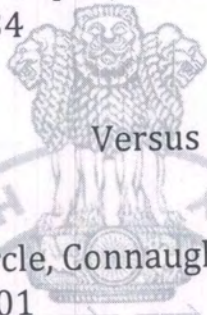


**BEFORE THE HARYANA REAL ESTATE REGULATORY
AUTHORITY, GURUGRAM**

Complaint no. : 1820 of 2018
First date of hearing : 07.12.2018
Date of decision : 29.08.2019

1. Mr Bharat Bhushan Singal
2. Mrs Ritu Agrawal
Both R/o: - D-64, Pushpanjali Enclave,
Pitampura, Delhi- 110034

Complainants


Versus

BPTP Ltd.
Office: M-11, Middle Circle, Connaught
Circus, New Delhi-110001

Respondent

CORAM:
Shri Subhash Chander Kush
Shri Samir Kumar

**Member
Member**

APPEARANCE:

Shri Dennis T Panmei
Shri Bharat Bhushan Singal
Ms. Sakshi Khatter

Advocate for the complainant
Complainant in person
AR on behalf of the
respondent

Ms. Meena Hooda

Advocate for the respondent

ORDER

1. A complaint dated 04.12.2018 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

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Development) Rules, 2017 by the complainants Mr Bharat Bhushan Singal and Mrs Ritu Agrawal against the promoter BPTP Ltd. in respect of unit described below, on account of violation of obligations of the promoter under section 11(4)(a) of the Act *ibid*.

3. Since the flat buyer's agreement was executed on 07.12.2012 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 the part of the respondent in terms of the provision of section 34(f) of the Act *ibid*.
4. The particulars of the complaint are as under: -

1.	Name and location of the project	"Park Generations", Sector 37D, Gurugram
2.	Nature of real estate project	Group housing complex
3.	Project area	43.558 acres
4.	Current status of the project	Possession offered on 17.10.2018 (Annexure A-5) pg. 88 of the complaint Occupation certificate

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		dated 09.10.2018 as stipulated in possession letter dated 17.10.2018
5.	DTCP license no.	83 of 2008 94 of 2011
6.	Unit no.	T1-1404, 14 th floor, tower T1
7.	Unit area	1760 sq. ft
8.	RERA registration status	Tower T-1 is not Registered
9.	Date of flat buyer agreement	07.12.2012 (Annexure A-2)
10.	Date of allotment letter	04.01.2013 (Annexure A-3)
11.	Payment Plan	Construction linked payment plan
12.	Total consideration amount	Rs. 95,62,865.89/- as per SOA pg. 91 of the complaint
13.	Total amount paid by the complainant	Rs. 78,10,827.10/- as per SOA pg. 91 of the complaint
14.	Due date of delivery (as per clause 3.1: 36 months + 180 days grace period from the date of execution of flat buyer's agreement)	07.06.2016
15.	Delay in handing over possession upto 17.10.2018	2 years 4 months 10 days

5. The details provided above have been checked as per record available in the case file which has been provided by the

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complainants. Flat buyer's agreement dated 07.12.2012 is available on record for the aforesaid unit.

6. 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 02.04.2019, 14.05.2019, 07.08.2019 and 29.08.2019. The reply filed on behalf of the respondent on 29.08.2019 and same has been perused by the authority.

Facts of the complaint

7. The complainants submitted that on 15.11.2011, they booked a unit in the project named "Park Generations" in Sector 37-D, Gurugram by paying an advance amount of Rs.6,00,000/- on 15.11.2011, Rs. 6,52,832 on 17.01.2012 and Rs. 9,77,871 on 23.07.2012 to the respondent as per their construction linked payment plan. Accordingly, the complainants were allotted a unit of tentative area of 1760 sq. ft bearing T1 (Tower-19) - 1404 on 4th January 2013.
8. The complainants also submitted that on 7th December 2012, the flat buyer's agreement was entered into between the

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complainants and the respondent. It is further stated that upto the year 2015 the complainants had paid a total amount of Rs 77,39,365/- to the respondent which is more than 95% of the total consideration amount for the said unit. It is also stated that the complainants have always made payments of the amount due in a timely fashion to the respondent.

9. The complainants also submitted due date of delivery of possession as per clause 3.1 of the agreement was 06.05.2016 (36 months from the date of execution of agreement plus grace period of 180 days) however as per offer of possession letter dated 17.10.2018 deemed delivery of the physical possession will be 91 days from the 17.10.2018 i.e 14.02.2019 there has been an unexplained and inordinate delay of more than 2 years and 9 months due to which the complainants had to face various difficulties and hardships.

10. The complainants also submitted that clause 3.3 of the flat buyer's agreement specifies that in the event the respondent fails to deliver the possession of the unit to the complainants within the stipulated time period and as per the terms and

conditions of the flat buyer's agreement, then the respondent shall pay to the complainants, delay compensation @ Rs. 5/- per sq. ft. per month of the super area of the said unit till the handover of the possession of the said unit.

11. The complainants also submitted that the respondent has committed grave deficiency on its part and adopted serious unfair trade practices with the complainants by failing to deliver the possession of the unit booked in time and miserably failed to fulfill his obligations u/s 11 of the Act and the promoter is liable under section 18(1) proviso to pay interest to the complainant, at the prescribed rate, for every month of delay till the handing over of possession. It is submitted that in the possession letter dated 17th October 2018 the respondent have demanded Rs. 6,80,510/- towards cost escalation from the complainants. Clause 12.12 of the agreement deals with the cost escalation.

12. The complainants also submitted that the operative part of the above said clause 12.12 is that sale consideration is escalation free except in the situation where the cost of construction of the project increases beyond 5%.

Accordingly, no escalation charges can be levied in case the increase in cost of the construction is less than 5%. It also means that escalation up to 5% was already accounted for in the basic sale price charged from the buyers.

13. The complainants also submitted that respondent charged the average cost of escalation (relevant index of October 2017) up to the actual date of offer of possession i.e. 17.10.2018. Since almost entire sale consideration was paid by the complainant to the respondent up to the year 2015. No default on the part of the complainant in making payment to the respondent. Admittedly the project has been delayed by around 2 years 9 months for no fault on the part of the complainant. It is, therefore, fair and just that the average cost of escalation, should be calculated only from the date of executing the flat buyer agreement i.e. 07.12.2012 to due date of delivery as per clause 3.1 of the agreement i.e. 6.05.2016. Further this calculation will be made only in respect of increase in the cost beyond initial 5% because 5% increase has already been accounted for in the basic cost charged from buyers.

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14. The complainants also submitted that the respondent have arbitrarily and unjustifiably imposed GST upon the complainants since this tax came into force on the 1st of July, 2017 whereas the unit was to be handed over on the 06.05.2016 (due date of delivery). Therefore, a tax which has been imposed on the complainants by the respondent and which has come into effect after the due date of delivery is totally unjustified. It is stated that the duty to pay GST would not have fallen upon the complainants if the unit had been delivered by the due date as mentioned in the agreement by the respondent and an additional tax has become payable due to the wrongful act of the respondent and without any fault of the complainants. It is thus submitted that the liability to pay GST should lie with the respondent and not the complainants.
15. The complainants also submitted that as per clause 2.1 of the agreement approximate of super area of the apartment has been shown to be 1760 sq. ft. It further reads: "The areas are tentative and subject to change till the grant of occupation certificate by the authority." Further vide offer of possession letter dated 17.10.2018 respondent enhanced the super area

to the 1897 sq. ft., which represents an increase of about 7.8% and respondent has made the demand on enhanced super area.

ISSUES RAISED BY THE COMPLAINANTS:

16. The following issues are raised by the complainants:

- i. Whether the respondent is liable to pay compensation for delayed possession?
- ii. Whether the respondent has wrongly calculated the escalation cost?
- iii. Whether the respondent has wrongly charged GST from the complainants?
- iv. Whether the respondent has increased the super area in accordance with the plans approved by the department/ competent authorities?

RELIEF SOUGHT:

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

- i. Direct the respondent to pay interest @ 18% per annum from the due date of possession 06.05.2016

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- to deemed date of possession 14.02.2019.
- ii. Direct the respondent to re-calculate the average escalation cost from the date of execution of the agreement to the due date of delivery of possession of the unit only and calculation will be made only in respect of increase in the cost beyond initial 5% because 5% increase has already been accounted for in the basic cost charged from buyers.
 - iii. Direct the respondent to pay GST.
 - iv. Direct the respondent to waive off the enhancement charges to the extent the enhancement in super area is found not to be in accordance with the approved plans.

Respondent's reply:

18. The respondent submitted that it had diligently applied for registration of the project in question i.e. "Park Generation" located at Sector 37-D, Gurugram before this hon'ble authority on 03.01.2019 and applied for the extension of the registration on 14.05.2019 and same is pending before this hon'ble authority. It is further submitted that the occupation

certificate has been granted on 09.10.2018 and the same has been duly admitted by the complainant.

19. The respondent submitted that they have already issued offer of possession to the complainant on 17.10.2018 pursuant to receipt of occupation certificate in terms of the agreement. It is submitted that the respondent has also paid a delay compensation of Rs. 2,48,454/- to the complainants in terms of clause 3.3 of the executed agreement. Complainants have failed to make the requisite payments as demanded and also have failed to take the possession of the said unit within the stipulated time.
20. It is further submitted that as per clause 3.4 of the agreement, it was agreed between them upon issuance of the offer of possession letter, the complainants shall take possession on or before 90 days, failing which the complainants shall be liable to pay the holding charges to him @ Rs. 5 per sq. ft. per month.
21. The respondent submitted that complainants approached through a broker, namely "genesis realty pro pvt. Ltd." after conducting due diligence of the relevant estate geographically market and after ascertaining the financial viability of the same.

22. It is further submitted that respondent has till date granted Rs. 2,20,332.40/- towards additional incentive in form of timely payment discount (TDP) to the complainant.
23. The respondent submitted that the complainant has also concealed from this hon'ble authority that he has committed defaults in payments of instalments. The demand raised vide letter dated 26.10.2012 was not paid within the stipulated time and also failed and neglected to clear outstanding dues in terms of letter dated 26.10.2012.
24. It is submitted that while offering possession vide offer of possession letter dated 17.10.2018 respondent vide annexure -E of the offer of possession duly explained the basis of calculating cost escalation to the complainant.
25. The respondent submitted that the project "Par Generation" has been delayed on account of reasons beyond the control of respondent. It is submitted that the construction was affected on account of the NGT order prohibiting construction activity of any kind in the entire NCR by any person, private and government authority.
26. It is submitted that that construction of towers 1,2 and 3 has been completed and the occupancy certificate has been granted on 09.10.2018, thereafter the respondent sent offer

of possession dated 17.10.2018, however the complainant being an investor does not wish to take possession as the real estate market is down and there are no sales in secondary market.

DETERMINATION OF ISSUES:

27. After considering the facts submitted by the complainants and perusal of record on file, the issue wise findings are as hereunder:
28. With respect to **first issue** raised by the complainants as per clause 3.1 of the flat buyer's agreement dated 07.12.2012, the possession of the unit was to be handed over within 36 months plus grace period of 180 days from the date of execution of agreement. In the present case, the flat buyer's agreement was executed on 07.12.2012. Therefore, the due date of handing over the possession shall be computed from 07.12.2012.
29. Accordingly, the due date of possession was 07.06.2016 and hence, the period of delay in delivery of possession is computed as 2 years 4 months 10 days till the date of offer of

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possession i.e. 17.10.2018. 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 07.06.2016, 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 read with rule 15 of the act to pay interest to the complainants, at the prescribed rate, for every month of delay till the date of offer of possession. Therefore, as per section 18(1) proviso read with rule 15 of the Rules ibid, the complainants are entitled to prescribed rate of interest i.e. 10.45% per annum.

30. With respect to **second issue** raised by the complainant, as per clause 12.12 of the agreement herein reproduced as below: -

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“the final cost of construction shall be calculated at the stage of completion of the project, should the variance be equal to or less than 5% of the cost of construction ascertained at the time of booking, the same shall be absorbed entirely by the seller/confirming party “

As the due date of possession was 07.06.2016 but the possession has been offered on 17.10.2018. Thus, the possession has been delayed by 2 years 4 months and 10 days by the respondent himself. Thus, the complainant can't be made liable for the negligence on the part of the respondent. The respondent can't claim escalation cost. Thus, the issue is decided in favour of the complainant.

31. With respect to **third issue**, raised by the complainant raised by the complainant, as the authority doesn't have jurisdiction in respect of this issue. So, complainant is directed to approach to concerned authority.
32. With respect to **fourth issue**, the respondent can only charge 5% increase of the super area allotted to the complainant.

FINDINGS OF THE AUTHORITY

33. 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.***

34. 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.
35. 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.

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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.

36. Arguments heard. As per clause 3.1 of the builder buyer agreement dated 07.12.2012 for unit no. T1-1404, Tower-T1, in project "Park Generation" Sector-37D, Gurugram, possession was to be handed over to the complainant within a period of 36 months from the date of execution of agreement i.e. 07.12.2012 plus 180 days grace period which comes out to be 07.06.2016. The respondent has received occupation certificate and offered the possession of the unit to the complainant on 17.10.2018. Complainant has already paid Rs. 78,10,827/- to the respondent.

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DECISION AND DIRECTIONS OF THE AUTHORITY:

37. 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. 07.06.2016 as per the provisions of section 18 (1) of the Real Estate (Regulation and Development) Act, 2016 till offer of possession i.e. 17.10.2018
- ii. The arrears of interest accrued shall be paid to the complainants within 90 days from the date of this order.
- iii. The complainant is directed to take over the possession of the offered unit within a period of

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one month from the date of issuance of this order failing which he shall be liable to pay holding charges.

iv. Complainant is directed to pay outstanding dues, if any, after adjustment of interest awarded for the delayed period.

v. The promoter shall not charge anything from the complainant which is not part of the flat buyer's agreement.


vi. Respondent is directed not to charge any escalation charges from the complainant and to complete the pending works of the unit in question. In case of any increase in super area, the respondent can only be charged @ 5% of the super area allotted to the complainant.

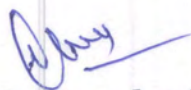
38. Since the project is not registered with the authority, so the authority has decided to take suo moto cognizance of this fact and directed the registration branch to initiate necessary action against the respondent under 59 of the Act. A copy of this order be endorsed to the registration branch.

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39. The order is pronounced.

40. 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



HARERA
GURUGRAM

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