

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

Complaint no.	:	2610 of 2021
Date of complaint	:	01.07.2021
Date of order	:	28.08.2024

Hari Ram Gupta, R/o: F-2611-B, Palam Vihar, Gurugram, Haryana-122017.		Complainant
Versus		
M/s Landmark Apartments Private Limited Regd. Office at: Landmark House 65, Sector-44, Gurugram.		Respondent
CORAM:		
Ashok Sangwan		Member
APPEARANCE:		
Priyanka Agarwal (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	04.06.2013 (Page no. 115 of reply)
8.	Date of execution of apartment agreement buyer	24.12.2013 (Page no. 26 of complaint)
9.	Unit no.	A-24, second floor, Tower-A (Page no. 32 of the complaint)
10.	Unit area admeasuring	1350 sq. ft. (Page no. 32 of the complaint)
11.	Possession clause	10.1 Possession The Developer/Company based on its present plans and estimates and subject to all just exceptions, contemplates to complete construction of the said Building/said Apartment within a period of Four years (48 Months) from the date of execution of this Agreement unless there shall be delay or there shall be failure due to reasons mentioned in Clauses 11:1, 11.2, 11.3 and Clause 41 or due to failure of Intending Allottee(s) to pay in time the price of the said Apartment along with

		<p>other charges and dues in accordance with the schedule of payments given in Annexure F or as per the demands raised by the Developer/Company from time to time or any failure on the part of the Intending Allottee(s) to abide by all or any of the terms or conditions of this Agreement. The Intending Allottee(s) agrees and undertakes that the company shall be entitled for a period of six months for the purpose of fit outs and a further period of six months on account of grace over and above the period more particularly specified here-in-above. [emphasis supplied] (Page 42 of the complainant)</p>
12.	Due date of possession	24.12.2018 (as per possession clause) (grace period of 12 months is allowed)
13.	Sale consideration	Rs.70,54,250/- (As per BBA on page 32 of complaint)
14.	Amount paid by the complainant	Rs. 47,20,000/- (As per SOA dated 23.09.2021 on page no. 215 of reply)
15.	Occupation certificate	25.09.2020 (Page 103 of reply)
16.	Offer of possession cum final demand letter	12.11.2020 (As per on page 178 of reply)
17.	Refund Request and reminder for refund	08.01.2018 and reminder on 24.11.2018 (Page no. 81 and 80 of the complaint respectively)

B. Facts of the complaint:

3. The complainant vide complaint and written submissions has made the following submissions: -
 - I. That the complainant was allotted a flat bearing no. A-24, Tower-A, admeasuring 1350 sq. ft. in the project of the respondent named

“Landmark the Residency” Sector- 103, Gurugram vide apartment buyer’s agreement dated 24.12.2013 for a total sale consideration of Rs.54,63,750/- against which the complainant has paid a sum of Rs.46,20,000/- in all in a time bound manner to the respondent till 26.10.2013.

- II. That as per clause 10.1 of the buyer’s agreement, the respondent was liable to hand over possession of the unit within period of 48 months from the date execution of this agreement, but the builder has failed to hand over possession even after passing approx. 2 year 6 months from the due date of possession.
- III. That after extracting more than 80% of the amount without doing appropriate work, the builder raised new demand. The complainant visited the site and saw that the builder was not doing considerable work and extracted money in advance. Hence, the complainant did not pay installment and the builder terminated the said unit and send cancelation letter on dated 12.06.2014. However, the respondent did not refund a single penny to the complainant, thus the said letter is null and void ab initio. Further, as per respondent’s own admission, the respondent kept on sending frequent demand letters to the complainant, thus rendering the aforesaid cancellation letter dated 12.06.2014 as unenforceable. Furthermore, the respondent sent an offer of possession letter dated 12.11.2020 to the complainant, thus the respondent itself acknowledged that the unit of the complainant was not cancelled.
- IV. That the complainant made repeated request before respondent to refund the amount paid by the complainant with an interest @18% per annum after cancelation of unit by builder, but no response has been received from the respondent. The complainant wrote letters to

respondent with reminder for refund the amount on 08.01.2018 & 24.11.2018 respectively, but the builder never refunded the amount till date.

- V. That such an inordinate delay in delivery of the possession to the allottee is an outright violation of the rights of the allottee under the provisions of RERA Act as well the agreement executed between the parties. The complainant's demand for the return of money with interest is in terms of Section 18(1) read with Section 18(3) of the Act, along with principles of justice, equity and good conscience.
- VI. That by merely sending a termination letter without actually refunding the amount paid by the complainant does not extinguish his right to seek relief before the Authority as the right of complainant survives till the time the actual amount is refunded .

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 interest @18% p.a.
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 its reply and written submissions has contested the complaint on the following grounds:
- i. That the complainant had in all probabilities purchased the apartments with a profit motive. However, later on account of recession, the complainant changed his mind to conclude the sale and started making defaults in making payment of the due amount. The respondent vide letter dated 12.06.2014 issued a final reminder cum cancellation letter to the

complainant on account of non-payment of dues against the demands raised by the respondent by way of several letters and reminders. It is submitted that the complainant was going through a financial crunch and on this score, he approached the respondent with a request to not cancel the unit and further assured to abide by the due payments in future. It is submitted that the respondent being a customer-oriented company acceded to the said request of the complainant and revoked the final reminder cum cancellation letter and issued reminder letter dated 12.06.2014. However, even thereafter the complainant defaulted in making payment of the dues with a promise to make the subsequent payments on time. Further another demand notice was sent by the respondent vide letter dated 03.11.2017 for clearance of the pending dues.

- ii. That thereafter vide letter dated 11.12.2018 an intimation regarding the possession of the unit was issued to the complainant. Through the said intimation, the respondent requested the complainant to clear its pending dues and contact the office of the respondent for the final formalities of the handover process. However, the complainant did not come forward to make any further payment or contact the office of the respondent for taking possession of the allotted flat. Thereafter, reminder 04.09.2019 was also sent to the complainant for clearance of the outstanding dues in order to enable the respondent to expedite the handover process of the unit, but the complainant failed to adhere to the said request for clearance of dues and taking over of possession.
- iii. That the respondent had applied for the grant of the occupation certificate on 23.04.2019. However, the Director Town and Country Planning Department, Haryana granted the occupation certificate to the respondent vide its letter dated 25.09.2020. Hence, the delay in this case cannot be attributed to the respondent as it took more than 1 year for the concerned

dept to grant occupation certificate to the respondent project.

- iv. That the respondent sent various demands & reminders dated 30.09.2020, 12.11.2020 and 15.03.2021 for clearance of outstanding dues and requested the complainant to come forward to take possession of the allotted unit. However, the complainant failed to clear the outstanding dues and take possession of its unit.
- v. That the complainant, instead of taking the possession and making the payment of remaining dues, filed a case for refund apparently with an intention to enrich himself in an unjust manner.
- vi. That in accordance with clause 10.1 of the buyer's agreement executed between parties on 24.12.2013, the possession of the unit was agreed to be handed over within a period of 48 months in addition to a grace period of one year.
- vii. That the construction of the project was affected on account of unforeseen circumstances beyond the control of the respondent such as delay on part of competent authority in granting occupation certificate, directions of the Hon'ble Supreme Court of India regarding mining activities, non-availability of raw material due to various orders of Hon'ble Punjab & Haryana High Court and National Green Tribunal, restrictions on usage of ground water, etc.
- viii. That the letter dated 12.06.2014 was issued to the complainant with the subject, "Final reminder cum cancellation letter". Although the complainant did not make any payment to the respondent, there was no formal letter of cancellation issued to the complainant thereafter and immediately thereafter a demand letter dated 31.07.2014 was issued in the form of a demand of pending dues against the unit of the complainant requesting for the payment of Rs 9,47,720/-. This goes on to substantiate the fact that the unit of the complainant was never cancelled, and the

respondent did not exercise the option of cancelling the unit of the complainant. It is also relevant to mention that the subsequent demands raised by the respondent immediately after the final reminder are more than sufficient to prove that the unit of the complainant was never cancelled, and it is further relevant to mention that the complainant was very much aware that his unit was not cancelled by the respondent.

- ix. That the claim of the refund on the basis of cancellation of the unit is an afterthought and had it really been thought to have been cancelled in the year 2014 then the complainant would have approached the respondent for refund much earlier than the year 2018.
 - x. That the complainant is not a consumer and an end user since he had booked the apartment in question purely for commercial purposes as a speculative investor and to make profits and gains. Hence, the captioned complaint is liable to be dismissed at threshold.
 - xi. That the present complaint has been filed after a period of more than 7 years from the date of cancellation and thus is hopelessly barred by limitation and the complainant has no right to seek any relief whatsoever. It is further brought to the notice of the Authority that the complainant thereafter requested to revoke the cancellation of the unit, which was revoked only subject to payment of the dues and accordingly a demand was raised thereafter. However, the same was never paid by the complainant and thus the cancellation of the unit subsists in the eyes of law.
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 present complaint has been filed after a period of more than 7 years from the date of cancellation. The complainant has submitted that he has wrote letters to respondent with reminder for refund the amount on 08.01.2018 & 24.11.2018 respectively, but the builder never refunded the amount till date. Further, the respondent kept on sending frequent demand letters to the complainant, thus rendering the aforesaid cancellation letter dated 12.06.2014 as unenforceable. Furthermore, the respondent sent an offer of possession letter dated 12.11.2020 to the complainant, thus the respondent has itself acknowledged that the unit of the complainant was not cancelled. After considering documents available on record as well as submissions made by the parties, it is determined that various demands/reminders as well as final reminder cum cancellation letter has been issued for making payment of the outstanding dues to the complainant, but the unit of the complainant was never cancelled by the respondent. The alleged cancellation letter dated 12.06.2014 was in fact a final reminder to the complainant to make the outstanding payments within a period of 7 days of that letter to avoid cancellation the unit. The respondent has itself admitted the said fact in para no. 7 at page 21 of its reply that *"Although the complainant did not make any payment to the respondent, there was no formal letter of cancellation issued to the complainant thereafter.* Moreover, the respondent after obtaining occupation certificate from the competent authority has offered possession of the unit to the complainant vide its letter dated 12.11.2020. However, the complainant has already withdrawn from the project and sought refund of the amount paid alongwith interest

vide letter dated 08.01.2018. Despite receipt of the same, the respondent has neither replied nor acceded the request of 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.

F. II Objection regarding the complainants being investor.

13. The respondent has taken a stand that the complainant is an investor and not a consumer. Therefore, he is not entitled to the protection of the Act and are not entitled to file the complaint under section 31 of the Act. It is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"

In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the agreement, it is crystal clear that the complainant is an allottee as the subject unit was allotted to him by the promoter. Further, the concept of investor is not defined or referred in the Act. Moreover, the Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as *M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.* has also held that the concept of investor is not defined or referred in the Act. In view of the above, the contention of promoter that the allottee being investor is not entitled to protection of this Act stands rejected.

F.III Objections regarding force majeure.

14. The respondent/promoter has raised the contention that the construction of the project has been delayed due to force majeure circumstances such as delay on part of govt. authorities in granting approvals, ban on the use of underground water for construction purposes, restriction on mining due to orders passed by Hon'ble Supreme Court, non-availability of raw material due to various orders of Hon'ble Punjab & Haryana High Court and National Green Tribunal etc. However, all the pleas advanced in this regard are devoid of merit. First of all, the possession of the unit in question was to be offered by 24.12.2018. Moreover, time taken in governmental clearances cannot be attributed as reason for delay in project. Further, the events alleged by the respondent do not have any impact on the project being developed by the respondent. Furthermore, some of the events mentioned above are of routine in nature happening annually and the promoter is required to take the same into consideration while launching the project. Thus, the promoter/respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

G. Findings on the relief sought by the complainant.

G.I To refund the entire amount deposited alongwith interest @18% p.a.

15. The complainant has submitted that as per clause 10.1 of the buyer's agreement, the respondent was liable to hand over possession of the unit within period of 48 months from the date execution of this agreement, but the builder has failed to hand over possession even after passing approx. 2 year 6 months from the due date of possession. Further, when the complainant visited the site, he observed that even after extracting more than 80% of the amount from him the builder was not doing considerable work at the project site. Hence, the complainant did not pay any further

installment to the respondent and sought refund of amount vide letter dated 08.01.2018, but the respondent never refunded the amount till date.

16. 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 @18% p.a 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)

17. **Due date of handing over of possession:** Clause 10.1 of the apartment buyer's agreement dated 24.12.2013 provides for handing over of possession and is reproduced below:

10.1 SCHEDULE FOR POSSESSION OF THE SAID APARTMENT

The Developer/Company based on its present plans and estimates and subject to all just exceptions, contemplates to complete construction of the said Building/said Apartment within a period of Four years (48 Months) from the date of execution of this Agreement unless there shall be delay or there shall be failure due to reasons mentioned in Clauses 11.1, 11.2, 11.3 and Clause 41 or due to failure of Intending Allottee(s) to pay in time the price of the said Apartment along with other charges and dues in accordance with the schedule of payments given in Annexure F or as per the demands raised by the Developer/Company from time to time or any failure on the part of the Intending Allottee(s) to abide by all or any of the terms or conditions of this Agreement. The Intending Allottee(s) agrees and undertakes that the company shall be entitled for a period of six months for the purpose of fit outs and a further period of six months on

account of grace over and above the period more particularly specified here-in-above.

18. As per clause 10.1 of the buyer's agreement, the possession of the allotted unit was supposed to be offered within a stipulated timeframe of 48 months plus 12 months of grace period, in case the construction is not complete within the time frame specified. It is a matter of fact that the respondent has not completed the project in which the allotted unit is situated and has not obtained the occupation certificate by December 2017. Accordingly, in the present case the grace period of 12 months is allowed. Therefore, the due date of possession comes out to be 24.12.2018.
19. **Admissibility of refund along with prescribed rate of interest:** The complainant/allottee intends to withdraw from the project and is seeking refund of the amount paid by him in respect of the subject unit with interest at 18% p.a. However, the legislature in its wisdom in the subordinate legislation, under the provision of rule 15 of the rules vide notification dated 12.09.2019, has determined that 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%. the prescribed rate of interest. Therefore, in case the complainant/allottee intends to withdraw from the project after commencement of the Act, 2016, the amount paid by him shall be refunded alongwith interest at prescribed rate 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.

20. 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.
21. 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., 28.08.2024 is **9.10%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **11.10%**.
22. On consideration of documents available on record and submissions made by both the parties, the authority is of the view that as per clause 10.1 of the agreement dated 24.12.2013, the possession of the apartment was to be delivered by 24.12.2018. However, the complainant has already withdrawn from the project by sending letter dated 08.01.2018 and sought refund of the paid-up amount with interest even before the due date of possession. So, in such a situation, the complainant withdrew from the project even prior to the due date. Thus, he is not entitled to refund of the complete amount but only 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."

23. Keeping in view the aforesaid factual and legal provisions, the respondent is directed to refund the paid-up amount of Rs.47,20,000/- after deducting 10% of the sale consideration of Rs.70,54,250/- being earnest money along with an interest @11.10% 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., 08.01.2018 till actual 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:
- The respondent/promoter is directed to refund the paid-up amount of Rs.47,20,000/- after deducting 10% of the sale consideration of Rs.70,54,250/- being earnest money along with an interest @11.10% 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., 08.01.2018 till its realization.



HARERA
GURUGRAM

Complaint No. 2610 of 2021

ii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

25. Complaint stands disposed of.

26. File be consigned to the registry.

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 28.08.2024



HARERA
GURUGRAM