HARYANA REAL ESTATE REGULATORY AUTHORITY PANCHKULA

Website: www.haryanarera.gov.in

COMPLAINT NO. 368 of 2019

Renu and Asheesh Lamba ....COMPLAINANT(S)

VERSUS

BPTP Pvt. Ltd. ....RESPONDENT(S)

CORAM: Rajan Gupta Chairman

Anil Kumar Panwar Member

Date of Hearing: 20.07.2021

Hearing: 18TH

Present: - Mr. Dharampal, Counsel for complainant
Mr. Hemant Saini & Mr. Himanshu Monga, Counsel for the respondent.

ORDER (RAJAN GUPTA-CHAIRMAN)

Today is the 18th hearing of this case. For last 3-4 hearings this case was adjourned for out of court settlement. Today, ld. counsel for complainant stated that no settlement has taken place between the parties therefore a case may be decided on merits.

2. Brief facts of the case are as follows:-

(i) An original allotee namely Mr. Rajnish Tandon had made booking of a flat on 29.09.2009. No allotment of any specific apartment was made in his favor. Complainants purchased allotment rights from the original allottee of Unit no. OM-28-09-SF having area 1478 sq ft situated in respondent's project Park-81, Faridabad vide builder buyer agreement executed between the parties on 11.07.2011. In terms of clause 5.1 of the BBA, possession was to be delivered within a period of 36 months from the date of execution of floor buyer agreement or sanction of building plan whichever is later alongwith grace period of 180 days for filing and pursuing for grant of occupation certificate. Deemed date of possession works out to 11.01.2015 (36+6 months from the date of builder buyer agreement). Complainants have already paid Rs 31,97,397/- against basic sale price of Rs 29,50,015/-. It has been alleged by the complainants that neither construction of the unit is complete nor occupation certificate has been received by respondent, however possession of the unit was offered by respondent on 04.10.2018 alongwith additional demand of Rs 8,30,828/-. Out of said demand complainants are impugning charges levied on account of cost escalation, GST, VAT, interest on delayed payments and increase in area from 1478 to 1536 sq ft. Possession has not accepted by the complainant on account of raising unreasonable demands and non-receipt of occupation certificate.

(ii) Feeling aggrieved present complaint has been filed by the complainants seeking possession of unit alongwith delay interest and quashing of

illegal/impugned demands raised by respondent on account of GST, VAT, cost escalation, interest for delayed payments. Complainants have also demanded compensation of Rs 10,00,000/- and Rs 5,00,000/- on account of mental agony suffered and deficiency in services.

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

(i) Complainants 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). Complainants have concealed the fact that respondent had given additional incentive in the form of timely payment discount amounting to Rs 80,552/- to the complainant.

(iii). Complainants had purchased the unit in question from original allotee in 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. Thereafter unit was endorsed in favour of complainants on 02.03.2011. Further an affidavit cum undertaking dated 28.07.2011 was signed by complainants wherein the complainants had specifically undertaken that they 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). Regarding increase in area it has been submitted that vide clause 10 of booking application, the complainants had agreed to accept change in super area of the unit and to pay for the increased area on the basis of the rate agreed in BBA. Further, respondent has also got report of a third party independent architect to measure the super area in terms of the agreed definition who has confirmed the super area to be in conformity with the definition.

(v). 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.

(vi). After completing construction work of the unit, offer of possession was made to complainant on alongwith demand on account of various charges which were duly agreed between the parties as per terms of BBA. All charges demanded by respondent are in consonance with the terms of BBA. It is the complainant who is at fault by not coming forward to take possession of the unit after paying due amount as demanded alongwith offer of possession.

4. Learned counsel for the complainant while submitting his oral arguments re-stated the facts of the case as produced in para 2 of this order.

5. 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 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 penalty 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. 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 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.

6. 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 enactment of the RERA Act,2016 all disputes arising out of those agreements as were can only be settled 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) Offer of possession

Admittedly respondent has issued offer of possession dated 04.10.2018 to the complainants alongwith demand for payment of additional Rs 8,30,828/-. However, said offer is not accompanied with occupation certificate issued by State government agencies. Today, ld. counsel for respondent stated that developer had applied for grant of Occupation Certificate in year 2019 but the same has not been received till date. It implies that the said offer of possession dated 04.10.2018 was made to the complainant around 1 year prior to even applying for occupation certificate. In these circumstances, the impugned offer of possession is not a valid offer of possession in eyes of law and complainant was not bound to accept the same. Therefore, the offer of possession dated 04.10.2018

cannot be called a lawful offer, hence the same is quashed. Therefore, now the respondent will offer a fresh possession after receiving occupation certificate from the department. As a logical consequence, the additional demands made alongwith invalid offer of possession also stands quashed.

(iii) Undertaking

The respondent has argued that complainants had signed an undertaking dated 28.07.2011 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 6 years has already taken place and the complainants who have already paid full basic sale price is still waiting to have possession of his unit. Factual position remains that builder buyer agreement was executed on 11.07.2011 and the aforesaid undertaking was also signed on 28.07.2011 i.e. merely 17 days after the execution of the builder buyer agreement. 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. Secondly, the undertaking executed within 17 days of signing of BBA, for all practical purposes has to be read as an addendum of

the agreement itself. Thirdly, the said undertaking is vague and unconscionable and one sided. It was got signed 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 upto the date actual possession is offered after obtaining occupation certificate.

(iv) Delay interest

In furtherance of aforementioned observations, it is decided that the complainant who is waiting for last 6 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 in complaint no. 113/2018 Madhu Sareen vs BPTP Pvt Ltd. Accordingly, it is decided that upfront payment of delay interest amounting to Rs 17,45,087/- in terms of Rule 15 of HRERA Rules, 2017 i.e. SBI MCLR+2% for the period

ranging from 11.01.2015 (deemed date of possession) to 20.07.2021 (date of this order) is awarded to the complainant. Further, monthly interest of Rs 23,540/- shall also be payable upto the date of actual handing over of the possession after obtaining occupation certificate. The Authority further orders that the complainant 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. At this stage ld. counsel for respondent argued that time period during which lockdown was being 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 6 years approximately and complainant who has already paid around 90% of basic sale price is still waiting for possession of his unit. More seriously, even now respondent is not committing any timeline for completion of unit and 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.

7. The delay interest mentioned in aforesaid paragraph is calculated on total amount of Rs 30,37,441/-. Said total amount has been worked out after deducting charges of taxes amounting to Rs 29,101/- paid on account of VAT and Rs 1,30,855/- paid on account of EEDC from total paid amount of Rs 31,97,397/- paid by complainant. The amount of such taxes is not payable to the builder and are rather required to passed on by the builder to the concerned 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 towards determining the interest payable to the allotee on account of delay in delivery of possession. Moreover, in this case the respondent has already applied for occupation certificate and is pursuing his case for grant of it. It can be safely assumed that after completing all necessary formalities out of which one is renewal of license and for said renewal all the taxes has to be fully paid to the concerned department, the respondent is awaiting for grant of occupation certificate.

8. Respondent is directed to pay the amount of upfront delay interest of Rs 17,45,087/- within 45 days of uploading of this order on the website of the

Authority. The monthly interest of Rs 23,540/- will commence w.e.f. 1st September, 2021.

9. **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]