

**BEFORE SHRI BALBIR SINGH, ADJUDICATING OFFICER,  
THE REAL ESTATE REGULATORY AUTHORITY, PUNJAB  
PLOT NO.3, BLOCK-B, FIRST FLOOR, SECTOR 18A,  
MADHYA MARG, CHANDIGARH.**

Complaint No.ADC1244/2019

Dated of Decision: 01.04.2021

1. Narayan Mishra
2. Manisha Mishra,  
residents of House NO.GD-217, Ganga Sector, Near  
Indane Gas Bottling Plant Jhunsi, Trivenipuram Colony,  
(ADA), District Allahabad, Uttar Pradesh.  
.....Complainants

Versus

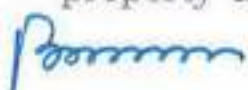
1. Palm Heights Private Limited, Sector 5, Haibatpur Road,  
Derabassi, District Sahibzada Ajit Singh Nagar (Mohali),  
Punjab.
2. DHFL, SCO No.811-812, Sector 22A, Chandigarh.  
.....Respondents

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

Present: Shri Satish Mishra, Advocate, representative for the  
complainants  
Ms. Manju Goyal, Advocate, representative for  
respondent No.1  
Respondent No.2 ex-parte.

**ORDER**

1. Complainants Narayan Mishra and Manisha Mishra filed  
this complaint against respondents Palm Heights  
Private Limited and DHFL Chandigarh seeking refund of  
the amount paid by them alongwith interest,  
compensation and litigation expenses.
2. It was the case of the complainants that they booked  
property unit bearing No.331, third floor, tower No.3, of



1200 square feet super area in Project **Palm Heights** situated at village Sadhe Majra, Haibatpur Road, Tehsil Derabassi, District SAS Nagar, Mohali for a sale price of Rs.28,20,000/- plus other charges. The complainants paid a sum of Rs.4,36,068/- from their own pocket and for rest of the payment, they applied for grant of loan from respondent No.2 DHFL and an amount of Rs.23,26,000/- was approved by the bank and an amount of Rs.23,04,000/- was disbursed by the bank to respondent No.1. Buyer's agreement was executed between complainants and respondent No.1 on 12.11.2014 and a tripartite agreement dated 13.11.2014 was also executed between the parties under the subvention scheme. As per the buyer's agreement, the complainants were not to pay any EMIs till possession, but, in the tripartite agreement, mention of initiation EMIs had been mentioned after a period of 24 months, which was contradictory to the terms and conditions of the buyer's agreement. The tripartite agreement was signed in secrecy and its copy was not supplied to the complainants, which was obtained by them by making payment of Rs.590/-. The possession of the unit was to be delivered by September 2016 including six months grace period; but, the respondent No.1 had not offered the possession of the property unit in question, rather sent a demand letter dated 19.02.2018. Thereafter, the respondent No.1 offered possession of some other unit in

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some other floor to escape liability and had also created a fake document alleged to be offer of possession with a different unit mentioned therein, which was never received by the complainants. The respondents in connivance with each other started charging EMIs from the complainants without any valid offer of possession. The complainants got served legal notice dated 08.08.2018 upon respondent No.2 for their mischievous act, which was never replied. The respondent No.1 had not obtained the occupancy certificate or completion certificate and no communication had ever been made to the complainant for change of their unit by respondent No.1 and no reply has been given by respondent No.2 for commencement of EMIs of complainants. In these circumstances, the complainants were left with no alternative, but, to withdraw from the project and to seek refund of the amount alongwith interest etc. Hence, this complaint.

3. In response to notice, respondent No.1 contested the complaint and filed written reply by way of raising preliminary objections in regard to locus standi of the complainants to file the instant complaint and its maintainability; that the matter was required to be settled through arbitration; that the complainants were holding the flat but were not making the further payments and demand letter was issued on 19.02.2018 for payment of Rs.4,96,743/-; that the provisions of the

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Real Estate (Regulation and Development ) Act 2016, (for short the Act) is applicable prospectively and was not affecting the past contractual rights of the parties; that the complaint was mala-fide and the complainants have not approached this Bench with clean hands and suppressed material facts. On merits, the averments of the complaint were denied and prayer for dismissal of the same was made.

4. Respondent No.2 was earlier proceeded against ex parte on 16.10.2019, but, Shri Harsh Chopra, Advocate appeared on certain dates and obtained adjournments for filing application for setting aside ex parte proceedings, but, on 12.10.2020, none appeared on behalf of respondent No.2, and was again proceeded ex-parte.
5. I have heard the representatives for parties and have gone through the evidence on record.
6. In support of their version, the complainants have relied upon copy of apartment buyer agreement dated 12.11.2014 Annexure C1, copy of tripartite agreement dated 13.11.2014 Annexure C2, copy of receipt for payment of Rs.590/- dated 06.09.2018 Annexure C3, copy of statement of account Annexure C4, copy of demand letter dated 19.02.2018 Annexure C5, copies of emails exchanged between the parties Annexure C6 (colly), copy of the legal notice Annexure C7, copy of

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CIBIL score issued by the State Bank of India Annexure C8.

7. On the other hand, respondent No.1 did not place on record any document.
8. The admitted facts in this case are that the complainants were allotted property unit No.331, third floor, tower No.3, of 1200 square feet super area in Project **Palm Heights** situated at village Sadhe Majra, Haibatpur Road, Tehsil Derabassi, District SAS Nagar, Mohali for a sale price of Rs.28,20,000/- plus other charges. It is further admitted that apartment buyer agreement was executed on 12.11.2014 and tripartite agreement was executed between the parties on 13.11.2014, under which house loan of Rs.23,04,000/- was sanctioned by respondent No.2 out of which an amount of Rs.21,12,800/- was disbursed as per statement of account Annexure C4 and an amount of Rs.4,36,068/- was paid by the complainants from their own pocket (as per clause 2(a) of the apartment buyer agreement itself). It is also an admitted fact that the possession of the property unit in question was to be delivered by September, 2016 which included six months' extended period. It is also admitted fact that possession has not so far been delivered.
9. The first objection taken on behalf of the contesting respondent was that the present case pertains to the period prior to coming in to operation of the Real Estate

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(Regulation and Development) Act 2016 (hereinafter referred to as the Act). The argument, however, lacks merit because the project of the case in hand was not complete prior to coming into force of the Act and it was an ongoing project; 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 Indi 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 Authority.

10. It was also agitated that there was arbitration clause which bars the jurisdiction of this Bench and matter could be decided by the Arbitrator. This objection is devoid of any merit in view of the overriding effect of the Act as per provisions of Section 89. Further, it is noteworthy, that Section 79 of the Act bars the jurisdiction of Civil Courts about any matter which falls within the purview of this Authority or the Real Estate Appellate Tribunal and, thus, the intention to render the



dispute of the kind in hand, as non-arbitral seems to be clear. The Punjab RERA Authority has also given similar observations in order dated 20.03.2018 while deciding the preliminary objection in regard to arbitration clause in complaint case titled as **Surjit Kaur Vs. M/s Omaxe Chandigarh**. Hence, the arbitration clause in the agreement does not have any bearing on the outcome of this case.

11. Another point agitated on behalf of the respondent was that the complainants defaulted in making the instalments as per schedule and therefore fault could not be attributed on the part of the respondent, who validly issued demand notice/letter on 19.02.2018, Annexure C5. On the other hand, the representative for the complainant submitted that the project was incomplete and the remaining amount was to be paid at the time of offer of possession and as such the demand raised through said demand letter was illegal as no offer of possession had yet been made.

12. In the instant case, an amount of Rs.4,36,068/- has been paid by the complainants from their own pocket and an amount of Rs.21,12,800/- totaling to Rs.25,48,868/- (i.e. more than 90% of sale price) has been disbursed by the bank to the respondent against the sale price of Rs.28,20,000/- plus taxes, as noticed above and rest of the amount was to be paid at the time of offer of possession. Though a mention has been made

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in the correspondence in the form of emails i.e. email dated 26.05.2018 part of Annexure C6 between complainants and respondent No.2 DHFL that possession was offered, but, the contesting respondent has not brought on record any offer of possession letter, rather raised the demand of Rs.4,96,743/- vide demand letter dated 19.02.2018 Annexure C5, which is illegal. In these circumstances, it cannot be said that the complainants were at fault in any manner in making the payments. Moreover, the possession was to be delivered way back in the Month of March 2016, which was stipulated as possession date under clause 4 of the buyer's agreement and by adding six months extended period the possession was to be delivered by September, 2016. Even no time line has been provided in the demand letter dated 19.02.2018 i.e. after lapse of seventeen months of the stipulated date of delivery of possession. In these circumstances, the complainants cannot be said to be at fault, rather the fault lay with the respondent, who issued the demand notice/letter on 19.02.2018 illegally, when the project was not complete and no offer of possession had been made. The argument is accordingly repelled.

13. In this case, the loan was advanced by DHFL under the subvention scheme on the basis of tripartite agreement dated 13.11.2014 Annexure C2 and as per clause 3 of said agreement, the respondent/developer was to pay





the Pre-EMI interest on behalf of the complainants/ borrowers for a period of 24 months from the date of first disbursement of the loan or till such time the respondent/developer hands over possession of the residential apartment/flat to the borrower, whichever period is earlier. In sub (c) ii of clause 2 of the apartment buyer agreement dated 12.11.2014 Annexure C1, it was agreed by the respondent promoter that there shall be no EMI and no interest on the disbursement loan amount till offer of possession of floor by the respondent. Meaning thereby, that no Pre-EMIs could be demanded from the complainants till the offer of possession; but, as is apparent from email dated 28.05.2018 part of Annexure-C6, the complainants were asked to bear the interest/EMI w.e.f. April 2018, but, the complainants rightly did not agree to the same. In these circumstances, charging of pre-EMIs prior to offer of possession from the complainants was also against the terms and conditions of the above agreements Annexure C1 and C2 and the respondents were not justified in doing so.

14. In the instant case as noticed above, the respondent failed to deliver possession of the property in question to the complainants and the fault lay with the respondent No.1. 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

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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.*

15. 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 property unit 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."*

16. 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. Under such a situation, the respondent is certainly at fault and the case is squarely covered within the mischief of the provisions of Section 18 of the Act, which runs as under:-

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

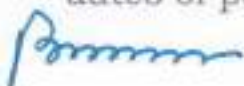
(3) If the promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations made there under or in accordance with the terms and conditions of the agreement for sale, he shall be liable to pay such

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*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 refund the amount of Rs.25,48,868/- to the complainants.

18. The next question which arises for consideration is as to whether the complainants are entitled to any interest on the amount paid to the respondent or not. The fact remains that the respondent has been using the amount so paid by the complainants to it since the day of payment, 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 promoter is getting benefit of interest accrued upon said amount, the similar benefit cannot be denied to the complainants/buyers. As such, to conclude with, I am of the view that the complainants is entitled the return of principal amount of Rs.25,48,868/- 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 today) plus 2% from the respective dates of payments by the complainants till realization. Accordingly, the respondent is directed to return the amount of Rs.25,48,868/- along with simple interest at the State Bank of India highest marginal cost of lending rate (as on today) plus 2% from the respective dates of payments by the complainants till realization.



19. Since the complainants had to seek the remedy under the existing law by engaging a representative and for that obviously had to suffer mental agony and had to incur expenses to pursue the case. 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 prolonged delay and as such, I am of the considered view that the complainants are held entitled for compensation under all the heads i.e. mental agony, litigation expenses etc to the tune of Rs.1,25,000/-.

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

1.	Principal amount	Rs.25,48,868/-
2.	Simple interest	At the SBI highest marginal cost of lending rate (as on today) plus 2% on the above said amount from the date of payment(s) till realization

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3.	On account of mental agony and litigation expenses	Rs.1,25,000/-
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The respondent is directed to pay the above said amount to the complainants within sixty days from the date of this order. The amount if any already paid by the respondent on account of delay in delivery of possession shall stand set off against the above said amount and the loan amount obtained by the complainants from respondent No.2/DHFL shall be first charge on the above said amount. File be consigned to record room after due compliance of notifying the parties of this order well in time.

Dated:01.04.2021



(Balbir Singh)  
Adjudicating Officer  
Real Estate Regulatory Authority