BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 32 of 2022
First date of hearing: 24.03.2022
Date of decision : 25.08.2023

Gaurav Dua **R/O: -** CRISIL Ltd, CRISIL House, Plot No 46, Sector 44 Gurugram Haryana	**Complainant**
Versus	
BPTP Ltd., M-11 Middle Circle, Connaught Circus Delhi 110001	**Respondent**

CORAM:	
Shri Sanjeev Kumar Arora	**Member**

APPEARANCE:	
Mr. Gaurav Rawat	Advocate for the complainant
Mr. Harshit Batra	Advocate for the respondent

ORDER

1. The present complaint dated 03.02.2022 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

2. The particulars of unit details, sale consideration, the amount paid by the complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S.N.	Particulars	Details
1.	Name of the project	"Pedestal", Sector- 70A, Gurugram
2.	Nature of project	Residential
3.	**DTPC License no.**	15 of 2011 dated 07.03.2011
	Validity status	04.04.2025
4.	**RERA registered/not registered**	Not Registered
5.	Unit no.	B-94-TF [As per page no. 79 of reply]
6.	Unit measuring	2878 sq. ft. [As per page no. 79 of reply]
7.	Allotment Letter	11.11.2013 (Page no. 68 of reply)
8.	Date of execution of Floor buyer's agreement	29.11.2013 (Page no. 74 of reply)
9.	Possession clause	**5. Possession** **5.1 The Seller/Confirming Party proposes to offer possession of the Unit to the Purchaser(s) within a Commitment Period**. The Seller/Confirming Party shall be additionally entitled to a Grace Period of 180 days after the expiry of the said

		Commitment Period for making offer of possession to purchaser(s). **1.4 "Commitment Period"** shall mean, subject to, Force Majeure circumstances; intervention of statutory authorities and Purchaser(s) having timely complied with all its obligations, formalities or documentation, as prescribed/requested by Seller/Confirming Party, under this Agreement and not being in default under any part of this Agreement, including but not limited to the timely payment of instalments of the sale consideration as per the payment plan opted, Development Charges (DC). Stamp duty and other charges, the Seller/Confirming Party shall offer the possession of the Unit to the **Purchaser(s) within a period of 36 months from the date execution of Floor Buyer's Agreement.**
10.	Due date of possession	29.11.2016 (Calculated from the execution of BBA)
11.	Basic sale Price	Rs. 1,62,17,702/- (Page 17 of complaint)
12.	Total amount paid by the complainant	Rs. 61,19,318/- (As alleged by the complainant)
13.	Occupation certificate dated	Not obtained
14.	Offer of possession	Not offered

B. Facts of the complaint

3. That respondent launched a group housing township/ project named as "Pedestal" situated in Sector-70A, Gurugram and complainant has purchased/booked one residential flat/apartment/unit bearing B-94-TF admeasuring around 2878 sq. ft. vide letter dated 04.09.2013.
4. That it is pertinent to state that here that timely payments of the consideration amount was made essence of the contract which apparently is unilateral whereas opposed to the representation made, through agreement as in the commitment period was of 36 months excluding grace period from the date of buyer agreement but the possession has not been handed over till now.
5. That it is further pertinent to mention here that complainant was very diligent in making the timely payment of the each and every demand being raised by the respondent and to ensure the smooth payment to the respondent, it has also taken loan from HDFC Bank. So that he can conceive the basic necessity of having a house.
6. It is relevant to submit here that complainant has time and again tried to contact to the respondent regarding delay compensation payable by it, however none of the personnel from the office of the it has responded to the complainant. It is specifically submitted that he is regularly paying Rs. 1,38,887/- as the EMI of against the loan taken without even consideration of holding charges to be paid by the it.

C. Relief Sought

7. This Authority may direct the respondent as follows:

   1. Direct the respondent to hand over the physical possession in a complete and habitable form with interest at the rate of 18%per annum on the amount paid from the committed date of possession till date of actual date of physical possession.
   2. Direct the respondent to not to raise any demand which is beyond the express terms and conditions of agreement.
   3. Direct the respondent to not to carry, out any illegitimate delay compensation payable to him against Pre -EMI being paid by respondent.
   4. Direct the respondent to execute conveyance deed in favour of complainant after ensuring/making payment of the delay interest.

D. Reply by the respondent

8. That on 04.09.2013, the complainant applied for the provisional allotment of a floor in the project being developed by the respondent namely **"PEDESTAL"** located Sector 70 & 70A, Gurugram, Haryana, and opted for the subvention payment plan. Subsequent to which the respondent *vide* allotment letter dated 11.11.2013 allotted a Unit bearing no.B-94-TF to him. Thereafter, on 29.11.2013, a floor buyer's agreement was executed between the parties. It is imperative to mention herein that in view of the clause 1.4 r/w clause 5.1 of the agreement the respondent proposed to handover the possession of the floor within a period of 36 months from the execution of the FBA in addition to further grace period of 180 days subject to force majeure circumstances and timely payment of instalments. Therefore, the

due date of possession subject to force majeure arrives out to be 29.05.2017 i.e. 36 months from the date of execution of the FBA in addition to further grace period of 180 days. However, the possession timeline, if any, has been diluted is due to the reasons beyond the control of the respondent i.e. the force majeure circumstances.

9. Further, the respondent has raised each specific demand as per the agreed payment schedule, however, it is the complainant who on several occasion had failed to remit the timely payments *qua* such demands due to which the respondent was constrained to issue numerous reminder letters on various occasions such as on 27.11.2013, 10.03.2016, 08.05.2018, 04.07.2018, 21.08.2018, 06.10.2018, 19.11.2018 and 03.12.2021. Despite aforesaid the respondent paid the monthly subvention amount of Rs. 50,64,164/- till November 2021, to the HDFC Bank. It is pertinent to mention herein that till date out of the total demand raised by the respondent out of which the complainant has only paid Rs. 26,99,858/- and the rest amount of Rs. 1,13,27, 495/- has been paid by the bank on behalf of complainant.
10. All other averments made in the complaint were denied in toto.
11. Copies of all the relevant documents have been duly filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority

The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

12. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, 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.

E.II Subject matter jurisdiction

The Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

> ***Section 11(4)(a)***
>
> *Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*
>
> ***Section 34-Functions of the Authority:***
>
> *34(f) of the Act provides to ensure compliance of the obligations cast upon the promoter, the allottees and the real*

estate agents under this Act and the rules and regulations made thereunder.

13. So, in view of the provisions of the act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings on the objections raised by the respondent

F.I Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act

14. The contention of the respondent is that authority is deprived of the jurisdiction to go into the interpretation or rights of the parties inter-se in accordance with the apartment buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the act or the said rules has been executed inter se parties. The authority is of the view that the act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the act. Therefore, the provisions of the act, rules and agreement have to be read and interpreted harmoniously. However, if the act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the act and the rules after the date of coming into force of the act and the rules. Numerous provisions of the act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of

Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017) decided on 06.12.2017 which provides as under:

> *"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter.....*
>
> *122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."*

15. Further, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya***, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal observed- as under

> *"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and <u>will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion</u>. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."*

16. The agreements are sacrosanct save and except for the provisions which have been abrogated by the act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

F.II Objection regarding force majeure conditions:

17. The respondent-promoter has raised the contention that the construction of the project was delayed due to reasons beyond the control of the respondent such as COVID-19 outbreak, lockdown due to outbreak of such pandemic and shortage of labour on this account. The authority put reliance judgment of Hon'ble Delhi High Court in case titled as M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr. bearing no. O.M.P (I) (Comm.) no. 88/ 2020 and I.As 3696-3697/2020 dated 29.05.2020 which has observed that-

> *"69. The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non- performance of a contract for which the deadlines were much before the outbreak itself."*

In the present complaint also, the respondent was liable to complete the construction of the project in question and handover the possession of the said unit by 05.08.2015. The respondent is claiming benefit of lockdown which came into effect on 23.03.2020 whereas the due date of handing over of possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non- performance of a contract for which the deadlines were much before the outbreak itself and for the said reason the said time period is not excluded while calculating the delay in handing over possession

18. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the prescribed rate, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

> ***Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
>
> *(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:*
>
> *Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.*

19. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

20. Consequently, as per website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as on date i.e., 25.08.2023 is 10.75%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.75%.

21. The definition of term 'interest' as defined under section 2(za) of the act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

> *"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.*
> *Explanation. —For the purpose of this clause—*
> *(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
> *(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

22. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 10.75% by the respondent/promoter

which is the same as is being granted to the complainant in case of delayed possession charges.

23. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the act by not handing over possession by the due date as per the agreement. By virtue of clause 5.1 read with 1.4 of the agreement executed between the parties on 29.11.2013, the possession of the subject apartment was to be delivered within stipulated time i.e., by 29.11.2016. As far as grace period is concerned, the same is not allowed for the reasons quoted above. The respondent has delayed in offering the possession and the same is not offered till date. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the act on the part of the respondent is established. As such, the allottee shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 29.11.2016 till date of valid offer of possession after obtaining OC plus two months or date of handing over of possession whichever is earlier at prescribed rate i.e., 10.75 % p.a. as per proviso to section 18(1) of the act read with rule 15 of the rules.

24. The counsel for the complainant stated at bar that the due date of possession was 29.11.2016 but no offer of possession has been made till date

and further stated that pre-EMIs were to be paid by the respondent which they paid up to November 2021 as admitted by the respondent at page No.2 of the reply. Further, the counsel for the respondent stated that undoubtedly there is a delay in possession, if the authority decides to allow DPC, the amount already paid as pre-EMI on behalf of the complainant to the bankers should be deducted out of the amount of DPC.

25. Relief no. 3 and 4 has not been pressed during the arguments so, no direction can be given in this regard.

G. Directions of the authority

26. Hence, the authority hereby passes this order and issues the following directions under section 37 of the act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

   i. The respondent is directed to pay delayed possession charges at the prescribed rate of interest i.e., 10.75% p.a. for every month of delay on the amount paid by complainant to it from the due date of possession i.e., 29.11.2016 till date of valid offer of possession after obtaining OC plus two months or date of handing over of possession whichever is earlier.

   ii. The amount of Pre-Emi's paid by the respondent on account of complainant to the banker should be deducted out of the amount of DPC.

iii. The rate of interest chargeable from the allottees, in case of default shall be charged at the prescribed rate i.e., 10.75% by the respondent/promoters which is the same rate of interest which the promoters shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

iv. The complainant is also directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.

v. The respondent is directed to handover the possession of the allotted unit within two months after obtaining OC from the concerned authority.

vi. The promoter shall not charge anything which is not part of the BBA.

27. Complaint stands disposed of.

28. File be consigned to registry.

HARERA
GURUGRAM

(Sanjeev Kumar Arora)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 25.08.2023