



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

Complaint no.	:	3223 of 2023
Date of complaint	:	12.07.2023
Date of order	:	29.01.2025

Dr. Mrinal Pahwa and Dr. Archana Rautela, Both R/o: A-002, Raheja Atlantis, Sector 31-32A, Gurugram.	Complainants
Versus	
M/s Landmark Apartments Private Limited Regd. office: Landmark House, Plot No. 65, Sector-44, Gurugram-122003.	Respondent
CORAM:	
Ashok Sangwan	Member
APPEARANCE:	
Ramit K Lalit (Advocate)	Complainants
Amarjeet Kumar (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainant/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 allottees 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 Cyber Park, Sector 67, Gurugram
2.	Total project area	8.3125 acres
3.	Nature of the project	Cyber Park
4.	DTCP license no. and validity status	97 of 2008 dated 12.05.2008 valid up to 11.05.2020
5.	Name of licensee	M/s Landmark Apartments Pvt. Ltd.
6.	RERA Registered/ not registered	Registered vide no. 61 of 2019 dated 25.11.2019
7.	Unit no.	29A, Ground Floor (page 33 of reply)
8.	Unit area admeasuring (Super area)	530 sq.ft (page 33 of reply)
9.	Builder buyer's agreement	18.11.2022 (Page 41 of complaint)
10.	Settlement agreement	25.02.2016 (page 26 of reply)
11.	MoU	25.02.2016 (page 29 of reply)
12.	Possession clause as per MoU	4. <i>"That the Developer/Company contemplates to handover the unit within 18 months from the date of execution of this MoU."</i>
13.	Due date of possession	25.08.2017 [Calculated as per possession clause]
14.	Total sale consideration	Rs. 71,76,200/- (Page 56 of complaint)
15.	Amount paid by the complainant	Rs. 41,40,000/- (Page 27 of reply)
16.	Occupation certificate	26.12.2018 (Page 35 of reply)
17.	Legal notice seeking refund	25.03.2023 (page 58 of complaint)

B. Facts of the complaint:

3. The complainants vide complaint as well as written submissions dated 10.12.2014 have made the following submissions: -

- I. That the complainants in July 2012, booked a retail space admeasuring 460 sq. ft. on the 2nd Floor in an IT Park being developed by the respondent named "Landmark the Outlet, at Sector 67, Gurgaon under the assured return scheme. Pursuant thereto, a memorandum of understanding dated 20.07.2012 was executed between the parties in respect of the said retail space for a total agreed basic sale price of Rs.9000/- (Approx.) per sq. ft. amounting to a total sale consideration of Rs.41,40,000/-, paid by complainants upfront at the time of signing of the MoU duly received by the respondent.
- II. That in terms of the said MoU, the complainants received the assured return for eighteen months from the respondent, amounting to Rs.6,70,680/- till 31.12.2013. However, thereafter, since January 2014, the respondent illegally stopped the payment of the assured returns. Further in terms of the MoU, the respondent was to deliver possession of the purchased retail space to the complainants within 3 years from the date of signing of the MoU. However, as it turned out, the construction of the project did not even commence within the stipulated 3 years. Hence, the respondent intentionally duped and cheated the complainants, by neither paying the assured return instalments and nor delivering the possession in time. With the project nowhere near completion, left with no option, the complainants issued a legal notice on 30.09.2015, to the respondent calling upon it to refund the amount paid by the complainants along-with interest and arrears of assured return instalments with interest and compensation for the harassment caused to them. However, the respondent refused to refund the amount, but advised the complainants that the principal amount paid by him can be



adjusted towards the cost of a unit at another project of it named "Landmark Cyber Park" at Sector 67, Gurgaon, the construction of which, is at an advanced stage and which is expected to be offered for possession within a period of 18 months. As the complainants had no other option, they agreed with the suggestion and shifted their allotment to the aforesaid project in which they were allotted space measuring a tentative super area of 530 sq. ft., in respect of which the parties have executed a memorandum of understanding dated 25.02.2016. The basic sale price of this unit was much higher at Rs.67,49,550/- and therefore the principal amount of Rs.41,40,000/- was adjusted against 61% of the basic sale price of this unit, and remaining balance of Rs.26,09,550/- was to be paid at the time of offer of possession, in terms of the said MoU dated 25.02.2016.

- III. That as per the new MoU, the respondent promised to handover the unit within 18 months from the date of execution of MoU failing which the respondent was liable to refund the entire principal amount with interest @18% per annum. However, to the utter shock and surprise to the complainants, the respondent again failed to adhere to the written/contractual obligation agreed by the respondent under the MoU, by not giving the possession of the said unit to the complainants within the stipulated time.
- IV. That, failing to evoke any response from the respondent, the complainants finally requested the respondent in the month of March 2018 to cancel their allotment and refund the entire principal amount of Rs.41,40,000/- paid by them, with interest as applicable. The complainants approached the respondent through its officials several times personally and telephonically, requesting for refund, but it refused to pay any heed to the request of the complainants.



- V. That in the month of January 2021, the respondent informed the complainants that the unit is ready for possession and insisted upon them to take possession, despite of the complainants' long-standing request to cancel his allotment and refund the principal amount with interest as applicable. Beginning the month of April 2022, the respondent started sending demand notices to the complainants for payment of balance basic sale price, maintenance/advance maintenance charges, holding charges, fire-fighting changes, development charges, IFMS charges etc. In the month of November 2022, when the complainants personally met official of the respondent to request for refund, they orally agreed to refund the amount representing that the complainant is required to sign a builder buyer agreement in respect of the allotted space, as a part of formality, to apply for refund. Believing upon their representation, the complainants signed the builder buyer agreement on 18.11.2022 in good faith, after which they had promised that the refund will be initiated soon. However, the complainants never heard from the respondent thereafter and till date.
- VI. That the complainants also sent a legal notice to the respondent on 25.03.2023 calling upon it to refund the entire paid-up amount with interest @18% alongwith Rs.10,00,000/- towards legal expense and compensation. However, the respondent ignored the same and chose to not respond to the same.
- VII. That the respondent is liable to refund the entire amount of Rs.41,40,000/- along with interest @18% per annum for the period commencing from 20.07.2012 (the date of payment) till the date of actual refund by the respondent along with legal expense and compensation for mental harassment. The interest is also being claimed since the respondent has used and enjoyed the monies which legally belong to the complainants and has either earned interest thereon or has saved



interest and has additionally denied the complainants their opportunity to earn interest on the said amount and has exposed the complainants to interest loss to that extent.

- VIII. That the respondent has claimed to have obtained the occupation certificate on 26.12.2018, however, the respondent never offered possession of the unit since the actual condition of the building or the unit was not fit to be occupied.
- IX. That the respondent has submitted that the complainants had already taken the possession of the unit in terms of the agreement dated 18.11.2022. Perusal of the BBA reveals that the actual possession was never handed over to the complainants. Clause 3(e) and 3(g) of the BBA contradicts itself at several places vis-à-vis the possession.
- X. That the respondent has pleaded that complainants has failed to fulfil the obligations in terms of the memorandum of understanding dated 25.02.2016 executed between the parties. It is submitted that the complainants cannot be expected to keep making payments and wait indefinitely for possession of the unit especially when there is nothing in foresight. The complainants in this case have been requesting the respondents since the month of March 2018 to cancel their allotment and refund the entire principal amount of Rs.41,40,000/- paid by them with interest as applicable, there is no question of making any further payments.

C. Relief sought by the complainants:

4. The complainants have sought following relief(s):
- Direct the respondent to refund the paid-up amount alongwith interest @18% per annum from date of payment till its realization.
 - Direct the respondent to pay to the complainants a sum of Rs.8,28,000/- towards the arrears of the assured return installments for the months of January, 2014 to August 2015 in terms of the MoU dated 25.02.2016 alongwith interest thereon @18% per annum.

c) Litigation cost.

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 13.09.2024 contested the complaint on the following grounds:
- i. That the complainant with a sole motive to invest and for gains filled the application form dated 08.06.2012 and thereafter entered into a Memorandum of Understanding dated 20.07.2012 and booked a unit in "Landmark The Outlet" admeasuring 460 sq. ft. That as per the clause 4 of the said Memorandum of Understanding, the respondent had to pay Rs.41,400/- as assured return per month payable quarterly till the date of possession or 3 years whichever is earlier. The respondent has already paid an amount of Rs.6,70,680/- as assured return to the complainant.
 - ii. That thereafter in the year 2016 in order to increase the gains, the complainant surrendered/cancelled the unit allotted to them under the Memorandum of Understanding dated 20.07.2012 and opted for a bigger unit in "Landmark Cyberpark". It is imperative to mention here that in this regard the complainant executed a settlement agreement dated 25.02.2016. It is also submitted that as per the clause 4 of the said settlement agreement, the pending assured return was fully settled and satisfied. Also, as per the clause 9 of the said settlement agreement, it was categorically mentioned that this settlement agreement supersedes all the previous MoUs. The complainant while entering into the settlement agreement was well aware that the respondent has already applied for the occupation certificate of the project.
 - iii. That a Memorandum of Understanding dated 25.02.2016 was executed for allotment of space admeasuring 530 sq. ft. and in lieu of the increased

space promised the respondent to pay a sum of Rs.26,09,550/-. It is pertinent to mention here that amount of Rs. 41,40,000/- paid earlier got adjusted under the present Memorandum of Understanding dated 25.02.2016.

- iv. That thereafter as the space allotted to the complainant under the Memorandum of Understanding dated 25.02.2016 was ready for handing over, the respondent wrote allotment cum demand letter dated 15.01.2019 to the complainant to clear the pending dues i.e. Rs.26,09,550/- to enable the process of handing over the unit as the respondent company had already applied for the occupation certificate on 17.04.2015 and had received the occupation certificate of the project way back on 26.12.2018. However, the said request of the respondent was never adhered to.
- v. That thereafter several intimation letters/request letters dated 21.05.2018, 18.04.2022, 04.05.2022, 07.06.2022, 05.07.2022, 05.08.2022, 05.09.2022 and 05.10.2022 were written to the complainant but to no avail.
- vi. That as complainant promised to pay the respondent the due amount, the respondents executed a builders buyers agreement dated 18.11.2022 in favour of the complainant. It is imperative to mention here that at the time of signing the builder buyer's agreement dated 18.11.2022, the complainants had already taken the possession of the space allotted to them under the Memorandum of Understanding dated 25.02.2016. Relevant extract of the builder buyer's agreement dated 18.11.2022 is reproduced herein below:

"3. Possession of 'the said unit'

- a) *That the said is ready for handover in all respect as bare shell and the possession of the said/IT space shall be deemed handed over to the allottee after signing of this agreement."*

- vii. That the complainants never adhered to their promise to pay the balance amount due along with additional changes for which the respondents were constraint to issue several intimation/reminder letters dated 05.03.2023, 05.04.2023, 05.05.2023, 05.06.2023, 05.07.2023, 05.08.2023, 05.09.2023, 05.10.2023, 05.11.2023, 05.12.2023, 05.01.2024, 05.02.2024, 05.03.2024, 05.04.2024, 05.05.2024, 05.06.2024, 05.07.2024, 05.08.2024 and 05.09.2024 to them.
- viii. That as the complainants despite taking possession of the space, did not make the payment of the legitimate dues of the respondent, the respondent is actually the aggrieved one. It is further respectfully submitted that the present complaint filed by the complainant is a gross abuse of law and the same is liable to be dismissed.
- ix. That the complainant is praying for the relief of "assured returns" which is beyond the jurisdiction of this Authority. It is further submitted that the legislature never intended to make the provisions of the Act effective retrospectively and retroactively applicable to cover the units already sold prior to the commencement of the Act. Thus, the provisions of the Act cannot be made applicable.
- x. That the complainant has failed to fulfil the obligations in terms of the memorandum of understanding dated 25.02.2016 executed between the parties and is trying to take the benefit of its own wrong. Despite several letters, the complainants did not come forward and did not make the payment of the dues/charges. It is necessary to mention that the complainants cannot be allowed or permitted to backtrack from the performance of its obligations. It is relevant to point out that the non-payment of the due charges also leads to delay in the completion of the project and now the complainants cannot be permitted to claim refund and compensation as the present case is not covered by any unreasonable delay on the part of the project company.

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.

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.

12. The respondent has contended that the 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 prior to the enactment of the Act and the provision of the said Act cannot be applied retrospectively. 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."

13. 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."

14. 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. Hence, in the light of above-mentioned reasons, the contention of the respondent w.r.t. jurisdiction stands rejected.

G. Findings on the relief sought by the complainants.

G.I Direct the respondent to the complainants a sum of Rs.8,28,000/- towards the arrears of the assured return installments for the months of January, 2014 to August 2015 in terms of the MoU dated 25.02.2016 alongwith interest thereon @18% per annum.

G.II Direct the respondent to refund the entire amount deposited alongwith interest @18% per annum from date of payment till its realization.

15. In the instant case, initially the complainants were allotted a retail space admeasuring 460 sq.ft. super area, on 2nd Floor in the project namely 'Landmark he Outlet' at Sector 67, Gurugram vide MoU dated 20.07.2012 for a total sale consideration of Rs.41,40,000/- and the complainants have paid it all while executing the said MOU. Subsequently, vide settlement agreement executed between the parties dated 25.02.2016, the complainants surrendered/cancelled the unit allotted to them under the MoU dated 20.07.2012 and opted to transfer the funds into a unit/space measuring 530 sq.ft. super area in the project of the respondent named "Landmark Cyberpark" at Sector 67, Gurugram. The said request of the complainants was accepted by the respondent in clause 3 of the said agreement. Thereafter, an MoU dated 25.02.2016 was executed between the parties vide which a space tentatively measuring 530 sq.ft. super area in the project named "Landmark Cyberpark" at Sector 67, Gurugram @Rs.12,735/- per sq.ft. was allotted to the complainants.
16. The complainants in the present complaint are seeking the relief of pending assured return at the rate of Rs.41,400/- per month from January 2014 to August 2015 in terms of the MoU dated 25.02.2016 alongwith 18% interest per annum. However, as per record, vide clause 4 of the settlement agreement dated 25.02.2016, it was agreed between the parties that the complainants shall be left with no right, title or interest in respect of the shop/unit in Landmark Outlet space and now the claim of the complainants towards the booking amount/interest/assured return/any other accruable

on the said unit or claim whatsoever has been fully paid/settled and satisfied. Further, vide clause 9 of the said agreement, it was also agreed between the parties that the settlement agreement dated 25.02.2016 supersedes all the previous MoUs, communications and any other documents. Thus, after execution of the settlement agreement dated 25.02.2016, all the previous transactions and agreements between the parties comes to an end. Moreover, there is not even a single clause available in the MoU dated 25.02.2016, vide which it was agreed between the parties that the respondent shall be obligated to pay the said assured return to the complainants. In view of the above, the claim of the complainants w.r.t assured return is being rejected being devoid of merits.

17. In the present complaint, the complainants intend to withdraw from the project and are seeking return of the amount paid by them in respect of subject unit along with interest @18% p.a. from the date of payment until realization 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)

18. **Due date of handing over possession:** Vide clause 4 of the MoU dated 25.02.2016, it was agreed between the parties that the possession of the allotted unit/space shall be handed over to the complainants within a

stipulated timeframe of 18 months from the date of its execution. Thus, the due date of possession comes out to be 25.08.2017.

19. **Admissibility of refund along with prescribed rate of interest:** The complainants are seeking refund of the amount paid by them alongwith interest at the rate of 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 this case as the complainant/allottees intend to withdraw from the project after commencement of the Act, 2016, the amount paid by them 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., 29.01.2025 is **9.10%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **11.10%**.

22. The complainants have submitted that due to failure of the respondent to handover possession within the stipulated period, the complainants requested the respondent in the month of March 2018 to cancel their allotment and refund the entire principal amount of Rs.41,40,000/- paid by them, with interest as applicable, but it refused to pay any heed to the request of the complainants. The complainants further submitted that in the month of January 2021, the respondent informed them that the unit is ready for possession and insisted upon them to take possession, despite of the complainants' long-standing request to cancel his allotment and refund the principal amount with interest as applicable. However, there is not even a single document available on record to substantiate the claim of the complainants that the unit/space in question was surrendered in the month of March 2018. Thus, due to non-availability of any documental proof regarding the same, the said claim of the complainants cannot be relied upon.
23. By virtue of clause 4 of the MoU dated 25.02.2016, the possession of the subject unit/space was to be delivered by 25.08.2017. The respondent completed the construction and development of the project and got the OC on 26.12.2018. The complainants in their pleadings have themselves admitted that in the month of January 2021, the respondent informed them that the unit is ready for possession and insisted upon them to take possession. It is further observed that vide clause 3(a) and (e) of the buyer's agreement dated 18.11.2022, it was mutually agreed between the parties that the respondent will give possession of the said unit in raw/bare shell condition and the same is ready for handover in all respect and shall deemed to be handed over to the complainants on the date of its execution. Furthermore, vide clause 3(g) of the buyer's agreement, the complainants were obligated take physical possession of the unit within 30 days after signing of the that agreement. Thus, the said BBA can be termed as offer of



possession. However, the complainants were not willing to continue with the project and sought refund of the entire paid-up amount alongwith interest from the respondent vide legal notice dated 25.03.2023. The Authority observes that section 18(1) is applicable only in the eventuality where the promoter fails to complete or unable to give possession of the unit in accordance with terms of agreement for sale or duly completed by the date specified therein. This is a case where the promoter has already offered possession of the unit after obtaining 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 allottees never earlier opted/wished to withdraw from the project even after the due date of possession and only when offer of possession was made and demand for due payment was raised, then only, they have filed a complaint before the authority.

24. The right under section 18(1)/19(4) accrues to the allottee on failure of the promoter to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein. If allottee has not exercised the right to withdraw from the project after the due date of possession is over till the offer of possession was made to him, it can be inferred that the allottee has tacitly consented to continue with the project. The promoter has already invested in the project to complete it and offered possession of the allotted unit.
25. 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 allottee as per agreement for sale. The judgement of the Supreme Court of India in *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 recognizes unqualified right of the allottees and liability of the promoter in case of failure to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. However, the complainant-allottees failed to exercise their right and rather tacitly wished to continue with the project themselves. Now, when unit is ready for possession, such withdrawal on considerations other than delay will not be in the spirit of the section 18 which protects the right of the allottees in case of failure of promoter to give possession by due date either by way of refund if opted by the allottee or by way of delay possession charges at prescribed rate of interest for every month of delay.

26. In the instant case, the unit was allotted to the complainants vide MOU dated 25.02.2016 and the due date for handing over for possession was 25.08.2017. The OC was received on 26.12.2018 whereas, possession was offered to the complainants on 18.11.2022. However, the complainants surrendered the unit/space in question and sought refund of the paid-up amount alongwith interest vide legal notice 25.03.2023. 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”

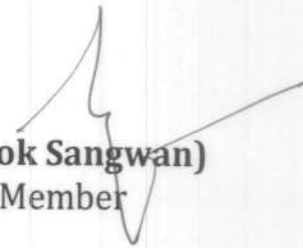
27. Thus, keeping in view the aforesaid factual and legal provisions, the respondent is directed to refund the paid-up amount of Rs.41,40,000/- after deducting 10% of the sale consideration of Rs.71,76,200/- being earnest money along with an interest @11.10% p.a. (the State Bank of India highest marginal 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., 25.03.2023 till actual refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

H. 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 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.41,40,000/- after deducting 10% of the sale consideration of Rs.71,76,200/- being earnest money along with an interest @11.10% p.a. on the refundable amount, from the date of surrender i.e., 25.03.2023 till actual refund 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.

27. Complaint stands disposed of.
28. File be consigned to the registry.


(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 29.01.2025



HARERA
GURUGRAM