**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 No. ADC 1281/2019
Dated of Institution: 19.07.2019
Date of Order:28.09.2020

1. Anupam Garg
2. Umesh Garg, residents of C-42, Uppal Marble Arch, Manimajra, Chandigarh.

Complainants

Versus

ATS Estates Private Limited, ATS Golf Meadows, NH 22, Tehsil Derabassi, District Mohali, Punjab.

Respondent

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

Present: Mr. Sandeep Khunger, Advocate, representative for the complainants.
Mr. Harsh Bunger, Advocate, representative for the respondent.
(Through Video Conferencing)

ORDER

1. Anupam Garg and Umesh Garg (hereinafter called as the complainants) filed this complaint against ATS Estate Private Limited (here-in-after called as the respondent) 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.4113, Type-A, 11th Floor, Tower No.4,

in the project namely **ATS Gold Meadows Lifestyle** located at village Madhopur, Tehsil Derabassi, District Mohali, Punjab. It was averred in the complaint that the complainants booked the above mentioned apartment on payment of Rs.13,58,037/- as booking amount, which was allotted to them vide allotment letter dated 20.01.2014, Annexure C1. Buyers agreement Annexure-C2 was also executed on 20.01.2014 and the total cost of the apartment including booking amount was Rs.85,21,500/- as per annexure-II. It was further the case of the complainants that they paid an amount of Rs.84,80,664/- by availing home loan of Rs.42,00,000/- from DHFL Ltd vide annexure C3. As per clause 14 of the buyers agreement dated 20.01.2014, the possession of the apartment was to be delivered within thirty six months with grace period of six months from the date of execution of buyers agreement i.e. on or before 20.07.2017. The claimants after waiting for one year from the stipulated date of delivery of possession decided to withdraw from the project and requested the respondents to refund the entire amount paid by them alongwith interest through an email dated 21.11.2018 Annexure-C4, but, no reply was ever received from the side of the respondent, however, on 22.05.2019 an email Annexure C5 was received from the side of the

respondent that they had received partial completion certificate qua the project in question and offered possession to the complainant. The said offer of possession without obtaining completion certificate/ occupancy certificate was not a legal one. As the complainants had already withdrawn from the project, and they could not be forced to take possession after delay of two years. Hence, the instant complaint.

2. Upon notice, respondent contested the complaint and in the written reply preliminary objections regarding cause of action to the complainants to file the instant complaint as there was no violation of the Act and there being no delay on the part of the respondent in handing over the possession because the period for completing the project had been given as nine years i.e. up to 31.08.2026 at the time of getting registration of the project with RERA. As such, the complainants were not entitled to grant of refund, interest or compensation as claimed by them. It was further alleged that no agreement to sell as per provisions of the Act had been executed between the parties. Rather, the agreement dated 11.03.2013 that has been referred to in the complaint had been executed much prior to the coming into force of the Act. Otherwise also, the complainants could not invoke the jurisdiction of this Authority as per clause 35 of the agreement mentioned above as

they were required to invoke the Dispute resolution mechanism settled between the parties in the agreement. It was further alleged that the project in question was complete way back in June 2018 prior to filing of the instant complaint on 19.07.2019 and on 03.07.2018 respondent applied for obtaining the completion certificate/occupancy certificate before the competent authority. Partial completion certificate was also issued to the respondent on 10.05.2019 vide Annexure-R4 and after obtaining said certificate, offer of possession was made to the complainants on 16.05.2019 vide Annexure-R5. On merits, the booking of the apartment in question and its allotment to the complainants had been admitted. Rest of the averments of the complaint have been denied and prayer for its dismissal had been made.

3. Both the respective representatives for parties addressed arguments on the basis of the submissions made in their respective pleadings as already summarized above 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 booked apartment bearing Apartment No.4113, Type-A, 11th Floor, Tower No.4, in the project

namely **ATS Gold Meadows Lifestyle**. Allotment letter was issued on 20.01.2014 and apartment buyers agreement was executed between the parties on that date. It is also admitted that the total sale consideration of the apartment was fixed at Rs.85,21,500/- and its possession was to be delivered to the complainants within thirty six months plus grace period of six months from the date of the agreement. The complainants deposited an amount of Rs.84,80,664/- with the respondent. It is also admitted that the possession of the apartment has not so far been delivered to the complainants.

6. The first point agitated by the representative for the respondent was that there was an arbitration clause i.e. clause No.35 in the buyer's 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. On this point, reference is required to be made to Sections 79, 88 and 89 of the Act, which read as under:-

> **"S.79.** *No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.*

> **S.88.** *The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.*
>
> **S.89.** *The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force."*

7. 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 complainants under the Act still subsists as it is in addition to the remedy available in any other forums. The argument is accordingly repelled.

8. The next point raised by the representative for respondent was that the transaction pertained to the year 2014 and the Act was not applicable to the instant matter. It may be that that the transaction pertained to the year 2014, but, the present project was ongoing and had not been completed; 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 further submission raised on behalf of the respondent was that no cause of action had arisen to the complainants, as the time for completion of project had been extended by the RERA Authority till August 2026 as was mentioned in the declaration by the respondent at the time of registration of the project, but, this arguments is devoid of any force, as the Hon'ble Bombay High Court in a case titled ***Neel Kamal Realtors Suburban Pvt. Ltd. and anr. Vs. Union of India and ors. WRIT PETITION NO. 2737 OF 2017 decided on 06.12.2017*** has 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."

10. In the above said case, the Hon'ble Bombay High Court has also made this point clear in paragraphs 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."*

11. In view of above observations, the plea of the respondent that they had given a declaration for

completion of the project by August, 2026 while registering the project with this Authority, is not tenable as the agreement between the parties was admittedly executed on 20.01.2014 and date given by the promoter to the allottees for handing over the possession of the flat was within 36 months plus extended period of six months i.e. up to 20.07.2017. At that time, RERA was not in force, therefore, the promoter cannot take the benefit of the completion date of the project i.e. August, 2026 given at the time of registration of the project. It would be appropriate to add here that as per settled proposition of law, this declaration would not be applicable to the allottees, who have entered into agreement prior to the coming into force of this Act.

12. It was also the argument on behalf of the respondent that it was provided in clause 15 of the agreement to sell itself that in case of delay of the delivery of possession, the complainants would be entitled to receive compensation and under such circumstances they were precluded from claiming the refund and interest more particularly when the project was complete and partial completion certificate had been issued vide Annexure R5 dated 10.05.2019 and the offer of possession had already been made to the complainants vide Annexure R4 dated 16.05.2019.

13. On the other hand the argument on behalf of the complainants was that there had been unreasonable delay on the part of the respondent in completion of the project and handing over possession of the apartment to the complainants as stipulated in the agreement, the complainants were certainly entitled to refund and interest from the respondent as it was optional for the complainants either to withdraw from the project by seeking refund of the amount paid with interest etc or in the alternative they may continue with the ongoing project and accept the compensation.

14. The above submission on behalf of the respondent is without substance because in case of default on the part of the respondent in delivery of possession as stipulated in the agreement, it was optional for the complainants either to withdraw from the project by seeking refund of the amount paid with interest etc or in the alternative they may continue with the ongoing project and accept the compensation as per agreement because of delay in delivery of possession. The said clause in the agreement did not bar the complainants nor they can be forced to take delayed possession as has been held by Hon'ble Supreme Court in civil appeals titled ***Pioneer Urban Land and Infrastructure Ltd Vs. Govindan Raghavan*** in case

titled as ***Marvel Omega Builders Pvt Ltd Vs. Shrihari Gokhle***, decided on 30.07.2019.

15. As far as the offer of possession Annexure R4 dated 16.05.2019 is concerned, it was not made within the stipulated period rather, about two years after the stipulated date for delivery of possession. Moreover, the alleged offer cannot be said to be valid offer as it was not the case of the respondent that they also sent alongwith the offer letter, the partial completion/ occupancy/completion certificate. As the possession could not be delivered within the stipulated period and delay occurred in delivery of possession, then a right accrued to the complainants to withdraw from the project on account of unreasonable delay and that right could not be snatched from them on the basis of delayed offer of possession, which otherwise was not a valid offer. Thus, the conduct of the respondent in this behalf would amount to unfair trade practice and in such a situation, the respondent was certainly at fault in not delivering the possession of apartment despite lapse of prolonged 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, apartment 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, apartment , 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."

16. In view of the above provisions of the Act, the respondent was duty bound to offer the possession of the apartment in question and on account of non-delivery of possession despite having received the due insalments, the respondent was liable to refund the amount of Rs.84.80.664/- paid by the complainants to the respondent.

17. The next question which arises for consideration is as to whether the complainants were entitled to any interest on the amount paid by them to the respondent

or not. The fact of the matter remains that the respondent had been using the amount so paid by the complainants to it since respective payments, as such, the respondent was liable to refund the above said amount alongwith interest to the complainants because once the amount was deposited with the promoter and he was getting benefit of interest accrued upon said amount, he could not deny the similar benefit to the buyer. As such, to conclude with, I am of the view that the complainants are entitled the return of principal amount of Rs.84,80,664/- 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 as on this date plus 2% from the respective dates of payments by the complainants till realization. Accordingly, the respondent is directed to return the amount of Rs.84,80,664/- along with simple interest at the State Bank of India highest marginal cost of lending rate as on this date plus 2% from the respective dates of payments by the complainants till realization.

18. Since the complainants could not purchase the apartment 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 the claim by way of engaging a 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 were held entitled for compensation under all the heads i.e. mental agony, litigation expenses etc to the tune of Rs.1,25,000/-.

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

1.	**Principal amount**	**Rs.84,80,664/-**
2.	**Simple interest**	**At the SBI highest marginal cost of lending rate as on this date 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 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:28.09.2020

Balbir Singh

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