



Complaint no. 1376,1382,1381,1380 all
of 2018 and 687/2019

HARYANA REAL ESTATE REGULATORY AUTHORITY PANCHKULA

Website: www.haryanarera.gov.in

1. COMPLAINT NO. 687 OF 2019

Prabhat Kumar MishraCOMPLAINANTS(S)

VERSUS

BPTP Ltd.RESPONDENT(S)
(Hearing-15TH)

2. COMPLAINT NO. 1376 OF 2018

Moli GayanCOMPLAINANTS(S)

VERSUS

BPTP Ltd.RESPONDENT(S)
(Hearing-17TH)

3. COMPLAINT NO. 1382 OF 2018

Randhir SinghCOMPLAINANTS(S)

VERSUS

BPTP Ltd.RESPONDENT(S)
(Hearing-17TH)

4. COMPLAINT NO. 1381 OF 2018

Brig Shailendra MalikCOMPLAINANTS(S)

VERSUS

BPTP Ltd.RESPONDENT(S)
(Hearing-17TH)

5. COMPLAINT NO. 1380 OF 2018

Purnima RamakrishnaCOMPLAINANTS(S)

VERSUS

BPTP Ltd.RESPONDENT(S)
(Hearing-17TH)

CORAM: Rajan Gupta
Anil Kumar Panwar

Chairman
Member

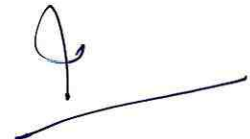
Date of Hearing:27.07.2021

Present: Mr. P.R Sikka, Mr. Arjun Kundra and Mr. Rohit Rana, Counsel for
the complainants.
Mr. Hemant Saini & Mr. Himanshu Monga, Counsel for
respondent.

ORDER (RAJAN GUPTA-CHAIRMAN)

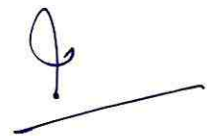
Captioned bunch of complaints is taken together for hearing as they
involve similar issues and are pertaining to same project-Park-81 of respondent.
This order is passed taking complaint no. 687/2019 as lead case.

2. Today is 15th hearing of this case. This case was heard at length on
20.11.2019 whereby respondent was directed to issue revised offer of possession
to the complainants in terms of principles laid down in complaint no. 113/2018
titled as Madhu Sareen vs BPTP Pvt Ltd and to provide details of status of
occupation certificate. Thereafter several opportunities were taken by respondent
to furnish said information. Statement of accounts were filed by the respondent
but the same was not acceptable to the complainant. Then this case was heard at
length on 01.12.2020 whereby offer of possession issued by respondent to the
complainant was quashed by the Authority and held that complainant is entitled
for upfront payment of delay interest. On the last date of hearing complainant had
filed his calculations of delay interest and respondent had been supplied a copy
of it and case was adjourned for today granting an opportunity to respondent to
file his objections, if any.



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

(i). An original allottee namely Mr. Aditya Kakkar had made booking of a flat on 26.09.2009. No allotment of any specific apartment was made in his favor. Complainant had stepped into shoes of original allottee vide endorsement dated 20.01.2012. An Allotment letter for unit no. AQ-05-27-SF having area of 1513 sq ft situated in respondent project-Park-81 was issued to complainant on 20.01.2012. Builder buyer agreement was executed between the parties on 26.06.2012 and in terms of clause 5.1 of it, possession was supposed to be delivered within a period of 36 months from the date of sanction of building plan 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 26.12.2015 (36+6 months from the date of builder buyer agreement). Complainant has already paid Rs 33,33,648/- against basic sale price of Rs 30,83,752/-. It has been alleged by the complainant that possession of the unit was offered by respondent on 07.08.2018 alongwith additional payment demand of Rs 12,37,403/-. Out of said demand complainant is impugning charges levied on account of cost escalation, GST, VAT, service tax, electrification and STP charges, electricity connection charges, EDC/IDC and increase in area from 1513 to 1563 sq ft. Possession has not been accepted by the complainant due to the unreasonable demands made and non-receipt of occupation certificate.



(ii). Feeling aggrieved present complaint has been filed by the complainant seeking possession of unit alongwith interest @18% from the date of respective payments and refund of amount already paid to respondent on account of EEDC, club charges and VAT.

3. 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 82,748/- to the complainant.

(iii). Complainant 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 and to abide by the terms of affidavit cum undertaking dated 02.07.2012 signed by him 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.

(v) Regarding club it has been submitted that complainant has misrepresented before this Hon'ble Authority that Rs 50,000/- has been charged towards club even though there is no club in existence. At present respondent has provided a temporary club in the project with all amenities and facilities and same is operational.

(vi) Regarding increase in area it has been submitted that vide clause 10 of booking application, the complainant 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.

(vii). 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.

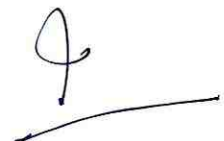
(vi). After completing construction work of the unit, offer of possession was made to complainant alongwith demand on account of various charges which were duly agreed between the parties as per terms of BBA. All charges demanded by respondent are in consonance with the terms of BBA. It is the complainant 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. He referred to order dated 01.12.2020 whereby Authority had already quashed offer of possession issued by respondent in all captioned complaints.

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-allottee 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 allottee 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*

"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 and 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

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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 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 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 07.08.2018 to the complainant alongwith demand for payment of additional Rs 12,37,403/-. However, said offer is not accompanied with occupation certificate issued by State government agencies. Today, Id. counsel for respondent stated that developer had already applied for grant of Occupation Certificate on 28.02.2019 but the same has not been received till date. However, the construction work of unit is complete and it is ready for possession. 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 Authority in conformity of view already expressed vide order dated 01.12.2020 decides that offer of possession dated 07.08.2018 cannot be called a lawful offer, hence the same stands quashed. Admittedly even the application for grant of occupation certificate was applied on 28.02.2019. 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 complainant had signed an undertaking dated 02.07.2012 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

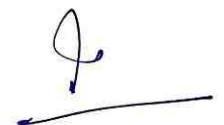
given an undertaking that he will not hold respondent responsible for any delay in offer of possession caused due to any act on account of any changes, modifications, revisions in the tentative lay out building plans during construction/completion of the floor. In this regard Authority observes that in this case delay of more than 6 years has already taken place and the complainant who has 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 26.06.2012 and the aforesaid undertaking was signed on 02.07.2012. 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 had obtained all requisite approvals. On this account complainant cannot be put to any disadvantage for no fault of his. Fairly and squarely and 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 after the allottee had paid about 35% 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

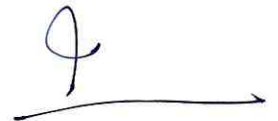
The Authority has gone through the rival contentions of the parties on the issue of delay interest. First of all to deal with the question of law posed by the respondent that the delay interest is not admissible in respect of a subsequent allottee, the Authority is unable to agree with the contention of the learned counsel for the respondent. In this case, the original allottee has only made booking of unit on 26.09.2009, thereafter the complainant stepped into the shoes of the original allottee on 20.01.2012 and allotment letter of unit in question was issued in his favor. Furthermore, flat buyer agreement was entered into between the present complainants and the respondent. The complainants are not claiming their right through the previous allottee. They are claiming their right in respect of the delay interest by virtue of the Flat Buyers Agreement executed by themselves on 26.06.2012. 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 allottee 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 on rent.*

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 allottee on 20.01.2012 and builder buyer agreement was executed between complainant and respondent on 26.06.2012. In terms of said builder buyer agreement deemed date of possession comes to 26.12.2015. The respondent was duty bound to deliver possession within stipulated time but he has failed in his duty. A proper



lawful offer of possession is yet to be made. In view of these reasons, the argument of respondent cannot be accepted.

In furtherance of aforementioned observations, it is decided that the complainants who are 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 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 15,72,855/- in terms of Rule 15 of HRERA Rules, 2017 i.e. SBI MCLR+2% (9.30%) for the period ranging from 26.12.2015 (deemed date of possession) to 27.07.2021 (date of this order) is awarded to the complainant. Further, monthly interest of Rs 24,547/- shall also be payable upto the date of actual handing over of the possession after obtaining occupation certificate. The Authority however 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 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 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. In complaint no. 687/2019, total paid amount alleged by the complainant in the complaint petition is Rs 33,33,648/- and the same is depicted as paid in statement of account issued alongwith offer dated 07.08.2018, but in latest statement of delay interest filed by complainant total paid amount is depicted as Rs 32,13,139/-. A difficulty however is being faced by the Authority is that parties have provided receipt of Rs 28,08,133/- only. In the face of these facts, paid amount is taken as Rs 33,33,648/- as same has been admitted by the respondent in offer of possession. For purpose of calculating delay interest, the amount is taken as Rs 31,67,339/-. This amount has been worked out after deducting taxes and duties paid by complainant on account of VAT amounting to Rs 30,220/- and EEDC amounting to Rs 1,36,089/- from total paid amount of Rs



33,33,648/-. The amount of such taxes is not payable to the builder and is 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. Similarly, in complaint no. 1376/2018, total paid amount alleged by the complainant in the complaint petition is Rs 31,60,480/- and in latest statement of delay interest filed by complainant total paid amount is depicted as Rs 31,87,510/-, but as per statement of account issued alongwith offer of possession dated 04.10.2018 total paid amount is Rs 31,05,405/-. A difficulty however is being faced by the Authority is that parties have provided receipt of Rs 28,66,986/- only. Total paid amount is taken as Rs 31,05,405/- as same is admitted in offer of possession. For purpose of calculating delay interest, total amount is taken as Rs 28,43,166/-. Said total amount has been worked out after deducting charges of taxes paid by complainant on account of VAT amounting to Rs 28,202/- and EEDC amounting to Rs 63,270/- and EDC/IDC amounting to Rs 1,70,767/- from total paid amount of Rs 31,05,405/-. Delay interest for the period ranging from



08.04.2013 to 27.07.2021 @9.30% works out to Rs 20,25,864/-and monthly interest works out to Rs 22,035/-.

9. In complaint no. 1380/2018 the delay interest is calculated on total amount of Rs 32,38,602/-. Said total amount has been worked out after deducting charges of taxes paid by complainant on account of VAT amounting to Rs 25,785/- and EEEDC amounting to Rs 1,18,345/- and EDC/IDC amounting to Rs 2,11,567/- from total paid amount of Rs 35,94,299/-. Delay interest for the period ranging from 16.04.2013 to 27.07.2021 @9.30% works out to Rs 19,31,220/- and monthly interest works out to Rs 25,099/-.

10. In complaint no. 1381/2018 the delay interest is calculated on total amount of Rs 31,93,687/-. Said total amount has been worked out after deducting charges of taxes paid by complainant on account of VAT amounting to Rs 15,469/- and EEEDC amounting to Rs 1,32,163/- and EDC/IDC amounting to Rs 2,24,202/- from total paid amount of Rs 35,65,521/-. Delay interest for the period ranging from 04.07.2013 to 27.07.2021 @9.30% works out to Rs 22,31,810/- and monthly interest works out to Rs 24,751/-.

11. In complaint no. 1382/2018 the delay interest is calculated on total amount of Rs 48,94,245/-. Said total amount has been worked out after deducting charges of taxes paid by complainant on account of VAT amounting to Rs 35,058/- and EEEDC amounting to Rs 2,31,953/- and EDC/IDC amounting to Rs 3,28,804/- from total paid amount of Rs 54,90,060/-. Delay interest for the period ranging



from 27.06.2013 to 27.07.2021 @9.30% works out to Rs 33,34,611/- and monthly interest works out to Rs 37,930/-.

12. 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.

13. Respondent is directed to pay the amount of upfront delay interest mentioned in above-paragraphs to the respective complainants within 45 days of uploading of this order on the website of the Authority. Further, it is made clear that the monthly interest will commence w.e.f. 1st September, 2021 and will continue to be paid till valid offer of possession is made after obtaining occupation certificate.

14. **Disposed of** in above terms. File be consigned to record room.



RAJAN GUPTA
[CHAIRMAN]



ANIL KUMAR PANWAR
[MEMBER]