



Complaint no.1247 of
2020

HARYANA REAL ESTATE REGULATORY AUTHORITY PANCHKULA

Website: www.haryanarera.gov.in

COMPLAINT NO. 1247 OF 2020

Harshit Gupta and Anr.

....COMPLAINANT(S)

VERSUS

M/s B.P.T.P Ltd

....RESPONDENT(S)

**CORAM: Rajan Gupta
Anil Kumar Panwar**

**Chairman
Member**

Date of Hearing: 28.07.2021

Hearing-7th

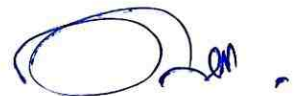
Present: - Mr. Gaurav Gupta, Counsel for the complainant
Mr. Hemant Saini & Mr. Himanshu Monga, Counsel for the
respondent.

ORDER (ANIL KUMAR PANWAR-MEMBER)

The complainant had purchased allotment rights of unit no. P-8-08-GF having area of 1203 sq ft from one original allottee namely Ms. Veena Shukija vide transfer letter dated 04.11.2015. Said unit was allotted to the original allottee vide allotment letter dated 24.12.2009. Thereafter builder buyer agreement was

executed between the parties on 17.06.2010 and in terms of clause 4.1 of it, possession was supposed to be handed over upto 17.12.2012 (24+6 months from the date of execution of builder buyer agreement). It has been alleged that respondent had got executed fresh builder buyer agreement on 22.02.2016 for the same unit bearing no. P-8-08-GF having area of 1410 sq ft after transfer of unit in favor of complainant from the original allottee. Now the said unit was allotted with increased area at basic sale price of Rs 21,52,124/- against which Rs 22,94,818/- already stands paid. In terms of clause 6.1 of fresh BBA possession of unit was supposed to be delivered upto 22.08.2019 (36+6 months from date of execution of builder buyer agreement) but respondent has failed in his duty to offer the unit after completing its construction work. Feeling aggrieved present complaint has been filed by complainant seeking possession of booked unit alongwith delay interest.

2. On the last date of hearing it was observed that contention/argument of complainant to award delay interest in terms of earlier executed builder buyer agreement dated 17.06.2010 could not be accepted after execution of fresh builder buyer agreement in year 2016. Further, statement of respondent's counsel was recorded that construction of allotted unit is going in full swing and possession will be handed over shortly. Accordingly, the respondent was directed to place on record the photographs of the unit in order to give an update of the stage of the



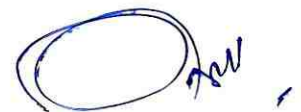
construction of the unit. Respondent has not filed details regarding stage of construction of unit.

3. Respondent in his reply had submitted as following: -

a. Provision of RERA Act,2016 does not apply to the present case as the BBA was executed prior to coming into force of RERA Act,2016. Agreement executed prior to the registration of the project under RERA shall be binding on the parties and cannot be re-opened. As per clause 33 of BBA complainants are bound to approach for arbitration proceedings for any dispute/grievance. Admittedly, complainants have raised dispute but did not take any steps to invoke arbitration and hence, is in breach of the agreement between the parties.

b. Present complaint is not maintainable as the allegations raised by the complainants require proper adjudication by tendering evidence , cross examination etc. and therefore ought not be adjudicated in a summary proceedings.

c. Complaint is liable to be dismissed in as much as the unit in question is an independent floor being constructed over a plot area tentatively admeasuring 140.430 sq meters. As per section 3 (2) (a) of RERA Act,2016 registration is not required for an proposed to be developed that does not exceed 500 sq meters.



d. Complainants have concealed the fact that respondent had given additional incentive in the form of timely payment discount amounting to Rs 86,850/- to the complainant.

e. Regarding delay caused in offering possession of the allotted unit it has been stated that delay has been occasioned due to inaction of the government or its agencies , hence, it should be inferred that any delay has been unfortunately caused due to force majeure circumstances beyond control of the developer. Further, it has been stated 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 stipulated 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 this policy to effect that whether the same is applicable to individual plot owners only and excludes the developers/colonizers the department vide notice dated 08.01.2014 granted 90 days time to submit requests for regularization of construction. 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 all the plans already submitted by respondent.

f. Regarding status of the unit in para 11 of the said reply it has been stated that the construction work is going in full swing unit and possession will be handed over soon to the complainants.

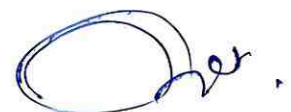
g. Complainants had purchased the unit in question from original allottee in resale from secondary market out of their own volition and after due diligence. At the time of submitting requisite documents for transfer/endorsement of unit in his favor, complainants had duly agreed to pay the entire balance sale consideration alongwith charges as per terms of BBA. Thereafter unit was endorsed in favour of complainants on 26.11.2015. Further an affidavit cum undertaking dated 12.10.2015 was signed by complainant 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.

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



(i) It is submitted that the builder buyer agreement was executed between the parties with mutual consent and are free from any of the vices of the Contract Act, 1872 viz. misrepresentation, fraud, coercion and undue influence. Since the Authority has already held that the agreements 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 is 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 valid, executed between the parties, thus 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 have entered into agreement with the respondent and there is no fraud, coercion, undue influence etc. The covenants of such agreements must prevail for deciding the rights between them.

(ii) Clause of delay penalty has been specifically incorporated in BBA and fact remains that both parties had mutually agreed upon the part that there can be delays in the project and for the same complainants-allottee would be compensated at a rate agreed mutually between parties which in this case is Rs 5 per sq ft per month. Delay penalty should be paid as per the terms and conditions




of the agreement till the RERA Act ,2016 came into force and thereafter as per the provisions of the Act. In support of his argument, he has referred to judgement passed in case of Neelkamal Relators Suburban Pvt Ltd and another vs Union of India and others wherein it was observed by Hon'ble Apex 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.

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

(i) Maintainability of complaint

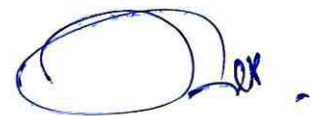
The respondent's argument is that first of all the matter should be referred to an Arbitrator or that the questions in dispute is a mixed question of fact and law therefore the same cannot be tried by this Authority. Further, the Authority is not having jurisdiction to entertain the complaint because the builder buyer agreement was executed much prior to coming into force of RERA Act,2016. The arbitration clause laid in BBA provides that the dispute between the parties will be referable to the Sole Arbitrator who shall be appointed by the Managing Director of Company. It has been specifically written that allottee cannot raise any objection on appointment of sole arbitrator. Section 12(5) of The Arbitration and Conciliation Act 1996, renders a person ineligible to act as an Arbitrator if he holds such relationship with any of the parties to the dispute, which falls in the



categories specified in the Seventh Schedule of the Arbitration Act. The Arbitrator so appointed by Managing Director of company which is party to the referable dispute falls in category 5 of said schedule. The Hon'ble Supreme Court in **TRF Limited versus Energo Engineering Projects Limited** has ruled that maxim " Qui facit per alium facit per se" (what one does through another is done by oneself) applies in the circumstance where the Managing Director himself has become ineligible to be appointed as arbitrator and he appoints another person to act as an arbitrator. The dictum of said ruling is that no person can get an act done indirectly by engaging another person as arbitrator if he himself is debarred from directly doing such act. So, the arbitration clause on which the respondent company is relying, is legally not enforceable.

Furthermore, the complainant has filed the present complaint under the provisions of Section 31 of the Real Estate (Regulation and Development) Act, 2016 (for short RERA Act). Said section confers a statutory right on the complainant to file a complaint with the Authority for redressal of his grievances against the promoter in whose project he had agreed to purchase an apartment. Section 89 of the RERA Act reads as under: -

“The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.”



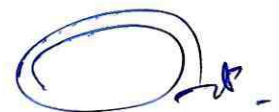
By virtue of the over-riding effect which the above quoted Section confers on the statutory provisions of the RERA Act, the Authority is even otherwise duty bound to decide the present complaint filed under the provisions of the Act undeterred by the embargo created by the arbitration clause contained in FBA. Further by virtue of the provision of Section 79, Section 80 and Section 89 all disputes relating to the real estate projects will fall within the purview of the RERA Act and can be adjudicated upon by RERA. The jurisdiction of Civil Courts is specifically barred to entertain any such complaint in the matter.

(ii) Offer of possession

Factual position reveals that no offer has been yet made by the respondent to the complainant. In 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.


(iii) Undertaking

The respondent has argued that complainants had signed an undertaking dated 12.10.2015 to not to hold liable the respondent for any delay caused in delivery of possession. Learned counsel for the respondent argued that complainant himself has given an undertaking that he will not hold respondent responsible for



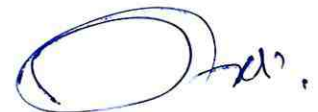
any delay in offer of possession caused due to any act on account of any changes, modifications, revisions in the tentative lay out building plans during construction/completion of the floor. In this regard Authority observes that the complainants who have already paid full basic sale price is still waiting to have possession of his unit. Further, it has been observed that 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. In such circumstances, said undertaking is vague and unconscionable and one sided. It was got signed after the allottee had paid about 65% 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-allottee 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



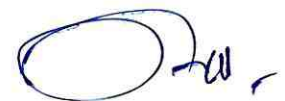
Authority vide its order dated 01.12.2020 had already observed that respondent has failed in his duty to deliver possession within the stipulated time and he is not in a position to handover the possession of the booked unit as construction work is still going on. For the fault of respondent, complainant should not suffer. In these circumstances it is decided that upfront payment of delay interest amounting to Rs 3,60,890/- calculated in terms of rule 15 of HRERA Rules,2017 i.e. SBI MCLR+2% (9.30%) for the period ranging from 22.08.2019 (deemed date of possession) to 28.07.2021 (date of order) is awarded to the complainant and monthly interest of Rs 15,548/- shall 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 the balance consideration amount to the respondent as and when a valid offer of possession duly supported with occupation certificate is made to them.

6. At this stage ld. counsel for respondent has 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 already delayed the project by 2 years approximately and complainant who has already paid around 90% of basic sale price is still waiting for possession of his unit, even of today respondent has not committed any timeline for completion of unit. Evenmore 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 cannot make a prayer to exempt lockdown period for 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 is rejected.

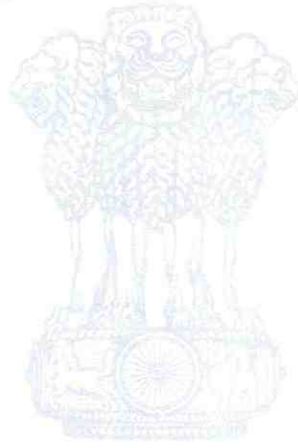
7. The delay interest mentioned in aforesaid paragraph is calculated on total amount of Rs 20,06,229/-. Said total amount has been worked out after deducting charges of taxes paid by complainant on account of VAT amounting to Rs 23,416/- and EDC/IDC amounting to Rs 1,67,344/- and EEEDC amounting to Rs 97,829/- from total paid amount of Rs 22,94,818/-. The amount of such taxes is not payable to the builder and has rather required to be 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 allottee towards delay in delivery of possession.



8. It is 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.

9. Respondent is directed to pay the complainants an amount of Rs 3,60,890/- as upfront delay interest within 45 days of uploading of this order on the website of the Authority. The monthly interest of Rs 15,548/- will commence w.e.f. 1st September, 2021.

10. 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]