HARYANA REAL ESTATE REGULATORY AUTHORITY PANCHKULA

Website: www.haryanarera.gov.in

COMPLAINT NO. 803 OF 2019

Rajesh Kumar and another ....COMPLAINANT(S)

VERSUS

M/s BPTP Pvt Ltd ....RESPONDENT(S)

CORAM: Rajan Gupta **Chairman**

Anil Kumar Panwar **Member**

Date of Hearing: 27.07.2021

Hearing:10th

Present: - Mr. Dixit Garg, Counsel for complainant through VC

Mr. Hemant Saini & Mr. Himanshu Monga, Counsels for respondent

ORDER (RAJAN GUPTA-CHAIRMAN)

Today is the 10th hearing of this case. This case was heard at length on hearing dated 01.12.2020 and 21.01.2021 and today it is heard on merits for final arguments.

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

(i). An original allotee namely Mr. Jitender Vashisht had made booking of a flat on 08.10.2009. Allotment letter for unit no. LM-04-50-FF was issued to original allottee on 24.12.2009. Complainants had purchased allotment rights of unit no. LM-04-50-FF having area 1203 sq ft situated in respondent's project 'Park elite floors, Faridabad from original allotee vide sale letter dated 26.06.2013. Builder buyer agreement was executed between the original allotee and respondent on 17.06.2010 and in terms of clause 4.1 of it, possession was supposed to be delivered within a period of 24 months from the date of execution of building plan alongwith grace period of 180 days for filing and pursuing the grant of OC. Accordingly, deemed date of possession comes to 17.12.2012 (24+6 months from the date of builder buyer agreement). Complainants have already paid Rs 31,59,842/- against basic sale price of Rs 22,37,003/-. 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 16.08.2018 alongwith payment demand of Rs 6,08,391/-. Out of said demand complainants are impugning charges levied on account of cost escalation, GST, electrification and STP charges, club membership charges and increase in area from 1203 to 1391 sq ft. Possession has not accepted by the complainants due to unreasonable demands and non-receipt of occupation certificate.

(ii). Feeling aggrieved present complaint has been filed by the complainants seeking possession of unit alongwith delayed interest in terms of clause 4.3 of BBA i.e.Rs 5 per sq ft per month.

3. The respondents in their reply have denied the allegations made by complainants 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. Complainants have 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 14,391/-- 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 complainant on 04.07.2013.

(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. Further it has been stated that delays has also been occassioned due to inaction of government or its agencies,which was ultimately force majeure beyond the control of respondent.

(vi). After completing construction work of the unit, offer of possession was made to complainants on 16.08.2018 alongwith demand of Rs 6,08,391/- 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 complainants while submitting his oral arguments re-stated the facts of the case as produced in para 2 of this order. He also referred to order dated 24.03.2021 wherein his statement was recorded that his client is not interested in pressing upon issue of increase in area so plea in this regard may be considered as withdrawn.

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 4.3 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. Moreover, in the present case the complainants have specifically prayed for delay interest in terms of builder buyer agreement so the relief cannot be awarded to complainant beyond his pleadings. 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 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*
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> *"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 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.

Regarding the argument of the respondent that this Authority does not have the jurisdiction to deal with the complaint relating to floors being constructed on the plots measuring 500 Sq. Mtrs., it is observed that the respondent is developing a larger colony over the several acres of land. One portion of the project is floors on small size of plots, 3 to 4 flats are being constructed on each floor and the same are being sold to different individuals. The registrability and jurisdiction of this Authority has to be determined in reference to the overall larger colony being promoted by the developers. Hundred of floors are being constructed over hundred of plots. The arguments of the respondent that since the plot does not exceeds 500 Sq. Mtrs, the jurisdiction of this Authority is untenable. The provisions of Section 3(a) are applicable, if the total project area is assessed less than 500 Sq, Mtrs. If such area in the larger colony in fact run into several acres, the arguments of the respondents in this regard is hereby rejected.

(ii) Offer of possession

Admittedly respondent has issued offer of possession dated 16.08.2018 to the complainants alongwith demand for payment of additional Rs 6,08,319/-. However, said offer is not accompanied with occupation certificate issued by State government agencies. Today, ld. counsel for respondent stated that developer had already obtained part completion certificate on 09.11.2017 and had also applied for grant of Occupation Certificate on 17.02.2020 but the same has not been received till date. However, the construction work of unit is complete and it is ready for possession. Admittedly, application for grant of occupation certificate was filed in February,2020. Therefore, the impugned offer of possession dated 16.08.2018 cannot be called a lawful offer, hence the same is hereby 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) 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 was allotted an

apartment in question on 24.12.2009 and builder buyer agreement in respect of it got executed between the parties on 17.06.2010, thereafter the complainants stepped into the shoes of the original allottee approximately 3 years after that i.e. on 26.06.2013. They are pressing for their rights in terms of builder buyer agreement dated 17.06.2010. 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 26.06.2013 after 3 years of execution of builder agreement dated 17.06.2010. Said transfer was duly endorsed by respondent on 04.07.2013. In terms of said builder buyer agreement deemed date of possession comes to 17.12.2012. The respondent was duty bound to deliver possession within stipulated time but he has failed in his duty. In view of aforesaid reasons, the argument of respondent is not accepted.

Next question arises for determination is at which rate of delay interest deserves to be calculated. Learned counsel for the respondent has argued that complainant has prayed for awarding interest @ Rs. 5/- per sq. ft. super area as agreed between the parties vide builder buyers agreement dated 17.06.2010, therefore, this Authority cannot award delay interest beyond the pleadings of complainant. The Authority regrets its inability to accept this argument of the respondent's counsel for the reason stated hereunder.

> Builders Buyers Agreement entered between the parties provides different rate of interest in respect of promoter's default to deliver possession on time and in respect of allottee's default to pay the instalments on time. The rate of interest which the promoter is entitled to charge from the allottee is 18% per annum, whereas, the rate of interest payable to the allottee for promoter's default in handing over the timely possession is just Rs. 5/- per sq. ft. of the super area which works out much lower than the rate of interest of 18% per annum. Section 2(za)

of the RERA Act, 2016 contemplates that the rate of interest payable by the promoter or the allottee as the case may be in respect of their respective default to discharge the obligations towards each other shall be same and there should be no disparity in that regard. The Authority now, therefore, has a duty to ensure the parity in respect of rate of interest payable to the promoter and the allottee of a project and cannot allow disparity in this regard merely because of the terms of Builder Buyers Agreement stipulates the different rate of interest or the Counsel for allottee has made a prayer for awarding interest in terms of the Builder Buyers Agreement. An allottee irrespective of terms and conditions of Builder Buyers Agreement entered with the promoter, after coming into force of the RERA Act draws a statutory right for payment to him at the same interest as the promoter has been charging from him in respect of his default to timely instalments. In other words, Section 2(za) of the RERA Act,2016 confers statutory right upon the allottee with regard to claim of rate of interest equal to one which is payable to him in terms of the agreement in respect of promoter's default to offer timely possession. Such statutory right cannot be allowed to be defeated merely because the allottee had demanded interest as per the Buyer's Agreement. As a matter of fact, a duty is cast upon the Authority to ensure that the allottee irrespective of rate of interest stipulated in Builders Buyers Agreement is granted the rate of interest statutory permissible to him. Authority is

of considered view that in the light of foregoing aspects, delay interest to the allotee deserves to be granted in terms of principles laid down in complaint no. 113/2018 titled as Madhu Sareen vs BPTP Ltd. Accordingly, as per majority judgment the delay interest is awarded in terms of Rule 15 of HRERA Rules,2017 i.e. SBI MCLR+2% (9.30%).

7. In furtherance of aforementioned observations, it is decided that the complainants who are waiting for last 9 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 19,00,609/- in terms of Rule 15 of HRERA Rules, 2017 i.e. SBI MCLR+2% for the period ranging from 17.12.2012 (deemed date of possession) to 27.07.2021 (date of this order) is awarded to the complainant. Further, monthly interest of Rs 22,237/- 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 9 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.

8. The delay interest mentioned in aforesaid paragraph is calculated on total amount of Rs 28,69,251/-. Said total amount has been worked out after deducting charges of taxes paid by complainant on account of VAT amounting to Rs 27,174/- and EEDC amounting to Rs 97,829/- and EDC/IDC amounting to Rs 1,65,588/- from total paid amount of Rs 31,59,842/-. 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.

9. 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

10. Respondent is directed to pay the amount of upfront delay interest of Rs 19,00,609/- within 45 days of uploading of this order on the website of the Authority. The monthly interest of Rs 22,237/- will commence w.e.f. 1st September, 2021.

11. **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]