

**PROCEEDINGS OF THE DAY**

Day and Date	Thursday and 22.11.2018
Complaint No.	439/2018 Case titled as Mr. Sharwan Kumar V/S M/S Landmark Apartment Pvt. Ltd.
Complainant	Mr. Sharwan Kumar
Represented through	Shri Mukul Kaushik, Advocate for the complainant.
Respondent	M/S Landmark Apartment Pvt. Ltd.
Respondent Represented through	Shri Amarjeet Kumar Advocate for the respondent.
Last date of hearing	29.10.2018
Proceeding Recorded by	Naresh Kumari & S.L.Chanana

**Proceedings**
**Project is not registered.**

Arguments heard.

MoU dated 9.9.2008 inter se both the parties was signed. As per clauses 1, 4 & 13 of MoU, which reads as under:-

***Clause - 1 "That the first party hereby agrees to sell/allot to the second party space admeasuring the aggregate tentatively, a super area of 500 sq. feet (hereinafter referred to as the space of proposed premises) subject to final confirmation of area on completion of the building in the proposed IT Park situated at Sector 67, Gurugram at the rate of Rs.5192/- (approximate) per square feet of super area amounting to a total consideration of Rs.25,96,000/- (Rupees Twenty Five Lakhs and Ninety Six Only). The area on completion may increase or decease by about 10% of the tentative area agreed***

***herein to be allotted. Correspondingly the consideration shall increase or decrease.***

***Clause-4 That the first party will pay Rs.25960/- as a assured return per month payable quarterly to second party till the date of possession or three years.***

***Clause-13 That the first party will reimburse the entire principal in case of non-completion of project alongwith bank interest of 18% annually”.***

An assured return of Rs.25960/- per month was to be given to the complainant. However, no date of actual possession of the office space booked by the complainant has been mentioned in the MoU. However, respondent/builder could not honour the provisions of these clauses. Later on, respondent stopped payment of assured return, as a result of which the complainant has filed the instant complaint. Project is not registered with the authority. After hearing the arguments, the authority has already adjudged in the order dated 7.8.2018 passed in complaint No.141 of 2018 titled as Brhimjeet Versus M/s Landmark Apartments Pvt. Ltd. which is as under:-

***“The complainant has made a complaint dated 15.5.2018 with regard to the refund of the assured return of Rs.55,000/- per month. As per Clause 4 of the Memorandum of Understanding dated 14.8.2010, the complainant is insisting that the RERA Authority may get the assured return of Rs.55,000/- per month released to him. A perusal of the Real Estate (Regulation & Development) Act, 2016 reveals that as per the Memorandum of Understanding, the assured return is not a formal clause with regard to giving or taking of possession of unit for which the buyer has paid an amount of Rs.55 Lakhs to the builder which is not within the purview of RERA Act. Rather, it is a civil matter. Since RERA Act deals with the builder buyer relationship to the extent of timely delivery of possession to the buyer or deals with withdrawal from the project, as per the provisions of Section 18 (1) of the Act. As such, the buyer is directed***

***to pursue the matter with regard to getting assured return as per the Memorandum of Understanding by filing a case before an appropriate forum/Adjudicating Officer”.***

As already decided in complaint No.141 of 2018 titled as Brhimjeet Versus M/s Landmark Apartments Pvt. Ltd. no case is made out. Counsel for respondent has given a Supreme Court Judgment dated 25.7.1997 vide which he has pleaded the doctrine of precedent. Since the authority has taken a view much earlier as stated above, the authority cannot go beyond the view already taken.

Complaint is disposed of accordingly. Detailed order will follow.  
File be consigned to the registry.

Samir Kumar  
(Member)

Subhash Chander Kush  
(Member)

Dr. K.K. Khandelwal  
(Chairman)  
22.11.2018

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

**Complaint No. : 439 of 2018**  
**First date of hearing: 07.08.2018**  
**Date of Decision : 22.11.2018**

Mr. Sharwan Kumar,  
R/o. G-106A, Second floor, South city-II,  
Gurugram, Haryana

**Complainant**

**Versus**

M/s Landmark Apartments Pvt. Ltd.  
Regd. Office: 1-8, C-R, Park,  
New Delhi-110019

**Respondent**

**CORAM:**

Dr. K.K. Khandelwal  
Shri Samir Kumar  
Shri Subhash Chander Kush

**Chairman**  
**Member**  
**Member**

**APPEARANCE:**

Complainant in person with Advocate for the complainant  
Shri Mukul Kaushik  
Ms. Shriya Takka along with Advocate for the respondent  
Amarjeet Kumar

**ORDER**

1. A complaint dated 14.06.2018 was filed under section 31 of the Real Estate (Regulation & Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 by the complainant Mr. Sharwan Kumar, against the promoter M/s Landmark Apartments Pvt. Ltd., on account of violation of the article 4 MoU (builder



buyer's agreement not executed) on 09.09.2008 in the project 'Landmark Cyber Space' with a space admeasuring 500 sq.ft. for not handing over booking unit on the due date i.e. **not given in the MoU** which is an obligation under section 11(4)(a) of the Act ibid.

**Note: As per article 4 of MOU dated 09.09.2008, it is stated that assured return would be payable till the date of possession or 3 years. The date of possession cannot be ascertained as no document proof has been provided.**

2. The particulars of the complaint case are as under: -

1.	Name and location of the project	"Landmark Cyber Park", Sector 67, Gurugram
2.	Shop space admeasuring	500 sq. ft.
3.	Shop no.	Not mentioned
4.	RERA registered/ unregistered.	<b>unregistered</b>
5.	Nature of project	<b>Commercial IT-Park</b>
6.	Booking date	03.09.2008
7.	DTCP No.	Not mentioned
8.	Payment plan	Assured Return
9.	Date of execution of memorandum of understanding	09.09.2008 (There's no Builder Buying Agreement and MOU is executed between the parties)
10.	Basic sale price	Rs. 25,96,000 /-
11.	Total amount paid by the complainant till date	Rs.25,96,000/-
12.	Date of delivery of possession	<b>Cannot be ascertained</b>
13.	Delay in handing over possession till date(delay to be calculated	<b>Last date of payment- 09.06.2013</b>



	from the date of last payment made)	<b>Delay- 5 years 5 months 13 days</b>
14.	Penalty clause as per MoU as there is no builder buyer agreement	<b>Cannot be ascertained</b>

3. The details provided above have been checked on the basis of record available in the case file which have been provided by the complainant and the respondent. A memorandum of understanding dated 09.09.2008 in the project “Landmark Cyber Park” is available on record for the aforesaid booked shop according to which the possession of the same was to be delivered by **cannot be ascertained**. Neither the respondent has delivered the possession of the said unit till (**cannot be ascertained**) to the purchaser. Therefore, the promoter has not fulfilled his committed liability till date..
4. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and appearance. The respondent appeared on 07.08.2018. The case came up for hearing on 07.08.2018, 20.09.2018, 28.09.2018, 29.10.2018 and 22.11.2018.

### Facts of the complaint

5. Briefly stated, the facts of the complainant that on 03.09.2012 the complainant along with his brothers visited the office of the respondent for inquiry regarding the project. The respondent lured the complainant, if they pay the total sale





consideration of shop at the time booking, the respondent promised to pay an assured return of Rs.25,960/- per month till the delivery of possession and also assured that they will complete the project within 3 years. After the completion, they will pay Rs.55/- per sq.ft as rent to the complainant for a period of 9 years.

6. That the complainants agreed to book three commercial shop admeasuring 500 sq ft. for a total sale consideration of Rs.25,96,000/- each in the aforesaid project of the respondent. That the complainant paid a sum of Rs.5,85,000/- to the respondent.
7. On 05.09.2008 the complainant visited the office again for execution of builder buyer agreement, but the respondent told them that the agreement would be executed after the clearance of cheques and assured them that they can execute the MOU with the complainant regarding the booking of the commercial shop.
8. On 09.09.2008, the respondent executed a memorandum of understanding with the complainant of the shop admeasuring 500 sq.ft @Rs. 5192 per sq.ft for a total consideration of Rs. 25,96,000/-. The respondent assured that the respondent will pay Rs. 25,960/- per month as



assured return payable quarterly to the complainant till the date of possession or 3 years.

9. The respondent assured the complainant that the construction would start shortly but the construction had already been delayed and not even the superstructure was ready within 3 years.

10. The complainant waited for more than 9 years and also requested them to execute the builder buyer agreement and allocate the shop or cancel the MOU and return the amount of Rs. 25,96,000/- along with agreed interest of 18% per annum till realization but the official of respondent refused to accede any of the demand of the complainant.

11. **Issues raised by the complainants are as follow:**

- i. Whether the respondent failed to construct the “landmark commercial park” within the agreed period of 3 years and in case of failure and whether, the complainant is entitled to recover the principal amount/total amount Rs.25,96,000/- paid by him to the respondent along with agreed interest @ 18% per annum as per clause 13 of MOU?





- ii. Whether the complainant is entitled to recover assured return of Rs. 70,092/- on quarterly basis due from July 2013 till date of possession from the respondent?
- iii. Whether the respondents intentionally, wilfully and committed fraud upon the complainant not executed the builder buyer agreement with the complainant till day?
- iv. Whether the respondent committed fraud with the complainant by not allotted the unit in the commercial project after receiving the total sale consideration of Rs. 25,96,000/- from the complainant?
- v. Whether the respondent breached the terms and condition of the MOU dated 09.09.2008 executed between the complainant & respondent?
- vi. Whether the respondent violated the provision of the RERA by not registering the said project within time?

**12. Relief sought:**

The complainant is seeking the following relief:

- i. That the respondent breach the terms and conditions of the MOU dated 09.09.2008 executed between the complainant and respondent and the respondents intentionally, wilfully committed fraud upon the complainant by not executing the builder buyer



agreement with the complainant after receiving the total sale consideration of Rs. 25,96,000/- from him. So, the complainant is entitled to recover the principal amount of Rs. 25,96,000/- along with agreed interest of 18% annually & also entitled to recover the assured return of Rs. 70,092/- on quarterly basis due from July 2013 till date of possession or till date of filing the present petition from the respondent.

- ii. That the respondent be held liable for violating the provision of the Haryana Real Estate (Regulation and Development) Act, 2016 & the Haryana Real estate (Regulation and Development) Rules, 2017, Act by not registering the said project within time.

#### **Respondent's reply**

13. The respondent submitted that the matter in dispute was to be adjudicated by the adjudicating officer and not by the authority and accordingly dismiss the complaint with the liberty to approach the adjudicating officer. In the case **K AJIT BABU AND OTHERS Vs. UNION OF INDIA AND OTHERS** the judgement of the Supreme court held that the present complaint should not be entertained by the hon'ble authority as the same would be against the doctrine of judicial precedent.



14. The respondent agreed to pay a sum of Rs. 25,960/- as a assured return per month payable quarterly to the second party i.e the allottee, till the date of possession or 3 years. The complainant concealed the material fact that the respondent has not only paid the assured returns amounting to Rs 8,57,628/- for a period of 3 years by 09.09.2011, but has also paid the same in excess by Rs. 4,90,644/- for the period of almost 1.5 years i.e till 9<sup>th</sup> June, 2013. The complainant apart from clearing the dues amounting to Rs. 4,27,450/- is also liable to the refund the excess of assured return amounting to Rs. 4,90,644/-. The complainant is trying to invoke the clause of the MoU which specifically states about the payment of assured returns.
15. The respondent submitted that the nature of the relief sought by the complainant in addition to the compensation is in the nature of the specific performance pf the contract for which the hon'ble authority has no jurisdiction and the appropriate forum is civil court. The complainant apart from seeking refund, also pertains to compensation and interest for a grievance and are required to be field before the adjudicating officer under Rule-29 of the Haryana Real Estate (Regulation& Development) Rules, 2017 read with section 31



and section 71 of the Act and not under Rule-28 before the authority.

16. The respondent submitted that the hon'ble Supreme Court has held in **SP Chengalvaraya Naidu v Jagannath {1994 (1) SCC (1)}** that non-disclosure of material facts and documents amounts to fraud on not only the Opposite Party but also on the Court. Therefore the complainant is liable for fraud for non-disclosure of material facts stated above.
17. The respondent submitted that the complainant had wilfully agreed to the terms and conditions of the MOU and is now at a belated stage attempting to wriggle out of their obligation by filing the instant complaint before this hon'ble authority.

**Determination of issues:**

After considering the facts submitted by the complainant, reply by the respondent and perusal of record on file, the issues wise findings of the authority are as under:

18. With respect to the **first issue** the respondent has failed to deliver the possession of the booked unit to the complainant till date. The Respondent has deliberately failed to deliver the possession of the unit even after inordinate delay of more than 10 years from the date of execution of Memorandum of Understanding dated 09.09.2008



19. With respect to the **second issue** the authority is of the view that as the respondent has failed to deliver the possession of the booked unit to the complainant till date and no formal occupation certificate neither application for occupation certificate has been supplied by the respondent, therefore the complainant is entitled to refund of total consideration paid by him along with interest calculated at the rate of 18% per annum committed by the respondent under clause 13 of MOU executed between the complainant and the respondent.

**Note : The respondent admitted in reply that the project was completed in the year 2015 and accordingly the respondent has already applied for the occupation certificate but neither copy of formal occupation certificate nor application for occupation certificate has been supplied by the respondent.**

20. **Third issue** : cannot be ascertained

**Note** : According to article 4 of MOU, the respondent is liable for payment of assured return of Rs 25960/- per month quarterly till the date of possession or 3 years.

21. The **fourth issue** raised by the complainant, as the complainant has failed to produce any material evidence in support of his claim, therefore this issue is decided in negative.



22. With respect to the **fifth issue**, according to section 3 of the Act, the promoter is liable for registration with this authority. According to section 59 of the Act, in case of contravention of this provision, the promoter shall be liable for a fine of up to 10% of the estimated cost of the project.
23. The complainant made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above.

**34 (f) Function of Authority –**

*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.*

The complainant requested that necessary directions be issued by the authority under section 37 of the Act *ibid* to the promoter to comply with the provisions and fulfil obligation which is reproduced below:

**37. Powers of Authority to issue directions**

*The Authority may, for the purpose of discharging its functions under the provisions of this Act or rules or regulations made thereunder, issue such directions from time to time, to the promoters or allottees or real estate agents, as the case may be, as it may consider necessary and such directions shall be binding on all concerned.*





### Findings of the authority

24. The project 'Landmark Cyber Park ' is located in Sector-67, Gurugram, thus the authority has territorial jurisdiction to entertain this complaint. As the nature of the real estate project is commercial in nature so the authority has subject matter jurisdiction along with territorial jurisdiction.
25. The preliminary objections raised by the respondent regarding jurisdiction of the authority stands rejected. The authority has complete jurisdiction to decide the complaint in regard to non-compliance of obligations by the promoter as held in ***Simmi Sikka V/s M/s EMAAR MGF Land Ltd.*** leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.
26. Keeping in view the facts and circumstances of the complaint, the authority is of the view that as MoU dated 09.09.2008 inter se both the parties was signed. As per clauses 1, 4 & 13 of MoU, which reads as under: -

*Clause - 1 "That the first party hereby agrees to sell/allot to the second party space admeasuring the aggregate tentatively, a super area of 500 sq. feet (hereinafter referred to as the space of proposed premises) subject to final confirmation of area on completion of the building in the proposed IT Park situated at Sector 67, Gurugram at the rate of Rs.5192/- (approximate) per square feet of super area amounting to a total consideration of Rs.25,96,000/- (Rupees Twenty Five Lakhs and Ninety Six*



*Only). The area on completion may increase or decrease by about 10% of the tentative area agreed herein to be allotted. Correspondingly the consideration shall increase or decrease.*

*Clause-4 That the first party will pay Rs.25960/- as a assured return per month payable quarterly to second party till the date of possession or three years.*

*Clause-13 That the first party will reimburse the entire principal in case of non-completion of project alongwith bank interest of 18% annually”.*

27. An assured return of Rs.25,960/- per month was to be given to the complainant. However, no date of actual possession of the office space booked by the complainant has been mentioned in the MoU. However, respondent/builder could not honour the provisions of these clauses. Later on, respondent stopped payment of assured return, as a result of which the complainant has filed the instant complaint. Project is not registered with the authority. After hearing the arguments, the authority has already adjudged in the order dated 07.08.2018 passed in complaint No.141 of 2018 titled as **Brhimjeet Versus M/s Landmark Apartments Pvt. Ltd.** which is as under:-



*“The complainant has made a complaint dated 15.5.2018 with regard to the refund of the assured return of Rs. 55,000/- per month. As per Clause 4 of the Memorandum of Understanding dated 14.8.2010, the complainant is insisting that the RERA Authority may get the assured return of Rs. 55,000/- per month released to him. A perusal of the Real Estate (Regulation & Development) Act, 2016 reveals that as per the Memorandum of Understanding, the assured return is not a formal clause*

*with regard to giving or taking of possession of unit for which the buyer has paid an amount of Rs.55 Lakhs to the builder which is not within the purview of RERA Act. Rather, it is a civil matter. Since RERA Act deals with the builder buyer relationship to the extent of timely delivery of possession to the buyer or deals with withdrawal from the project, as per the provisions of Section 18 (1) of the Act. As such, the buyer is directed to pursue the matter with regard to getting assured return as per the Memorandum of Understanding by filing a case before an appropriate forum/Adjudicating Officer”.*

### **Decision and directions of the authority**

28. After taking into consideration all the material facts as adduced and produced by both the parties, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issues the following directions to the respondent in the interest of justice and fair play:

- (i) As already decided in complaint No.141 of 2018 titled as **Brhimjeet Versus M/s Landmark Apartments Pvt. Ltd.** no case is made out. Counsel for respondent has given a Supreme Court Judgment dated 25.7.1997 vide which he has pleaded the doctrine of precedent. Since the authority has taken a view much earlier as stated above, the authority cannot go beyond the view already taken.



29. The authority has decided to take suo-moto cognizance against the promoter for not getting the project registered & for that separate penal proceeding will be initiated against the respondent u/s 59 of the Act by the registration branch.

30. The order is pronounced.

31. Case file be consigned to the registry. Copy of this order be endorsed to registration branch.

**(Samir Kumar)**  
Member

**(Subhash Chander Kush)**  
Member

**(Dr. K.K. Khandelwal)**  
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Date: 22.11.2018

HARERA  
GURUGRAM



Judgement uploaded on 19.12.2018