



Complaint No. 576 of 2020

HARYANA REAL ESTATE REGULATORY AUTHORITY PANCHKULA

Website: www.haryanarera.gov.in

COMPLAINT NO. 576 OF 2020

Parminder Singh Sohal

....COMPLAINANTS(S)

VERSUS

BPTP Ltd.

....RESPONDENT(S)

**CORAM: Rajan Gupta
Dilbag Singh Sihag**

**Chairman
Member**

Date of Hearing: 01.09.2021

Hearing: 6th

Present: Shri N.K Setia, learned counsel for the complainant through video-conferencing.

Shri Hemant Saini and Shri Himanshu Monga, learned counsels for the Respondent.

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ORDER: (DILBAG SINGH SIHAG-MEMBER)

1. Initiating his pleadings, learned counsel of the complainant narrated major facts of the case in question in following manner. Flat buyer agreement was executed against flat bearing no. B-901 admeasuring 1120 square ft. in the respondent's project 'Discovery Park' on 13.09.2012. Deemed date of possession was 36 months plus 6 months from the date of sanctioning of the building plans or execution of Builder buyers' agreement, whichever is later which works out to be 12.03.2016 as respondent has not disclosed date of sanction of building plan. Complainant had already paid an amount of Rs. 32,04,540/- against basic sales price of Rs. 28,56,453.6/-. Possession has already been delayed for more than five years. As per agreement, delay penalty is Rs. 5 per sq. ft payable to the complainant in the event of delay in offering possession by the respondent but as per clause 2.11 of the agreement, respondent is entitled to charge interest @ 18 % p.a. in case complainant delays in making payments. Therefore, it is alleged that Builder buyers' agreement executed between the parties is completely one sided against the principle of equity and natural justice. Moreover, customer was not left with exit option as respondent had taken substantial amount of Rs. 8,94,502/- that is approx. 30 percent of total sales consideration before execution of BBA. At the time of advertising, marketing and booking of project Discovery

Park was described as a single project of flats but now possession has only been offered to the unit holders in Towers F, G, H, J and K whereas rest of the allottees in Tower A, B, C, D, E, L, M are awaiting possession of their respective units.

He further pleaded that complainant purchased said flat for his family use after taking a loan for the same. Concluding his pleadings, he mentioned following reliefs to be awarded in his favor:

- (i) Possession of his flat along with delay interest @ 18 % p.a. and execution of conveyance deeds in his favor be ordered.
- (ii) He shall also be treated at par with allottees who were related to judgement of the Authority passed in complaint case no. 633 of 2018 titled as Discovery Park Buyers Welfare Association vs BPTP Limited and 1228 of 2018 titled as Discovery Park Buyers Welfare Association vs BPTP Limited.
- (iii) Respondent be restrained from raising any illegal demand on account of Cost Escalation, area increase over and above the booked area, demand towards EEDC till the decision of the Hon'ble High Court, GST, taxes after March 2016, Club membership charges.
- (iv) Any other relief which may be deemed fit by this Hon'ble Authority under Real Estate (Regulation and Development) Act, 2016.

2. On the other hand, learned counsel of the respondent promoter sought attention of the Authority to his reply filed on 22.01.2021 by denying all the allegations made by the 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. 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) Respondents admitted that an amount of Rs. 32,04,540/- has been received from the complainant and Builder buyers' agreement was executed between the parties on 13.09.2012 and complainant availed an inaugural discount of Rs. 1,28,346/-. He further submitted that possession was to be delivered within 36 months from the date of execution of agreement or sanction of building plans, whichever is later after adding grace period of 6 months. Said delivery of possession was subject to entire instalments being paid on time and no force majeure circumstances being occurred.

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He further pleaded that during the course of construction various force majeure events took place. From last 3-4 years, NGT has been banning the usage of DG sets, usage of ground water for construction activities near Diwali without which construction could not have been raised. Construction activities had been also put on hold due to increase in Air quality index in the NCR region for almost 3 months every year. Labor also got demobilized due to these force majeure events and it took months to take back adequate number of labor back at site. Demonetization also disrupted the construction as purchasing power was taken from the hands of the citizens of India. As per clause 3.5 of the agreement it was agreed between the parties that if respondent fails to complete construction due to force majeure or circumstances beyond its control then the respondent shall be entitled to reasonable extension of time for completion of construction. Complainant was regularly updated about the construction progress on site. It was also informed to the complainant that construction of the project would be in phases. Now construction of the project is in full swing and possession of the unit will be handed over shortly

(iii) Basic sales price of the unit largely depends upon market forces. Complainant has defaulted in making payment of 03.02.2012. Demands are raised as per the payment plan opted by the complainant which was a subvention plan. Respondent has paid the pre-EMI interest till 30.09.2014.

(iv) He further averred that occupation certificate had already been obtained in case of other towers situated in the same project.

(v) Besides, he also pleaded that complainant has relied on decision of Hon'ble Authority in complaint no. 633 of 2018 and 1228 of 2018, whereas complainant is not similarly placed as complainant has not been offered possession of his booked unit. Relief sought by the complainant is also different. Further, respondent has challenged the order passed by the Authority in the said case.

3. Learned counsel for the respondent in addition to his written submissions also pleaded following 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 were sacrosanct and their covenants could 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 thereafter for the period 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 whereby 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. He further argued that delay interest be not given to the complainant for the time period of lockdown was imposed in view of pandemic COVID-19.

(ii) He insisted that clause 3.3 relating to delay penalty has been specifically incorporated in BBA. Fact remains that both parties had mutually understood that there might be delay in completion of the project, if so then complainants-allottee would be compensated at a rate agreed between parties i.e., case is Rs 5/- per sq ft per month. In case, if at all, any delay penalty is to be awarded, then in such case at least, 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 passed by Hon'ble High Court of Bombay in Neel Kamal 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) He also pleaded that allottee be directed to make all the balance payments to the respondent before being entitled to relief of delay interest etc as per provision of Section 19(6) and (7) of the Real Estate (Regulation and Development) Act, 2016 under which allottees are held responsible for making necessary payments in the manner and time prescribed and interest on such payments if delayed by the allottee.

4. Authority after hearing the arguments of both the parties and perusal of written submissions, observes and orders as follows:

(i) Maintainability of complaint

Respondent's argument that question in dispute is a mixed question of fact and law therefore the same cannot be tried by this Authority since Authority has no jurisdiction to entertain such complaint. Moreover, the builder buyer agreement was executed much prior to coming into force of RERA Act, 2016. However, Authority is of the view that such pleading of the promoter respondent does not hold any ground in view of the provision of Sections 79, 80 and 89 of the RERA Act. Considering these provisions of RERA Act, all disputes relating to the real estate projects, fall within the purview and jurisdiction of the RERA Authority. So same can be heard and adjudicated upon by the RERA Authority. Moreover, jurisdiction of Civil Courts is specifically barred to entertain any such complaint

under section 79 of the Act. For this reason, challenge to the jurisdiction of the Authority cannot be sustained and Authority is of considered view that it has jurisdiction to entertain any complaint received from the allottee of a promoter respondent and adjudicate the same on merits and facts of the case.

(ii) Offer of possession

Factual position reveals that no offer has been made by the respondent to the complainant. In his written statement, respondent has stated in his reply under para (xi) that possession will be offered soon to the complainant. But no specific timeline for handing over possession has been provided. In these circumstances, respondent is directed to offer possession of unit to the complainant as and when he receives occupation certificate from the competent Authority keeping in consideration the principles already decided by the Authority in complaint no. 113/2018-Madhu Sareen vs BPTP Pvt Ltd. In case, any lawful dues remain payable by the complainant to the respondent, the same can be demanded by the respondent at the time of offer of possession.

(iii) Exemption of delay interest for period of Covid-19 and ban on construction by NGT.

As far as his pleadings of force majeure is concerned, it has no legal weightage since the lockdown of pandemic COVID-19 and ban on construction by NGT were in the year of 2019-20 whereas deemed date of possession in this case was

in March 2016. After expiry of Deemed date of possession in 2016, there is no relevancy of pandemic Covid-19 and ban on construction imposed by NGT or any Authority. He has not mentioned any instance of catastrophe which hampered construction work before 2016 and after execution of BBA.

(iv) Delay interest

Clause 3.4 and 11.1 of builder buyer agreement are discriminatory in nature moreover one-sided in favor of respondent. Respondent has been charging 18 percent interest p.a. on account of delayed payments whereas awarding only Rs 5 per sq ft per month to the complainant in case of delay on his part. 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 allottee vis-à-vis the charging of 18% interest on account of delayed payments made by allottee does not even reflect bargain. Terms of the agreement have been drafted by the developer and they do not 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 not 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 time lines by the developer. The agreement does not reflect an even bargain."

As per complainant's submissions, deemed date of possession is 12.03.2016 which was 36 months plus 6 months from the date of sanctioning of the building plans or execution of flat buyers' agreement, whichever is later. No averment whatsoever, has been made by the respondent as to when building plans were got approved. Considered view of this Authority is that the complainant is entitled to interest for the entire period of delay from the deemed date of offer of possession which was 12.03.2016 till actual offer of possession of the unit as and when being offered after obtaining occupation certificate from concerned department of the State Government.

In furtherance of aforementioned observations, it is prudent to observe that the complainant who has been waiting for more than 5 years to have possession of booked unit should not suffer any more on account of lapse and default on the part of respondent. Hence, he is very much entitled to be paid upfront interest for the delay caused in completion of the project by the respondent promoter from the deemed date of possession till handing over of

possession that too after receipt of occupation certificate further in terms of principles laid down by the Authority in complaint no. 113/2018 Madhu Sareen vs BPTP Pvt Ltd. Accordingly, it is decided that upfront payment of delay interest amounting to Rs. 12,64,326/- in terms of Rule 15 of HRERA Rules, 2017 i.e., SBI MCLR+2% for the period ranging from 12.03.2016 (deemed date of possession) to 01.09.2021 is awarded to the complainant. Further, monthly interest of Rs. 21,856/- shall also be payable up to the date of actual handing over of the possession after obtaining occupation certificate. Authority further orders that the complainants will remain liable to pay any outstanding consideration if any remains as and when a valid offer of possession is to be made to him after obtaining occupation certificate by the promoter. 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 for more than five years approximately and complainant who had already paid almost whole of basic sale price, is still waiting for possession of his unit. More seriously, even 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 deeds as he himself was at fault for not completing the project within timeframe decided by himself. He cannot make a pleading 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 or ban on construction before deemed date of possession 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. For these reasons argument of respondent cannot be accepted as such argument does not have legal backing.

5. The delay interest mentioned in aforesaid paragraph is calculated on total amount of Rs. 28,20,188/- Said total amount has been worked out after deducting charges paid by complainant on account of development charges amounting to Rs. 3,84,352.2 from total paid amount of Rs. 32,04,540/-. The amount of development charges is not payable to the builder 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 development charges collected by a builder cannot be considered a factor for determining the interest payable to the allottee towards delay in delivery of possession.



6. Respondent is directed to pay the amount of upfront delay interest of Rs 12,64,326/- within 45 days of uploading of this order on the website of the Authority. The monthly interest of Rs 21,856/- will commence w.e.f. 1st September, 2021. **Disposed of** in above terms. File be consigned to record room.



RAJAN GUPTA
(CHAIRMAN)



DILBAG SINGH SIHAG
(MEMBER)

