HARYANA REAL ESTATE REGULATORY AUTHORITY PANCHKULA

Website: www.haryanarera.gov.in

COMPLAINT NO. 62 OF 2020

Hemant Arora and Meenal ....COMPLAINANT(S)

VERSUS

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

CORAM: Rajan Gupta Chairman
Anil Kumar Panwar Member

Date of Hearing: 28.07.2021

Hearing:7th

Present: - Mr. Arjun Kundra, Counsel for complainant
Mr. Hemant Saini & Mr. Himanshu Monga, Counsel for respondent.

ORDER (ANIL KUMAR PANWAR-MEMBER)

Complainants had purchased allotment rights of unit no. PE-99-FF having area 1025 sq ft situated in respondent's project namely 'Park Elite Floors, Faridabad from original allotees namely Mr. Hanish Sethi and Mr. Rajat Sethi vide sale letter dated 26.04.2013. Said unit was booked by the original allotees in year 2009 by making payment of Rs 2,00,000/-. Builder buyer agreement was executed between the original allotee and respondent on 03.04.2013 and in terms of clause 5.1 of it, possession was

supposed to be delivered within a period of 24 months from the date of execution of floor buyer agreement or sanction of building plan whichever is later alongwith grace period of 180 days provided to promoter for filing and pursuing the grant of OC. Accordingly, deemed date of possession comes out to 03.10.2015 (24+6 months from the execution of BBA). It has been alleged by the complainant that possession has not been offered by the respondent till date even after receiving Rs 18,70,787/- against basic sale price of Rs 19,69,328/-. Feeling aggrieved, present complaint has been filed by the complainants seeking possession of unit alongwith delay interest.

2. Respondent had already filed his reply wherein it has been submitted as following: -

a. Original allotees Mr. Hanish Sethi and Mr. Rajat Sethi had applied for booking of an independent floor in their project Park Elite floors on 04.06.2009 and complainants had purchased the unit no. PE-99-FF from original allotee and said transfer has been duly endorsed by the developer vide endorsement dated 30.04.2013 annexed as Annexure R-6. Builder buyer agreement dated 03.04.2013 signed with the original allotee is an admitted fact.

b. 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 34 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.

c. 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.

d. Complainant 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.

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 ay 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 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. Total sale consideration of Rs 19,69,328/- has been denied stating that it can be determined at the time of offer of possession as per terms of BBA.

g. Regarding status of the unit in para 11 and 17 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 complainant.

3. Learned counsel for complainant has referred to order dated 01.12.2020 wherein it has been observed by the Authority 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 and it was decided that respondent should pay the amount of delay interest accrued till 31.12.2020 to the complainant by way of RTGS. Thereafter, the complainant had filed his calculation of delay interest amounting to Rs 9,57,945/- for the period ranging from 03.04.2015 to 31.12.2020 at the rate prescribed in Rule 15 of HRERA Rules,2017 alongwith details of his bank account. Respondent was supplied a copy of same in order to file his objections but no objections has been filed till date.

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-allotee would be compensated at a rate agreed mutually between parties which in this case is Rs 5 per sq ft per month. Besides this subsequent allotee has purchased the flat from the open market. The respondent company was hesitant in effecting such transfers and 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 about 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 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.

(iii) Further , Ld. counsel for respondent argued that subsequent allottee is not entitled to any delay interest and 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*

"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."

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.

6. 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 allotee 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.

(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 builder buyer agreement between original allotee and respondent in respect of unit in question got executed between the parties on 03.04.2013, thereafter the complainants stepped into the shoes of the original allottee just after 23 days i.e. on 26.04.2013. 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 26.04.2013 just after 23 days of execution of builder agreement dated 03.04.2013. Said transfer was duly endorsed by respondent on 30.04.2013. In terms of said builder buyer agreement deemed date of possession comes to03.10.2015. The respondent was duty bound to deliver possession within stipulated time but he has failed in his duty. Even of today there is no specific timeline provided by respondent for handing over of possession. In view of aforesaid reasons, the argument of respondent is not accepted.

7. Authority vide its order dated 01.12.2020 has 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 8,93,102/-calculated in terms of rule 15 of HRERA Rules,2017 i.e. SBI MCLR+2% (9.30%) for the period ranging from 03.10.2015 (deemed date of possession) to 28.07.2021 (date of order) is awarded to the complainant and monthly interest of Rs 12,790/- 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.

8. 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 6 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.

9. The delay interest mentioned in aforesaid paragraph is calculated on total amount of Rs 16,50,276/-.Said total amount has been worked out after deducting charges of taxes paid by complainant on account of EDC/IDC amounting to Rs 2,20,511/- from total paid amount of 18,70,787/-.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.

10. 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.

11. Respondent is directed to pay the complainants an amount of Rs 8,93,102/- as upfront delay interest within 45 days of uploading of this order on the website of the Authority. The monthly interest of Rs 12,790/- will commence w.e.f. 1st September, 2021.

12. **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]