing over 43.558 acres. The total numbers of flats approved are 2688 (including EWS) & the building plan is approved vide memo no 18868 dated 21.09.2012...."*

11. The complainant submitted that as per flat buyer's agreement dated 23.06.2009, the total grace period of 42

months from the date issuance of building plan dated 21.09.2012, was expired on 21.03.2016, however, he had never received any satisfactory response or communication of such undue delay.

12. The complainant submitted that the fact of delay was also acknowledged by the respondents in its letter of offer of possession, dated 04.03.2017, which was issued even before the occupation certificate/part occupation certificate, issued by the relevant authorities to the respondents with respect to the respective towers where the flat/unit of the complainant is located in the project. The relevant excerpt of the letter of offer of possession is as under:

“...in view of the fact that the project is already delayed, we are offering the possession...”

13. The complainant submitted that he had also lodged a strong protest with the respondent no.1 expressing the fact of flawed calculations in the said letter of offer of possession dated 04.03.2017, including levy of escalation cost. The said emails were sent by him to the customer care team of the respondent no.1 repeatedly for issuing a revised offer of letter of possession, but the queries were never resolved by the customer care team of the respondent no.1. The said emails and reminders were sent by the complainant dated 24.03.2017, 29.03.2017, 10.04.2017, 25.04.2017, 01.09.2017 and 08.02.2018, wherein it was specifically informed to the customer care team of the respondent no.1 that the demand on account of escalation cost is illegal and not acceptable.

14. The complainant submitted that when the imposition of the said escalation cost was protested by him, with the office of the respondents no. 1, on account of the various reasons including undue delays in offer of possession, breach of the provisions of the flat buyer's agreement dated 23.06.2009 and also breach of provisions of the Real Estate (Regulation and Development) Act read with relevant rules and regulations, the complainant was assured during in one of the meetings with the customer care team of the respondents no 1., that the escalation cost of Rs. 5,84,289/- would be reversed. This was also mentioned by the complainant in an email written to the senior management and executives' representatives of the customer care team of the respondent no. 1, in an email dated 06.07.2018 of the complainant.
15. The complainant submitted that the respondents no.1 never attempted to resolve the queries raised by the complainant and the customer care team kept fooling the complainant with irrelevant emails and instead vide letter notice dated 04.07.2018, had served upon the complainant a demand notice for the payment of Rs. 9,37,790/-. It is further submitted that this amount is inclusive of the escalation cost of Rs. 5,84,289/- which the respondents no.1 did not reverse and cancel despite giving verbal assurances to the complainant.
16. The complainant further submitted that vide statement of account dated 08.03.2018, he was shocked to find out that



the respondents no. 1 had in spite of repeated request to withdraw the escalation costs, they imposed an unreasonable and unexplained escalation cost to the tune of Rs. 5,84,289/-.

17. The complainant further submitted that occupation certificate was issued on 07.08.2017. Hence it is covered by RERA Act, 2016.

**ISSUES RAISED BY THE COMPLAINANTS:**

18. The following issues are raised by the complainants:

1. Whether the respondents are competent to charge any escalation cost from the complainants for the ongoing project?
2. Whether the respondents are liable to pay any interest on account of the delay caused in handing over the possession of the respective flat to the complainant?

**RELIEF SOUGHT:**

19. In view of the above, complainants seek the following relief:

- (a) Direct the respondents to waive off escalation cost of Rs. 5,84,289/- wrongfully charged from the complainants;
- (b) Direct the respondents to handover the possession of the flat to the complainants;

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- (c) Direct the respondents to pay interest for the delay in possession of flat in project group housing colony - "Park Serene", as per the prescribed standards, on the total amount paid and deposited by the complainants till date, commencing from 21.03.2016;

**REPLY ON BEHALF OF RESPONDENT:**

20. The respondent submitted that the present complaint is liable to be dismissed as the Ld. authority has no jurisdiction to adjudicate the present complaint as the complainant has sought compensation of interest as a relief in the complaint and as per the judgement dated 02.05.2019 passed by the Ld. appellate Authority in the case of *Sameer Mahawar Vs MG Housing Pvt. Ltd Appeal No 06/2018*.
21. The respondent submitted that the present complaint is liable to be dismissed as no cause of action has arisen against the respondent or in favour of the complainant. There is a well-documented agreement executed by the complainant wherein he has undertaken to pay the cost escalation charges. Therefore, the complainant is bound to make payment towards the cost escalation as per the said agreement.
22. The respondent submitted that the flat buyer's agreement that was executed by the complainant dated

23.06.2009 is binding upon him as the same is agreed by the himself, with his free consent much before coming into existence of the RERA Act 2016.

23. The respondent submitted that the provisions of Real Estate (Regulation and Development) Act, 2016, does not apply to the project of the respondent no.1 in issue as the respondent no.1 had already applied for the occupancy certificate before the RERA Act came into force.
24. The respondent submitted that the both complainant and as well as respondent had agreed under the flat buyer's agreement dated 23.06.2009 to attempt at amicably settle the matter and if the matter is not settled amicably, to refer the matter for arbitration.
25. The respondent submitted that the complainant had agreed that the basic sale value is escalation free but is subject to revision, in case of increase in raw materials or construction materials due to Government action, policies or otherwise in terms of clause 11.15 of the said agreement. The said cost escalation can be ascertained only at the stage of completion of the building/project and, therefore, the said amount has been charged at the time of offer of possession. Further, the demand/part demand of cost escalation has been duly paid by the complainant dated 06.09.2017 and 09.10.2017.

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**DETERMINATION OF ISSUES:**

After considering the facts submitted by the complainant, reply by the respondent and perusal of record on file, the issue wise findings are as hereunder:

26. With respect to **first issue** raised by the complainant, as per the flat buyer's agreement dated 23.06.2009 there is no stipulation of escalation cost in the aforesaid agreement, which was charged arbitrarily by the respondents. Thus, this issue is decided in favour of complainant.

27. With respect of **second issue** raised by the complainant, as per clause 2.1 of the flat buyer's agreement dated 23.06.2009, which has been reproduced below:

*"within period of 36 months from the date of issuance of the sanction letter of the building plans of the said project."*

the possession of the unit was to be handed over within 36 months plus grace period of 180 days from the date of approvals of building plans. In the present case, the building plans were approved on 21.09.2012. Therefore, the due date of handing over the possession shall be computed from 21.09.2012.

28. Accordingly, the due date of possession was 21.03.2016 but the possession has not been offered till date. Hence, there is delay in delivery of possession. The delay compensation payable by the respondent @ Rs.5/- per sq. ft. per month of super area for any delay in offering

possession of the unit as per clause 3.4 of flat buyer's agreement is held to be very nominal and unjust.

The possession of the apartment was to be delivered by 21.03.2016, the authority is of the view that the promoter has failed to fulfil his obligation under section 11(4)(a) of the Real Estate (Regulation and Development) Act, 2016. As the promoter has failed to fulfil his obligation under section 11(4)(a), the promoter is liable under section 18(1) proviso to pay interest to the complainants, at the prescribed rate i.e. 10.35% for every month of delay till the date of offer of possession.

#### **FINDINGS OF THE AUTHORITY**

29. The authority has complete jurisdiction to decide the complaint in regard to non-compliance of obligations by the promoter as held in ***Simmi Sikka V/s M/s EMAAR MGF Land Ltd.***
30. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Department of Town and Country Planning, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram district, therefore this authority has complete territorial jurisdiction to deal with the present complaint.

31. With regard to issue of "Arbitration Clause" raised by the respondent in reply, the authority is of the considered opinion that it has been held in a catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506***, 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 would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause.

Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015***, it was held that the arbitration clause in agreements between the complainants and builders could not circumscribe jurisdiction of a consumer. This view has been upheld by the Supreme Court in **civil appeal no.23512-23513 of 2017** and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view.

32. Argument heard. As per clause 2.1 of the builder buyer agreement dated 23.06.2009 for unit no. E202, tower-E in project "Park Serene" Sector-37D, Gurugram,

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possession was to be handed over to the complainant within a period of 36 months from the date of approval of building plans i.e. 21.09.2012 plus 6 months grace period which comes out to be 21.03.2016. The respondent has received the occupation certificate on 07.08.2017 but not yet offer the possession of the unit to the complainant. Complainant has already paid Rs. 53,56,455/- to the respondent against a total consideration of Rs. 58,22,228/-.

**DECISION AND DIRECTIONS OF THE AUTHORITY:**


33. After taking into consideration all the material facts as adduced and produced by complainants, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issue the following direction to the buyer in the interest of justice and fair play:

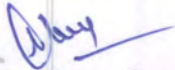
- i. The respondent is directed to pay delayed possession charges at the prescribed rate of interest i.e. 10.45% per annum w.e.f. due date of possession i.e. 21.03.2016 as per the provisions of section 18 (1) of the Real Estate (Regulation and Development) Act, 2016 till actual offer of possession.

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- ii. The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order.
  - iii. Complainant is directed to pay outstanding dues, if any, after adjustment of interest awarded for the delayed period.
  - iv. The promoter shall not charge anything from the complainant which is not part of the flat buyer's agreement.
  - v. Interest on the due payments from the complainant shall be charged at the prescribed rate of interest i.e. 10.45% by the promoter which is the same as is being granted to the complainant in case of delayed possession.
34. The order is pronounced.
35. Case file be consigned to the registry.

  
**(Samir Kumar)**  
Member

  
**(Subhash Chander Kush)**  
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 29.08.2019

Judgement uploaded on 26.09.2019

**SANDEEP BHUCKAL**  
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