HARYANA REAL ESTATE REGULATORY AUTHORITY PANCHKULA

Website: www.haryanarera.gov.in

COMPLAINT NO. 298 of 2021

Anuj Kapoor ....COMPLAINANT(S)

VERSUS

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

CORAM: Rajan Gupta **Chairman**
Anil Kumar Panwar **Member**
Dilbag Singh Sihag **Member**

Date of Hearing: 28.09.2021

Hearing:2nd

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

ORDER (RAJAN GUPTA-CHAIRMAN)

Original allotees Mr. Akhileshwar Gupta and Ms. Rina Gupta had booked a flat in respondent's project-Park Elite Floors, Faridabad on 28.05.2009. Allotment letter of unit no. H-13-02-FF having area of 1022 sq ft was issued to allotees on 24.12.2009. Builder buyer agreement was executed between the parties on 30.07.2010 and in terms of clause 4.1 of it, the possession was supposed to be delivered upto 30.01.2013. Complainant had purchased allotment rights of

aforesaid unit vide sale letter dated 07.04.2011. It has been alleged that respondent has not delivered possession even after receiving Rs 24,44,405/- against basic sale price of Rs 20,55,999/-. Feeling aggrieved present complaint has been filed seeking possession of booked unit alongwith delay interest and to restrain respondent from charging interest @18% on delayed payments.

2. Respondent in their reply have denied the allegations made by complainant and has made following submissions: -

(i). Original allotees Mr. Akhileshwar Gupta and Ms. Rina Gupta had applied for booking of an independent floor in their project Park Elite floors on 28.05.2009 and complainant had purchased the unit no. H-13-02-FF from original allotee and said transfer has been duly endorsed by the developer vide endorsement dated 07.04.2011 annexed as Annexure R-7. Builder buyer agreement dated 30.07.2010 signed with the original allotee is an admitted fact.

(ii). 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.

(iii). 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.

(iv). Complaint 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 108.51 sq meters. As per section 3 (2) (a) of RERA Act,2016 registration is not required for an area proposed to be developed that does not exceed 500 sq meters.

(v). 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 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 stipulated 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.

(vi). Total sale consideration of Rs 27,17,911/- has been denied stating that it can be determined at the time of offer of possession as per terms of BBA.

(vii). Regarding status of the unit in para 4.3 (b) & (n) of the said reply it has been stated that the 70% of the construction work of the unit is complete and further construction work is in progress and possession will be handed over soon to the complainant.

3. Learned counsel for complainant has re-stated the facts stated in para 1 of this order and further he has argued that respondent had charged interest of Rs 58,618/- for delayed payments @18% which is not justified.

4. Learned counsel for the respondent in addition to his written statement has submitted oral arguments as follows:

(i) 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 this 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 legally and valid, executed between the parties, thus terms and conditions 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. therefore covenants of such agreements must prevail for deciding rights between the parties.

(ii) Clause 4.3 relating to delay penalty has been specifically incorporated in BBA. 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 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 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' and para 6 of judgement dated 23.10.2008 of Hon'ble Supreme Court in Civil Appeal no. 3409 of 2003 titled as HUDA vs Diwan Singh. Relevant paras of the said judgements are reproduced below: -

Para 38 - "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.

Para 6- *"One significant aspect to be noticed is that respondent is not the allotee who was allotted the plot in 1990, but a re-allottee who was re-allotted the plot in April 1998. When he was offered possession of the plot in May 1998, he found that a part of it was used for purposes of the road. Thereafter, the appellant even offered an alternative plot. The respondent however rushed to the District Forum in 1999, hardly within a year of re-allotment. The allegations*

of inordinate delay, negligence, harassment on the part of appellant, in a complaint filed by a re-allotee , within one year of re-allotment, appears to be hollow and without merit. In this factual background, having regard to the principles laid down in Ghaziabad Development Authority vs Balbir Singh (2004 (5) SCC 65), Haryana Urban Development Authority vs Darsh Kuma (2005 (9) SCC 449) and Bangalore Development Authority vs Syndicate Bank (2007 (6) SCC 711), the award of interest was not warranted. A re-allotee in 1998 cannot obviously be awarded interest from 1992 on the amounts paid by the original allotee in 1990 on the ground that the original allotee was not offered delivery in 1990."

6. The Authority after hearing the arguments of both the parties observes and decides as follows:

(i) Maintainability of complaint

The respondent's argument that first the matter should be referred to an Arbitrator, or that questions in dispute are a mixed questions of facts and law therefore the same cannot be tried by this Authority and that the Authority is not having jurisdiction to entertain such complaints because 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 has been specifically barred to entertain any such complaint in the matter. While RERA Act will not adversely affect lawfully executed agreements between the parties prior to its

coming into force in terms of the principles laid down by this Authority in complaint no. 113/2018 Madhu Sareen vs BPTP and complaint no. 49/2018 Prakash Chand Arohi vs Pivotal Infrastructure Pvt Ltd, but after its enactment all disputes arising out of those agreements can be settled only by the Authority and jurisdiction of civil Court stands specifically barred in terms of 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

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 30.07.2010, thereafter the complainants stepped into the shoes of the original allottee on 07.04.2011. They are pressing for their rights in terms of builder buyer agreement dated 30.07.2010. 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 15.02.2011. Said transfer was duly endorsed by respondent on 07.04.2011. In terms of builder buyer agreement dated 30.07.2010, deemed date of possession comes to 30.01.2013. 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. In furtherance of above mentioned observations, it is decided that upfront payment of delay interest amounting to Rs 17,48,063/-calculated in terms of rule 15 of HRERA Rules,2017 i.e. SBI MCLR+2% (9.30%) for the period ranging from 03.01.2013 (deemed date of possession) to 28.09.2021 (date of order) is

awarded to the complainant and monthly interest of Rs 16,714/- 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 8 years approximately and complainant who has already paid around 95% 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 21,56,768/-. Said total amount has been worked out after deducting charges of taxes paid by complainant on account of VAT amounting to Rs 24,375/-, Rs 1,64,259/- paid on account of EDC/IDC and Rs 99,003/- paid on account of EEDC from total paid amount of 24,44,405/-. The amount of such taxes is not payable to the builder and are 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. In regard to charging of interest on delayed payments, the Authority finds that respondent had calculated interest on the defaulted amount @18% p.a. The respondent's plea is that he was entitled to charge said rate of interest in terms of BBA. What is significant to notice from the BBA is that there is no parity between the rate of interest payable to complainant for respondent's default in offering timely possession and the rate of

interest payable by complainant to the promoter for delay in payment of timely instalments. Such disparity in the rate of interest was unreasonable, arbitrary and unfair. Neither there exists any justification for such disparity nor the same is permissible as per the spirit of provisions of Section 2 (za) of RERA Act,2016. So, the Authority is directing the respondent to recalculate the interest on the delayed payments at the rate of 9.30% which is SBI MCLR+2%. Said amount of interest shall be duly reflected in the revised statement of account to be served with offer of possession to be sent to complainant after receiving occupation certificate.

11. Respondent is directed to pay the complainants an amount of Rs 17,48,063/- as upfront delay interest within 45 days of uploading of this order on the website of the Authority. The monthly interest of Rs 16,714/- will commence w.e.f. 28.10.2021.

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]

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DILBAG SINGH SIHAG
[MEMBER]