

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

Complaint no.	:	7557 of 2022
Date of complaint	:	13.12.2022
Date of order	:	07.08.2024

Sanjeev Vohra, R/O: Jayant Vihar, Bari Halder, VPO-Kangra, District- Kangra.		Complainant
Versus		
M/s Landmark Apartments Private Limited Regd. office: A-11, Chittranjan Park, New Delhi-110019. Also at: Landmark House, Plot no. 65, Sector-44, Gurugram-122003.		Respondent
CORAM:		
Ashok Sangwan		Member
APPEARANCE:		
Priyanjali Singh (Advocate)		Complainant
Amarjeet Kumar (Advocate)		Respondent

ORDER

1. The present complaint has been filed by the complainant/allottee 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 complainant, 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	19.12.2012 (Page no. 8 of complaint)
8.	Date of execution of apartment buyer agreement	Not executed
9.	Unit no.	A-123, 12 th floor, Tower-A (Page no. 8 of the complaint)
10.	Unit area admeasuring	1710 sq. ft. (super area) (Page no. 8 of the complaint)
11.	Possession clause	Not provided
12.	Due date of possession	19.12.2015 [Calculated as per <i>Fortune Infrastructure and Ors. vs. Trevor D'Lima and Ors. (12.03.2018 - SC); MANU/SC/0253/2018</i>]
13.	Total sale consideration	Rs. 92,72,300/- (Page no. 2 of reply)
14.	Amount paid by the complainant	Rs. 25,95,000/- (Page no. 7 of reply)
15.	Occupation certificate	25.09.2020 (Page 36 of reply)



16.	Final reminder	10.09.2012 (page 30 of reply)
17.	Cancellation letter	27.09.2012 (page 32 of reply) Note: Cancellation was revoked by the respondent as admitted on page 13 of reply)
18.	Offer of possession	Not offered
19.	Refund request	12.10.2018 (page 46 of complaint)

B. Facts of the complaint:

3. The complainant has made the following submissions: -

- I. That the complainant was allotted a residential unit bearing no. A-123, admeasuring 1710 sq.ft., 12th Floor in project of the respondent named "Landmark The Residency", Sector 103 Gurugram vide provisional allotment letter dated 19.12.2012.
- II. That attracted by the glamorous brochure published by the respondent, complainant submitted application dated 12.07.2012 to book a unit measuring 1710 sq.ft. in the said project under construction linked plan. Clause 16 of the terms and conditions of the booking promised completion and delivery of possession within 36 months after date of execution of buyer's agreement with a grace period of 90 days, but respondent fraudulently avoid execution of the buyer's agreement despite recovering 35% payment from complainant.
- III. That towards the booking, complainant paid Rs.7,00,000/- to the respondent against receipt dated 15.07.2012, Rs.4,00,000/- against receipt dated 07.09.2012. On 10.09.2012, respondent issued a "Final Reminder cum cancellation letter" showing the amount due (25%) as per payment plan of Rs.1838250/- out of which Rs.795052/- remained unpaid and demanding payment of this unpaid balance on the threat of



cancellation. Complainant paid Rs.7,95,000/- against receipt dated 29.09.2012, completing 25% of payment. Thereafter, respondent issued email on 19.11.2012 forwarding a demand notice dated 15.11.2012 for Rs.6,78,550/- being the amount required to complete 35% payment. Complainant issued email protesting against the demand, pointing out that earlier demands had clearly showed 25% as the booking amount, rest of the payments were construction linked and therefore he asked for the withdrawal of the demand notice dated 15.11.2012 and asked for the execution of builder buyer agreement that respondent had promised to be execute before Deepawali. Since respondent was threatening cancellation, complainant met officers of respondent on 12.12.2012 to reiterate the protest that he had earlier raised in the email of 19.11.2012 against the demand for 35% and to demand the execution of builder buyer agreement. Respondent told the complainant to pay Rs.1,50,000/- immediately and issue a postdated cheque of Rs.5,50,000/- for 10.01.2013, assuring that before cashing the cheque of 10.01.2013, the builder buyer agreement would be executed. To avert the threat of cancellation the said cheques dated 12.12.2012 and 10.01.2013 (postdated) were submitted by the complainant, for which receipts were issued by the respondent on 19.12.2012.

- IV. That the respondent issued allotment letter dated 19.12.2012 allotting unit no. A-123 to the complainant. This was a fraudulent re-allotment of the same unit which had earlier been allotted to Mr. Rajesh Ghai on 03.11.2011.
- V. That PDC given earlier on 12.12.2012 against receipt dated 19.12.2012 was cashed by the respondent, thereby completing a total of Rs.25,95,000/- being the completion of 35% payment. No further



payment was made by complainant because the respondent failed to execute the builder buyer agreement.

- VI. That the complainant met officers of respondent on 12.01.2013, reminding that they had promised execution of builder buyer agreement in January 2013 before cashing the cheque dated 10.01.2013 towards last installment of 35% costs. However, the officers of respondent refused to execute the builder buyer agreement citing internal issues. Later complainant discovered that he was victim of a fraudulent double allotment, and that the construction was frozen because the project land was under litigation between respondent and its joint venture partners.
- VII. That since no construction was happening and since unit was already allotted to another person and since there appeared to be ongoing litigation amongst the joint venture partners developing the project, and since respondent was refusing to execute any builder buyer agreement, the complainant asked the respondent for return of his monies.
- VIII. That when the respondent refused to return the monies, the complainant filed complaint no. 180 of 2013 with Economic Offences Wing.
- IX. That on 15.04.2015, the licence of respondent lapsed. Since there was no refund, no progress in Economic Offences Wing case and no construction, the complainant issued a legal notice dated 12.10.2018 formally terminating the allotment and demanding refund of the monies paid with interest. However, the respondent neither refunded monies nor replied to the legal notice. The receipt of notice was admitted by the respondent in subsequent NCLT proceedings.
- X. That on 25.01.2019, complainant (together with another allottee) filed company petition no.280(PB)/2019 before the NCLT under section 7 of the IBC. Reply was filed by respondent and. In their reply in NCLT, respondent claims that it cancelled the allotment on 27.09.2012 but says



that the cancellation was revoked on 10.01.2013 and thereafter there was no cancellation. While the story of this temporary cancellation is obviously false because the respondent issued the allotment letter on 19.12.2012 which is before the period of alleged revocation of cancellation. However, the IBC petition was rendered invalid and dismissed on 14.12.2021 due to the new requirements introduced by Bankruptcy Code (Amendment) Ordinance, 2019 and Insolvency and Bankruptcy Code (Amendment) Act, 2020.

- XI. That the license was renewed by the respondent on 11.06.2019 and OC may have been obtained recently. However, the respondent has neither cancelled and refunded nor offered possession of the unit to the complainant.
- XII. That as complainant has rightly terminated the allotment vide legal notice dated 12.10.2018, respondent is liable to refund the entire monies of the complainant with interest.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s):
- a) Direct the respondent to refund the paid-up amount alongwith prescribed rate of interest.
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 vide reply dated 07.02.2024 contested the complaint on the following grounds:
- i. That the complainant vide application dated 12.07.2012, booked a unit in its project named 'Landmark The Residency' at Sector 103, Gurgaon





for a total sale consideration of Rs. 92,72,300/- and paid an amount of Rs.7,00,000/- for further registration.

- ii. That the complainant was 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.
- iii. That as per clause 16 of the application for provisional allotment, the said project was proposed to be completed with thirty-six months from the date of execution of the buyer's agreement subject to certain limitations as may be proposed and the respondent was also entitled to ninety days grace period over and above the aforesaid period for applying for necessary approvals etc.
- iv. That as per clause 10 of the application form, the complainant was duty bound to make the payment for the said unit as and when demanded by the respondent as per the payment schedule. It is an admitted fact that the time was an essence for the complainant's obligation in making the payment towards the agreed sale consideration and the respondent was not duty bound to issue any payment reminders/notices.
- v. That inspite after knowing the payment obligation, the complainant has failed to pay the requisite amount as and when demanded by the respondent in compliance with the payment schedule and on not receiving any amount the respondent had to serve demand notices calling upon the complainant to pay the amount so agreed.
- vi. That the respondent was authorized to terminate the allotment/agreement and recover all the payment and seek specific performance of the agreement.
- vii. That vide clause 31 of the application form it was agreed that in case the payment is delayed, or any loss is suffered by the respondent due to non-



payment of the instalment, then the complainant will indemnify the respondent for the loss so suffered.

- viii. That the complainant being the habitual defaulter in terms of payment have failed to adhere to the payment plan and have violated the terms and conditions embodied under the aforesaid said application.
- ix. That upon not receiving the payment despite after making payment reminders the respondent was bound to issue cancellation of the unit letter on 27.09.2012 to the complainant. However, upon oral assurances given by the complainant, the respondent revoked its cancelation letter and agreed to re-allot the said residential unit to the said petitioner subject to the complainant making the payment. Such an understanding was arrived at on 10.01.2013 between the respondent and complainant.
- x. That till 10.01.2013, the complainant had paid a sum of Rs.25,95,000/- to the respondent against the allotted residential unit valued at Rs.92,72,300/-. However, even during this time, the complainant had not paid the full amounts due and payable to the respondent in terms of the earlier demands made by the respondent and was falling short on his commitment.
- xi. That on 25.07.2013, the respondent also got issued stamp papers for executing the builder buyer agreement with the complainant qua the unit in question. After issuance of the stamp papers, the respondent requested the complainant to sign the builder buyer agreement; however, the complainant never came forward to execute the same or made any payments with respect to the demands raised by the respondent. Thereafter, in the year 2014, the complainant with an oblique motive and in order to wriggle out of the contractual obligations filed a false complaint case alongwith similarly situated individuals



against the respondent with the Economic Offence Wing, Mandir Marg, New Delhi, under the Indian Penal Code.

- xii. That the complainant had for the very first time issued legal notices dated 12.10.2018 terminating the contract and seeking recovery of the alleged amount alongwith interest and had not raised any such claim before the date of issuance of the legal notices.
 - xiii. That the complainant had earlier filed a claim before the NCLT and the same was dismissed with a liberty to pursue the matter if the cause survives.
 - xiv. That the present complaint filed by the complainant is thus time barred as the same has been filed on 02-12-2022 (date of Performa-B) seeking refund of the entire amount along with interest, whereas the said complainant had lastly made payments qua his unit in question on 19.12.2012. In other words, the limitation to seek recovery of the amount as sought by the complainant stood expired way back in the year December 2015.
 - xv. 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 amount paid by the complainant as he has failed to execute the builder buyer agreement and to make the further payments.
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 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.

F. Findings on the objections raised by the respondent:

F.I Objection regarding complaint being barred by limitation.

12. The respondent has contended that the present complaint is not maintainable and barred by the law of limitation as the complainant had lastly made payments qua the unit in question on 19.12.2012 and limitation to seek recovery of the amount as sought by the complainant stood expired way back in year December, 2015. The complainant has submitted that

despite payment of 35% of the cost of flat, the respondent has failed to execute a builder buyer agreement with the complainant. Moreover, as no construction was happening at the project site due to ongoing litigation amongst the joint venture partners developing the project, the complainant vide legal notice dated 12.10.2018 sought refund of the amount paid by him alongwith interest, but the respondent has neither refunded monies nor replied to the legal notice. After considering documents available on record as well as submissions made by the parties, it is determined that vide legal notice dated 12.10.2018, the complainant has already withdrawn from the project and sought refund of the amount paid alongwith interest. However, the respondent has neither replied to same nor has refunded the amount paid by the complainant so far, which clearly shows a subsisting liability. Moreover, the law of limitation is, as such, not applicable to the proceedings under the Act and has to be seen case to case. Therefore, in view of the above, the objection of the respondent w.r.t. the complaint being barred by limitation stands rejected.

G. Findings on the relief sought by the complainant.

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

13. In the present complaint, the complainant intends to withdraw from the project and is seeking return of the amount paid by him 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)

14. **Due date of handing over of 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."

15. Accordingly, the due date of possession is calculated as 3 years from the date of allotment i.e., 19.12.2012. Therefore, the due date of handing over of the possession for the flat/unit comes out to be 19.12.2015.

16. **Admissibility of refund along with prescribed rate of interest:** The complainant is seeking refund the amount paid by him along with interest prescribed rate of interest as provided under rule 15 of the rules. Rule 15 has been reproduced as under:

Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

17. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.
18. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 07.08.2024 is 9%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 11%.
19. The complainant has submitted that in terms of the construction linked plan, the complainant had paid a sum of Rs.25,95,000/- in respect of the said apartment to the respondent being the completion of 35% payment and no further payment was made by him because the respondent failed to execute the builder buyer agreement. Moreover, as no construction was happening at the project site due to ongoing litigation amongst the joint venture partners developing the project, the complainant vide legal notice dated 12.10.2018 sought refund of the amount paid by him alongwith

interest, but the respondent has neither refunded monies nor replied to the legal notice.

20. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date. The possession of the subject flat was to be delivered by 19.12.2015 whereas, the occupation certificate for the project was obtained by the respondent on 25.09.2020. However, the complainant has already withdrawn from the project by sending legal notice dated 12.10.2018 and sought refund of the paid-up amount with interest i.e., prior to obtaining occupation certificate, due to inordinate delay on part of the respondent; but the said request was not acceded by the respondent. Moreover, as per record even after obtaining occupation certificate way back in September 2020, the respondent has neither cancelled the allotment nor offered possession of the unit to the complainant. In view of the above-mentioned facts, the allottee intends to withdraw from the project and is well within the right to do the same in view of section 18(1) of the Act, 2016.
21. 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. observed as under: -

"25. The unqualified right of the allottee 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 allottee, 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 allottee/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 allottee 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."

22. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottees as per agreement for sale under section 11(4)(a). The promoter has failed to fulfil its obligations as provided Section 13 of the Act, 2016 and also failed to complete or unable to give possession of the unit by the due date of possession. Accordingly, the promoter is liable to the allottee, as he wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by it in respect of the unit with interest at such rate as may be prescribed.
23. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such, the complainant is entitled to refund of the entire amount paid by him at the prescribed rate of interest i.e., @11% 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 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

H. Directions of the Authority:

24. 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.25,95,000/- received by it from the complainant along with interest at the rate of 11% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual realization 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.
25. Complaint stands disposed off.
26. File be consigned to the registry.


(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 07.08.2024