



HARYANA REAL ESTATE REGULATORY AUTHORITY PANCHKULA

Website: www.haryanarera.gov.in

COMPLAINT NO. 48 of 2021

Jolly Saxena

....COMPLAINANT(S)

VERSUS

M/s BPTP Pvt Ltd

....RESPONDENT(S)

CORAM: Rajan Gupta

Chairman

Dilbag Singh Sihag

Member

Date of Hearing: 24.11.2021

Hearing: 3rd

Present: - Ms. Srishti Girdhar, Counsel for the complainant through VC

Mr. Hemant Saini & Mr. Himanshu Monga, Counsel for the respondent.

ORDER (DILBAG SINGH SIHAG-MEMBER)

While perusing case file, it is revealed that on the last date of hearing dated 22.09.2021 following order was passed :-

"Reply has already been filed but Ld. counsel for respondent is seeking some to argue this case. Complainant's counsel has no objection to his request but presses for staying the operation of cancellation letter dated 31.10.2021 and to maintain status quo in respect of allotment rights of unit no. P-07-F-FF till the pendency of this complaint.

2. *Factual matrix of the case is that complainant is seeking possession of unit no. P-07-F-FF having area of 1418 sq ft situated in respondent's project- 'Park Elite*

Floors'. Builder buyer agreement was executed between the parties on 14.06.2012 and in terms of it, possession of unit was supposed to be delivered upto 14.12.2014. An amount of Rs 33,49,839/- has already been paid against basic sale price of Rs 20.96 lakhs. It has been alleged that respondent had offered possession of unit on 23.11.2019 alongwith additional demand of Rs 10,18,448/-. Said offer was not accepted by complainant due to illegal demands raised by respondent on account of increase in area from 1418 to 1571 sq ft, EEDC, PLC, cost escalation, electrification and STP charges, GST and club charges and non-adjustment of delay interest. The respondent has admittedly not refunded any amount to the complainant after said cancellation till date. So, Authority is of view that alleged cancellation is prima facie not valid and status quo regarding the unit allotted to complainant needs to be maintained. So, the operation of cancellation letter is stayed and status quo regarding unit allotted to complainant be maintained till further orders."

2. Today, ld. counsel for complainant argued that respondent be directed to issue fresh offer of possession after setting aside cancellation letter dated 31.10.2021 because offer of possession dated 23.11.2019 sent by respondent is not a valid offer of possession in the absence of occupation certificate. So, she is praying for possession of unit alongwith delay interest till the date of getting occupation certificate by the respondent party from the competent authority.

3. On the other hand, respondents in their reply have denied 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. Complainant has filed this complaint completely

ignoring clause 33 of the agreement which provides that dispute involved therein 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 proceedings being adopted by this Authority. So, jurisdiction of this Authority cannot be invoked in this matter by the complainant.

(ii). Complaint is liable to be dismissed as the unit in question is an independent floor being constructed over a plot area tentatively admeasuring 1418 sq ft. As per section 3 (2) (a) of RERA Act,2016 registration is not required for an area that does not exceed 500 sq meters.

(iii). As far as delay caused in offering of possession of the allotted unit is concerned, it has been stated that delay has been occurred due to inaction of the government or its agencies on time , that, it should be inferred that any delay which has been unfortunately caused due to force majeure circumstances as the same were beyond control of the developer. Moroever, it has been stated that 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 ,construction could be started. Respondent applied for approval of

building plans but they were withheld by the DTCP that these building plans were well within the ambit of building norms and policies. Since there was no clarity in this policy whether the same is applicable to individual plot owners only excluding developers/colonizers. The department vide notice dated 08.01.2014 granted 90 days time to submit requests for regularization of construction. Thereafter DTCP clarified that self certification policy would also be applicable to cases of approval of building plans submitted by colonizer/developer vide order dated 08.07.2015 but did not formally released all the plans already submitted by respondent.

(iv). Complainant has concealed the fact that respondent had given additional incentive in the form of timely payment discount amounting to Rs 76,402/- to the complainant.

(v). Regarding increase in area, it has been submitted that complainant was duly informed about said increase and demand of Rs 2,36,006/- was raised for it. Same has already been paid by complainant on 05.07.2012 without any protest and demur.

(vi). After completing construction work of the unit, offer of possession was made to the complainant on 23.11.2019 alongwith demand on account of various charges which were duly agreed between the parties as per terms of BBA. All charges demanded by the respondent are in consonance with the terms of BBA. It is the complainant who is at fault not coming forward to take possession of the

unit after paying due amount as demanded alongwith offer of possession. Thereafter, allotment of booked unit was cancelled on 31.10.2020 due to non-payment of amount of Rs 10,18,448/- raised alongwith offer of possession.

4. In addition to his written statement, Learned counsel for the respondent has also argued that complainant in his relief clause has not prayed for quashing/setting aside of cancellation letter dated 31.10.2020 so same shall not be proceeded with relief of possession. In support, he cited judgement dated 23.09.2008 passed by Hon'ble Supreme Court in Civil Appeal no. 5798-5799 of 2008 titled as Bachhaj Nahar vs Nilima Mandal and another.

5. Authority after hearing the arguments and perusing written submissions of both parties observes and decides as follows:

(i) Maintainability of the complaint

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 vis-à-vis the provision of Section 79, Section 80 and Section 89 of the Act by virtue of which all disputes relating to 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. 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.

As far the argument of the respondent that this Authority does not have jurisdiction to deal with the complaint relating to floors being constructed on plot measuring 500 Sq. Mtrs. or less is concerned, it is observed that the respondent has been developing a larger colony covering several hundred acres of land. Some part of the project has been developed in the shape of floors construction on various size of plots with a given FAR (floor area ratio) permitted by the competent authority while approving its zoning plan. Over such plots, 3 to 4 flats are being constructed on each plot and the same are being sold to different individuals. Such practice is permissible in view of provisions of the Haryana Development and Regulation of Urban Areas Act,1975. However, registrability and jurisdiction of this Authority has to be determined with reference to overall area of a larger colony being promoted by the developers instead of a single plot



of 500 sq mtrs or less. Hundred of floors are being constructed over hundred of plots. The arguments of the respondent that plot does not exceeds 500 Sq. Mtrs, therefore there is no jurisdiction of this Authority is not correct from legal point of view. The provisions of Section 3 (2) (a) of RERA Act,2016 are applicable, in case total area of the project is less than 500 Sq, Mtrs. So, the arguments of the respondents in this regard are hereby rejected. The relevant part of Section 3(2)(a) is reproduced for ready reference:-

*“Notwithstanding anything contained n sub-section (1) ,
no registration of the real estate project shall be required-
Where the area of land proposed to be developed does not
exceed five hundred square meters or the number of apartments
proposed to have developed does not exceed eight inclusive of
all phases”.*

As far as contention of the respondent for seeking force majeure pleaded and recorded in paragraph 2(iii) is concerned, the same does not hold any merit. Respondent has misinterpreted the concept of self certification policy. This policy is a facility given to the owner of any plot to construct his building to be planned by any registered architect and supervised by structural engineer provided such building is in conformity with building bye laws notified by the department of Town and Country Planning or in conformity with Haryana Building Code, 2017. Under this scheme an owner of any plot of licensed colony, is not required to await the approval of building plans from the competent authority of department of Town and Country Planning rather he is required to submit a copy of proposed building plan to the concerned DTP with an intimation that after expiry of

stipulated time of 15 days from the submission of building plan, if nothing received in black and white from such authority, then he can proceed with the commencement of construction of building. Moreover, a registered architect may also after completion to issue a completion certificate mentioning that building has been raised in conformity with building bye laws and approved zoning plan. In view of the above facts, averment of the Ld. counsel of the respondent does not hold any merits and hence the same is hereby rejected.

(ii) Offer of possession

It has been alleged that allotment of booked unit was cancelled by the respondent on 31.10.2020 due to non-payment of amount as per demand issued alongwith offer of possession. At the time of cancellation of allotment of unit, respondent was already in receipt of Rs 30,99,210/- which is more than the basic sale price of unit. Complainant's act of non-payment of demanded amount due to non-adjustment of delay interest was therefore for a valid cause and alleged cancellation deserves to be quashed on this very ground. Moreover, possession was offered to the complainant on 23.11.2019 when the project had not received occupation certificate/ completion certificate. Therefore, said offer made was not a valid offer. So, the promoter's conduct in asking the complainant to meet additional demands was not justifiable because he had already paid more than basic sale consideration. Alleged cancellation for this reason is also not tenable and is therefore, quashed.

So long as contention of respondent for not allowing the relief of quashing of termination letter as not specifically prayed in relief sought is concerned, Authority is of view that main prayer of the complainant is for possession and quashing of cancellation of allotment of unit is incidental thereto. Moreover, complainants' counsel has specifically argued about cancellation and staying of termination letter dated 31.10.2020 on last date of hearing. Further, relevant paragraph of said judgement dated 23.09.2008 is reproduced below for reference:-

"12. It is thus clear that a case not specifically pleaded can be considered by the court only where the pleadings in substance, though not in specific terms, contains the necessary averments to make out a particular case and the issues framed also generally cover the question involved and the parties proceed on the basis that such case was at issue and had led evidence thereon. As the very requirements indicate, this should be only in exceptional cases where the court is fully satisfied that the pleadings and issues generally cover the case subsequently put forward and that the parties being conscious of the issue, had led evidence on such issue. But where the court is not satisfied that such case was at issue, the question of resorting to the exception to the general rule does not arise. The principles laid down in Bhagwati Prasad and Ram Sarup Gupta (supra) referred to above and several other decisions of this Court following the same cannot be construed as diluting the well settled principle that without pleadings and issues, evidence cannot be considered to make out a new case which is not pleaded. Another aspect to be noticed, is that the court can consider such a case not specifically pleaded, only when one of the parties raises the same at the stage of arguments by contending that the pleadings and issues are sufficient to make out a particular case and that the parties proceeded on that basis and had led evidence on that case. Where neither party puts forth such a contention, the court cannot obviously make out such a case not pleaded, suo moto."

It is clearly indicated in above quoted part that Court can consider a case not specifically pleaded, only when one of the parties raised the same at the stage of arguments by contending that pleadings and issues are sufficient to make out a particular case. So is the case in present matter, complainant's counsel has specifically argued about issue of cancellation in previous hearings as well as in today's hearing. It is not the case where the complainant was silent about termination letter dated 31.10.2020. Viewed from this perspective, argument of the respondent is not tenable.

Admittedly respondent has issued offer of possession dated 23.11.2019 to the complainant alongwith demand for payment of additional Rs 10,18,448/-. However, said offer is not accompanied with completion certificate/ occupation certificate issued by State government agencies. Today, ld. counsel for the respondent stated that developer had applied for grant of Occupation Certificate on 25.11.2019 but the same has not been received till date. 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, offer of possession dated 23.11.2019 cannot be called a lawful offer, hence the same is hereby quashed. Now, respondent will offer a fresh possession after receiving occupation certificate from the department. As a logical consequence, additional demands made alongwith invalid offer of possession also stands quashed.

(iii) Delay interest

In furtherance of above mentioned observations, it is decided that upfront payment of delay interest amounting to Rs 18,71,823/-calculated in terms of rule 15 of HRERA Rules,2017 i.e. SBI MCLR+2% (9.30%) for the period ranging from 14.12.2014 (deemed date of possession) to 24.11.2021 (date of order) is awarded to the complainant and monthly interest of Rs 23,343/- shall 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 the balance consideration amount to the respondent as and when a valid offer of possession duly supported with occupation certificate is made to him.

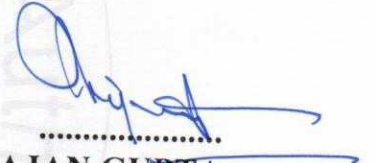
6. Delay interest mentioned in aforesaid paragraph is calculated on total amount of Rs 30,12,064/-. Said total amount has been worked out after deducting charges of taxes paid by complainant on account of VAT amounting to Rs 32,015/-, Rs 1,18,573/- on account of EEDC and Rs 1,87,187/- paid on account of EDC/IDC from total paid amount of 33,49,839 /-. The amount of such taxes is not payable to the builder rather required to passed on by the builder to the concerned revenue department/authorities. If a builder does not pass on this amount to concerned department, the interest thereon becomes payable only to department 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 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.

7. It is further clarified 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. Respondent is directed to pay the complainants an amount of Rs 18,71,823/- as upfront delay interest within 45 days of uploading of this order on the website of the Authority. The monthly interest of Rs 23,343/- will commence w.e.f.24.12.2021.

9. **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]