

BEFORE THE HARYANA REAL ESTATE REGULATORY

AUTHORITY, GURUGRAM

Complaint no. 481 of 2018

Date of first hearing 23.08.2018

Date of decision 05.12.2018

1. Sadhna Gupta
2. Rajeev Kumar Gupta
R/o FC-87, Shivaji Enclave, Raja ..Complainants
Graden, New Delhi- 110027

Versus

M/s Landmark Apartments Pvt Ltd
Office : A-8, CR Park, New Delhi-
110019 ...Respondent

CORAM:

Dr. K.K. Khandelwal
Shri Samir Kumar
Shri Subhash Chander Kush

Chairman
Member
Member

APPEARANCE:

Complainant in person with Advocate for the complainant
Shri Maneesh Gumber
Shri Shriya Takkar, Amarjeet Advocate for the respondent
Kumar



ORDER

1. A complaint dated 25.06.2018 was filed under Section 31 of the
Real Estate (Regulation and Development) Act, 2016 read with

Rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 by the complainants, Sadhna Gupta and Mr. Rajeev Kumar Gupta against the promoter M/s Landmark Apartments Pvt Ltd.

2. Since, the agreement to sell has been executed on 16.05.2012 i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, therefore, the penal proceedings cannot initiated retrospectively, hence, the authority has decided to treat the present complaint as an application for non compliance of contractual obligation on the part of the promoter/respondent in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016

1. The particulars of the complaint are as under: -

1.	Name and location of the project	Landmark The Residency, Sector 103, Gurugram.
2.	Registered/Unregistered	Not registered
3.	Payment plan	Construction linked
4.	Date of agreement to sell	16.05.2012
5.	Buyers agreement	Not executed
6.	Allotment letter	16.05.2012





7.	Booking amount	Rs. 8,00,000/-
8.	Total consideration	Rs 56,70,000/-
9.	Total amount paid by the complainant	Rs 14,61,301/-
10.	Status of the project	Cannot be ascertained
11.	Possession	Cannot be ascertained
12.	Delay till date	Cannot be ascertained
13.	Penalty As per clause 19 of agreement to sell	Rs 5 per sq. ft.
14.	Cancellation of allotment	05.04.2013

2. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. Accordingly, the respondent appeared on 23.08.2018. The reply has been filed on behalf of the respondent.

FACTS OF THE CASE:

3. That M/s India Home 253, Platinum Heights, DDA Multi Storey, Sector- 18B, Dwarka, New Delhi-110078 agent of Respondent approached the complaints for booking of flat of the respondent at Delhi.





4. That respondent and their agent M/s India Home represented to the complainant that the respondent have clear title of the land and upon which project "Landmark-The Residency" at Sector 103, Gurgaon is carried out and they will delivered the apartment within time limit.
5. That both complainants jointly booked an apartment with the respondent in the project "Landmark-The Residency" at Sector 103 vide application dated 16.05.2012.
6. That upon the representation of respondent, complainants deposited vide cheque No. 132328 dated 16.05.2012 sum of Rs. 4,00,000/- for allotment of apartment.
7. That at the time of booking/ receiving the amount, respondent confirmed that they have clear title, interest and right of the land on which the above mentioned project will be executed and also confirmed that respondent had already obtained the necessary license from the department of Town and Country Planning, Haryana and after some period proper agreement in this respect will be executed.



8. That the complainants made from time to time regular payments as per instructions & directions in the favour of the respondent. That till date complainants deposited Rs. 14,61,301/- against above mentioned unit.
9. That without consent of the various buyers including the present complainant, the respondent continue to change the schedule of payments to their advantage and extract more money from complainants without doing any construction and with the intention of deferring the allotment of unit on the pretext of raising money beyond 25% of the project cost and also giving threatening to cancel the booking if payments are not made on due date.
10. That respondent have not entered the builders buyers agreement with complainants even after making payment of more than 25% of the cost of unit by misrepresentation and suppressing the facts that the matter was in court and cannot be entered until dispute with farmers are settled.
11. That the complainants from time to time visited the respondent, mail, telephonic and reminder requested the



respondent to know the actual position of the project, but failed.

12. That the complainants till date deposited Rs. 14,61,301/- (including service tax) against the above mentioned unit from time to time as advised by the respondent

13. That in spite of no allotment was made of a particular unit in the residency project and no builders buyers agreement entered, complainant continued and deposited amount based on demands raised by the respondent against various demand letters.

ISSUES RAISED BY THE COMPLAINANTS:

14. The following issues have been raised by the complainant:

- i. Whether or not the respondent is bound to refund the amount that has been received by him from the complainants?
- ii. Whether or not the complainants are entitled to seek compensation on account of hardship caused to them due to failure of fulfilment of obligations by the promoter?



RELIEF SOUGHT BY THE COMPLAINANTS:

15. In view of the facts mentioned the following reliefs have been sought by the complainants:

- i. Refund the amount of Rs 14,61,301 that was paid by the complainants to the respondent.**
- ii. Pay interest from the date of booking @18% compounded till realization.**
- iii. To pay compensation @ Rs 5 per sq. ft. for every month amounting to Rs 27,000 as on date and further to be paid till its realization.**
- iv. Cost of litigation charges of Rs 55,000 to the complainants.**
- v. Any other relief that this hon'ble authority deem fit and proper.**



REPLY BY THE RESPONDENT:

16. The respondent submitted that the present complaint is not maintainable in the eyes of law as the complainants have not approached this hon'ble authority with clean hands and has not disclosed the true and material facts relevant to this case. The complainants have suppressed this material fact that the said unit was cancelled by the respondent (vide letter dated 05.04.2013) due to default in making payment.

17. It is settled law as held by the hon'ble Supreme Court in S.P. Chengalvaraya Naidu v. Jagannath that non-disclosure of material facts and documents amounts to a fraud not only on the opposite parties but also on the court. Reference may also be made to the decisions of the hon'ble Supreme Court in Dilip Singh v State of UP and Amar Singh v. Union of India which is also been followed by the hon'ble National Commission in the case of Tata Motors v. Bbaba Huzoor Maharaj.

18. The respondent further submitted that the present complaint is not maintainable before this authority in terms of section 71 of the Act *ibid.*



19. The respondent further submitted that the complainants are attempting to raise issues now at a belated stage, attempting to seek modification of the application of the allotment terms entered into between the parties in order to acquire benefits for which the complainants are not entitled in the least.

20. The respondent submitted that the applicant had wilfully agreed to the terms and conditions of the application for allotment and are not at belated stage attempting to wriggle out their obligations by filing the instant complaint before this authority.

DETERMINATION OF ISSUES:

21. After considering the facts submitted by the complainants, reply by the respondents and perusal of record on file, the issue wise determination are as follows:

- i. With respect to the **first issue**, it has to be noted that the builder is duty bound to execute the builder buyer agreement and has failed to do the same. Clause 16 of the allotment letter dated 16.05.2012 mentions that the due date of possession shall be calculated from the date of



execution of buyers agreement. The said clause has been reproduced below:

"The company shall make all efforts to handover possession of the unit within 36 months from the date of the execution of the buyer agreement, subject to certain limitations as may be provided in the buyers agreement and timely compliance of the provisions of the buyers agreement by the applicant. The applicant agrees and understands that the company shall be entitled to a grace period of 90 days and above the period more particularly specified hereinabove, for applying and obtaining necessary approvals in respect of the project."

Thus, the due date cannot be ascertained since no buyers agreement has been executed the date.

There is no photographs annexed with the reply submitted by the respondent and no document is produced to show the status of the project. Thus, the issue of refund cannot be determined.

- ii. With respect to the **second issue** raised by the complainant, the complainant reserves his right to seek compensation from the promoter for which he shall make separate application to the adjudicating officer, if required. Also, the complainant had made a statement on



23.08.2018 during proceedings that he is not appearing before the authority for compensation but for the fulfilment of the obligations by the promoter as per the Act. Therefore, the issue raised by the complainant regarding compensation becomes superfluous.

FINDINGS OF THE AUTHORITY:

22. The preliminary objections raised by the respondent regarding jurisdiction of the authority stands rejected. The authority has complete jurisdiction to decide the complaint in regard to non-compliance of obligations by the promoter as held in *Simmi Sikka V/s M/s EMAAR MGF Land Ltd.* leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

23. The complainant made a submission before the authority under section 34(f) to ensure compliance of the obligations cast upon promoter.

24. The complainant requested that necessary directions be issued by the authority under section 37 of the Act ibid to the promoter to comply with the provisions and fulfil obligations



25. Counsel for the complainant has raised an issue w.r.t. forfeiture of amount to the extent of Rs.14,61,301/- by the respondent-M/s Landmark Apartment Pvt. Ltd. Counsel for the complainant has alleged that he has made payment of 25% of the total consideration amount. However, the respondent was not forthcoming for getting any BBA signed and later-on the builder vide letter dated 05.04.2013 cancelled and forfeited the entire amount in a unilateral manner. This tactics on the part of respondent builder is high handed. Counsel for the complainant also alleged that he has not received any cancellation letter. Counsel for the respondent raised primarily three issues (i) since the matter is of the year 2013, it is time barred (ii) the doctrine of precedent as ruled by the Hon'ble Apex court is applicable in this case also. (iii) He has also produced a precedent judgment of this authority wherein the matter has been decided on account of delay and latches.



26. After considering all the pros and cons of the matter, in the present case the doctrine of precedent applicability does not fit it as the facts of earlier case are entirely different. The respondent has acted unilaterally perhaps by way of taking the

entire amount in an hurried manner which is unreasonable and unjustified. Builder has no right to forfeit the entire amount which is unreasonable.

DECISION AND DIRECTIONS OF THE AUTHORITY:

27. Thus, the Authority exercising power under section 37 of Real Estate (Regulation and Development) Act, 2016 issue directions:

i. The respondent is directed to refund the balance amount i.e. Rs ~~51,03,000/-~~ ^{14,61,301/-} after forfeiting 10% of the consideration amount and the amount which the respondent had kept.

ii. The respondent is directed to give an interest @ 10.75% per annum amounting to Rs ~~8,90,175/-~~ ^{5,44,778.38/-} from the date of cancellation to date of this order to the complainant.

28. The authority has decided to take suo-moto cognizance against the promoter for not getting the project registered and




Corrected vide order dated 12/8/2019


for that separate proceeding will be initiated against the respondent u/s 59 of the Act by the registration branch.

29. The order is pronounced.

30. Case file be consigned to the registry.


(Samir Kumar)

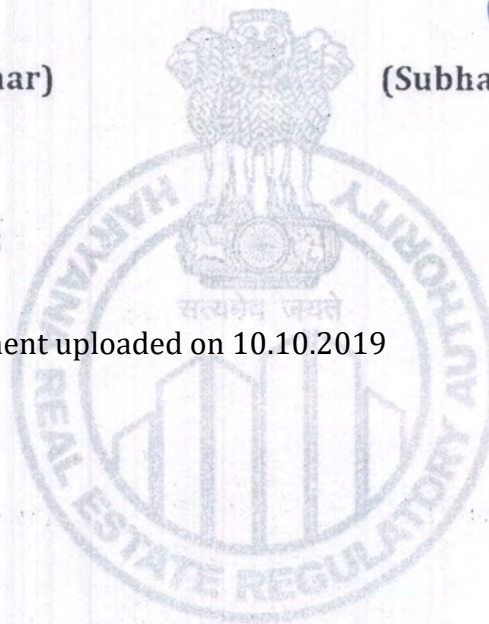
Member


(Subhash Chander Kush)

Member

Date:05.12.2018

Corrected judgement uploaded on 10.10.2019



HARERA
GURUGRAM



PROCEEDINGS OF THE DAY

Day and Date	Wednesday and 05.12.2018
Complaint No.	481/2018 Case titled as Ms. Sadhna Gupta & Anr. Vs M/s Landmark Apartment Pvt Ltd.
Complainant	Ms. Sadhna Gupta & Anr.
Represented through	Complainant in person with Shri Maneesh Gumber, Advocate.
Respondent	M/s Landmark Apartment Pvt Ltd.
Respondent Represented through	Ms. Shriya Takkar and Amarjeet Kumar, Advocates for the respondent
Last date of hearing	12.9.2018
Proceeding Recorded by	Naresh Kumari & S.L.Chanana

Proceedings

Arguments heard.

Counsel for the complainant has raised an issue w.r.t. forfeiture of amount to the extent of Rs.14,61,301/- by the respondent-M/s Landmark Apartment Pvt. Ltd. Counsel for the complainant has alleged that he has made payment of 25% of the total consideration amount. However, the respondent was not forthcoming for getting any BBA signed and later-on the builder vide letter dated 5.4.2013 cancelled and forfeited the entire amount in a unilateral manner. This tactics on the part of respondent-builder is high handed. Counsel for the complainant also alleged that he has not received any cancellation letter. Counsel for the respondent raised primarily three issues (i) since the matter is of the year 2013, it is time barred (ii) the doctrine of

precedent as ruled by the Hon'ble Apex court is applicable in this case also.

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After considering all the pros and cons of the matter, in the present case the doctrine of precedent applicability does not fit it as the facts of earlier case are entirely different. The respondent has acted unilaterally perhaps by way of taking the entire amount in an hurried manner which is unreasonable and unjustified. Builder has no right to forfeit the entire amount which is unreasonable. Accordingly, the respondent is directed to refund the balance amount after forfeiting 10% of the consideration amount and the amount which the respondent had kept, the respondent is directed to give an interest @ 10.75% per annum to the complainant.

Complaint stands disposed of. Detailed order will follow. File be consigned to the registry.

Samir Kumar
(Member)
05.12.2018

Subhash Chander Kush
(Member)
05.12.2018

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28. The authority has decided to take suo-moto cognizance against the promoter for not getting the project registered and

for that separate proceeding will be initiated against the respondent u/s 59 of the Act by the registration branch.

29. The order is pronounced.

30. Case file be consigned to the registry.

(Samir Kumar)

Member

Date:05.12.2018

(Subhash Chander Kush)

Member



HARERA
GURUGRAM



Judgement Uploaded on 05.01.2019