

BEFORE THE HARYANA REAL ESTATE REGULATORY

AUTHORITY, GURUGRAM

Complaint no. : 1194 of 2018
First date of hearing: 21.01.2019
Date of decision : 13.03.2019

Mr. Aman Sood
H.no. D-7/7450, Vasant Kunj,
New Delhi

Complainant

Versus

M/s BPTP Ltd.
Office: Plot no. 15, Udhyog Vihar Phase-4,
Gurugram

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Aman Sood Complainant in person
Shri Gulab Singh Advocate for complainant
Shri Shashank Bhushan Advocate for the respondent



ORDER

1. A complaint dated 17.10.2018 was filed under section 31 of the Real Estate (Regulation and Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and

Development) Rules, 2017 by the complainant Mr. Aman Sood against the promoter, M/s BPTP Ltd., on account of violation of the section 11(4)(a) of the Act ibid for non- delivery of possession on due date for the project described below.

2. Since, the flat buyer's agreement has been executed on 12.12.2012 i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, therefore, the penal proceedings cannot initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non-compliance of contractual obligation on the part of the promoter/respondent in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016

3. The particulars of the complaint are as under: -

- **Nature of the project: group housing tower**
- **DTCP license no: 83 of 2008 and 94 of 2011**
- **RERA registration: 299 of 2017 dated 31.10.2017**
- **Valid upto : 12.10.2020**



1.	Name and location of the project	"TERRA", Sector-37D, Gurugram, Haryana
2.	Payment plan	Construction linked plan
3.	Date of builder buyer's agreement	12.12.2012

4.	Allotment letter	06.12.2012
5.	Unit no.	T-20-603
6.	Area of unit	1691 sq. ft.
7.	Date of booking	28.07.2012
8.	Basic sale price	Rs. 88,77,750/- as per flat buyer's agreement
9.	Total consideration	Rs.1,09,95,306/- as per statement of account dated 12.10.2018
10.	Total amount paid by the complainant	Rs 1,09,01,872/- as per statement of account dated 12.10.2018
11.	Due date of Possession as per clause 5.1 of the flat buyer's agreement Clause 1.6- within 42 months from the date of sanction of the building plan or execution of flat buyer's agreement, whichever is later Clause-5.1 within commitment period clause 1.6 plus 180 days grace period	12.12.2016 Building plan not available therefore, due date calculated from date of execution of agreement
12.	Delay in handing possession	2 years 3 months and 2 days
13.	Delay possession charges as per clause 6.1	Rs.5/- per sq. ft. per month of the super area for every month of delay



4. The details provided above have been checked and flat buyer's agreement dated 12.12.2012 is available on record for the unit

no. T-20-603 according to which the possession was to be delivered by 12.12.2016. Hence, promoter not fulfilled his liabilities.

5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. The case came up for hearing on 21.01.2019, 07.02.2019 and 13.03.2019. The reply filed on behalf of the respondent has been perused.

FACTS OF THE CASE:

6. The complainant submitted that he along with his family member visited the Gurugram office and project site of respondent. The location was excellent and the complainant consulted the local representative of the developer. The local representative gave him a brochure, price list etc. and allured him by showing attractive pictures of project. The marketing staff assured the complainant that the possession of flat will be handed over within 42 months as construction had already started.



7. The complainant submitted that the complainant is the first buyer of the flat, bearing no. 603 on 6th floor of tower 20 admeasuring 1691sq. ft. in the project that is Terra constructed by the respondent party for sale consideration of Rs. 1,09,95,306/- with all charges included.
8. The complainant submitted that the main grievance of the complainant in present complaint is that in spite of the fact that complainant had paid more than the 98% of the actual amount of the flat and willing to pay the remaining amount.
9. The complainant submitted that complainant submitted that it was promised by the respondent at the time of receiving payment for the flat that the possession of fully construction flat would be handed over to complainant within 42 months from the date of signing of the agreement which is 12.06.2016.
10. The complainant submitted that complainant submitted that said apartment has been mortgaged with HDFC for a loan amounting of Rs.73,00,000/- and the complainant belongs to a middle class family. It is hard to bear the pain of the EMI.



11. That the complainant has also visited several times to the office of respondent for the speedy construction and possession but was of no use. All time fake promise had been made.
12. That the cause of action for the present complaint arose in or around 2012 when a pre-printed buyer agreement containing unfair and unreasonable terms was, for the first time, force upon all allottees. The cause of action further arose on many occasions when the respondent party failed to handover the possession of the flat as per the buyer agreement.
13. That as per section 18 of RERA Act, 2016, the promoter is liable to pay compensation to the allottees of an apartment, building or project for a delay or failure in handing over such possession as per the terms and agreement of the sale.

ISSUES RAISED BY THE COMPLAINANTS:

14. The following issues have been raised by the complainant:
 - i. Whether the developer has violated the terms and condition of the flat buyer's agreement?



- ii. Whether there is any reasonable justification for not completing the construction of the project?
- iii. Whether there has been deliberate or otherwise, misrepresentation on the part of developer for delay in giving possession?
- iv. Whether the complainant is entitled for refund of his entire deposited amount?

RELIEF SOUGHT BY THE COMPLAINANTS:

15. In view of the facts mentioned the following reliefs have been sought by the complainant:

- i. Direct the respondents to refund the entire deposited amount of Rs.1,09,01,872/- to the complainant and compensate with interest of Rs.24% from July 2012 to the date of refund.
- ii. Direct the respondent to pay amount of Rs. 5,00,000/- for deficiency in service.
- iii. Direct the respondent to pay amount of Rs. 1,00,000/- as relegation expenses.



- iv. Respondent party may kindly be directed to refrain from giving effect to the unfair clauses unilaterally incorporation in the flat buyer's agreement.

REPLY ON BEHALF OF THE RESPONDENT

16. The respondent submitted that respondent had diligently applied for registration of the project in question i.e. "Terra" located at Sector-37D, Gurugram including towers-T-20 to T-25 and EWS before this hon'ble authority and accordingly, registration certificate dated 13.10.2017 was issued by this hon'ble authority wherein the registration for the said project is valid for a period commencing from 13.10.2017 to 12.10.2020.

17. The respondent submitted that the complainant has approached this hon'ble authority with unclean hands i.e. by concealing and misrepresenting facts material to the present purported complaint. It is submitted that the Hon'ble Supreme Court in a plethora of cases has held that anyone approaching court must come with clean hands as any concealment/misrepresentation of facts amount to fraud not only on the



respondent but also on the court and as such, the complaint warrants dismissal without any further adjudication. In this regard, reference may be made to the following:

- i. It is submitted that the complainant has failed to disclose before this hon'ble authority that the complainant has approached the respondent through a broker namely "Property Hub" after conducting due diligence and the respondent has also offered a discount to the tune of Rs.88,778/- which is reflected on Pg.48 of the complaint Paper book.
- ii. The complainant has concealed from this hon'ble authority that he has been a habitual defaulter in making payments of the installments as and when demanded by the respondent in terms of the agreed payment plan. It is further submitted that complainant has also concealed e-mail dated 15.01.2013 from this hon'ble authority wherein the complainant has agreed to delay on his part in making payments. The complainant has also concealed from this hon'ble authority various reminder letters sent



to the complainant for payment of the outstanding amount.

iii. The complainant has further concealed from this hon'ble authority regarding various construction updates being shared by the respondent to the complainant.

18. The respondent submitted that the relief(s) sought by the complainant are unjustified, baseless and beyond the scope/ambit of the agreement duly executed between the parties, which forms a basis for the subsisting relationship between the parties. It is further submitted that the complainant has entered into the said agreement with the Respondent with open eyes and is bound by the same. It is further submitted that the relief(s) sought by the complainant travel way beyond the four walls of the agreement duly executed between the parties. It is submitted that the complainant while entering into the agreement has accepted and is bound by each and every clause of the said agreement, including clause-6.1 which provides for delayed penalty in case of delay in delivery of possession of the said flat by the respondent.



19. It is further submitted that the detailed relief claimed by the complainant goes beyond the jurisdiction of this hon'ble authority under the Real Estate (Regulation and Development) Act, 2016 and therefore the present complaint is not maintainable qua the reliefs claimed by the complainant.

20. It is further submitted that, the above submission implies that while entering into the agreement, the complainant had the knowledge that there may arise a situation whereby the possession could not be granted to the complainant as per the commitment period and in order to protect and/or safeguard the interest of the complainant, the respondents have provided reasonable remedy under clause-6.1, and, the complainant having accepted to the same in totality, cannot claim anything beyond what has been reduced to in writing between the parties.

21. In this regard, reference may be made to section-74 of the Indian Contracts Act, 1872, which clearly spells out the law regarding sanctity and binding nature of the ascertained amount of compensation provided in the agreement and further specifies that any party is not entitled to anything



beyond the same. Therefore, the complainant, if at all, is only entitled to compensation under clause-6.1 of the agreement.

22. It is further submitted that having agreed to the above, at the stage of entering into the agreement, and raising vague allegations and seeking baseless reliefs beyond the ambit of the agreement, the complainant is blowing hot and cold at the same time which is not permissible under law as the same is in violation of the 'Doctrine of Aprobate & Reprobate'. In this regard, the respondents reserves their right to refer to and rely upon decisions of the Hon'ble Supreme Court at the time of arguments, if required. Therefore, in light of the settled law, the reliefs sought by the complainant in the complaint under reply cannot be granted by this hon'ble authority.

23. The respondent submitted that the proposed timelines for possession being within 42 months from the date of sanction of building plans or execution of FBA, whichever is later, along with 180 days of grace period was subject to *force majeure* circumstances and circumstances beyond control of the respondent. However, the complainant has indulged in selective reading of the clauses of the FBA whereas the FBA



ought to be read as a whole. It is further submitted that the construction is going on in full swing and the respondent is making every endeavor to hand over the possession at the earliest. However, the following are noteworthy:-

24. The Parties had, vide clause 5.1 of the FBA [clause G (1) of the booking application], duly agreed that subject to force majeure and compliance by the complainant of all the terms and conditions of the FBA, the respondent proposes to hand over possession of the flat to the complainant within 42 months from the date of sanction of the building plans or execution of the FBA, whichever is later along with a further grace period of 180 days.

25. The respondent submitted that vide clause 7.3 of the FBA, an option to cancel the allotment is available to the complainant, however, acceptance of the same is on discretion of the respondent. It is pertinent to mention herein that the project in question is at advance stage of construction. It is submitted that the respondent shall stand by its commitment as per the terms of FBA. It is further submitted that the respondent has



already invested huge money and at this stage cancelling the allotment is not acceptable.

26. That vide clause-G.2 of the application for allotment, which was later reiterated vide clause 6.1 of the FBA, it was duly agreed between the parties that subject to the conditions mentioned therein, in case the respondent fails to hand over possession within 42 months from the date of sanctioning of the building plans or execution of FBA, whichever is later along with 180 days of grace period, the respondent shall be liable to pay to the complainant compensation calculated @ Rs.5 per sq. ft. for every month of delay. It is further submitted that the parties had agreed the penalty in case of delay in offering possession prior to entering into the transaction. Prior to entering into the transaction, the parties had further agreed vide clause G.2 of the booking application that in case the complainants fail or default in making timely payment of any of the installments, then the complainants would not be eligible for delay compensation and the said understanding was also reiterated in clause 6.1 of the FBA. Thus, the understanding between the parties regarding compensation



for delay in offering of possession had been agreed and accepted prior to entering into the transaction.

27. The respondent submitted that with regard to the construction of the tower in which the unit in question is located, work such as structure, brick work, door frames, internal and external plaster, IPS flooring have been completed. It is further submitted that around 70% of the construction with regard to tower T-20 in the project Terra is complete and for the remaining construction, work is going at full pace at the site and the respondent shall be handing over the possession shortly.

REPORT OF THE LOCAL COMMISSIONER

28. During site inspection, the overall progress of the project being developed by M/s BPTP Ltd. has been accessed on the basis of actual construction at site by visiting at the location of project on dated 25.02.2019 and is concluded that,

- a. The physical progress of overall project is about 45 percent.
- b. The physical progress of tower T-20 is about 55 percent.



DETERMINATION OF ISSUES

29. After considering the facts submitted by the complainant, reply by the respondent and perusal of record on file, the issue wise findings are as hereunder:

30. With respect to **first and second issues** raised by the complainant the authority came across clause 5.1 of buyer's agreement which states the possession of the said apartment was to be handed over within 42 months from the date of the execution agreement or date of sanction of building plan, whichever is later plus 180 days grace period. In present case due date of possession will be calculated from the date of execution of flat buyer's agreement. The flat buyer's agreement was executed on 12.12.2012. Therefore, the due date of possession comes out to be 12.12.2016 and the possession has been delayed by **2 years 3 months and 2 days** till the date of decision. The delay compensation payable by the respondent @5/- per sq. ft. of the super area per month of delay of the unit for the period of delay beyond 36 + 6 months as per clause 6.1 of buyer's agreement is held to be very nominal and unjust. The terms of the agreement have been



drafted mischievously by the respondent and are completely one sided as also held in para 181 of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)***, wherein the Bombay HC bench held that:

“...Agreements entered into with individual purchasers were invariably one sided, standard-format agreements prepared by the builders/developers and which were overwhelmingly in their favour with unjust clauses on delayed delivery, time for conveyance to the society, obligations to obtain occupation/completion certificate etc. Individual purchasers had no scope or power to negotiate and had to accept these one-sided agreements.”

31. Therefore, under section 18(1) proviso to pay interest to the complainant, at the prescribed rate, for every month of delay till the handing over of possession. The authority issues directions to the respondent u/s 37 of the Real Estate (Regulation and Development) Act, 2016 to pay interest at the prescribed rate of 10.75% per annum on the amount deposited by the complainant with the promoter on the due date of possession i.e. 12.12.2016 upto the date of offer of possession.
32. With respect to **third issue** raised by complainant, the complainant has not produced any material document and has



only made assertions in issues. Thus, without any proof or document the said issues become infructuous.

33. With respect to **fourth issue** raised by the complainant, the project is registered vide RERA registration: 299 of 2017 dated 31.10.2017 valid upto: 12.10.2020 with the authority, the authority is of the view that in case refund is allowed in the present complaint, it shall hamper the completion of the project. The refund of deposited amount will also have adverse effect on the other allottees. Therefore, the relief sought by the complainant cannot be allowed. However, as per proviso to section 18(1) of the Act, the complainant shall be paid interest for every month of delay calculated at the prescribed rate of 10.75% per annum till the handing over of the possession.

FINDINGS OF THE AUTHORITY:

34. The preliminary objections raised by the respondent regarding jurisdiction of the authority stands rejected. The authority has complete jurisdiction to decide the complaint in regard to non-compliance of obligations by the promoter as held in *Simmi Sikka V/s M/s EMAAR MGF Land Ltd.* leaving



aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

35. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Department of Town and Country Planning, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram district, therefore this authority has complete territorial jurisdiction to deal with the present complaint.

36. The complainant made a submission before the authority under section 34(f) to ensure compliance of the obligations cast upon the promoter.

37. The complainant requested that necessary directions be issued by the authority under section 37 of the Act ibid to the promoter to comply with the provisions of the Act and to fulfil its obligations.

38. Local commissioner report was placed on record. Under the circumstances, refund is not allowed



39. As per clause 5 of the flat buyer's agreement dated 12.12.2012 for unit no. T-20-603, Sector 37-D, in project "TERRA", Gurugram, possession was to be handed over to the complainant by 12.12.2016. Complainant has already paid Rs.1,09,01,872/- to the respondent against a total sale consideration of Rs.1,09,95,306/-. However, the respondent has not delivered the unit in time. As such, complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f 12.12.2016 as per the provisions of section 18 (1) of the Real Estate (Regulation and Development) Act, 2016 till handing over the possession to the complainant.

DECISION AND DIRECTIONS OF THE AUTHORITY:

40. After taking into consideration all the material facts as adduced and produced by both the parties, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issue the following direction to the buyer in the interest of justice and fair play:



- i. The respondent is directed to pay interest at the prescribed rate of 10.75% per annum on the amount deposited by the complainant with the promoter on the due date of possession i.e. 12.12.2016 upto the date of offer of possession.
- ii. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order and thereafter monthly payment of interest till offer of possession shall be paid before 10th of subsequent month.

41. The order is pronounced.

42. Case file be consigned to the registry.

43. Copy of this order be endorsed to the registration branch.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member



Haryana Real Estate Regulatory Authority, Gurugram

Dated: 13.03.2019

Judgement Uploaded on 11.04.2019