

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

**Complaint no. : 953 of 2018**  
**Complaint filed on : 13.09.2018**  
**Date of decision : 09.01.2024**

Sh. Vinod Kumar  
Mrs. Madhu Yadav  
R/o: H.No. 951, Bawana, New Delhi.

**Complainants**

**Versus**

M/s Landmark Apartments Pvt. Ltd.  
Regd. Office: Landmark Cyber Park, Sector-67,  
gurugram, Haryana.

**Respondent**

**CORAM:**

Shri Vijay Kumar Goyal  
Shri Ashok Sangwan  
Shri Sanjeev Kumar Arora

**Member**  
**Member**  
**Member**

**Appearance:**

Shri Aditya Gupta  
Shri Amarjeet Kumar

Advocate for the complainant  
Advocates for the respondent

**ORDER**

1. The present complaint has been filed by the complainant/allottees in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 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 to the allottee as per the agreement for sale executed inter se them.

**A. Project and unit related details**

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

S. N.	Particulars	Details
1.	Name and location of the project	"Landmark Cyber Park", Sector 67, Gurugram
3.	RERA Registered/ not registered	Not Registered
4.	Date of execution MoU	12.10.2010
5.	Unit no.	Not Mentioned in MoU
6.	Assured return payable upto	Clause4 Of MoU- Rs. 27,500/- per month till the date of possession or 3 years whichever is later
7.	Due date of possession	Cannot be ascertained
8.	Delay till date	Cannot be ascertained
9.	Total sale consideration	Rs. 13,75,000/-
10.	Amount paid by the complainant	Rs. 13,75,000/-
11.	Offer of possession	15.07.2015 (intimation of possession prior to receiving occupation certificate)
11.	Occupation certificate	26.12.2018



12	Offer of possession	14.05.2019
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**B. Facts of the complaint**

3. The complainant has made the following submissions in the complaint:

- a. That complainants and respondent entered into memorandum of understanding for the upcoming project of the respondent named as "Landmark Cyber Park" at sector-67, Gurugram.
- b. That complainants were allotted 500 Sq. Ft. subject to the final confirmation of area on completion of the building for the total sale consideration of Rs. 13,75,000/-. Out of which the complainants have paid a sum of Rs. 13,75,000/-
- c. That the complainants as well as the respondent entered into the MOU dated 12.10.2010 in terms of which as per clause 4, the respondent was liable to make payment of Rs. 27,500/- per month to the complainant as assured return up till the date of possession of the property or 3 years whichever is later.
- d. That complainants visited office of the respondent and requested the respondent to handover physical possession of the property and to clear the outstanding assured returns from December 2012 onwards. Similar request was made by email dated 31.07.2015, 30.07.2015. However, no reply was received from the respondents. That the respondent had offered possession to the complainants on the ground that respondent have applied for occupancy certificate from the appropriate authority, however it is a settled principle of law that the possession offered without the occupancy certificate is non-est in the eye of law.

- e. That the complainants sent email to the respondent for providing copy of license, sanction plan, application for occupation certificate and occupancy certificate and seeking the resolution of issues regarding payment of assured return as well as handover of possession of the property, however no reply was received. The respondent was also asked to make the payment of the remaining assured return along with the interest of 18% P.A.
- f. The complainants have been seeking payment of assured return due, however the respondent has failed to respond to the complainants in any manner. Hence the present complaint.
- g. That the respondent has not paid the assured return in terms of the agreement w.e.f. from January 2013, and therefore, as on the date of filing of this complaint a total sum of Rs. 18,70,000/- has become due and payable along with interest @ 18% per annum.

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

4. The complainants have sought following relief(s)
  - a. The complainants in view of the foregoing submissions be awarded of Rs. 18,70,000 due against the assured return from January 2013 till date along with interest at the rate of 18% per annum compounded quarterly in terms of the provisions of the Act governing this present forum from the date of the same becoming due, until its realization.
  - b. The complainants further be awarded future assured return in accordance with the terms and conditions of the MOU along with interest at the rate of 18% per annum compounded quarterly in terms of the provisions of the Act governing this present forum from the date of the same becoming due, until its realization.



- c. The respondent be directed to provide copy of License, Sanction Plan.
  - d. The complainants further prays for compensation for the harassment and mental agony caused to the complainants on account of the harassment meted out to the complainants for the past 10 years by the respondent.
  - e. The respondent be directed to allot and identify and handover the physical possession of the office space.
5. On the date of hearing, the authority explained to the respondent /promoter about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

**D. Reply by the respondent**

6. The respondent contested the complaint on the following grounds:
- a. The respondent submitted that the hon'ble authority in the similar matter titled as "Brhimjeet vs. Landmark Apartments pvt. Ltd. last listed on 7.8.2018, has held that the matter in dispute therein was to be adjudicated by the adjudicating officer and not by the authority and accordingly dismissed the complaint with the liberty to approach the adjudicating officer.
  - b. The respondent submitted that the present complaint is not maintainable or tenable in the eyes of law as the complainant has not approached this hon'ble authority with clean hands and has not disclosed the true and material facts relevant to this case of the complainant. The complainants had specifically not disclosed the fact that the complainants had failed to make timely payments which was

- a necessary covenant under the provisional allotment. That despite several reminders from the respondent, the complainants had failed to make the payments so as to be entitled for the possession of the unit.
- c. The complainants, thus, have approached the hon'ble authority with unclean hands and has suppressed and concealed material facts and proceedings which have a direct bearing on the very maintainability of the purported complaint and if there had been disclosure of these material facts and proceedings, the question of entertaining the purported CR complainants would not have arisen.
- d. The present petition, so preferred under the real estate regulation and development Act 2016, is not maintainable as the complainant has failed to disclose any maintainable cause of action under the said provisions of the Act as alleged. That section 19 of the real estate regulation and development Act 2016 clearly prescribes the rights and duties of the allottees and section 19 (6).
- e. That the present complaint pertains to compensation and interest for a grievance under section 12, 14, 18 and 19 of the real estate (regulation and development) Act, 2016 (hereinafter referred to as the "said Act" and are required to be filed before the adjudicating officer under rule-29 of the Haryana Real Estate (Regulation & Development) rules, 2017 read with section 31 and section 71 of the said Act and not before this hon'ble regulatory authority under rule- 28. Section 31, section 71, rule-28 and rule-29.



- f. It is submitted that the respondent vide letter dated 23.6.2015 offered possession to the complainant with the request to make payment towards EDC/IDC/IMFC and any other charges in order to take possession.
7. All other averments made in the complaint were denied in toto.
8. 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 based on these undisputed documents and submission made by the complainant.
- E. Jurisdiction of the authority**
9. 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**
10. 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**

11. 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.*

12. 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 complainant at a later stage.

**F. Findings on the relief sought by the complainant**

**F.I Assured return**

13. The Act of 2016 defines "agreement for sale" means an agreement entered into between the promoter and the allottee [Section 2(c)]. An agreement for sale is defined as an arrangement entered between the promoter and allottee with freewill and consent of both the parties. An agreement defines the rights and liabilities of both the parties i.e., promoter and the allottee and marks the start of new contractual relationship between them. This



contractual relationship gives rise to future agreements and transactions between them. The different kinds of payment plans were in vogue and legal within the meaning of the agreement for sale. One of the integral parts of this agreement is the transaction of assured return inter-se parties. The "agreement for sale" after coming into force of this Act (i.e., Act of 2016) shall be in the prescribed form as per rules but this Act of 2016 does not rewrite the "agreement" entered between promoter and allottee prior to coming into force of the Act as held by the Hon'ble Bombay High Court in case *Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors.*, (Writ Petition No. 2737 of 2017) decided on 06.12.2017. Since the agreement defines the buyer-promoter relationship therefore, it can be said that the agreement for assured returns between the promoter and allottee arises out of the same relationship. Therefore, it can be said that the real estate regulatory authority has complete jurisdiction to deal with assured return cases as the contractual relationship arise out of agreement for sale only and between the same parties as per the provisions of section 11(4)(a) of the Act of 2016 which provides that the promoter would be responsible for all the obligations under the Act as per the agreement for sale till the execution of conveyance deed of the unit in favour of the allottees. Now, three issues arise for consideration as to:

- a) Whether authority is within the jurisdiction to vary its earlier stand regarding assured returns due to changed facts and circumstances.

- b) Whether the authority is competent to allow assured returns to the allottees in pre-RERA cases, after the Act of 2016 came into operation,
- c) Whether the Act of 2019 bars payment of assured returns to the allottees in pre-RERA cases
14. While taking up the cases of *Brhimjeet & Anr. Vs. M/s Landmark Apartments Pvt. Ltd. (complaint no 141 of 2018)*, and *Sh. Bharam Singh & Anr. Vs. Venetain LDF Projects LLP" (complaint no 175 of 2018)* decided on 07.08.2018 and 27.11.2018 respectively, it was held by the authority that it has no jurisdiction to deal with cases of assured returns. Though in those cases, the issue of assured returns was involved to be paid by the builder to an allottee but at that time, neither the full facts were brought before the authority nor it was argued on behalf of the allottees that on the basis of contractual obligations, the builder is obligated to pay that amount. However, there is no bar to take a different view from the earlier one if new facts and law have been brought before an adjudicating authority or the court. There is a doctrine of "prospective overruling" and which provides that the law declared by the court applies to the cases arising in future only and its applicability to the cases which have attained finality is saved because the repeal would otherwise work hardship to those who had trusted to its existence. A reference in this regard can be made to the case of *Sarwan Kumar & Anr Vs. Madan Lal Aggarwal Appeal (civil) 1058 of 2003* decided on 06.02.2003 and wherein the hon'ble apex court observed as mentioned above. So, now the plea raised with regard to maintainability



of the complaint in the face of earlier orders of the authority in not tenable. The authority can take a different view from the earlier one on the basis of new facts and law and the pronouncements made by the apex court of the land. It is now well settled preposition of law that when payment of assured returns is part and parcel of builder buyer's agreement (maybe there is a clause in that document or by way of addendum , memorandum of understanding or terms and conditions of the allotment of a unit), then the builder is liable to pay that amount as agreed upon and can't take a plea that it is not liable to pay the amount of assured return. Moreover, an agreement for sale defines the builder-buyer relationship. So, it can be said that the agreement for assured returns between the promoter and allottee arises out of the same relationship and is marked by the original agreement for sale. Therefore, it can be said that the authority has complete jurisdiction with respect to assured return cases as the contractual relationship arises out of the agreement for sale only and between the same contracting parties to agreement for sale. In the case in hand, the issue of assured returns is on the basis of contractual obligations arising between the parties. Then in case of *Pioneer Urban Land and Infrastructure Limited & Anr. v/s Union of India & Ors. (Writ Petition (Civil) No. 43 of 2019) decided on 09.08.2019*, it was observed by the Hon'ble Apex Court of the land that "...allottees who had entered into "assured return/committed returns' agreements with these developers, whereby, upon payment of a substantial portion of the total sale consideration upfront at the time of execution of agreement, the

developer undertook to pay a certain amount to allottees on a monthly basis from the date of execution of agreement till the date of handing over of possession to the allottees". It was further held that 'amounts raised by developers under assured return schemes had the "commercial effect of a borrowing' which became clear from the developer's annual returns in which the amount raised was shown as "commitment charges" under the head "financial costs". As a result, such allottees were held to be "financial creditors" within the meaning of section 5(7) of the Code" including its treatment in books of accounts of the promoter and for the purposes of income tax. Then, in the latest pronouncement on this aspect in case *Jaypee Kensington Boulevard Apartments Welfare Association and Ors. vs. NBCC (India) Ltd. and Ors.* (24.03.2021-SC): MANU/ SC/0206 /2021, the same view was followed as taken earlier in the case of *Pioneer Urban Land Infrastructure Ld & Anr.* with regard to the allottees of assured returns to be financial creditors within the meaning of section 5(7) of the Code. Then after coming into force the Act of 2016 w.e.f 01.05.2017, the builder is obligated to register the project with the authority being an ongoing project as per proviso to section 3(1) of the Act of 2017 read with rule 2(o) of the Rules, 2017. The Act of 2016 has no provision for re-writing of contractual obligations between the parties as held by the Hon'ble Bombay High Court in case *Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors.,* (supra) as quoted earlier. So, the respondent/builder can't take a plea that there was no contractual obligation to pay the amount of



assured returns to the allottee after the Act of 2016 came into force or that a new agreement is being executed with regard to that fact. When there is an obligation of the promoter against an allottee to pay the amount of assured returns, then he can't wriggle out from that situation by taking a plea of the enforcement of Act of 2016, BUDS Act 2019 or any other law.

15. The present complaint was disposed-off on 31.01.2019 by the Authority with following direction:

*.....As such, the counsel for the respondent stated that they have received occupation certificate which is placed on record and they are offering possession to the complainant. As per clause 4 of MoU, both the complainant and respondent are advised to settle their matter w.r.t assured return..*

The complainants filed a rectification application dated 16.11.2020 for rectification of order dated 31.01.2019 before this authority but the same was dismissed without any substantial relief to the complainants. The complainant thereafter preferred an appeal before the appellate tribunal wherein the instant matter has been remanded back to the authority for fresh adjudication of the matter considering the merits of the case, which is reproduced as below:

*...We, thus, feel that the order passed by the Authority is wholly unsustainable in the eyes of law. The order under challenge is hereby set aside. The matter is remitted to the Authority for decision afresh after affording opportunity of hearing to both the parties...*

16. The complainant was allotted 500 sq. ft. for a total sale consideration of Rs. 13,75,500/- against which the complainant paid a sum of Rs. 13,75,000/-. The complainant and respondent entered into the MoU on 12.10.2010. As per clause 4 of the MoU, the respondent was liable to make payment of Rs. 27,500/- per month to the complainant as assured return up till the date of possession of the property or 3 years whichever is later. Which is reproduced as below:

*that the First Party will pay Rs. 27,500/- as an assured return per month payable quarterly to Second Party till the date of possession or 3 years whichever is later*

17. The complainants are seeking unpaid assured returns on monthly basis as per MoU at the rates mentioned therein as possession is not yet handed over. It is pleaded that the respondent has not complied with the terms and conditions of the MoU. Though for some time i.e. June 2013 the amount of assured returns was paid but later on, the respondent refused to pay the same.
18. The respondent states that the project was complete in the year 2015 and accordingly the respondent had applied for OC before the competent authority and offered possession vide intimation letter dated 15.07.2015.
19. Now the question for consideration arises as to for how much period, the allottees are entitled for Assured Return. It is necessary to clarify this concept because after valid and lawful offer of possession, the liability of promoter for assured return comes to an end. On the other hand, if the



possession is not valid and lawful, the liability of promoter continues till valid offer is made and allottee remains entitled to receive assured return till valid possession. The authority is of considered view that a valid offer of possession must have following components:

- i. Possession must be offered after obtaining occupation certificate;
- ii. The possession should not be accompanied by unreasonable additional demands.

20. It is observed that the respondent offered the possession of the subject unit on 15.07.2015 without obtaining occupation certificate as the same was obtained from the competent Authority only on 26.12.2018. Hence, at the outset the said offer of possession failed to fulfil the first and foremost criteria of the valid offer of possession. Hence, the same cannot be regarded as a valid offer of possession.

21. Moreover, the fact cannot be ignored that occupation certificate is public document as well as Section 19(10) of Act also conferred obligation over complainant-allottees to take the possession of the subject unit within two months from grant of occupation certificate. The relevant part of the Act of ,2016 is reproduced as below:

*Every allottee shall take physical possession of the apartment, plot or building as the case may be, within a period of two months of the occupancy certificate issued for the said apartment, plot or building, as the case may be.*

22. Section 19(10) of the Act obligates the allottees to take possession of the subject unit within 2 months from the date of receipt of occupation

certificate. In the present complaint, the occupation certificate was granted by the competent authority on 26.12.2018. The respondent offered the possession of the unit in question to the complainant only on 14.05.2019, so it can be said that the complainants came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainants should be given 2 months' time from the date of offer of possession. These 2 months' of reasonable time is being given to the complainants keeping in mind that even after intimation of possession practically he has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition.

23. Therefore, considering the facts of the present case, the respondent is directed to pay the amount of assured return of Rs. 27,500/- per month from the date the payment of assured return has not been paid i.e., **July 2013 till offer of possession i.e. 14.05.2019 plus 2 month i.e. 14.07.2019 as per the provisions of section 19(10) of the Act of, 2016.**
24. The respondent is directed to pay the outstanding accrued assured return amount till date at the agreed rate within 90 days from the date of this order after adjustment of outstanding dues, if any, from the complainant and failing which that amount would be payable with interest @ 8.75% p.a. till the date of actual realization.

**FII- Direct the respondent to provide copy of License, Sanction Plan.**



25. As per Section 11(3) of the Act, the promoter/builder has to make available to the home buyers the layout/ sanctioned plans of the project along with its specification and the approval by the authority.

**F.III Compensation**

26. Hon'ble Supreme Court of India, in case titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors.* (civil appeal nos. 6745-6749 of 2021, decided on 11.11.2021), has held that an allottee is entitled for claiming compensation 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 shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. Therefore, the complainants are at liberty to approach the adjudicating officer for seeking compensation.

**F.IV The respondent be directed to allot and identify and handover the physical possession of the office space**

27. The respondent builder is directed to locate the allotted unit to the complainants and handover the physical possession of the office space admeasuring 500 sq.ft. with proper access from common areas and passages in the premises as per terms and conditions of the MoU.

**G. Directions of the authority**

28. 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 function entrusted to the authority under section 34(f) of the Act:

- i. The respondent is directed to pay the amount of assured return at the agreed rate i.e., **@ Rs. 27,500/- per sq. ft. per month** from the date the payment of assured return has not been paid i.e., **July 2013 till offer of possession i.e. 14.05.2019 plus 2 month i.e. 14.07.2019 as per the provisions of section 19(10) of the Act of, 2016.**
  - ii. The respondent is directed to pay the outstanding accrued assured return amount till date at the agreed rate within 90 days from the date of this order after adjustment of outstanding dues, if any, from the complainants and failing which that amount would be payable with interest @ 8.75% p.a. till the date of actual realization.
  - iii. The respondent is directed to handover the possession of the allotted unit to the complainants completes in all aspects as per specifications of MoU within two months from date of this order.
  - iv. The respondent builder is directed not to charge anything which is not part of MoU.
29. Complaint stands disposed of.
30. File be consigned to the registry.

  
(Sanjeev Kumar Arora)  
Member

  
(Ashok Sangwan)  
Member

  
(Vijay Kumar Goyal)  
Member

Haryana Real Estate Regulatory Authority, Gurugram

Date: 09.01.2024