

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

<b>Complaint no.</b>	:	<b>3957 of 2021</b>
<b>Date of filing complaint:</b>		<b>30.09.2021</b>
<b>First date of hearing</b>	:	<b>02.11.2021</b>
<b>Date of decision</b>	:	<b>14.02.2023</b>

Varun Sharma and Priyanka Sharma <b>R/O:</b> 22, First floor, Coral Block, Emaar Emerald, Hills, Sector – 65, Gurugram	<b>Complainants</b>
Versus	
M/s Landmark Apartments Private Limited <b>Regd. office:</b> Landmark House, Plot no. 65, Sector – 44, Gurugram	<b>Respondent</b>

<b>CORAM:</b>	
Shri Vijay Kumar Goyal	<b>Member</b>
Shri Ashok Sangwan	<b>Member</b>
<b>APPEARANCE:</b>	
Sh. Anuj Chauhan (Advocate)	Complainants
Sh. Pankaj Chandola (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 allottees 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	Landmark - The Residency, sector - 103, Gurugram
2.	Project area	10.868 acres
3.	Nature of the project	Residential
4.	DTCP license no. and validity status	33 of 2011 dated 19.04.2011 valid up to 15.04.2021
5.	Name of licensee	Basic Developers Pvt. Ltd. and others
6.	RERA Registered/ not registered	Not registered
7.	Provisional allotment letter	09.09.2012 (Page no. 31 of reply)
8.	Date of execution of apartment agreement buyer	Not executed
9.	Unit no.	Cannot be ascertained
10.	Unit area admeasuring	1350 sq. ft. (Page no. 45 of the reply)
11.	Possession clause	16. That the possession shall be offered by the company within 36 months from



		the date of signing of this agreement to sell. (Page 34 of the reply)
12.	Due date of possession	09.09.2015 (Calculated from the date of allotment as no buyer's agreement has been executed inter se parties)
13.	Sale consideration	Rs. 73,04,000/- (Page no. 50 of reply) Rs. 62,53,500/- (Page no. 50 of reply – basic sale price)
14.	Amount paid by the complainants	Rs. 15,34,527/- (Page no. 5 of reply) Last payment was made on 17.10.2012
15.	Occupation certificate	Cannot be ascertained as unit is not specified.
16.	Offer of possession cum final demand letter	Not offered
17.	Reminder letter	08.01.2013
18.	Email sent by complainants regarding initiation of refund of the amount paid by the complainants	15.07.2013 (Page no. 16 of the complaint)
19.	Final Reminder letter	15.10.2013
20.	Surrender requests	24.01.2014 and 29.09.2016

**B. Facts of the complaint:**

3. That in September 2012, the respondent company approached the complainants and requested them to buy a 2BHK residential apartment in the abovesaid project. The complainants booked an apartment in the said project and paid 25% of the total consideration i.e., Rs. 15,34,527/- as booking amount.
4. That the complainants were informed by the builder that the agreement to sale between the parties will be executed soon and On the assurance of the builder, the complainants took a pre-approval from HDFC Bank regarding loan for the rest of the payment of the said apartment. Even after lapse of around one year, there was no development on the site. Neither any construction was initiated nor agreement to sell was executed with the complainants.
5. That aggrieved with the illegal and unlawful conduct of the builder, the complainants, in February 2013, requested the builder to cancel the booking and refund the entire amount but the builder paid no heed to their request. They regularly followed up the builder via email and also in person visits the builder on various occasions to request the respondent to cancel the booking and refund the amount. They were made to run for their own hard-earned money whereas the builder was reaping all the benefits of that money.
6. On 23.01.2014, after various requests, the builder sent surrender format to the complainants and asked them to fill the format accordingly and

send along with requisite documents. The builder assured that if the surrender application is approved by them then the booking shall stand cancelled, and the refund would be initiated.

7. On such assurances, the complainants filled the surrender form and submitted it to the builder on 24.01.2014 along with receipts of the payments, signature verification of the complainants issued by the concerned banks, NOC issued by the dealer 'Madhyaam' which was duly received by the builder, but they never approved the said surrender or initiated the refund.
8. The complainants continuously pursued with the builder for the approval of the surrender form. Even after lapse of 2 years of submitting the surrender form, the said request was pending. They also sent an email on 29.04.2016, wherein they sought the status of the said surrender application. The builder is continuously at default by not paying the complainants their refund amount. It is also submitted that the builder is developing the aforesaid project but till date has not got it registered under the RERA which is also a punishable offence.

**C. Relief sought by the complainants:**

9. The complainants have sought following relief(s):
  - a) Direct the respondent to refund Rs. 15,34,527/- along with pendent lite and future interest @ SBI highest MCLR + 2%, compounded quarterly in favour of complainants and against the respondent.
  - b) Direct the respondent to give compensation to complainants to the tune of Rs. 20,00,000/- for damages caused to them.



- c) Direct the respondent for awarding Rs. 1,00,000/- as the cost of the present complaint in favour of them.

**D. Reply by respondent:**

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

10. That the present complaint, filed by the complainants, is bundle of lies and hence liable to be dismissed as it is filed on baseless grounds. That the complainants herein, has failed to provide the correct/complete facts and the same are reproduced hereunder for proper adjudication of the present matter. That the complainants have not approached the Authority with clean hands and has suppressed relevant material facts. It is submitted that the complaint under reply is devoid of merits and the same should be dismissed with cost.
11. That somewhere in 2012, the complainants got to know about the project launched by the respondent titled as 'Landmark the Residency' (hereinafter referred to as 'Project') situated at Sector 103, Gurgaon and repeatedly approached the respondent to know the details of the said project. Having keen interest in the project, they decided to invest in the project and vide application dated 09.12.2012, booked a unit for a total sale consideration of Rs. 73,04,000/- and paid an amount of Rs.15,34,527/- for further registration.
12. That the complainants were well aware of the terms and conditions mentioned under the said application and only after satisfying with each and every term agreed to sign over the same without any protest or

demur. That as per said application for the project was proposed to be completed with thirty-six months from the date of execution of the agreement subject to certain limitations as may be proposed.

13. That the complainants being habitual defaulter in terms of payment, failed to adhere to the payment plan and have violated the terms and conditions embodied under the aforesaid said application. It is an evident fact that since starting the respondent has been running behind them for respective instalments. Upon not receiving the payment despite making payment reminders the respondent herein was bound to issue a last and final reminder cum cancellation of the unit letter to the complainants.
14. That despite making several requests and reminder to the complainants, they have failed to adhere to the payment schedule and have breached the conditions embodied under the application form. It is to be noted, that in the aforesaid final letter dated 15.10.2013, the respondent has evidently mentioned that in case the complainants failed to make the payment then the aforesaid unit/allotment shall stand cancelled.
15. That even after making constant reminders, the complainants have failed to pay any amount. Due to non-payment of the respective instalment towards the agreed sale consideration it had no other option but to cancel the unit allotted to them.
16. That as per clause 10 of the application for provisional allotment the complainants have agreed that 15% of the total sale consideration shall constitute earnest money and the respondent shall be entitled to forfeit

the amount upon cancellation of unit due to non-payment of instalment. It is submitted that subsequent to the booking of the said unit the complainants have failed to pay any amount and has not only breached the terms of the application but has also made the respondent suffer due to sudden nonpayment not only financially but mentally. Further, as per the aforesaid clause the respondent is entitled to forfeit the booking amount paid by the complainants upto the earnest money and other charges including late payment charges and interest deposited by them. Thereafter, on failure to make any payment further the complainants instead of making delayed payment decided to cancel the unit. It is to note, that since starting the complainants have showed casual behavior towards various compliances even before the execution of the agreement and have failed to make the requisite payments on time.

17. That as per the application, the complainants herein have agreed that in case they withdraw or surrender the said unit then the company may at its sole discretion and shall forfeit the amount paid/deposited upto the earnest money. That upon sudden withdrawal/surrender of the unit by them, it was forced to forfeit the booking amount paid/deposited up to the earnest amount. That the *Hon'ble Maharashtra Appellate Tribunal in the matter of Oberoi Constructions Ltd. vs. Assets Auto (I) Limited Appeal No.AT005000000010502 of 2018*; while setting aside the impugned order has evidently allowed the developer/builder to retain the earnest amount, if the allottee wish to cancel the allotment even in the absence of the agreement signed and executed by both the parties.



However, in the lights of the above stated facts and precedents the respondent herein shall be entitled to forfeit the earnest amount paid by the complainant.

18. That the respondent has cancelled the unit allotted to the complainants long back in the year 2013, On 15.10.2013 and as per the decided law, the period of limitation for claiming the booking amount after adjusting the earnest amount was till 15.10.2016. However, the complainants herein today have approached the Authority on 25.08.2021, almost after a period of five years of limitation period.
19. That the complainants were well aware of the cancellation of the unit and the same was admitted by them vide their request for cancellation. However, it is to note, that they have been sleeping for more than five years and have today filed this complaint which is merely an afterthought of the complainants.
20. That in light of the above, the respondent humbly submits that as per the mutually agreed clauses of the application form, the respondent is entitled to forfeit the earnest amount paid by the complainants as the complainants have failed to execute the agreement and to make the further payments.
21. 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:**

22. 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 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. Entitlement of the complainants for refund:**

**F.I Direct the respondent to refund Rs. 15,34,527/- along with pendent lite and future interest @ SBI highest MCLR + 2%, compounded quarterly in favour of complainants and against the respondent.**

23. The project detailed above was launched by the respondent and the complainants were provisionally allotted the subject unit on 09.09.2012 against total sale consideration of Rs. 73,04,000/-. A period of 3 years was allowed to the respondent for completion of the project and that period has admittedly expired on 09.09.2015. It has come on record that against the basic sale price of Rs. 62,53,500/-, the complainants have paid a sum of Rs. 15,34,527/- to the respondent which constitutes 24.5% of the sale consideration.
24. The complainants after observing the slow pace of construction in the project made a request of surrender of the unit to the builder on 15.07.2013 that is before due date of possession. However, the said request of surrendering the unit by the complainants were not taken into account by the respondent. The respondent submitted that the allotment of the complainants was terminated in 2013 on account of non-payment of due installments by them. But it was clarified by the complainants that they made request for surrender of unit on 15.07.2013 through e-mail but even no reply has been received as to whether they have cancelled the

allotment or not. despite that the respondent sent last reminder letter dated 15.10.2013 and no cancellation letter was ever sent to them. The respondent through pleadings contended that he has cancelled the unit allotted to the complainants long back in the year 2013, specifically on 15.10.2013, as admitted by the complainants, despite that they approached the Authority on 25.08.2021, i.e., almost after a period of five years of limitation period (if it is calculated from 15.10.2013) and further contends that as per mutually agreed clauses of the application form, the respondent is entitled to forfeit the earnest amount paid by the complainants, as they have failed to execute the agreement and to make the further payments. Clause 10 and clause 23 of the application form is reproduced hereunder -:

*10. that 15% of the total sale consideration shall constitute the earnest money. Further the company shall also be entitled to terminate/cancel this allotment/booking in the event of defaults of any terms and conditions of this application.*

*23. the applicant has fully understood and agrees that in case the applicant withdraws or surrender his application for the allotment for any reason whatsoever at any point of time, then the company at its sole discretion may cancel/terminate the booking/allotment/application and shall forfeit the amount paid/deposited up to the earnest money as stated herein above, and may refund the balance amount to the applicant if applicable without interest and compensation whatsoever.*

25. It is observed that at both the occasions i.e., whether acceding to request of withdraw by complainants or cancellation by the respondent were not properly made as he has not refunded any amount after making requisite deductions. Even it did not reply to any of the emails sent on 24.01.2014 and 29.09.2016 by the complainants w.r.t. surrender of the unit. Also, no valid cancellation letter has been sent to the complainant.

26. The respondent raised an objection that the despite such cancelation/surrender in 2013, they were dormant on their rights and approached the

Authority in 2021. The Authority is of the view that even if the said cancellation has been made by the respondent, neither the same has been communicated to the complainants nor any document w.r.t. the alleged cancellation has been placed on record by the respondent. Thus, the complaint cannot be barred on ground of a cancellation letter whose existence is itself a question. Further, the respondent has failed to return the amount of the complainants after making requisite deduction at that point of time, thus there was subsisting obligation on part of the respondent and the cause of action kept recurring. Thus, keeping in view of aforesaid matrix of the case and the law of the land, it is concluded that if not cancellation, then also the present case is of surrender as the complainants made their request for withdrawal on 15.07.2013 i.e., before, due date of handing over of possession. Now the other issue that arise before the Authority is that even if the subject unit of the complainants were cancelled on the request of surrender of the complainants themselves, no amount has been advanced in their favour till date. Thus, there has been subsisting obligation upon the respondent that after deducting the reasonable money/earnest money it should have refunded the amount but the same has not been done. Thus, keeping in view decision of Hon'ble Apex Court of land in cases *of Maula Bux Vs. Union of India, (1970) 1 SCR 928 and Sirdar K.B. Ram Chandra Raj Urs Vs. Sarah C. Urs, (2016) 4 SCC 136*, that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in the nature of penalty, then provisions of the section 74 of the Contract Act, 1872 are

attracted and the party so forfeiting must prove actual damages. A similar view was taken by the *Hon'ble National Consumer Dispute Redressal Commission in consumer case no. 2766 of 2017 titled as Jayant Singhal & Anr. Vs M/s M3M India Limited decided on 26.07.2022*. Even keeping in view, the principles laid down in the first two cases, the Haryana Real Estate Regulatory Authority Gurugram framed regulation 11(5) known as (Forfeiture of earnest money by the builder) Regulations, 2018, providing as under-

*"AMOUNT OF EARNEST MONEY*

*Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment/plot/building as the case may be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer"*

27. It could have retained 10% of the basic sale consideration of the unit and returned the remainder on surrender/withdraw. Since that was not done, so now the respondent is directed to refund the paid-up amount after deducting 10% of the basic sale consideration of the unit being earnest money from the date of surrender i.e., 15.07.2013 within 90 days from the date of this order along with an interest @10.60 % p.a. on the refundable amount, till the date of realization of payment.

**F.II Direct the respondent to give compensation to complainants to the tune of Rs. 20,00,000/- for damages caused to them.**

**F.III Direct the respondent for awarding Rs. 1,00,000/- as the cost of the present complaint in favour of them.**

28. 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.

**G. Directions of the Authority:**

29. 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 paid-up amount of Rs. 15,34,527/-, to complainants after deducting 10% as earnest money of the basic sale consideration of Rs. 62,53,500/- with interest at the prescribed rate i.e., 10.60% on such balance amount, from the date of surrender i.e., 15.07.2013 till the date of realization.



**HARERA**  
**GURUGRAM**

Complaint No. 3957 of 2021

- 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.

30. Complaint stands disposed of.

31. File be consigned to the registry.

Ashok Sangwan  
Member

V.I-3  
Vijay Kumar Goyal  
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 14.02.2023



**HARERA**  
**GURUGRAM**