HARYANA REAL ESTATE REGULATORY AUTHORITY PANCHKULA

Website: www.haryanarera.gov.in

COMPLAINT NO. 1181 OF 2020

Pushkar Raj Kaushik ...COMPLAINANT(S)

VERSUS

1. BPTP Pvt Ltd
2. Countrywide Promoters ....RESPONDENT(S)

CORAM: Rajan Gupta Chairman
Dilbag Singh Sihag Member

Date of Hearing: 01.09.2021

Hearing:5th

Present: - Mr. Kanhaiya Parabhakar , Ld. Counsel for the complainant (through video conferencing)
Mr. Hemant Saini & Mr. Himanshu Monga, Ld. Counsel for the respondent.

ORDER (DILBAG SINGH SIHAG-MEMBER)

Initiating his pleadings, ld. counsel for the complainant has stated that complainant had booked a flat in respondent's project-'Park-81' on 19.09.2009 by paying Rs 3,00,000/-. An Allotment letter against unit no. VL-1-12 A-FF, (having area of 1402 sq ft) was issued to him on 16.03.2010. Builder buyer agreement was executed between the parties on 11.04.2012 and in terms of clause 5.1 of it, possession was 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 occupation certificate. Accordingly, deemed date of possession work out to be 11.10.2015 (36+6 months from the date of builder buyer agreement). Against basic sale price of Rs 30,74,012/-, complainant has already paid Rs 32,47,855/-. It has further been alleged by the complainant that respondent has offered possession of the booked unit on 22.07.2020 alongwith an illegal demand of Rs 11,72,682/- without receiving occupation certificate from the concerned department. Aginst said demand complainant has contested charges for increased area of 76 sq ft i.e. 1402 sq ft to 1478 sq ft , cost escalation, EEDC, electrification, STP charges, club charges and GST. So, feeling aggrieved present complaint has been filed by the complainant seeking possession of unit alongwith delay interest and quashing of illegal and unjustified demands.

2. Respondents in their reply have denied all allegations made by complainant with 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 completely ignoring clause 33 of the agreement which provides that 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. So, jurisdiction of this Authority cannot be invoked in this matter by the complainant.

(ii) Complainant has concealed that interest waiver for the amount of Rs 36,701/- and Rs 1,44,845/- has already been given to him by the respondent.

(ii). As far as demand of VAT and EEDC is concerned, 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 2012 and 2016 respectively. Regarding club charges it is submitted that these charges are agreed vide clause 2.5 of BBA and a temporary club in the project with all amenities has been provided. Regarding electrification and STP charges it has been stated that complainant is liable to make payment vide clause 1.15 and 1.16 of BBA.

(iii). As far as delay caused in offering possession of the allotted unit is concerned, it has been alleged that delay has been occurred due to inaction of the government or its agencies. He further averred that on 31.10.2018, Environmental Pollution Prevention Control Authority banned construction activities from 01.11.2018 to 10.11.2018. Thereafter, again imposed a ban on construction activities from 6 pm to 6 am from 26.10.2019 to 30.10.2019. Hon'ble Supreme Court released the ban to partial extent vide order dated 09.12.2019 but complete ban was uplifted on 14.02.2020. Hence, it should be inferred that delay has been unfortunately caused due to force majeure circumstances beyond control of the developer.

(iv). So far as, possession of unit is concerned, it is submitted that possession was inadvertently issued to the complainant on 22.07.2020 and same stood withdrawn.

3. Learned counsel for the respondent in addition to his written statement also submitted his following verbal arguments:

(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 to the date of the Act came into force. 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. 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 agreed that there may be delay in completion of the project for which complainants-allotee would be compensated at a rate agreed between parties i.e. Rs 5/- per sq ft per month. Delay penalty is to be awarded 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, whereby 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.

4. Authority after hearing the arguments of both the parties and taking into consideration of written submissions and documents placed on record observes and orders as follows:

(i) Maintainability of complaint

Respondent promoter has raised an issue of maintainability of the complaint. The very basic argument of the respondent is that this matter should be referred to an Arbitrator, as the questions in dispute is a mixed question of fact and law. Therefore the same cannot be tried by this Authority as Authority does not have jurisdiction to entertain such complaint on the ground that the builder buyer agreement was executed i.e. on 11.04.2012 much prior to coming into force of RERA Act,2016. But Authority is of considered view that this argument does not hold legal strength in view of the provision of Section 79, Section 80 and Section 89 of the RERA Act,2016 which empower the Authority to hear and adjudicate all disputes arising among the allotees and their respective promoters of a real estate project.Therefore, being subject matter of RERA Act,2016, all such disputes fall within purview of RERA Authority. Moreover, it is also pertinent to mention here that the jurisdiction of Civil Courts is specifically barred to entertain any such complaint in the matter under Section 79 of the Act ibid. Authority has been honouring all the lawfully executed agreements provided these are fair , unbiased reasonably based on the principles of equity and natural justice for both parties. However in this case, Authority observed that there are

unfair, unreasonable and discriminatory provisions in the agreement against the principles of fair trade practice, professional ethics and principle of equity and natural justice. Such discriminatory provisions are not legally sustainable and liable to be struck down between the parties even if these have been executed prior to coming into force of RERA Act,2016. For instance, clause 2.10 of builder buyer agreement absolutely discriminatory and one-sided in favour of respondent. He is charging 18 percent interest on account of delayed payments whereas is awarding only Rs 5 per sq ft to the complainant, which is even less than two percent. Moreover, this agreement was executed when complainant had already paid substantial payment of approximately Rs 8,00,000/- that is 30% of total sale consideration. Authority does not hold such agreement legally enforceable. It is pertinent to mention that the Hon'ble Supreme Court in para 22 of **Civil Appeal no. 6239 of 2019 Wg. Commander Arifur Rahman and Aleya Sultana and ors. Vs DLF Southern Homes Pvt Ltd dated 24.08.2020** has observed that the provision of agreement awarding delay compensation @ Rs 5 per sq ft per month to the allotee vis-à-vis the charging of 15% interest on account of delayed payments made by allotee does not even reflect bargain. Terms of the agreement have been drafted by the developer and they do no maintain a level platform as between the developer and purchaser. Relevant part of said paragraph is reproduced below for reference:-

> *"In other words, a delay on the part of the flat buyer attracts interest at the rate of 18 per cent annum beyond ninety days. On the other hand,*

where a developer delays in handing over of possession the flat buyer is restricted to receiving interest at Rs 5 per sq ft per month under clause 14 (which in the submission of Mr. Prashant Bhushan works out to 1-1.5 percent interest per annum). Would the condition which has been prescribed in clause 14 continue to bind the flat purchaser indefinitely irrespective of the length of the delay? The agreement stipulates thirty-six months as the date for the handing over of possession. Evidently, the terms of the agreement have been drafted by the developer. They do no maintain a level platform as between the developer and purchaser. The stringency of the terms which bind the purchaser are not mirrored by the obligations for meeting times lines by the developer. The agreement does not reflect an even bargain."

Therefore, all such disputes arising out of those agreements can be settled only by the Authority and jurisdiction of civil Court stands specifically barred by Section 79 and 80 of the Act. On this legal and logical reasoning challenge to the jurisdiction of the Authority cannot be sustained.

(ii) Offer of possession

Factual position reveals that offer has been made by the respondent to the complainant on 22.07.2020. However, in his written statement under para 7 it has been stated that offer of possession was sent in anticipation of completion of construction work but the same has already been withdrawn. Therefore, now respondent will offer a fresh possession only after receiving occupation certificate from the concerned department. Occupation certificate is required because it certified that building is fit for human habitation and promoter had already taken permissions from various Authorities verifying that building is safe and can be

used for human habitation. As a logical consequence, illegal additional demands raised alongwith invalid offer of possession also stands quashed since there is no rational component wise justification made by the promoter while seeking such demand.

(iv) Delay interest

In furtherance of aforementioned observations, it is also decided that the complainant who had been waiting for last 6 years to get possession of booked unit should not suffer anymore on account of default, mismanagement and unprofessional trade practice adopted by the respondent. So, complainant is very much legally entitled to be paid upfront interest for the delay caused therein from the deemed date of possession i.e. 11.10.2015 till handing over of legal possession after receipt of occupation certificate from the competent Authority 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 15,16,751/- in terms of Rule 15 of HRERA Rules, 2017 i.e. SBI MCLR+2% (9.30%) for the period ranging from 11.10.2015 (deemed date of possession) to 31.08.2021 is awarded to the complainant. Further, monthly interest of Rs 23,439/- shall also be payable upto the date of actual handing over of the possession after obtaining occupation certificate. Authority further orders that the complainants will remain liable to pay balance consideration amount if

any to the respondent when a valid offer of possession is made to him after obtaining occupation certificate from the concerned authority.

5. 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. So, is the case of respondent with regard to ban on construction activities by NGT or any State agencies in the NCR region. In this regard, Authority is of considered view that respondent has delayed the project by 6 years approximately as deemed date of possession was 11.10.2015 and complainant who had already paid around ninety-five percent of basic sale price has been waiting for possession of his booked unit. More seriously, even as of now, respondent is not committing any timeline for completion of unit and for handing over possession. So, in given situation, respondent cannot be allowed to take undue benefit of his own wrong deeds and mismanagement as he himself was at fault by not completing the project within timeframe upto 2015 decided by himself consciously. He cannot seek any excuse at this stage to exempt the lockdown period or any other period of ban on construction that was happened in year 2019-2020 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 or ban imposed by ,certain Authority before 2015 then the case would have been different. Here the respondent is not even able to justify the time period already lapsed on his part in completion of project even

before happening of pandemic and ban on construction. For these reasons, argument of respondent cannot be accepted as these are not based on principle of force majeure as per provision of Section 6 of RERA Act,2016.

6. Delay interest mentioned in aforesaid paragraph is calculated on total amount of Rs 30,24,365/- .Said total amount has been worked out after deducting charges of taxes paid by complainant on account of VAT amounting to Rs 9821/- and Rs 2,13,669/- paid on account of EDC/IDC from total paid amount of Rs 32,47,855/-. The amount of such charges are not payable to the builder and required to be passed on by the builder to the concerned department/authorities. If a builder does not pass on this amount to the concerned department, interest thereon becomes payable only by the respondent instead of complainant . 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. Lastly, as far as demand raised by respondent in lieu of increase in area, it is observed that respondent has not provided any justification to the complainant

for it. In case, any such demand is raised, respondent is directed to provide component wise detail of increased area in terms of principles laid down in complaint no. 607/2018 titled as Vivek Kadyan vs TDI Infrastructure Pvt Ltd alongwith copy of revised building plan if any showing increase in area to the complainant in order to justify increased area.

9. Respondent is directed to pay the amount of upfront delay interest of Rs 15,16,751/-within 45 days of uploading of this order on the website of the Authority. Monthly interest of Rs 23,439/- 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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DILBAG SINGH SIHAG
[MEMBER]