

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

I)

Complaint TR/AO/27/2019
Old GC No.4(c)/2019
Dated of Institution: 08.08.2017
Date of Order: 23.06.2020

Gautam Uppal son of Shri Ranvir Uppal resident of House No.470, Sector 6, Panchkula (Haryana).

Complainant

Versus

M/s Country Colonizers Pvt Ltd through its authorized signatory, reg. office P.O. Rayal and Silk Mills, Adjoining Coca Depot, GT Road, Chhehrta Amritsar, Punjab 143105.

2nd address:

Corporate Office: A25, Mohan Cooperative Industrial Estate, Main Mathura Road, New Delhi 110044.

Respondent

II)

Complaint TR/AO/28/2019
Old GC No.4(b)/2019
Dated of Institution: 08.08.2017
Date of Order: 23.06.2020

Gautam Uppal son of Shri Ranvir Uppal resident of House No.470, Sector 6, Panchkula (Haryana).

Complainant

Versus

M/s Country Colonizers Pvt Ltd through its authorized signatory, reg. office P.O. Rayal and Silk Mills, Adjoining Coca Depot, GT Road, Chhehrta Amritsar, Punjab 143105.

2nd address:

Corporate Office: A25, Mohan Cooperative Industrial Estate, Main Mathura Road, New Delhi 110044.

Respondent

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AND

III)

Complaint TR/AO/29/2019
Old GC No.4(a)/2019
Dated of Institution: 08.08.2017
Date of Order: 23.06.2020

Gautam Uppal son of Shri Ranvir Uppal resident of House No.470, Sector 6, Panchkula (Haryana).

Complainant

Versus

M/s Country Colonizers Pvt Ltd through its authorized signatory, reg. office P.O. Rayal and Silk Mills, Adjoining Coca Depot, GT Road, Chhehrta Amritsar, Punjab 143105.

2nd address:

Corporate Office: A25, Mohan Cooperative Industrial Estate, Main Mathura Road, New Delhi 110044.

Respondent

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

Present: Shri P.M. Goyal, Advocate, representative for the complainant.

Shri Tejeshwar Singh, Advocate, Representative for the respondent.

ORDER

1. Through this common order, I would like to dispose of the abovementioned three complaints as the same are based on substantially similar facts, cause of action, against same promoter and the same project.
2. In all the complaints the complainant sought refund of the amount paid by him as the respondent failed to deliver possession of three flats in the project Wave

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Estate, Sector 85 and 99 Mohali the detail of which is given below:-

No. of complaint	Flat No.	Area of Flat	Total sale consideration	Amount paid
TR/AO/27/19	705 Tower Tulip, 7 th floor One BHK	594.5 sq ft	Rs.29,05,000/-	Rs.22,65,490/-
TR/AO28/19	103, Erica 1 st Floor, Three BHK	1990 sq ft	Rs.74,62,500/-	Rs.59,99,753/-
TR/AO29/19	707, Erica 1 st Floor, One BHK	700 sq ft	Rs.29,05,000/-	Rs.23,48,287/-

The parties entered into three apartment buyer agreements dated 05.09.2012, 17.05.2013 and 11.07.2013 respectively. As per the terms and conditions of the agreements, the possession of the apartments was to be delivered to the complainant within thirty months with an extended period of six months. The complainant made due payments within the stipulated period, but, the respondent failed to complete the construction at the site and hand over the possession of the apartments to the complainant. By doing so, the respondent violated the provisions of the Act and as such the complainant was entitled to seek refund of the amounts so paid by him to the respondent. Hence, these complaints.

3. Upon notice, respondent-promoter contested the complaint by way of filing written reply raising preliminary objection that the complaint was not maintainable as the complainant had not purchased the apartments for residential purposes and rather to earn profit by way of investment and as such he was

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not entitled to any relief under the Act. The complainant also failed to make the payments as per payment plan. There was no time for mandatory completion of construction of the project as such there was no delay in completion of the project. The respondent had entered into memorandum of agreement with the government on 03.02.2016, but, the government failed to acquire the land for the respondent and in this manner some land being not in possession of the respondent it was not possible to lay lines for basic services. The complainant had no cause of action to file the present complaints as there was neither deficiency in service nor any unfair trade practice, rather the default lies on the part of the complainant who failed to make the payments in terms of payment plan. On merits, denying the rest of the averments of the complaints, it was prayed that the complaints be dismissed.

4. It would be worthwhile to mention here that the complainant earlier filed these complaints before the Authority and the learned Chairperson, vide order dated 05.06.2018 accepted the complaints and directed the respondent to refund the amount deposited by the complainant with interest to be paid from the date of deposit to the date of refund at the rate prescribed in Rule 16 of the Punjab State Real Estate (Regulation and

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Development) Rules 2017 i.e. State Bank of India's highest marginal cost of lending rate (as applicable from time to time) plus 2%.

5. The respondent preferred appeals before the said order before the Real Estate Appellate Tribunal, Punjab. At the time of disposal of miscellaneous application for condonation of delay of 65 days in filing the application, in the said appeals, the counsel for parties agreed on instructions that instead of any order on merits, the impugned orders in all the appeals be set aside and the matter be remitted to the appropriate Authority/Adjudicating Officer for fresh adjudication after taking into consideration the procedure set out in the Act and as interpreted by this Tribunal in appeal No.1 of 2018 titled Emaar MGF Land Ltd Vs. Kamalroop Singh Sooch and another decided on 20.09.2018. The Hon'ble Real Estate Appellate Tribunal, Punjab, vide order dated 04.12.2018 directed the parties to appear before the Authority/Appropriate officer with a direction to decide the complaint from the stage of filing reply.
6. After remand of the case, the learned Chairperson, vide order dated 26.03.2019 transferred these complaints to my predecessor the then Adjudicating Officer as per the ratio of the order dated 27.02.2019 of the Hon'ble Real Estate Appellate Tribunal, Punjab passed in Appeal



No.53 of 2018 and other connected appeals, as in the instant complaints, refund had been sought by the complainant and were to be dealt with by the Adjudicating Officer. The complaints were also converted from Form-M to Form-N in view of the above order of the Hon'ble Real Estate Appellate Tribunal, Punjab by my learned predecessor and came up before the undersigned for the first time on 07.11.2019.

7. I have heard the representatives for parties and have gone through the record on the file.
8. The first point raised by the representative for the respondent was that the transaction in these cases pertained to the years 2012 and 2013 and as such the Act was not applicable to the same and this Bench did not have jurisdiction over the matter, but, the present project is ongoing and has not been completed till date; and it is also 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.

9. The other argument on behalf of the respondent was that the project could not be completed because of the circumstances beyond the control of the developer/respondent i.e. force-majeure. We however, find that such plea of force-majeure was not taken by the respondent in any communications to the complainant/buyer before start of the present litigation. Secondly, the alleged ground taken by the respondent to the effect that the Government failed to acquire land and hand over the possession thereof to the respondent as per the memorandum of agreement dated 03.02.2006 and as such development works could not be undertaken, for taking up the plea of force-majeure is also not covered under the said plea because such type of hassles could easily be taken care of by the developer by dealing with the government diligently. The other plea taken on behalf of the respondent was that there had been status quo order of Hon'ble High Court, no doubt the said time of litigation he could exclude, but, the further plea that because of escalation of costs, he was unable to sell the flats at original cost agreed cannot be made a ground by him to avoid his liability under the buyer-builder agreement.

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10. It was also the argument on behalf of the respondent that the complainant of the cases in hand had purchased the flats by way of commercial activities and therefore, was not a consumer and secondly he was not entitled to the beneficial provisions of the Act which were available to the normal consumer. The argument however lacks merit in as much as for seeking the benefit of the beneficial provision of the Consumer Protection Act, the applicant has to fall within the definition of consumer, whereas, no such distinction is drawn by the Legislature in formulating the provisions of the Act, which are equally applicable to the commercial activities as well as personal needs.

11. The next point raised by the learned representative for respondent was that there was an arbitration clause in the agreement, 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.

12. Another argument taken up on behalf of the respondent was that the complainant defaulted in making timely payments as per the demands made by

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the respondent and, therefore, was not entitled to the protection of beneficial provisions of the RERA Act alleging the delay in handing over the possession by the developer/respondent. The argument, however, does not hold much water because admittedly, up to the date of starting of litigation between the parties, which initially was in the shape of proceedings before the Authority of RERA in Form-M, which later on was converted into form-N as the relief had been sought for refund, interest and compensation, there was default on the part of the complainant in making payment but actually the demand which had been made by the respondent subsequent to the filing of the litigation by the complainant against the respondent with respect to the cause of action of the cases in hand. It, therefore, cannot be said that there was any default on the part of the complainant in making the timely payment prior to the start of the litigation between the parties.

13. Admittedly, the possession of the apartments had not been delivered to the complainant and nor offer of possession has been made as the project is not complete. 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/flat 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 flat 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.

14. In the instant case, the complainant is not at all 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:-

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- (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/flat 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/flat.”

15. 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/flat along with interest at the rate specified in the Rules within ninety days.

16. As it has been discussed above, the respondent had not delivered the lawful physical possession of the flats to the complainant within the stipulated time frame and in such a situation, the respondent is certainly at fault

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in not delivering the possession of flats within the 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."

17. In view of the above provisions of the Act, the respondent was duty bound to offer the possession of the flats in question and on account of non-delivery of

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possession despite having received the due instalments, he was liable to refund the amount as follows:

Sr. No	Complaint No.	Amount
1.	RT/AO/27/19	Rs.22,65,490/-
2.	RT/AO/28/19	Rs.59,99,753/-
3.	RT/AO/29/19	Rs.23,48,287/-

18. The next question which arises for consideration is as to whether the complainant 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 complainant to it since respective payments, as such, the respondent is liable to refund the above said amount alongwith interest to the complainant 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 each of the complainant is entitled the return of above mentioned principal amounts 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 complainant till realization.

19. Since the complainant could not purchase the flats in question and had to seek the remedy under the existing law and for that obviously he had to suffer mental agony and had to incur expenses to pursue their claim.

The compensation has not been defined under this Act;

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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 prolonged delay and as such, I am of the considered view that each of the complainant is held entitled for compensation under all the heads i.e. mental agony, litigation expenses etc to the tune of Rs.1,25,000/- in each complaint.

20. In view of above discussions and observations, both the complaints stand accepted to the following extent and heads:-

1. Complaint No. TR/AO/27/2019 (GCNo.4(c)2019		Gautam Uppal	Country Colonizer
1.	Principal amount	Rs.22,65,490/-	
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/-	
2. Complaint No. TR/AO/28/2019 (GCNo.4(b)2019		Gautam Uppal	Country Colonizer
1.	Principal amount	Rs.59,99,753/-	

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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/-	
3. Complaint No. TR/AO/29/2019 (GCNo.4(a)2019		Gautam Uppal	Country Colonizer
1.	Principal amount	Rs.23,48,287/-	
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 complainant within sixty days from the date of this order. In case, any amount has already been received by the complainant from the respondent in this matter on account of delay in delivery of possession shall stand adjusted against the above said due amount. An attested copy of this order be placed on the files of connected complaints bearing No.TR/AO/28/2019 and No.TR/AO/29/2019 both titled as Gautam Uppal Vs. Country Colonizers. File be consigned to record room after due compliance of notifying the parties of this order well in time.

Dated:23.06.2020

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