

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

Complaint no. : 2205 of 2018
Date of first hearing: 26.03.2019
Date of decision : 29.08.2019

1. Mrs Shelly Saxena,
2. Mr Sanjay Saxena,
Both R/o. C-1/680, 2nd floor, Palam Vihar, **...Complainants**
Gurugram, Haryana-122017

Versus

BPTP Limited
M-11, Middle Circle,
Connaught Circus,
New Delhi-110001 **...Respondent**

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Smt. Priyanka Agarwal Advocate for the complainant
Smt. Sakshi Khattar AR on behalf of respondent
Smt. Meena Hooda Advocate for the respondent

ORDER

1. A complaint dated 18.12.2018 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 Development) Rules, 2017 by the complainant Mrs Shelly Saxena and Mr. Sanjay Saxena against the respondent



promoter BPTP Ltd. in respect of apartment/unit described below in the project 'Park Generation', Sector- 37 D, Gurugram Haryana, on account of violation of clause 3.1 of the flat buyer's agreement dated 19.11.2012 in respect of unit no. T6-1003 of the said project for not handing over the possession by due date which is an obligation of the promoter under section 11(4)(a) of the Act *ibid*.

2. Since the flat buyer's agreement has been executed on 19.11.2012 i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, therefore, the penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non-compliance of statutory obligation on the part of the promoter/respondent in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016
3. The particulars of the complaint are as under: -

1.	Name and location of the project	"Park Generation" Sector- 37 D, Gurugram Haryana
2.	Registered/not registered	Registered vide no. 7 of 2018 for towers



		T 14 to T19 only (Present tower B is not registered)
3.	Rera Registration valid up to	30.11.2018 (Tower 14,15 and 18) 30.04.2018 (Tower 16, 17 and 19)
4.	Nature of real estate project	Group housing complex
5.	Land area	43.558 acres
6.	Payment plan	Construction Linked
7.	DTCP license number	83 of 2008 and 94 of 2011
8.	Date of execution of flat buyer's agreement	19.11.2012
9.	Addendum to flat buyer's agreement	30.09.2013 (page 71 of reply)
10.	Unit area	1760 sq ft.
11.	Unit no.	T6-1003
12.	Total basic sale price	Rs 6,441,600/- (as per the agreement & statement of account as on 03.06.2015)
13.	Total consideration	Rs 80,14,480/- (as per statement of account at Pg .26 of the complaint)
14.	Date of delivery of possession (As per clause 3.1: within 36 months from date of execution of flat buyer's agreement and	19.05.2016



	there shall be grace period of 180 days)	
15.	Delay of number of months/ years till date 07.08.2019	3 years 2 months 19 days.
16.	Penalty as per clause 3.3 of the agreement	Rs 5 per sq. ft. per month on super area

4. As per the details provided above, which have been checked as per record of the case file. A flat buyer's agreement is available on record for unit no. T6-1003 according to which the possession of the aforesaid unit was to be delivered by 19.05.2016. The promoter has failed to deliver the possession of the said unit to the complainants by the due date as per flat buyer agreement dated 19.11.2012. Therefore, the promoter has not fulfilled his committed liability as on date.
5. Taking cognizance of the complaint, the authority issued notice to the respondents for filing reply and for appearance. The case came up for hearing on 26.03.2019, 14.05.2019, 07.08.2019 and 29.08.2019. The reply has been filled by the respondent on 08.08.2019 which have been perused.

Facts of the case: -

6. Briefly stated, the facts of the case of the complaint are that the complainants and the builder had entered into a flat buyer's agreement on 19.11.2012.
7. It is submitted by the complainants that they approached to the respondent for booking of a flat measuring 1760 sq. ft. 3 BHK in BPTP Park Generations Sector- 37 D, Gurugram and paid booking amount of Rs. 600000/- on 14.09.2011. The complainants further submitted that they were allotted the flat no. T6-1003 admeasuring 1760 sq. ft. 3 BHK in in the said project vide allotment letter dated 17.12.2012.
8. It is submitted by the complainants that the total cost of the said flat is Rs. 8014480/- exclusive taxes. Out of this a sum of Rs. 7967462/- has been paid by the by the complainants in time bound manner. The complainants further submitted that according to the statement, the complainants paid a sum of Rs79,67,462/-to the respondent till August 2017 and only last instalment is remain as per the statement. The respondent

was liable to hand over the possession of a said unit before 19.11.2015 as per clause 3.1 of the flat buyer's agreement.

9. As per para 10 of complaint it is contended by the complainant that they have paid all the instalments timely and deposited Rs. 79,67,462/-. The respondent in an endeavour to extract money from allottees devised a payment plan under which respondent linked more than 30 % amount of total paid against as an advance and rest 65% amount linked with remove space the construction of super structure only.
10. It is submitted by the complainants that respondent have charged interest on delayed instalment @ 18 % compounded interest as per clause 2.11 of FBA and the delay penalty for himself is just Rs 5/- month as per clause 3.3 which is totally arbitrary. As the delivery of the apartment was due in November 2015 which was prior to the coming into of force of the GST Act, 2016 i.e. 01.07.2017, it is submitted that the complainants are not liable to incur additional financial burden of GST due to the delay caused by the respondent. Therefore, the respondent should pay the GST on behalf of the

complainants at the time of last instalment as and when will demanded by builder.

Issues to be determined: -

1. Whether the respondent has breached the provisions of the Act as well as the agreement by not completing the construction of the said unit in time bound manner.
2. Whether the respondent has unjustly enriched them by misusing the hard-earned money of the complainants for almost 7 years without paying any interest or penalty for the delay in delivery of the said unit?
3. Whether the respondent is liable to pay interest on the amount paid to them by the complainants at the same rate 18% which they charged from the complainants in case of delayed payment by the complainants?

Relief sought by complainants

1. To pass an order for delay interest on paid amount of Rs. 7967462/- from November 2015 along with pendent lite and future interest till actual possession thereon @ 18 %.

2. To direct the respondent to pay monthly interest on the amount collected till date with immediate effect.

Reply by the Respondent

11. The respondent submitted that the respondent had diligently applied for registration of the project in question i.e. "Park Generations" located at Sector-37D, Gurugram before this hon'ble authority and accordingly, registration certificate dated 03.01.2018 was issued by this hon'ble authority wherein the registration for the said project is valid for a period till 30.11.2018.
12. The respondent submitted that the complainants have approached this hon'ble authority for redressal of their 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 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



between the parties. It is further submitted that the complainant entered into the said agreement with the respondent with open eyes and is bound by the same. It is further submitted that the relief(s) sought by the complainants travel way beyond the four walls of the agreement duly executed between the parties. It is further submitted that the complainants while entering into the agreement have accepted and are bound by each and every clause of the said agreement, including clause-3.3 which provides for delayed penalty in case of delay in delivery of possession of the said floor by the respondent. It is further submitted that the detailed relief claimed by the complainants goes beyond the jurisdiction of this hon'ble authority under the Real Estate (Regulation and Development) Act, 2016 and therefore the present complaint is not maintainable qua the reliefs claimed by the complainants.

14. The respondent submitted that the above submission implies that while entering into the agreement, the complainants had the knowledge that there may arise a situation whereby the possession could not be granted to the complainants as per the

misrepresentation of material facts, as the same amounts to fraud not only against the respondent but also against the court and in such situation, the complaint is liable to be dismissed at the threshold without any further adjudication.

In this regard, reference may be made to the following instances which establish concealment /suppression/ misrepresentation on the part of the complainants.

- i. The respondent submitted that the complainants approached the respondent through a broker, namely 'Lord Krishna Real Infrastructure' after conducting due diligence of the relevant real estate geographical market and after ascertaining the financial viability of the same. It is further submitted that complainants are investor and have booked the unit in question to yield gainful returns by selling the same in the open market, however, due to the ongoing slump in the real estate market, the complainants have filed the present purported complaint to wriggle out of the agreement.



- ii. The respondent has till date granted Rs. 2,51,895.90/- towards additional incentive in the form of the timely payment discount to the complainant.
- iii. The complainants in the complaint under reply has wrongfully alleged that the unit in question is not in habitable condition. The complainants have concealed the fact that the respondent on various occasions has kept informed about the stages and progress in the development and construction of the unit in question vide demand letters and construction updates vide emails dated 14.04.2016, 21.05.2016, 10.06.2016, 21.12.2016, 21.02.2017, 22.02.2017, 22.06.2017, 12.07.2017, 28.07.2017, 23.08.2017, 25.10.2017, 11.12.2017, 09.04.2018, 07.05.2018, 15.06.2018, 16.06.2018, 15.08.2018, 09.09.2018, 17.11.2018, 19.12.2018, 22.01.2019, 23.02.2019, 22.03.2019, 19.04.2019 and 15.05.2019.
13. The respondent submitted that the reliefs sought by the complainants are unjustified, baseless and beyond the scope/ambit of the agreement duly executed between the parties, which forms a basis for the subsisting relationship



commitment period and in order to protect and/or safeguard the interest of the complainants, the respondent has provided reasonable remedy under clause-3.3, and, the complainants having accepted to the same in totality, cannot claim anything beyond what has been reduced to in writing between the parties. In this regard, reference may be made to section-74 of the Indian Contracts Act, 1872, which clearly spells out the law regarding sanctity and binding nature of the ascertained amount of compensation provided in the agreement and further specifies that any party is not entitled to anything beyond the same. Therefore, the complainant, if at all, is only entitled to compensation under clause-3 of the agreement.

15. The respondent submitted that having agreed to the above, at the stage of entering into the agreement, and raising vague allegations and seeking baseless reliefs beyond the ambit of the agreement, 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 respondent reserve their right to refer to and rely

upon decisions of the Hon'ble Supreme Court at the time of arguments, if required.

16. Therefore, in light of the settled law, the reliefs sought by the complainant in the complaint under reply cannot be granted by this hon'ble authority.
17. The respondent submitted that the complainants duly executed flat buyer's agreement on 19.11.2014 wherein the complainants agreed that subject to force majeure, the possession of the flat to the complainant will be handed over within 36 months from the date of the execution of the flat buyer's agreement along with a further grace period of 180 days. The remedy in case of delay in offering possession of the unit was also agreed to between the parties as also extension of time for offering possession of the floors.
18. The respondent submitted that the project "park generations" has been marred with serious defaults in timely payment of instalments by majority of customers, due to which, on the one hand, the respondent had to encourage additional incentives like TPD while on the other hand, delays in payment caused

major setback to the development works. Hence, the proposed timelines for possession stood diluted.

19. The respondent submitted that the possession of the unit in question has been delayed on account of reasons beyond the control of the 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 or government authority.
20. It is submitted that the respondent after fulfilling requisite formalities has received Occupation certificate on 09.10.2018 from the concerned authority and thereby, has served offer of possession to the customers including the complainants of tower T1, T2 and T3, i.e. the respondent has already offered possession to total 219 customers (till 30.06.2019). It is further submitted that the construction of the balance towers including the tower where the unit in question is located, is going on at full swing at site and that the respondent would be offering possession of the unit shortly.

21. It is submitted that the respondent has been regularly updating the complainants about the status of construction. It is further submitted that the major construction work of unit in question is completed. All the structure, brick work, plaster work (internal as well as external) is completed and possession will be handed over shortly.

22. It is submitted that the complainants are in breach of agreement for non- invocation of arbitration. The parties had agreed under the agreement to attempt at amicably settling the matter and if the matter is not settled amicably, to refer the matter for arbitration.

Determination of issues

23. After considering the facts submitted by the complainant and perusal of record on file, the issue wise findings of the authority are as under:

24. With respect to the **first and third issue** raised by the complainant, as per clause 3.1 of the flat buyer's agreement dated 19.11.2012, for unit no. T6-1003 in project " Park Generations" Sector 37D, Gurugram, the respondent was

under statutory obligation to deliver the possession of the unit within a period of 36 months from the date of execution of agreement i.e. 19.11.2012 and 180 days grace period which comes out to be 19.05.2016. the respondent has not delivered the possession of the unit to the complainant. Complainants have already paid Rs. 78,94,306/- to the respondent against a total consideration of Rs. 80,14,480/-. Further, 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. However, on account of failure in handing over possession by due date according to section 18(1) proviso read with rule 15 of the act, the respondent is liable to pay delayed possession charges at the prescribed rate of interest 10.45% i.e per annum w.e.f. 19.05.2016 till the offer of possession.

25. With respect to the **second issue**, the complainants have failed in furnishing any concrete documentary proof in order prove any unjust enrichment on part of the respondent.

Findings of the authority: -

26. The authority has complete subject matter jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as held in *Simmi Sikka v/s M/s EMAAR MGF Land Ltd.* leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town & Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District. 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.

27. 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.

28. The complainants made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above. The complainants requested that necessary directions be issued by the authority under section 37 of the Act ibid to the promoter to comply with the provisions and fulfil obligations.
29. As per clause 3.1 of the flat buyer's agreement dated 19.11.2012, for unit no. T6-1003 in project " Park Generations" Sector 37D, Gurugram, the respondent was under statutory obligation to deliver the possession of the unit within a period of 36 months from the date of execution of agreement i.e. 19.11.2012 and 180 days grace period which comes out to be 19.05.2016. The respondent has not delivered the possession of the unit to the complainant. Complainant has already paid Rs. 78,94,306/- to the respondent against a total consideration of Rs. 80,14,480/-. Further, 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. However, on account of failure in handing over possession by due date according to section 18(1) proviso read with rule 15 of the act, the respondent is liable to pay delayed possession charges at the prescribed rate of interest i.e 10.45% per annum w.e.f. 19.05.2016 till the offer of possession.

Decision and direction of the authority: -

30. The authority exercising its power under section 37 of the Act hereby issues the following directions to the respondent:-

- i. The respondent shall be liable to pay delay possession charges at prescribed rate of interest i.e. 10.45% per annum from the due date of delivery of possession (19.05.2016) till actual offer of possession.
- ii. The interest so accrued from the due date till the date of order be paid within 90 days from the date of order and


thereafter the monthly interest be paid on 10th of each subsequent month.

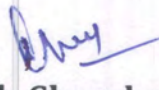
iii. Complainant is directed to pay outstanding dues, if any, after adjustment of interest awarded for delayed period.

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

31. The order is pronounced.

32. Case file be consigned to the registry.


(Samir Kumar)
Member


(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Date:29.08.2019

Judgement uploaded on 23.10.2019

HARERA
GURUGRAM