

**Before Sh. Balbir Singh, Adjudicating Officer,
Real Estate Regulatory Authority, Punjab, Plot No.3,
Block-B, First Floor, Madhya Marg, Sector 18A,
Chandigarh-160018.**

Complaint AdCNo.1222/2019
Dated of Institution: 20.05.2019
Date of Order:19.06.2020

1. Murugan Mookam
2. Rekha Mookam
Resident of # 1513, 1st Floor, Sector 34D, Chandigarh.
Complainants

Versus

M/s Sushma Buildtech, SCO 172-173, 1st Floor, Sector 9C,
Chandigarh.


Respondent

Complaint under Section 31 of the Real Estate
(Regulation and Development) Act 2016.

Present: Shri Ved Parkash and Ms. Manju Goyal, advocate,
representatives for the complainants.
Shri Sanjiv Sharma, Advocate, representative for
the respondent.

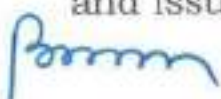
ORDER

1. Murugan Mookam and Rekha Mookam have filed this complaint against M/s Sushma Buildtech alongwith documents alleging violation of Section 18 of the Real Estate (Regulation and Development) Act 2016 (herein-after called as the Act) seeking refund and interest etc. as per the provisions of the Act on account of delay in handing over possession of apartment No.E-1304, 13th Floor, Tower-E, in the project namely **Sushma Chandigarh Grande**. It was averred in the complaint that the complainants purchased the above said




apartment for a total sale consideration of Rs.74,43,450/- plus additional charges including PLC, FPC power backup etc. Builder-buyer agreement was executed between the parties on 09.02.2017 and as per its clause 14(d) possession was to be delivered within fifteen months i.e. by 10.05.2018. The complainants paid total amount of Rs.63,34,376/- towards sale consideration of the apartment to the respondent. Thereafter the respondent kept on raising demand of exaggerated amounts time and again, but, never intimated about the completion of the project and delivery of possession. Even the respondent also stopped assured amount upto December, 2018. In these circumstances, the complainants lost faith in the respondent and wanted to withdraw from the project. Hence, this complaint for refund, interest and compensation.

2. Upon notice, complaint had been contested on behalf of respondent by raising preliminary objections that the complaint was not maintainable and that no refund could be awarded to the complainants, as the complainants were themselves defaulters and had not paid due amounts despite demand. Even offer of possession was also made and then termination letter was also issued to them after completion of the units and issuance of completion certificate by the competent



authority. The unit had already been cancelled and amount forfeited as per terms and conditions of the buyer agreement and rather the complainants were liable to pay back the subvention scheme amount of Rs.7,03,284/- paid by the respondent to the bank. It was also alleged that no relief as claimed by the complainants could be granted to them and that further as per the arbitration clause of the agreement, the matter was required to be referred to the arbitrator. It was then alleged that the total price of the apartment was Rs.83,58,605/-, including interest of Rs.3,00,348/- against which the complainants had paid only an amount of Rs.63,34,376/- and still amount of Rs.20,24,229/- was payable by the complainants. Further, as per the time granted by the RERA Authority at the time registration of the project, the completion date of the project was 2022 and therefore, the instant complaint was not maintainable. The apartment/unit of the complainants was governed by the provisions of the Punjab Apartment and Property Regulation Act 1995 (in short the PAPR Act 1995) because the transaction pertained to the period before coming into force of the Act and as such the complainant was not maintainable. While denying rest of the averments of the complaint, it was prayed that the complaint be dismissed.



3. Both the respective representatives for parties addressed arguments on the lines of averments made in their respective pleadings and the elaboration thereof shall be made in the discussion.
4. I have anxiously considered rival contentions of the learned representatives for the parties.
5. It is not disputed between the parties that complainants purchased Apartment No.E-1304 in the year 2017 in the project subsequently got registered with this authority against No.PBRERA-SAS79-PR0085 namely **Sushma Chandigarh Grand**. Builder-buyer agreement was executed between the parties on 09.02.2017, copy whereof is Annexure-CII. As per clause 14(d) of said agreement the possession of the apartment in question was to be delivered within fifteen months i.e. upto 10.05.2018. It was also admitted by the respondent in their written reply that total amount of Rs.63,34,376/- had been paid by the complainant towards sale price of the apartment in question.
6. The first point raised by the representative for the respondent was that the transaction in this case was covered under the PAPR Act 1995 as the RERA Act was not in force at that time, however, the argument lacs merit as it is well settled law that the Act would certainly regulate the existing contracts, even though, it is prospective in nature, but, is retroactive also to some



extent. On this point, reliance may be placed on the law laid down by the Hon'ble Bombay High Court in case titled as **Neel Kamal Realtors Suburban Pvt. Ltd and another Vs. Union of India and others**, bearing Writ Petition No.2737 of 2017 decided on 06.12.2017, wherein, it has been held that unilateral contracts of the prior period not being in accordance with the provisions of the Act are not enforceable to that extent and the provision of the Act would be applicable to cover up the ongoing project got registered with RERA.

7. It was also contention on behalf of the respondent that there was an arbitration clause in the agreement to sell, according to which the dispute between the parties was to be referred to the arbitrator and this Bench had no jurisdiction to adjudicate the controversy between the parties. A conjoint reading of Sections 79, 88 and 89 of the Act leaves no manner of doubt that despite there being arbitration clause, the remedy available to the complainant under the Act still subsists. The argument is accordingly repelled.

8. The next point agitated by the representative for the respondent was that the project was complete and partial completion certificate had been issued by the competent authority on 23.07.2019, though the time granted by this Authority at the time of registration of the project for completion of the project was July 2022,



however, the complainants failed to take possession of the apartment in question and also failed to make the remaining payment of more than Rs.20,00,000/- as demanded vide reminder and termination letter as Annexures-A5 and statement of account as Annexure-A6. This submission made by the respondent's representative is inconsequential because Hon'ble Bombay High Court in a case titled **Neelkamal Realtors Suburban Pvt. Ltd. and anr. Vs. Union of India and ors. WRIT PETITION NO. 2737 OF 2017 decided on 06.12.2017** had been very categorical with regard to the agreements entered between the parties even prior to coming into force of this Act and in this respect the paragraph 119 is reproduced herein-below:-

"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. The promoter would tender an application for registration with the necessary preparations and requirements in law. While the proposal is submitted, the promoter is supposed to be conscious of the consequences of getting the project registered under RERA. Having sufficient experience in the open market, the

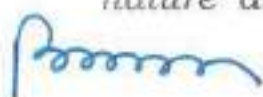


promoter is expected to have a fair assessment of the time required for completing the project. After completing all the formalities, the promoter submits an application for registration and prescribes a date of completion of project. It was submitted that interest be made payable from the date of registration of the project under RERA and not from the time-line consequent to execution of private agreement for sale entered between a promoter and an allottee. It was submitted that retrospective effect of law, having adverse effect on the contractual rights of the parties, is unwarranted, illegal and highly arbitrary in nature."

9. In the above said case, the Hon'ble Bombay High Court has also made this point clear in paragraph 256 and 261, which are reproduced below:-

"256. Section 4(2)(l)(C) enables the promoter to revise the date of completion of project and hand over possession. The provisions of RERA, however, do not rewrite the clause of completion or handing over possession in agreement for sale. Section 4(2)(l)(C) enables the promoter to give fresh time line independent of the time period stipulated in the agreements for sale entered into between him and the allottees so that he is not visited with penal consequences laid down under RERA. In other words, by giving opportunity to the promoter to prescribe fresh time line under Section 4(2)(l)(C) he is not absolved of the liability under the agreement for sale."

"261. In my opinion Section 18 is compensatory in nature and not penal. The promoter is in effect



constructing the apartments for the allottees. The allottees make payment from time to time. Under the provisions of RERA, 70% amount is to be deposited in a designated bank account which covers the cost of construction and the land cost and has to be utilized only for that purpose. Interest accrued thereon is credited in that account. Under the provisions of RERA, 30% amount paid by the allottees is enjoyed and used by the promoter. It is, therefore, not unreasonable to require the promoter to pay interest to the allottees whose money it is when the project is delayed beyond the contractual agreed period. Even under Section 8 of MOFA on failure of the promoter in giving possession in accordance with the terms of the agreement for sale, he is liable to refund the amount already received by him together with simple interest @ 9% per annum from the date he received the sum till the date the amount and interest thereon is refunded. In other words, the liability under Section 18(1)(a) is not created for the first time by RERA. Section 88 lays down that the provisions of RERA shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force."

10. In view of above observations, the plea of the respondent that they had given a declaration for completion of the project by July 2022 in registering the project with this Authority, was not tenable as the agreement between the parties was admittedly executed on 09.02.2017 and as per its terms and conditions,



possession was to be delivered to the complainants on or before 10.05.2018 whereas, alleged partial completion certificate had been obtained in the year 2019. Now, the specimen proforma for agreement for sale has been prescribed under the Punjab State Real Estate (Regulation and Development) Rules 2017. The clause 5 of said agreement says that time is essence for the promoter as well as the allottee and the promoter shall abide by the time schedule for completing the project and handing over the apartment/plot to the allottee and the common areas to the association of the allottees. Clause 7 of the said agreement deals with the possession of the apartment or plot and clause 7.5 runs as under:-

“Cancellation by allottee:- The allottee shall have the right to cancel/withdraw his allotment in the project as provided in the Act:

Provided that where the allottee proposes to cancel/withdraw from the project without any fault of the promoter, the promoter herein is entitled to forfeit ten percent of the total amount of the consideration money, interest and other dues payable for the allotment. The balance amount of money paid by the allottee shall be returned by the promoter to the allottee within ninety days of such cancellation.

11. In the instant case, the complainants are not at fault and in these circumstances, the promoter was under



obligation to provide possession of the flats within the stipulated period. Clause 9.2 of the said proforma of agreement prescribes the rights of the allottee in case of default by the promoter, which runs as under:-

9.2 In case of default by promoter under the conditions listed above, the allottee is entitled to the following:-

- (i) stop making further payments to the promoter as demanded by the promoter. If the allottee stops making payments, the promoter shall correct the situation by completing the construction milestone and only thereafter the allottee will be required to make the next payment without any penal interest; or*
- (ii) the allottee shall have the option of terminating the agreement in which case the promoter shall be liable to refund the entire money paid by the allottee under any head whatsoever towards the purchase of the apartment/plot along with interest at the rate specified in the Rules within ninety days of receiving the termination notice;*

Provided that where an allottee does not intend to withdraw from the project or terminate the agreement, he shall be paid by the promoter, interest at the rate specified in the Rules for every month of delay till the handing over of the possession of the apartment/plot."

12. Under this clause, the promoter is liable to refund the entire money paid by the allottee under any



head whatsoever towards the purchase of the apartment/plot along with interest at the rate specified in the Rules within ninety days.

13. As it had been discussed above, the respondent had not delivered the lawful physical possession of the flat to the complainants within the stipulated time frame. The submission of the representative for respondent that despite reminders the complainants did not make the remaining payment is also without any force, as the complainants had sent letters dated 25.03.2019 and 08.04.2019 seeking confirmation of the likely date of handing over of the allotted unit, but, said letters were never replied and no confirmation in the reminders relied upon by the respondent in regard to completion of the project in question had been given. In view of this attitude of the respondent, the complainants were justified in stopping further payments, as no clear reply was forthcoming regarding completion of the unit in question. Further, the plea of respondent was also that the booking of the flat was terminated, but, no such letter has been conveyed to the complainants specifically mentioning therein that their booking had been cancelled or terminated. Even no offer of possession has been brought on record, though it has been so claimed by the respondent. In such a situation, the respondent is certainly at fault in not



conveying the correct stage of the construction and not delivering the possession of flat despite lapse of stipulated period and as such, this case is squarely covered within the mischief of Section 18 of the Act which runs as under:-

"18. (1) If the promoter fails to complete or is unable to give possession of an apartment, flat or building,—

(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason, he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, flat, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided 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 the possession, at such rate as may be prescribed.

(2) The promoter shall compensate the allottees in case of any loss caused to him due to defective title of the land, on which the project is being developed or has been developed, in the manner as provided under this Act, and the claim for compensation under this subsection shall not be barred by limitation provided under any law for the time being in force.

(3) If the promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations made there under or in accordance with the terms and conditions of the agreement for sale, he shall be liable to pay such compensation to the allottees, in the manner as provided under this Act."

14. In view of the above provisions of the Act, the respondent was duty bound to offer the possession of



the flat in question and on account of non-delivery of possession despite having received the due amount, he was liable to refund the amount of Rs.63,34,376/- paid by the complainants to the respondent.

15. The next question which arises for consideration is as to whether the complainants is entitled to any interest on the amount paid by him to the respondent or not. The fact of the matter remains that the respondent has been using the amount so paid by the complainants to it since respective payments, as such, the respondent is liable to refund the above said amount alongwith interest to the complainants because once the amount is deposited with the promoter and he is getting benefit of interest accrued upon said amount, he cannot deny the similar benefit to the buyer. As such, to conclude with, I am of the view that the complainants is entitled the return of principal amount of Rs.63,34,376/- along with interest at the prescribed rate as per Rule 16 of the Act i.e. State Bank of India highest marginal cost of lending rate plus 2% from the respective dates of payments by the complainants till realization. Accordingly, the respondent is directed to return the amount of Rs.63,34,376/- along with simple interest at the State Bank of India highest marginal cost of lending rate plus 2% from the respective dates of payments by the complainants till realization.



16. Since the complainants could not purchase the flat in question and had to seek the remedy under the existing law and for that obviously they had to suffer mental agony and had to incur expenses to pursue their claim by way of engaging their representative. The compensation has not been defined under this Act; however, it has been defined under some other statutes such like Workman Compensation Act, Land Acquisition Act etc etc. In my opinion, in the instant case, the compensation can be granted under the heads pecuniary and non-pecuniary and Section 72 of the Act speaks about the factors to be taken into consideration while adjudicating the quantum of compensation. No exact amount can be assessed on this count, but, keeping in view all the factors enunciated under Section 72 of the Act, in the instant case, the extent of mental agony and harassment can also be gauged in view of the long delay and as such, I am of the considered view that the complainants is held entitled for compensation under all the heads i.e. mental agony, litigation expenses etc to the tune of Rs.1,25,000/-.

17. In view of above discussions and observations, the complaint stands accepted to the following extent and heads:-

1.	Principal	Rs.63,34,376/-
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	amount	
2.	Simple interest	At the SBI highest marginal cost of lending rate plus 2% on the principal amount from the date of respective payments till realization
3.	On account of mental agony and litigation expenses	Rs.1,25,000/-

The respondent is directed to pay the above said amount to the complainants within sixty days from the date of this order. In case, any amount has already been received by the complainants from the respondent in this matter on account of delay in delivery of possession, the same shall stand adjusted against the above said due amount. File be consigned to record room after due compliance of notifying the parties of this order well in time.

Dated:19.06.2020


 (Balbir Singh)
 Adjudicating Officer,
 Real Estate Regulatory Authority, Punjab.