HARYANA REAL ESTATE REGULATORY AUTHORITY PANCHKULA

Website: www.haryanarera.gov.in

COMPLAINT NO. 480 of 2019

Rajiv Kumar Jain & Rachna Jain ....COMPLAINANT(S)

VERSUS

1. Ms. BPTP Ltd.

2. Countrywide Promoters ....RESPONDENT(S)

CORAM: Rajan Gupta Chairman

Anil Kumar Panwar Member

Date of Hearing: 27.07.2021

Hearing: 12th

Present: Ms. Srishti Girdhar, Counsel for the complainants (through VC)
Mr. Hemant Saini & Mr. Himanshu Monga, Counsel for the respondent.

ORDER (RAJAN GUPTA-CHAIRMAN)

Brief facts of the case are as follows:-

(i). An original allotee namely Ms. Shammi Malhotra had made booking of a flat in year 2009. An Allotment letter for unit no. E-40-44-GF having area of 876 sq ft situated in respondent's project-Park Elite floors was issued to original allotee on 24.12.2009. Builder buyer agreement was executed between the

original allotee and respondent on 30.06.2011 and in terms of clause 4.1 of it, possession was to be delivered within a period of 24 months from the date of payment of 35% amount towards basic sale price alongwith 20% towards EDC/IDC or date of execution of floor buyer agreement whichever is later, alongwith grace period of 180 days for filing and pursuing the grant of OC. Accordingly, deemed date of possession comes to 30.12.2013 (24+6 months from the date of builder buyer agreement). Complainant stepped into the shoes of original allotee vide sale deed dated 04.02.2012. It has been alleged by the complainant that even after receiving Rs 20,96,659/- against basic sale price of Rs 23,00,397/- respondent has not offered possession of unit till date.

(ii). Feeling aggrieved present complaint has been filed by the complainant seeking possession of unit alongwith interest @18% from the date of respective payments.

2. The respondents in their reply have denied the allegations made by complainant and has made following submissions:

(i) Complainant cannot seek relief qua the agreement that was executed prior to coming into force of the RERA Act. Both parties are bound by the terms of builder buyer agreement. Complainant has filed this complaint despite as per clause 33 of the agreement dispute involved herein was supposed to be referred to an arbitrator. Further, present complaint involves disputed questions of fact

and law requiring detailed examination and cross examination of several independent and expert witnesses and therefore it cannot be decided in a summary manner by this Authority. For these reasons, jurisdiction of this Authority cannot be invoked in this matter by the complainant.

(ii). Complainant has concealed the fact that respondent had given additional incentive in the form of timely payment discount amounting to Rs 24,036/- to the complainant.

(iii). Complainant had purchased the unit in question from original allotee by way of resale from secondary market out of their own volition and after due diligence. At the time of submitting requisite documents for transfer/endorsement of unit in his favor, complainants had duly agreed to pay the entire balance sale consideration alongwith charges as per terms of BBA and to abide by the terms of affidavit cum undertaking dated 21.07.2011 signed by original allotee wherein he had specifically undertaken that he shall have no objection regarding relocation/change/modification of super area of unit and tentative layout/building plans and also undertook not to hold respondent-company liable for the delay due to modification/revision in tentative layout plan during construction of the floor.

(iv) Regrading demand of VAT and EEDC it is submitted that these demands were asked in consonance with the agreed payment plan and same has been duly paid by complainant way back in year 2016 and 2012 respectively.

(v) It is denied that total sale consideration of the unit was agreed at Rs 23,00,397/- as it could only be calculated at the stage of offer of possession.

(vi). Regarding delay caused in offering possession it has been submitted that the booking of the unit was accepted by the respondent on the basis of self certification policy issued by DTCP, Haryana. In terms of said policy any person could construct building in licensed colony by applying for approval of building plans to the Director or officers of department delegated with the powers for approval of building plans and in case of non-receipt of any objection within the situated time , the construction could be started. Respondent applied for approval of building plans but they were withheld by the DTCP despite the fact that these building plans were well within the ambit of building norms and policies. Since there was no clarity in the policy to the effect that whether same is applicable to individual plot owners only and excludes the developers/colonizers or not. The department vide notice dated 08.01.2014 had granted 90 days time to submit requests for regularization of the constructions. Thereafter vide order dated 08.07.2015 DTCP clarified that self certification policy shall also apply to cases of approval of building plans submitted by colonizer/developer but did not formally released the plans already submitted by respondent. Further it has been stated that delays has also been occasioned due to inaction of government or its agencies, which was ultimately force majeure beyond the control of respondent.

(vii). Regarding handing over of possession of unit it is submitted that respondent have already offered possession of different units to customers in the same project and will be offering soon to the complainant also.

3. Learned counsel for the complainant while submitting his oral arguments re-stated the facts of the case as produced in para 1 of this order.

4. Learned counsel for the respondent in addition to his written statement submitted his arguments as follows:

(i) That the builder buyer agreement was executed between the parties with mutual consent free from any of the vices of the Contract Act, 1872 viz. misrepresentation, fraud, coercion and undue influence. Since this Authority has already held that agreements made between the parties are sacrosanct and their covenants cannot be re-written, thus it is prayed that delay interest should be granted in terms of the covenants of the agreement from the deemed date of possession till the Act came into force and for the period thereafter, as per the provision of RERA Act,2016. A judgement of Hon'ble Apex Court was quoted titled as Ganga Dhar Vs. Shankar lal and others AIR 1958 SC 770 in which the Hon'ble Supreme Court had held that since the agreements were legal and validly executed between the parties, the term and condition of the agreement containing 85 years clause as a period of redemption would not render it illegal ipso-facto. The specific argument of learned counsel for the respondent is that as the allottees

had entered into a lawful agreement with the respondent and there is no element of fraud, coercion, undue influence etc. therefore covenants of such agreements must prevail for deciding the rights and liabilities between them.

(ii) Clause 5.5 relating to delay penalty has been specifically incorporated in BBA. Fact remains that both parties had mutually understood that there may be delay in completion of the project for which complainants-allotee would be compensated at a rate agreed between parties which in this case is Rs 5/- per sq ft per month. Besides, present complainant is a subsequent allotee who has purchased the flat from the open market. The respondent company was hesitant in effecting such transfers and had allowed the sale only on the condition that the purchaser buying the flat/unit from open market would not saddle the developer with compensation for delay etc. as purchaser is already well aware of the delay already having occurred in the construction of the project. In case, if at all, any delay penalty is to be awarded , then in such cases atleast, the same should be paid as per the terms and conditions of the agreement till coming into force of RERA Act ,2016 and thereafter as per the provisions of the Act. In support of his argument, he referred to judgement of by Hon'ble High Court of Bombay in Neelkamal Relators Suburban Pvt Ltd and another vs Union of India and others, wherein it was observed by Hon'ble Court that RERA Act,2016 is prospective in nature and that the penalty under section 18,38,59,60,61,63 and 64 is to be levied prospectively and not retrospectively.

(iii) Further , Ld. counsel for respondent argued that subsequent allottee is not entitled to any delay interest in support he cited para 38 of judgement dated 24.08.2020 of Hon'ble Supreme Court in Civil Appeal number 6239 of 2019 titled 'Wing Commander Arifur Rahman Khan and Aleya Sultana and others versus DLF Southern Homes Private limited'. Relevant paras of the said judgement is reproduced below: -

> *"Similarly, the three Appellants who have transferred their title, right and interest in the apartments would not be entitled to the benefit of the present order since they have sold their interest in the apartments to third parties. The written submissions which have been filed before this Court indicate that "the two buyers stepped into the shoes of the first buyers" as a result of the assignment of rights and liabilities by the first buyer in favour of the second buyer. In* ***HUDA v. Raje Ram****, this court while holding that a claim of compensation for delayed possession by subsequent transferees is unsustainable, observed that*
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> *"7. Respondents in the three appeals are not the original allottees. They are re-allottees to whom re-allotment was made by the appellant in the years 1994, 1997 end 1996 respectively. They were aware, when the plots were re-allotted to them, that there was delay (either in forming the layout itself or delay in delivering the allotted plot an account of encroachment etc.) .In spite of it, they took re-allotment. Their cases cannot be compared to cases of original allottees who were made to wait for a decade or more for delivery and thus put to mental agony and harassment. They were aware that time for performance was not stipulated as the essence of the contract and the original allottees had accepted the delay."*
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> *Even if the three appellants who had transferred their interest in the apartments had continued to agitate on the issue of delay of possession, we are not inclined to accept the submissions that the subsequent transferees can step into the shoes of the original buyer for the purpose of benefiting from this order. The subsequent transferees in spite of being aware of the delay in*

delivery of possession the flats, had purchased the interest in the apartments from the original buyers. Further, it cannot be said that the subsequent transferees suffered any agony and harassment comparable to that of the first buyers, as a result of the delay in the delivery of possession in order to be entitled to compensation.

5. The Authority after hearing the arguments of both the parties observes and orders as follows:

(i) Maintainability of complaint

The respondent's argument that first the matter should be referred to an Arbitrator, or that the questions in dispute is a mixed question of fact and law therefore the same cannot be tried by this Authority and that the Authority is not having jurisdiction to entertain the complaint because the builder buyer agreement was executed much prior to coming into force of RERA Act,2016 holds no ground in the face of the provision of Section 79, Section 80 and Section 89 of the Act by virtue of which all disputes relating to the real estate projects falls within the purview of the RERA Act and can be adjudicated upon by RERA after coming into force of the Act. The jurisdiction of Civil Courts is specifically barred to entertain any such complaint in the matter. While this Act will not adversely affect the lawfully executed agreements between the parties prior to its coming into force but after its enactment all disputes arising out of those agreements can be settled only by the Authority and jurisdiction of civil Court stands specifically barred by section 79 of the Act. For this reason challenge to the jurisdiction of the Authority cannot be sustained.

(ii) Undertaking

The respondent has argued that original allotee had signed an undertaking dated 21.07.2011 to not to hold liable the respondent for any delay caused in delivery of possession. Learned counsel for the respondent argued that allottee himself has given an undertaking that he will not hold respondent responsible for any delay in offer of possession caused due to any act on account of any changes, modifications, revisions in the tentative lay out building plans during construction/completion of the floor. In this regard Authority observes that in this case delay of more than 8 years has already taken place and the complainant who has already paid 90% of basic sale price is still waiting to have possession of his unit. Factual position remains that builder buyer agreement was executed on 30.06.2011 and the aforesaid undertaking was signed on 02.07.2011. The Authority observes that firstly it has not been demonstrated by respondents that the delay has occurred due to change of layout plans etc therefore the undertaking will not come into play at all. Plea of the respondent that town and country planning department had delayed in approval of building plans also cannot be accepted because the respondent had no right to demand almost entire sales consideration from the complainant without obtaining approval of building plans, the respondent had no right to demand any money beyond 10% booking amount. When respondent demanded entire consideration amount, it is to be presumed that they have obtained all requisite approvals. On this account complainant

cannot be put to any disadvantage for no fault of his. Fairly and squarely only respondent is to be held liable on this account. Secondly, the said undertaking is vague and unconscionable and one sided. It was got signed just 3 days after signing of BBA and after the allottee had paid about 30% of the basic sale price. After payment of substantial amount, the allottees are left with no choice but to sign the documents as are presented to them by the respondent company. The Authority, therefore, is of considered view that said undertaking will have no effect for mitigating the liability of respondents towards allottee for delay caused in handing over the possession. Accordingly, as per principles pertaining to delay interest decided in complaint no. 113/2018 titled as Madhu Sareen vs BPTP Pvt Ltd, the complainants-allotee are entitled to delay interest in terms of Rule 15 of HRERA Rules, 2017 for the entire period of delay from the deemed date of possession i.e. 30.12.2013 upto the date actual possession is offered after obtaining occupation certificate.

(iii) Offer of possession

Factual position reveals that no offer has been yet made by the respondent to the complainant. In his written statement respondent has stated that possession will be offered soon to the complainant, but no specific timeline has been provided. In these circumstances, the respondent is directed to offer possession of unit to the complainant after receiving occupation certificate in terms of principles already decided in complaint no. 113/2018-Madhu Sareen vs BPTP Pvt Ltd.

(iv) Delay interest

The Authority has gone through the rival contentions of the parties on the issue of delay interest. First of all to deal with the question of law posed by the respondent that the delay interest is not admissible in respect of a subsequent allottee, the Authority is unable to agree with the contention of the learned counsel for the respondent. In this case, the original allottee was allotted an apartment in question on 24.12.2009 and builder buyer agreement in respect of it got executed between the parties on 30.06.2011, thereafter the complainants stepped into the shoes of the original allottee approximately 1 year after that i.e. on 04.02.2012. The complainants are not claiming their right through the previous allottee. Moreover, in terms of definition of 'allottee' provided under Section 2(d) of RERA Act,2016 the person who has subsequently acquired allotment of unit through sale, transfer or otherwise i.e subsequent allotee is duly covered in it. So, for all practical purposes, the present complainants are like an original allottee. Section 2 (d) of RERA Act,2016 is reproduced below for reference:-

> *Allottee- in relation to a real estate project, means the person to whom a plot, apartment or building, as the case may be has been allotted or sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and* ***includes the person who subsequently acquires the said allotment through sale, transfer or otherwise*** *but does not include a person to whom the plot or apartment is given onrent.*

It is pertinent to mention here that Hon'ble Supreme Court in Civil Appeal no. 7042 of 2019 titled as M/s Laurate Buildwell Pvt Ltd vs Charanjeet Singh has held that that per se bar to the relief of interest on refund, enunciated by the decision in 'Huda vs Raje Ram' which was applied in 'Wg. Commander Arifur Rahman' cannot be considered good law. The nature and extent of relief, to which a subsequent purchaser can be entitled to, would be fact dependent. In this case factual position reveals that complainant has stepped into shoes of original allotee on 04.02.2012 just after 8 months of execution of builder agreement dated 30.06.2011. Said transfer was duly endorsed by respondent on 20.03.2012. In terms of said builder buyer agreement deemed date of possession comes to 30.12.2013. The respondent was duty bound to deliver possession within stipulated time but he has failed in his duty. In view of aforesaid reasons, the argument of respondent is not accepted.

In furtherance of aforementioned observations, it is decided that the complainants who are waiting for last 8 years to have possession of unit should not suffer anymore on account of default on the part of respondent and is entitled to be paid interest for the delay caused therein from the deemed date of possession till handing over of possession after receipt of occupation certificate as per principles laid down in complaint no. 113/2018 Madhu Sareen vs BPTP Pvt Ltd. Accordingly, it is decided that upfront payment of delay interest amounting to Rs 13,75,426/- in terms of Rule 15 of HRERA Rules, 2017 i.e. SBI MCLR+2% for

the period ranging from 30.12.2013 (deemed date of possession) to 27.07.2021 (date of this order) is awarded to the complainants. Further, monthly interest of Rs 15,131/- shall also be payable upto the date of actual handing over of the possession after obtaining occupation certificate. The Authority further orders that the complainants will remain liable to pay balance consideration amount to the respondent when a valid offer of possession is made to him after obtaining occupation certificate. Ld. counsel for respondent has also argued that time period during which lockdown was imposed in view of pandemic COVID-19 be exempted from said delay interest. In this regard, Authority is of view that respondent has delayed the project by 8 years approximately and complainant who has already paid around 95% of basic sale price is still waiting for possession of his unit. More seriously, even of now respondent is not committing any timeline for completion of unit and for giving lawful possession. Now, respondent cannot be allowed to take benefit of his own wrong as he himself who is at fault by not completing the project within timeframe decided by himself. He cannot make a prayer at this stage to exempt the lockdown period from awarding delay interest. Had it been the case where respondent was not able to complete the project solely because of restrictions imposed by way of lockdown then the case would have been different. Here the respondent is not even able to justify the time period already lapsed on his part towards completion of project. For these reasons argument of respondent cannot be accepted.

6. As per receipts attached in the file, total paid amount comes out to Rs 21,88,414/- after including 4 receipts of cash payment available at page 38-41 of complaint file. But complainant has stated in his petition that he has paid Rs 20,96,659/-. So, total paid amount for calculation of delay interest is taken Rs 20,96,659/-. The delay interest mentioned in aforesaid paragraph is calculated on total amount of Rs 19,52,324/- .Said total amount has been worked out after deducting charges of taxes paid by complainant on account of VAT amounting to Rs 20,740/- and Rs 1,23,595/- paid on account of EDC/IDC from total paid amount of Rs 20,96,659/-. The amount of such taxes is not payable to the builder and has rather required to passed on by the builder to the concerned revenue department/authorities. If a builder does not pass on this amount to the concerned department the interest thereon becomes payable only to the department concerned and the builder for such default of non-passing of amount to the concerned department will himself be liable to bear the burden of interest. In other words it can be said that the amount of taxes collected by a builder cannot be considered a factor for determining the interest payable to the allotee towards delay in delivery of possession.

7. It is also added that if any lawful dues remain payable by the complainant to the respondent, the same shall remain payable and can be demanded by the respondent at the time of offer of possession.

8. Respondent is directed to pay the amount of upfront delay interest of Rs 13,75,426/-.within 45 days of uploading of this order on the website of the Authority. The monthly interest of Rs 15,131/- will commence w.e.f. 1st September, 2021. **Disposed of** in above terms. File be consigned to record room.

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RAJAN GUPTA
[CHAIRMAN]

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ANIL KUMAR PANWAR
[MEMBER]