BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**465 of 2022**
Date of order	:	**31.05.2024**

Reena Devi and Deepa Both r/o: Jata ki dhani, Sector -57, Wazirabad District- Gurugram, Haryana - 122001	**Complainants**
Versus	
M/s Landmark Apartments Private Limited **Regd. office:** A-11, Chittranjan Park, South Delhi - 110019	**Respondent**

CORAM:	
Sanjeev Kumar Arora	**Member**
APPEARANCE:	
Rahul Bhardwaj (Advocate)	Complainants
Amarjeet Kumar (Advocate)	Respondent

ORDER

1. The present complaint dated 18.02.2022 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	"Landmark – The outlet", Sector 67, Gurugram, Haryana part of Landmark corporate center
2.	RERA Registered/ not registered	Not Registered
3.	Unit no.	ATM - 25, Ground floor (Page 28 of the complaint - allotment letter)
4.	Unit area admeasuring	230 sq. ft. (Page 28 of the complaint- allotment letter)
5.	Date of application form	Undated (Page 93-38 of reply)
6.	Date of execution of agreement	Not executed
7.	Date of execution of MOU	21.02.2012 [Page 25 of the complaint]
8.	Assured Return Clause	*4. That the first party will pay Rs. 46,000/- as assured return per month payable quarterly to second party till the date of possession or 3 years whichever is earlier.* (Page 26 of complaint)

9.	Due date of possession	21.02.2015 ***(As per Fortune Infrastructure v. Trevor d' lima (2018) 5 SCC 442 : (2018) 3 SCC (civ) 1 – three (3) years from the date of MOU)***
10.	Total sale consideration	Rs.46,00,000/- (Page 26 of the complaint)
11.	Amount paid by the complainants	Rs.46,00,000/- (Page 26 of the complaint)
12.	Occupation certificate	26.12.2018 (Page 109 of reply)
13.	Offer of possession	27.07.2015 (Page 108 of reply)
14.	Amount paid by respondent as assured return till Nov 13	Rs. 8,69,400/- (Page 91 of reply)

B. Facts of the complaint:

3. The complainants have made the following submissions: -

I. That, the respondent somewhere in the year 2010-2011 launched a commercial project as IT Park known as "landmark cyber park" in sector 67, Gurgaon. She considered booking a unit admeasuring 230 sq. ft.

II. That relying upon the respondent's representations and being assured that the respondent would abide by its commitments, they in good faith booked a unit in the project by virtue of a memorandum of understanding dated 21.02.2012 by paying a full and final amount of Rs. 46,00,000/- vide cheque. The said booking amount was duly

acknowledged by the respondent in the memorandum of understanding dated 21.02.2012.

III. That, in order to facilitate the said transaction making it legally binding, both the parties entered into the memorandum of understanding (MOU) dated 21.02.2012 which enumerated the rights and liabilities of both the parties. It was agreed by virtue of the MOU entered by the parties that the sale consideration for the said unit would be Rs 20000 per sq. ft. of super area thereby amounting to a total consideration of Rs. 46,00,000/- excluding of all charges levied by the respondent like maintenance, parking, PLC etc. to be paid at the time of possession.

IV. She paid the total sale consideration amounting to Rs 46,00,000/- in one complete transaction which was duly affirmed and acknowledged by the respondent in the memorandum of understanding executed between them under clause 7.

V. It is pertinent to mention that the as per clause 4 of the memorandum of understanding the respondent promised that the respondent would pay Rs. 46,000/- as an assured return/rent on monthly basis payable quarterly to the them till the date of possession or 3 years whichever is earlier.

VI. Moreover, the respondent was liable to pay agreed assured return amount to them every month however, the respondent has failed to pay any assured return amount to them from the month of November 2013 till date.

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

S. NO.	HEADS	INFORMATION

1.	Name and location of the project	Landmark Cyber Park, Sector 67, Gurugram, Haryana
2.	Nature of the project	Corporate Center
3.	Unit no.	ATM no. 25, Ground floor
4.	Unit measuring	230 sq. ft.
5.	Memorandum of Understanding	21.02.2012
6.	Date of execution of apartment buyer's agreement	Not executed

C. Relief sought by the complainant:

4. The complainants have sought following relief(s):

a) Direct the respondent to pay agreed assured return charges along with interest at the prescribed rate to the complainant;

b) Direct the respondent to pay delayed possession charges to the complainants till the handing over the possession;

But vide proceeding dated 29.09.2023, the counsel for the complainants sought amendment of relief (from delayed possession charges to refund). Further vide proceeding 02.02.2024 the counsel for the respondent has averred that she has no objection to this change of relief.

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 respondent:

6. The respondent has contested the complaint on the following grounds:

i. That complainants booked a unit/serviced office space in "Landmark Corporate Centre" which was the part of the project developed by the respondent named "Landmark Cyber Park" at Sector 67 Gurugram. That one of the offers made by the respondent at that point of time was that the unit will have a benefit of assured return for a period till the physical possession is handed over to the buyer. Thereafter, the complainants entered into an MOU dated 21.02.2011 with the respondent determining all the rights and liabilities of the parties.

ii. That the complainant, as per the terms of the MOU made payments of Rs.46,00,000/- towards the sale price to the respondent. However, in addition to the above the complainants were also supposed to make other payments in the nature of EDC/IDC, IFMS and advance maintenance charges etc.

iii. That as per the terms of the MOU, it was specifically agreed that the respondent will pay a sum of Rs.46,000/- every month as assured return, payable quarterly till the date of possession or 3 years whichever is earlier.

iv. That no offer of possession was intimated to the complainant. However, as such there was no time limit provided under the MOU for handing over the possession of the unit since the unit was sold on an assured return plan. That as per the MOU, the complainants were paid the assured returns to a tune of Rs.8,69,400/-.

v. That the respondent successfully completed the project in the year 2015 and accordingly applied for OC on 17.04.2015 and after applying the OC it accordingly informed the tentative date of receiving the OC to all its buyers including the complainants vide letter dated 27.07.2015 and accordingly requested the complainants to clear all the pending dues of EDC and IDC.

vi. That the project is already complete and the respondent has also received the OC from the competent authorities and thus is not a fit case of refund.

vii. That the complainants have neither come forward to take the possession nor cleared them outstanding dues to the tune of Rs. 15,75,235/- and are liable to pay interest on the outstanding dues.

7. 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:

8. The respondent raised a preliminary submission/objection that the authority has no jurisdiction to entertain the present complaint. The objection 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

9. 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

10. 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.*

11. 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.

12. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2021-2022(1) RCR(C), 357*** and 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*** and wherein it has been laid down as under:

> *"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest',*

'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. if the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."

13. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the case mentioned above, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

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.

14. The 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 MOU 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."*

15. 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."*

16. The agreements are sacrosanct save and except for the provisions which have been abrogated by the act itself. Further, it is noted that the MOU has 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 MOU 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.

G. Findings on the relief sought by the complainant.

G.I To refund the entire amount deposited alongwith prescribed rate of interest.

17. The complainants were allotted a unit admeasuring 230 sq.ft. super area, in the project namely 'Landmark the outlet part of Landmark Corporate centre' at Sector 67, Gurugram vide MOU dated 21.02.2012 for a sale consideration of Rs.46,00,000/- and the complainants have paid it all while executing the said MOU.

18. Vide proceeding dated 05.04.2024, the counsel for the complainants stated that occupation certificate has been received by the respondent but neither the offer of possession has been sent by the respondent to the allottees not assured return has been paid. Further stated that the complainants is no more willing to continue with the project and is seeking refund along with interest.

19. On the contrary, the counsel for the respondent stated as per clause 2 of MOU dated 21.02.2012 which is at page 25 of the complaint, it is clearly mentioned that remaining balance and other charges like maintenance, parking, EDC and IDC etc. according to the demand will be paid at the time of possession. Further stated that as regard assured return, it is clearly mentioned that clause 4 of this MoU, that assured return was payable till date of possession or 3 years whichever is earlier. Further stated that the respondent paid the assured return for 3 years except last one quarter.

20. In the present complaint, the complainants intends to withdraw from the project and is seeking return of the amount paid by them in respect of subject unit along with interest at the prescribed rate as provided under section 18(1) of the Act. Sec. 18(1) of the Act is reproduced below for ready reference:

> *"**Section 18: - Return of amount and compensation***
> *18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building.-*
> *(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or*
> *(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,*
> ***he shall be liable on demand to the allottees**, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, **to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed** in this behalf including compensation in the manner as provided under this Act:*
> *Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."*
> *(Emphasis supplied)*

21. **Due date of handing over possession:** As per the documents available on record, no BBA has been executed between the parties and the due date of possession cannot be ascertained. A considerate view has already been taken by the Hon'ble Supreme Court in the cases where due date of possession cannot be ascertained then a reasonable time period of 3 years has to be taken into consideration. It was held in matter ***Fortune Infrastructure v. Trevor d' lima (2018) 5 SCC 442 : (2018) 3 SCC (civ) 1*** and then was reiterated in ***Pioneer Urban land & Infrastructure Ltd. V. Govindan Raghavan (2019) SC 725 -:***

> *"Moreover, a person cannot be made to wait indefinitely for the possession of the flats allotted to them and they are entitled to seek the refund of the amount paid by them, along with compensation. Although we are aware of the fact that when there was no delivery period stipulated in the agreement, a reasonable time has to be taken*

into consideration. In the facts and circumstances of this case, a time period of 3 years would have been reasonable for completion of the contract i.e., the possession was required to be given by last quarter of 2014. Further there is no dispute as to the fact that until now there is no redevelopment of the property. Hence, in view of the above discussion, which draw us to an irresistible conclusion that there is deficiency of service on the part of the appellants and accordingly the issue is answered."

22. Accordingly, the due date of possession is calculated as 3 years from the date of signing of MoU. Therefore, the due date of handing over of the possession for the space/unit comes out to be 21.02.2015.

23. The respondent company completed the construction and development of the project and got the OC on 26.12.2018. Although, the possession of the unit has not been handed over till date. This is a case where the promoter has already obtained occupation certificate. Moreover, the allottee has approached the Authority seeking withdrawal from project after a passage of more than 3 years from date of obtaining occupation certificate and never before. The allottee never earlier opted/wished to withdraw from the project even after the due date of possession.

24. In the instant case, the unit was provisionally allotted vide MOU(memorandum of understanding) dated 21.02.2012 and the due date for handing over for possession was 21.02.2015. The OC was received on 26.12.2018. However, the complainants surrendered the unit on 18.02.2022 by filing the present complaint. Therefore, in this case, refund can only be granted after certain deductions as prescribed under the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, which provides as under:

"5. 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"

25. Thus, keeping in view the aforesaid factual and legal provisions, the respondent is directed to refund the paid-up amount of Rs. 46,00,000/- after deducting 10% of the sale consideration of Rs. 46,00,000/- being earnest money along with an interest @10.85% p.a. (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 on the refundable amount, from the date of surrender i.e., 18.02.2022 till actual refund of the amount after adjusting the amount of assured return paid by respondent within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

H. Directions of the Authority:

26. 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.46,00,000/- after deducting 10% of the sale consideration of Rs.46,00,000/- being earnest money along with an interest @10.85% p.a. on the refundable amount, from the date of surrender i.e., 18.02.2022 till actual refund of the amount after adjusting the amount of assured return paid by respondent.

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.

27. Complaint stands disposed of.

28. File be consigned to the registry.

(Sanjeev Kumar Arora)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 31.05.2024