

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

Complaint no. : 355 of 2018
Date of first hearing : 25.07.2018
Date of decision : 05.12.2018

Ms. Kailash Devi
R/o Village Sikanderpur Badha Tehsil &
District Gurugram, Haryana

Versus

...Complainant

M/S Landmark Apartments Pvt. Ltd
R/o 4, Vipul Square, Sushant Lok-I, Gurgaon,
Haryana

...Respondent

APPEARANCE:

Shri Dinesh Kaushik Advocate for the complainant

Shri Amarjeet Kumar and Ms. Shriya Takkar Advocates for the respondent

CORAM:

Dr. K.K. Khandelwal

Shri Samir Kumar

Shri Subhash Chander Kush

Chairman

Member

Member



ORDER

1. A complaint dated 30.05.2018 was filed under section 31 of the Real Estate (Regulation And Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation And Development) Rules, 2017 by the complainant Ms. Kailash Devi against M/S Landmark Apartments Pvt. Ltd, on account of

violation of the article 3 of MOU executed on 07.12.2010 in respect of unit described as below for not handing over possession and not providing assured returns which is an obligation of promoter under section 11(4)(a) of the Act ibid.

2. Since, the MOU has been executed on 07.12.2010 i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, therefore, the penal proceedings cannot initiated retrospectively, hence, the authority has decided to treat the present complaint as an application for non compliance of contractual obligation on the part of the promoter/respondent in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016.

3. The particulars of the complaint are as under: -

1.	Name and location of the project	"Landmark Cyber Park", Sector- 67, Gurugram
2.	Registered / not registered	Not registered
3.	Unit no.	Executive suites, on 4 th floor,
4.	Unit measuring	220 sq. ft. (approx.)
5.	Date of execution of MOU	07.12.2010
6.	Assured return	Rs. 22,990/- every month as assured return
7.	Amount paid by the complainant till date	Rs. 14,99,000/- as per MOU
8.	Total sale consideration	Rs. 14,99,000 /- as per



		MOU
9.	Percentage of amount paid	100%
10.	Date of delivery of possession.	Cannot be ascertained
11.	Delay of number of months/ years	Cannot be ascertained

4. The details provided above have been checked on the basis of record available in the case file which has been provided by the complainant and the respondent. No builder buyer agreement is available on record but an MOU is provided which was executed on 07.12.2010.
5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. The respondent appeared on 25.07.2018. The case came up for hearing on 25.07.2018 and 05.12.2018. The reply has been filed on behalf of the respondent

Facts of the case

6. The complainant submitted that in and around December, 2010, respondent approached the complainant with the representation that they are developing an IT park under the name and style of "Landmark Cyber Park" located in Sector 67, Gurugram and also promoted the said project by giving large number of advertisements in newspapers followed by telephonic calls and personal visits.



7. The complainant submitted that respondent assured to the complainant that the said project would be delivered by the respondent and the same would be fully furnished having world class facilities. It was stated that the super area of 220 sq. ft. of this unit in the said project would be for a basic sale price of Rs. 14,99,000/- along with other charges.
8. The complainant submitted that respondent also assured that the said project would be completed for possession within a period of 36 months from the date of booking. Further it was also assured that till the possession is not given to the complainant, respondent shall regularly pay monthly assured return of Rs. 22,990/- per month. Thereafter, the respondent shall pay assured leasing returns for a lock-in-period of 9 years after possession @ Rs. 95/- per sq. ft. as rent for a continuous period of 9 years with escalation of 15 % after 3 years.
9. Complainant submitted that she agreed to purchase a 220 sq. ft. commercial space in the said project at a basic sale consideration of Rs. 14,99,000/- and entered into a provisional allotment letter and the complainant paid the entire sale consideration amount vide cheque. Complainant handed over a cheque bearing no. Rs. 14,99,000/- in favour of the respondent. Respondent duly acknowledged the receipt of the cheque



against receipt of entire sale consideration of a commercial space in the said project by issuing a receipt.

10. The complainant entered into an MOU dated 07.12.2010 with the respondent wherein all the terms and conditions of the booking including the ones stated at the time of booking is detailed. In the terms of the said MOU, the respondent had been paying quarterly assured return to the complainant; however, the same was regularly paid only till 07.12.2013. Further, it is pertinent to mention here that the respondent was liable to give possession by December, 2013, however, the basic structure of the project was not ready and the said project of the respondent was immensely delayed. Further, the complainant is entitled to regular monthly assured return to be paid quarterly till the time the physical possession is handed over and 9 years after that as per MOU, as in present case, respondent failed to handover possession within a period of 3 years as such, the complainant is entitled to receive assured return till the date of possession and 9 years thereafter and as such, the same was next due was on 07.03.2014. However, it is submitted that the respondent neither handed over the possession of the unit nor paid the accrued monthly assured return to the complainant from 07.03.2014 till date.



11. The complainant submitted that even till date the respondent has not been able to complete the construction of the project and have been very irregular in paying the assured return in terms of the MOU dated 17.12.2010 after 07.12.2013.

12. The complainant submitted that the respondent was liable was liable to pay assured return for a period of 51 months and an amount comes equivalent to Rs. 11,72,490/- subject to deduction of TDS@ 10% as per applicable rate.

13. Issues to be decided

- i. **Whether the respondent is liable to pay assured returns as per the MOU?**
- ii. **Whether the respondent is in default of payment to be made to the complainant as per clause 3 and 4 of the MOU?**
- iii. **Whether it was mandatory for the respondent to abide by the terms and conditions of the MOU?**

13. Relief sought

- i. **Handover the fully developed physical possession of the commercial space admeasuring 220 sq.ft. super area in IT park of the respondent.**
- ii. **Respondent may be directed to refund the entire basic sale consideration amount Rs. 14,99,000/- along with interest @ 24 % per annum.**



- iii. To pay the assured return in a sum of Rs. 11,72,490/-
subject to deduction of TDS @ 10% along with the
interest rate @24% p.a.

Reply on behalf of respondent

Preliminary objections

14. The respondent submitted that the hon'ble authority in the similar matter titled as "Brhimjeet vs. Landmark Apartments pvt. Ltd. last listed on 7.08.2018, has held that the matter in dispute therein was to be adjudicated by the adjudicating officer and not by the authority and accordingly dismissed the complaint with the liberty to approach the adjudicating officer.
15. The respondent submitted that the present complaint is not maintainable or tenable in the eyes of law as the complainant has not approached this hon'ble authority with clean hands and has not disclosed the true and material facts relevant to this case of the complainant. That the complainant had specifically not disclosed the fact that the complainant had failed to make timely payments which was a necessary covenant under the provisional allotment. That despite several reminders from the respondent, the complainant had failed to make the payments so as to be entitled for the possession of the unit. However, in the present complaint is seeking the refund of the amount citing reasons which are illegal and untenable.



16. That the complainant, thus, has approached the hon'ble authority with unclean hands and has suppressed and concealed material facts and proceedings which have a direct bearing on the very maintainability of the purported complaint and if there had been disclosure of these material facts and proceedings, the question of entertaining the purported complainant would not have arisen. It is settled law as held by the hon'ble Supreme Court in **S.P. Chengalvaraya Naidu v. Jagannath 1994(1)SCC(1)** that non-disclosure of material facts and documents amounts to a fraud on not only on the opposite parties but also on the court. Reference may also be made to the decisions of the hon'ble Supreme Court in **DilipSingh Vs State of UP 2010-2-SCC-114** and **Amar Singh Vs Union of India 2011-7-SCC-69** which is also been followed by the Hon'ble National Commission in the case of **Tata Motors Vs Baba HuzoorMaharaj** being **RP No. 2562 of 2012** decided on **25.09.2013**.



17. That the present petition, so preferred under the Real Estate Regulation And Development Act 2016, is not maintainable as the complainant has failed to disclose any maintainable cause of action under the said provisions of the Act as alleged. That section 19 of the real estate regulation and development Act 2016 clearly prescribes the rights and duties of the allottees and section 19 (6).

18. That the present complaint pertains to compensation and interest for a grievance under section 12, 14, 18 and 19 of the Real Estate (Regulation And Development) Act, 2016 and are required to be filed before the adjudicating officer under Rule-29 of the Haryana Real Estate (Regulation And Development) Rules, 2017 (hereinafter referred to as the "said Rules") read with Section 31 and Section 71 of the said Act and not before this hon'ble regulatory authority under Rule-28.
19. The respondent submitted that an amount of Rs. 7,44,876/- has been paid to the complainant as assured return and thus it is quite evident that time was not an essence of the contract. Further, submitted that the respondent vide letter dated 04.07.2015 offered possession to the complainant with the request to make payment towards EDC/IDC/IMFC and any other charges in order to take possession.
20. The respondent denied that he has not completed the construction till date. The respondent is willing to give the remaining assured returns as promised along with the possession, however, complainant needs to clear the statutory dues which to the tunes of Rs. 2,71,417/-.



21. With regard to the issue relating to non-payment of assured returns, the relevant portion of Article 3.4 of the MOU is reproduced hereunder:

“Developer shall continue to pay to the Allottee an Assured Return from the date of execution of this MOU till the first Lease Rent become payable to the Allottee from the Lessee.”

As per this article the respondents were duty bound to provide assured returns to the complainants which they defaulted since 17.03.2014. and, no documentary proof has been provided by the respondent to show otherwise.

Findings of the authority

Jurisdiction of the authority

Subject Matter Jurisdiction

22. The authority has complete jurisdiction to decide the complaint regarding 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 complainants at a later stage.

Territorial Jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town & 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 complainants.

23. MoU inter-se the parties was signed on 7.10.2010 As per clauses 3 and 12 of MoU, which reads as under:-

Clause -3 "That the buyer has paid the entire basic sale price to the company @ Rs.6814/- per sq. ft. for the total area admeasuring 220 sq. ft and the company has agreed to pay Rs.22,990/- every month as assured return to the Buyer which shall be payable quarterly, till the physical possession is handed over to the Buyer.

Clause - 12 "That the company agrees to sell the demised premises to the Buyer, which is a space admeasuring the aggregate tentatively, a super area of 220. Sq. ft. subject to final confirmation of area on completion of the building in Landmark Cyber Park at the rate of Rs.6814/- per sq. ft. of super area, amounting to a total consideration of 14,99,000/-. The final area on completion may increase or decrease by about 10% of the tentative area agreed herein to be sold. Correspondingly, the consideration amount shall also increase or decrease".

24. In the present case, an assured return of Rs.22,990/- 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 is of the view that the authority has already adjudged the present case 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 And 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”.

25. As already decided in complaint No.141 of 2018 titled as Brhimjeet Versus M/s Landmark Apartments Pvt. Ltd. no case is made out. It is pertinent to note that counsel for respondent has given a Supreme Court Judgment dated 25.07.1997 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.

Decision and directions of the authority

26. The complainants made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above. The complainants 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.

27. 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. 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”.

28. The order is pronounced.

29. Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated : 05.12.2018



HARERA
GURUGRAM



Judgement Uploaded on 05.01.2018

PROCEEDINGS OF THE DAY

Day and Date	Wednesday and 05.12.2018
Complaint No.	355/2018 case titled as Ms. Kailash Devi Vs M/s Landmark Apartments Pvt. Ltd.
Complainant	Ms. Kailash Devi
Represented through	Shri Dinesh Kaushik, Advocate for the complainant.
Respondent	M/s Landmark Apartments Pvt. Ltd.
Respondent Represented through	Shri Amarjeet Kumar and Ms. Shriya Takkar, Advocates for the respondent.
Last date of hearing	12.9.2018
Proceeding Recorded by	Naresh Kumari & S.L.Chanana

Proceedings

Project is not registered.

Arguments heard.

MoU inter-se the parties was signed on 7.10.2010 As per clauses 3 & 12 of MoU, which reads as under:-

Clause -3 "That the buyer has paid the entire basic sale price to the company @ Rs.6814/- per sq. ft. for the total area admeasuring 220 sq. ft and the company has agreed to pay Rs.22,990/- every month as assured return to the Buyer which shall be payable quarterly, till the physical possession is handed over to the Buyer.

Clause - 12 "That the company agrees to sell the demised premises to the Buyer, which is a space admeasuring the aggregate tentatively, a super area of 220. Sq. ft. subject to final confirmation of area on completion of the building in Landmark Cyber Park at the

rate of Rs.6814/- per sq. ft. of super area, amounting to a total consideration of 14,99,000/-. The final area on completion may increase or decrease by about 10% of the tentative area agreed herein to be sold. Correspondingly, the consideration amount shall also increase or decrease”.

An assured return of Rs.22,990/- 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. Arguments advanced on behalf of the parties heard.

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 by the complainant. Counsel for the respondent has submitted a copy of judgment dated 25.7.1997 passed by the Hon’ble Supreme Court vide which he has pleaded on 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)
05.12.2018

Subhash Chander Kush
(Member)
05.12.2018