

**BEFORE THE
MAHARASHTRA REAL ESTATE REGULATORY
AUTHORITY, PUNE**

Complaint No.CC004000000010066

- 1. Kanwar Sain,**
R/at 312/4, Doubling Colony,
Civil Lines, Gondiya (M CI)
Tal.Gondiya, District Gondiya-441601
- 2. Sailesh Oica,**
R/at Flat No. 304,
Sumit Mension Society,
Yadav Nagar, Opposit Petrol Pump,
Nagpur-440017
- 3. Prem Shrikrishna Jaiswal,**
R/at Qtr. No. E-10, N.I.T.Colony,
Kapil Nagar, Narl Road,
Nagpur-440 026.
- 4. Ajay Prakash Jaiswal,**
R/at 12/2, SEC Railway Colony,
Wanjari Nagar, P/o. Ajni,
Nagpur-440003.

.. Complainants

Versus

Panchvati Builder,
Plot No.603, Suman Accord,
Amrawati Road, Giripeth,
Nagpur-440010.

.. Respondent

**Coram : Shri W.K. Kanbarkar
Hon'ble Adjudicating Officer**

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Appearance :-**Complainant : In person****Respondent : Adv. K.D. Shukla****FINAL ORDER****(31.01.2019)**

1. Present complaint is for refund of amount together with interest, compensation and cost as per Section 18 of the Real Estate (Regulation & Development) Act, 2016 (hereinafter called as "RERA Act"). Complaint speaks that Kanwar Sain, Shailesh Oica, Prem Shrikrishna Jaiswal and Ajay Prakash Jaiswal have booked flat Nos. 403, 306, 107 and 303 respectively in the project known as "SUMAN VATIKA", situate at Nagpur with M/s. Panchvati Builders vide agreements, dated 12.08.2015, 05.08.2015, 12.08.2015 and 28.12.2016 for the agreed consideration of Rs.24,89,000/- Rs. 22,79,250/-, Rs.21,57,000/- and Rs. 25,56,000/- respectively. The Respondent/Developer has agreed to deliver possession of the booked flats in favour of Mr. Kanwar Sain, Shailesh Oica and Mr. Prem Jaiswal on or before 30th August, 2017; whereas as regards Mr. Ajay Jaiswal, the Respondent agreed to deliver possession of his booked flat on or before 30th March, 2017. In pursuance of the aforesaid agreements, Complainants/Allottees have made some actual payments out of the agreed consideration, by way of cheque and disbursement of

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bank loans. The Respondent/Developer has not completed the construction work as well as has failed to deliver actual possession of the booked flats as per agreement. Further the Complainants surprisingly came to know on 16.03.2018 that Religare Finvest Ltd. has taken physical possession of the said project on which the scheme is being constructed, under the Securitization And Reconstruction of Financial Asset and Enforcement of Security Interest Act, 2002 (hereinafter referred as SARFAESI Act) for the loan taken by the promoter against the said land. The Respondent/Developer has stopped the construction work and the Complainants have not taken the actual possession of the booked flats. Therefore, the present complaint for refund of amounts together with interest thereon and compensation and cost of the present proceedings.

2. Respondent/Developer has filed separate detail explanation towards each of the Complainant/Allottees and resisted Complainants' claim on various grounds, as detailed therein. Present complaint is grossly premature in view of date of possession being mutually and tentatively agreed as 30.12.2018 and hence contention of Complainants that they are unaware of the extended date of possession is not correct. Complainants have booked their flats only after obtaining loan facility as against their respective

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booked flats after providing requisite documents and NOC by Respondent/Developer including NOC granted by M/s. Religare Finvest Ltd. for grant of housing loan to the Complainants. Therefore, at the time of disbursement of respective loans of Complainants, substantive portion of disbursed amounts was adjusted towards and paid by banker of Complainants in favour of said M/s. Religare Finvest Ltd. and there were specific applications made in that regard by the Complainants. So, the contention of the Complainants that surprisingly they came to know about taking physical possession of said project by Religare Finvest Ltd. under the SARFAESI Act, 2002 is not correct. Complainants are bound by the principle of estoppel and they cannot approbate and reprobate the same thing as per their wish and desire. As per the terms and conditions of the agreements, the date of handing over of the possession obviously including completion of said apartments subject to making payment of installments in time by Complainants, but they have failed to make such payments timely and thereby the construction of the entire building could not be completed. There was specific contract between the parties and due to force majeure, the Respondent/Developer could not complete the construction work due to unavoidable circumstances beyond control of the Respondent/Developer. Therefore, the claim of Complainants for refund of

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amounts together with interest, compensation and cost of the present proceedings is not just and proper and the same is not maintainable under law and liable to be dismissed with compensatory cost.

3. On the basis of controversial contentions, following points have arisen for my determination and findings thereon are as under :-

POINTS

FINDINGS

- | | | |
|-----|---|--------------------------|
| (1) | Whether the Complainants/Allottees are entitled to refund of amount together with interest and compensation for the delayed possession in spite of the agreement with Respondent/Developer?.. In the Affirmative. | |
| (2) | What order ? | As per final order |

REASONS

7. **POINT Nos. 1** :- Complainants/Allottees Kanwar Sain, Shailesh Oica, Prem Shrikrishna Jaiswal and Ajay Prakash Jaiswal have admittedly booked their separate flats Nos. 403, 306, 107 and 303 respectively in the project known as 'SUMAN-VATIKA' situate at Nagpur, to be constructed by Respondent Panchvati Builders. Complainants Kanwar Sain and Prem Jaiswal have executed separate agreements on 12.08.2015 for consideration of Rs. 24,89,000/- and Rs. 21,57,000/-

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respectively. Complainant Shailesh Oica and Ajay Jaiswal have executed their separate agreements on 05.08.2015 and 28.12.2016 for consideration of Rs.22,79,250/- and Rs. 25,66,000/- respectively. Further admitted position as per the agreements executed in favour of Complainants Kanwar Sain, Shailesh Oica and Prem Jaiswal, possession of the booked flats must be delivered on or before 30th August, 2017 whereas as regards Complainant Ajay Jaiswal, possession of his booked flat was to be delivered on or before 30th March, 2017, However, Respondent/Developer has taken stand that the date of possession extended till 30.12.2018 that too, with the knowledge and consent of the Complainants and therefore, on that count, the present complaint is liable to be dismissed at the threshold and the same is not maintainable under law. On the contrary, Complainants/Allottees have come with a stand that Respondent/Developer without knowledge and consent of the Complainants, has extended the date of delivery of possession to 30.12.2018. Documents of agreements relating with Complainants Kanwar Sain, Shailesh Oica and Prem Jaiswal clearly demonstrating the work of flat expected to be completed for delivery of possession on or before 30th August, 2017, whereas as regards agreement relating to Ajay Jaiswal reflects that possession of the booked flat after expected completion of construction to be delivered on or before

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30th March, 2017. Respondent/Developer has raised contention as aforesaid that possession was to be delivered on or before 30.12.2018 and therefore, present complaint prima facie at the threshold is liable to be dismissed under the law, but such contention of the Respondent is not substantiated by any document that the Complainants/Allottees have expressly consented for extension of date of delivery of actual possession of the booked flats on or before 30.12.2018.

8. Respondent/Developer has come with a further stand of maintainability of the present complaint on the ground in the light of clause 3.29 of each of the agreements of the Complainants in relation to delivery of possession of the flats booked by them on 30.08.2017 and 30.03.2017 as aforesaid, and thereby the delivery of possession of the booked flats subject to making payment of stipulated installments in time by the prospective purchasers and the construction work is not interrupted or disturbed due to non-availability of building materials, laborers strike, natural calamities, emergencies and other unavoidable circumstances beyond the control of the confirming party. In clause 3.29 of the said agreements, some terms and conditions are reflecting that prospective purchasers are entitled to actual possession of the booked flats subject to payment of timely installments. Apart from such terms and conditions incorporated in clause 3.29

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of the agreements, the earlier terms and conditions of agreement vide clause 2.3 clearly mandate on the part of the Respondent/Developer to complete the construction work and to deliver the actual possession of the booked flats in favour of Complainants Kanwar Sain, Shailesh Oica and Prem Jaiswal on or before 30th August, 2017 however, as regards Complainant Ajay Jaiswal on or before 30th March, 2017. Therefore, contention taken by the Respondent/Developer that delivery of actual possession of the booked flats in favour of prospective purchasers subject to stipulated timely possession is not just, proper, reasonable and appropriate under the law.

9. Clause 2.4 of the agreement also referred on behalf of Respondent mentioning after receipt of full consideration amount and other contributory charges, dues, etc. from the purchaser, developer has to execute conveyance deed/sale-deed and to deliver actual possession of the booked premises in favour of the purchaser. Just to mention that as far as this clause is concerned, appropriately discussed as aforesaid and therefore, needless to discuss anymore in detail. At the instance of the Respondent argued that in the light of terms and conditions of the agreement more particularly expressly agreed in addition to clause 2.3, 2.4 and 3.29, other terms and conditions embodied in clause 3.2 and 3.23 are to be taken into

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embodied in clause 3.2 and 3.23 are to be taken into consideration and thereby binding upon the parties such terms and conditions in the light of Indian Contract Act. Clause 3.2 of the agreement speaks about the cancellation of allotment or agreement by the confirming party for the reasons of non-payment of default into payment or other violation on the part of the purchaser and the confirming party shall be entitled to forfeit the amount paid by the purchaser. The Complainants moved the present complaint to withdraw from the project, but not placed on record about cancellation of allotment or cancellation of the agreement by the confirming party on the ground of non-payment or default of payment or any other failure on the part of the proposed purchasers. At the instance of the Respondent further referred clause 3.23 of the agreement, which speaks that the Purchaser has agreed that the present consideration amount fixed and settled in favour of the prevailing rate of building material and labour charges etc. At the instance of the Respondent not substantiated on record by any authenticate document that than that of fixed and settled which is prevailing rates of building material and labour charges in such material dates and labour charges have been increased to any extent. So, contention of the Respondent that consideration price also includes such increased material and labour charges and therefore, even on that count, claim of the

Complainants is not acceptable in the light of record and legal position.

10. Further objected present complaint contending as per demand of Complainants Ajay Jaiswal and Shailesh Oica, internal modifications and changes in the allotted flats are carried out and amount in that regard are also taken into consideration towards the total consideration price of their booked flats. Such contention of the Respondent is also not substantiated by any authenticate document on record and therefore, such contention is also not acceptable under law.
11. Respondent has contended that due to force majeure, failed to complete the project and now facing financial crisis. Force majeure clause can be made applicable only when the entire situation is beyond human control or dis-majeure. Therefore, the stand taken by the Respondent about non-completion of the project on account of force majeure or financial crisis is also not acceptable and not maintainable under law.
12. Present complaint is objected on the further ground that details of consideration amount and details of actual payments made by the Complainants/Purchasers to the Respondent/Developer are contradictory to each other and not authenticated by any document and therefore, the present claim even on that count, also

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liable to be dismissed. At the instance of the Respondent argued that when the parties have suppressed the material fact, the claim of such party has to be rejected and referred SCC 1994 (Vol.I), Page 1.

13. So also argued on behalf of the Respondents that if the Complainants are allowed to withdraw from the project then every likelihood that the project may be stalled as in this project there are 36 flats to be constructed and some 10 purchasers have booked flats including the Complainants and RERA Act does not allow refund of amount under given circumstances without any justifiable cause.
14. Complaint speaks that the Complainants have surprised and shocked as on 16.03.2018 Religare Invest Ltd. has taken physical possession of the project property under the SARFAESI Act, 2002 for the loan taken by the promoter against the said land. In this context made submissions at the instance of the Respondent that the Complainants were fully aware that the loan facilities have booked flats was made available after obtaining NOC granted by M/s. Religare Finvest Ltd. and cannot be said that surprisingly the possession of the said project taken over by Religare Finvest Ltd. It appears that project premises were mortgaged with the Religare Finvest Ltd. and because of that, NOC was granted by

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said Religare Finvest Ltd. for granting housing loan to the Complainants. Point arisen for determination, whether in the light of given circumstances on record, the claim of the complainants about withdrawal from the said project is justifiable or not. Respondent has failed to deliver actual possession of the flats within the stipulated period and as per the agreement and therefore, the Complaints have suffered much monetary loss and thereby REAR Act allows the Complainants to withdraw from the aforesaid project. Accordingly, claim of the Complainants to withdraw from "Suman Vatika" Project is just, proper and legal and has to be accepted under law. The Complainants (1) Kanwar Sain, (2) Shailesh Oica, (3) Prem Jaiswal and (4) Ajay Jaiswal have booked their aforesaid flats for the agreed consideration of Rs. 24,89,000/-, 22,79,250/-, 21,57,500/- and Rs. 25,56,600/- respectively. The Complainants have made submissions that out of such agreed consideration, Complainant Kanwar Sain, Shailesh Oica, Prem Jaiswal and Ajay Jaiswal have made actual payment of Rs. 23,41,815/-, 23,29,542/-, 20,51,715/- and 21,06,000/- respectively. Of course, the Respondent has objected about making such actual payments and taken contention that there are contradictions in the agreed consideration and the actual payments and there is no authenticate document and therefore, on that count claim is liable to be dismissed. As regards Complainant Kanswar Sain, loan

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statement account of PNB Housing Finance Ltd. indicates disbursement of loan of Rs. 15,72,800/- for the booked flat in the said project and further 3 cheques issued of Rs. 2,00,000/-, Rs. 50,000/- and Rs.88,000/- and total Rs.3,38,000/-. Thus Complainant Kanwar Sain has made actual payment of Rs. 19,10,800/- excluding the stamp duty of Rs. 1,61,800/- and payment of registration charges of Rs. 26,150/-. As regards Complainant Shailesh Oica, loan statement account issued by PNB Housing Finance Ltd. denotes disbursement and payment of Rs. 16,41,492/- towards the booked flat. He has borne stamp duty of Rs.1,48,200/- and registration charges of Rs. 24,060/-. As regards Complainant Prem Jaiswal, loan sanction statement speaks of Rs. 13,40,450/- for the booked flat and further payments by cheque and receipts of Rs. 4,57,000/- and thereby payment made of Rs. 17,97,450/- for the booked flat and Rs. 1,40,300/- towards stamp duty and Rs.21,570/- towards registration charges. So far as Complainant Ajay Jaiswal is concerned, there is loan sanction letter on record, but disbursement of loan of Rs. 10,19,400/- is not speaking. However, complainant Ajay Jaiswal has placed on record receipts and cheques about the actual payment made about the booked flat of Rs. 17,55,500/- and has borne stamp duty of Rs. 1,66,200/- and registration charges of Rs. 26,800/-. Thus in the light of the aforesaid record cannot be said

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that claim of the Complainants for withdrawal from the aforesaid project is not substantiated in documents and not justifiable. On the contrary, the claim of the Complainants for withdrawal from "Suman Vatika" project is just, proper, reasonable and in accordance with the law.

15. In the light of the aforesaid discussions, Complainants are entitled to refund of the amounts as mentioned below.

(1)	Kanwar Sain	..	Rs. 19,10,800/-.
(2)	Shaillesh Olca	..	Rs. 16,41,492/-.
(3)	Prem Jaiswal	..	Rs. 17,97,450/-
(4)	Ajay Jaiswal	..	Rs. 17,55,500/-

16. So far as the stamp duty paid by each of the Complainants, they can claim refund of the same from the competent authority as per the provisions of the Stamp Act.

17. So also the complainants have suffered much monetary loss in the aforesaid project as they have borne registration charges towards the booked flats. On that count, they are further entitled to compensation for the following amounts.

(1)	Kanwar Sain	..	Rs. 26,150/-.
(2)	Shaillesh Olca	..	Rs. 24,060/-.
(3)	Prem Jaiswal	..	Rs. 21,570/-
(4)	Ajay Jaiswal	..	Rs. 26,800/-

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18. In view of the prescribed rules and provisions of Section 18 of the RERA Act, the Respondent/Developer shall be liable to pay interest as per the State Bank of India's highest Marginal Cost of Lending Rate i.e. $8.70\% + 2\% = 10.70\%$ p.a. on amount of refund to each of the Complainants as mentioned in para (15) above. Under such circumstances, Point No.1 is answered accordingly. Further the Complainants are also entitled to cost of this proceedings @ Rs.10,000/- each i.e. total Rs. 40,000/-. In the result, I proceed to pass the following order.

ORDER

- (1) The Respondents/Promoters shall pay interest to the Complainants on the amount of refund mentioned below at the State Bank of India's Highest Marginal Cost Lending Rate i.e. $8.70\% + 2\% = 10.70\%$ p.a. from the date of actual payments received by him from each of the Complainants time to time.

(i)	Kanwar Sain	..	Rs. 19,10,800/-.
(ii)	Shallesh Oica	..	Rs. 16,41,492/-.
(iii)	Prem Jaiswal	..	Rs. 17,97,450/-
(iv)	Ajay Jaiswal	..	Rs. 17,55,500/-

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- (2) The Respondent shall also pay the compensation to each of the Complainants as mentioned below.

(i)	Kanwar Sain	..	Rs. 26,150/-.
(ii)	Shailesh Oica	..	Rs. 24,060/-.
(iii)	Prem Jaiswal	..	Rs. 21,570/-
(iv)	Ajay Jaiswal	..	Rs. 26,800/-

- (v) Respondent/Developer shall pay Rs.10,000/- to each Complainants/Allottees as cost of this complaint.

- (vi) The Respondent/Developer shall pay the aforesaid amounts within 30 days from the date of this order.

- (vii) The Complainants shall execute cancellation deeds of the respective agreements after receipt of all the amounts mentioned in the order, at the cost of the Respondent/Developer.

Pune
Dated :- 31/01/2019

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(W.K.Kanbarkar)
Adjudicating Officer,
MahaRERA, Pune