



**BEFORE THE HARYANA REAL ESTATE REGULATORY
AUTHORITY, GURUGRAM**

Complaint no.	:	2541 of 2021
Date of filing complaint:	:	22.06.2021
First date of hearing	:	09.09.2021
Date of decision	:	14.02.2023

Nandini Mathur and Pradeep Mathur Both R/O: 178, Samachar Apartments, Mayur Vihar, Phase – I, New Delhi- 110091	Complainants
Versus	
M/s Landmark Apartments Private Limited Regd. office: A-11, Chittranjan Park, South Delhi - 110019	Respondent

CORAM:	
Shri Vijay Kumar Goyal	Member
Shri Ashok Sangwan	Member
APPEARANCE:	
Sh. Sanjay Singh Chhabra (Advocate)	Complainants
Sh. Amarjeet Kumar (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainants/allottees under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions

under the provision of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

2. The particulars of the project, the details of sale consideration, the amount paid by the complainants, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S. N.	Particulars	Details
1.	Name of the project	Earlier they invested in landmark the mall but later on request of complainants through letter placed at Annexure R-4 of reply the amount was transferred into Landmark the Outlet, Sector-67, Gurgaon
2.	Total project area	8.3125 acres
3.	Nature of the project	Cyber Park
4.	DTCP license no. and validity status	97 of 2008 dated 12.05.2008 valid up to 11.05.2020
5.	Name of licensee	M/s Landmark Apartments Pvt. Ltd.
6.	RERA Registered/ not registered	Registered vide no. 61 of 2019 dated 25.11.2019
7.	Unit no.	Ground floor (As per on page 35 of complaint)
8.	Unit area admeasuring	520 sq. ft. (As per on page 33 of complaint)



9.	Date of application	15.10.2007 (As per on page 16 of complaint)
10.	Date of execution of agreement to sell	Not Executed
11.	Date of Initial MOU	17.01.2008 (As per on page 17 of complaint)
12.	Date of Subsequent MOU	01.02.2014 (As per on page 32 of complaint)
13.	Provisional Allotment letter/ Application letter	18.12.2013 (Page no. 31 of the complaint)
14.	Possession clause	10. That the company shall offer the possession within 36 months from the date of signing of the agreement to sell. (From the allotment letter) (Page 29 of the complaint).
15.	Due date of possession	18.12.2016 (Calculated from the date of allotment)
16.	Total sale consideration	Rs.64,23,040/- (As per on page 33 of complaint)
17.	Amount paid by the complainants	Rs.50,90,800/- (As alleged by the complainants in the facts on page 6 of complaint)
18.	Assured Return paid by respondent till 05.05.2013	Rs.25,97,340/-

		(As per on page 26 of reply)
19.	Date of withdrawal	05.04.2021 (As per on page 35 of complaint)
20.	Occupation Certificate	26.12.2018 (As per on page 36 of reply)
21.	Offer of possession	23.06.2015 (As per on page 34 of reply) But it is a invalid offer

B. Facts of the complaint:

3. That complainants wanted to purchase a shop. The respondent company sometime in the year 2007 launched a project namely "LANDMARK THE MALL" wherein shops were offered to the public at large. The project was situated in Sector 66, Gurugram Haryana. After discussion and negotiations, the complainants agreed to purchase a shop and applied for in a pre-printed form for allotment of shop on ground floor admeasuring 520 sq. ft. and paid an advance amount of Rs.50,000/-.
4. They further raised Rs.41,95,000/- as a loan from ICICI Bank. The complainants accordingly paid 100% consideration towards the shop. A memorandum of understanding dated 17.01.2008 was entered into between the parties and the same was acknowledged and were therefore entitled to 12% assured return on quarterly basis as per the same.

5. The complainants approached the respondent and showed their willingness for refund of amount as respondent failed to construct the project and provide timely delivery as well as defaulted in payment of the assured return despite having pocketed the entire consideration for the shop. The petitioners repeatedly approached the respondent for refund of the amount as there was no work carried out at the site. At this juncture, the respondent tricked the complainants by offering them a shop in another project namely "The Outlet" represented to be constructed by it. A memorandum of understanding dated 01.02.2014 was executed between parties wherein the complainants were allotted the same size of shop/retail space on the ground floor however at an enhanced rate per sq. ft. burdening them with an additional cost. The amount already paid earlier was adjusted against the said allotment.
6. That the respondent failed to construct the said project as well. Hence, the complainants are no longer interested in continuing with the allotment/booking. Clause 8 of the MOU dated 01.02.2014, categorically assured the complainants that in the event of non-completion of the project the invested amount would be returned along with interest @18% p.a.

C. Relief sought by the complainants:

7. The complainants have sought following relief(s):
- a) Direct the respondent to refund the invested amount of the



complainants in a sum of Rs.50,90,800/- along with agreed rate of interest @18% per annum from the date the amount was paid i.e., 17.01.2008.

b) Direct the respondent to compensate the complainants in a sum of Rs.10,00,000/- towards loss of opportunity, mental pain, agony and harassment.

c) Direct the respondent to pay a sum of Rs.1,00,000/- towards cost of this litigation.

D. Reply by respondent:

The respondent by way of written reply made the following submissions:

8. The complaint is not maintainable as the transaction being contractual in nature and so, the same is to be adjudicated by a civil court.
9. The present complaint is not maintainable as the authority has no jurisdiction to entertain and adjudicate as per the provisions of the Act.
10. That the complainants booked a unit in a project being developed by the respondent by the name "Landmark the mall" situated in sector 66 Gurugram. One of the offers made by respondent at that point of time was that the unit would have benefit of assured return for a period of three years. Thereafter, the complainants entered into an MoU dated 17.01.2008 with the respondent determining all the rights and liabilities of the parties.
11. That the complainants as per the terms of the MoU made 100% payment towards the basic sale price of the shop to the respondent. However, in addition to the above, they were also supposed to make other payments in

the nature of EDC/IDC, maintenance, parking etc. as per the demands raised by the respondent.

12. Thus, there was no time limit provided under the MoU for handing over the possession of the unit. It is pertinent to mention that time was not the essence of the contract for delivering the possession. However, it was mutually agreed upon that the complainants would be entitled to the benefit of assured returns for a period of 3 years or till the possession. It is also to mention here that second MOU was executed between the parties on 01.02.2014 w.r.t. a different unit in different project i.e., Landmark the Outlet and as per it, they have paid 79% of the consideration.
13. That it is pertinent to mention here that the respondent successfully completed the project in the year 2015 and accordingly applied for OC in April 2015.
14. That in consideration of the aforementioned facts, it becomes quite evident that the respondents had already applied for grant of OC in April 2015 when the building was complete in all respects and based on the application, Occupation Certificate was granted on 26.12.2018.
15. The very inclusion of such a clause in the MOU goes a step further in illustrating the fact that the complainants very well knew and understood the implication having no date of possession but having a buffer/protection of payment of assured return. Hence, now it doesn't lie in the mouth of the complainants to allege that there has been undue delay

in the handing over of the possession and the present case needs to be dealt within the parameters of the clauses contained in the MOU executed between the parties by fully understanding the import of its contents without any coercion, influence of undue pressure.

16. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of those undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority:

17. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram district. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee's as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the objections raised by the respondent:

F.I Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act.

18. Another contention of the respondent is that authority is deprived of the jurisdiction to go into the interpretation or rights of the parties inter-se in accordance with the apartment buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the act or the said rules has been executed inter se parties. The authority is of the view that the act nowhere provides, nor can be so construed, that

all previous agreements will be re-written after coming into force of the act. Therefore, the provisions of the act, rules and agreement have to be read and interpreted harmoniously. However, if the act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the act and the rules after the date of coming into force of the act and the rules. The numerous provisions of the act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of **Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)** decided on 06.12.2017 which provides as under:

"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....."

122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."

19. Further, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya***, in order dated 17.12.2019, the Haryana Real Estate Appellate Tribunal observed- as under

"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."

20. The agreements are sacrosanct save and except for the provisions which have been abrogated by the act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

F.II Objections regarding default in payment on behalf of the complainants:

21. It was pleaded on behalf of respondent that the complainants failed to make timely payments of the subject unit. The authority observes that the complainants have paid full consideration for the unit and the same is

evident from the pleadings and documents attached. The occupation certificate of the project has been received on 26.12.2018 after the due date of possession i.e., 18.12.2016. It was the obligation on part of the respondent to complete the construction within time. When the complainants did not get any positive response w.r.t. completion of project. They stopped making further payments to the respondent. As per Section 18 of RERA Act, if a promoter fails to complete or is unable to give possession of an apartment/unit (shop in the present case) duly completed by the date specified in the agreement, the promoter would be liable, on demand, to return the amount received by him in respect of that apartment if the allottee wishes to withdraw from the project. Therefore, the plea advanced by the respondent with regard to non-payment by the complainants is devoid of merit and hence, is rejected.

22. The respondent stated at bar that although no written formal offer letter for taking possession has been issued after obtaining occupation certificate but there was a verbal communication made with the allottees for giving possession. The same was denied by the complainants and stated that no offer of possession has been made till date and hence, are seeking refund of the amount deposited along with prescribed rate of interest.

G. Entitlement of the complainants for refund:

G.I Direct the respondent to refund the invested amount of the complainants in a sum of Rs.50,90,800/- along with agreed rate of interest @18% per annum from the date the amount was paid i.e., 17.01.2008.

23. Initially the complainants were allotted a unit in the project namely 'landmark-the mall' vide MOU dated 17.01.2008. After observing the pace

of construction, which was equivalent to nil, the paid amount thereafter on request of complainant was transferred/adjusted in the new unit in project namely 'Landmark the outlet'. Subsequently, a second MOU was executed between the parties on 18.12.2013 wherein allotting the unit on the ground floor of 520 sq. ft. for a total sale consideration of Rs. 64,23,040/-. A period of 3 years was required by the respondent for completion of the project and that period has admittedly expired on 18.12.2016. It has come on record that against the total sale consideration of Rs.64,23,040/-, the complainants have paid a sum of Rs.50,90,800/-to the respondent.

24. Again, the complainants after observing the pace of construction in the new project made a request of surrender of the unit to the builder on 05.04.2021 i.e., after due date of possession (18.12.2016). The counsel for the complainant further stated that unit was to be part of 'Landmark-the Outlet' and there is no project even as on date in this name and hence, the same seems to be abandoned and hence is entitled for full refund along with interest. Whereas it has been the version of the respondent that the occupation certificate of the same has already been received on 26.12.2018 i.e., before filing of complaint by the complainants on 05.04.2021.
25. The Authority observes as per written submissions of respondent the project in question 'Landmark the Outlet' was a part and parcel of Landmark Cyber Park and the occupation certificate for the said park was received on 26.12.2018. So, the project in question (i.e., Landmark the Outlet) cannot be said to be abandoned and the respondent has obtained the occupation certificate from competent authority on 26.12.2018.

26. The section 18(1) is applicable only in the eventuality where the promoter fails to complete or unable to give possession of the unit in accordance with terms of agreement for sale or duly completed by the date specified therein. This is a case where the promoter has already offered possession of the unit after obtaining occupation certificate. Moreover, the allottee has approached the Authority seeking withdrawal from project after a passage of more than 2 years from date of obtaining occupation certificate and never before. The allottees wishes to withdraw from the project and demand return of the amount received by the promoter in respect of the unit with interest at the prescribed rate.
27. The right under section 18(1)/19(4) accrues to the allottees on failure of the promoter to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein. If allottees has not exercised the right to withdraw from the project after the due date of possession is over till the offer of possession was made to him, it can be inferred that the allottee has tacitly consented to continue with the project. The promoter has already invested in the project to complete it and offered possession of the allotted unit. Although, for delay in handing over the unit by due date in accordance with the terms of the agreement for sale, the consequences provided in proviso to section 18(1) will come in force as the promoter has to pay interest at the prescribed rate of every month of delay till the handing over of possession and allottee's interest for the money he has

paid to the promoter are protected accordingly and the same was upheld by in the judgement of the Hon'ble Supreme Court of India in the cases of *Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra)* reiterated in case of *M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020* decided on 12.05.2022; that

25. *The unqualified right of the allottees to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottees, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottees/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottees does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed.*

28. Since the complainant wishes to withdraw from the project after the OC has been received, the respondent/promoter is directed to refund the amount received by it from the complainants i.e., **Rs. 50,90,800/-**, after deducting 10% of the basic sale price with interest at the rate of 10.60% from the date of surrender/withdrawal of said unit i.e., 05.04.2021 till the actual date of refund of the amount.
29. The respondent also submitted that it has already paid an amount of Rs. 25,97,340/- to the allottee as assured return and took a plea that the both the MOUs were drafted in such a way that it provides provision of assured

return (only in first MOU) instead of provision of providing any due date of possession. The Authority observes that as per first MOU dated 17.01.2008, contained provision of payment towards assured return. However, the later MOU dated 01.02.2014, only provides transfer of funds from the previous project to the present project and does not provide any provision of handing over of possession and of assured return w.r.t. the subject unit. The rights and liabilities w.r.t. first MOU will have no effect to the present complaint as it is submitted by respondent itself in para 6 of its written arguments dated 28.03.2023 that the complainants cannot take leverage from the first MOU after signing the subsequent MOU which also mean that assured return that has been already paid will not be deducted from the refundable amount and ultimately the subsequent MOU has superseded the first one.

G.II Direct the respondent to award compensation of Rs. 11,00,000/-

30. The complainants are seeking relief w.r.t. compensation in the above-mentioned relief. *Hon'ble Supreme Court of India in civil appeal titled as M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors.(supra)*, has held that an allottee is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses. Therefore, for claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainants may file a separate complaint before the Adjudicating

Officer under section 31 read with section 71 of the Act and rule 29 of the rules.

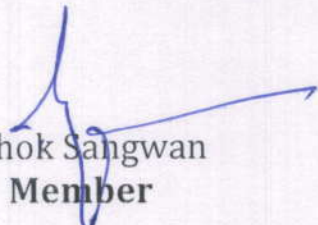
H. Directions of the Authority:

31. Hence, the Authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

- i. The respondent/promoter is directed to refund the amount received by it from the complainants i.e., **Rs. 50,90,800/-**, after deducting 10% of the basic sale price with interest at the rate of 10.60% from the date of surrender/withdrawal of said unit i.e., 0504.2021 till the actual date of refund of the amount.
- ii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

32. Complaint stands disposed of.

33. File be consigned to the registry.


Ashok Sangwan
Member


Vijay Kumar Goyal
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 14.02.2023