

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

**Complaint no. : 1143 of 2018**  
**Date of first hearing : 24.01.2019**  
**Date of decision : 05.03.2019**

Mr. Amit Sharma  
R/o: H. no. 47, Sector-1A,  
Trikuta Nagar, Jammu

**...Complainant**

Versus

Landmark Apartments Pvt. Ltd.  
Office: The Landmark House, 85,  
Sector-44, Gurugram, Haryana

**...Respondent**

**CORAM:**

Dr. K.K. Khandelwal  
Shri Subhash Chander Kush

**Chairman  
Member**

**APPEARANCE:**

Shri Dinesh Gulia  
Dr. Amarjeet Kumar

Advocate for the complainant  
Advocate for the respondent

**ORDER**

1. A complaint dated 08.10.2018 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 Mr. Amit Sharma, against the promoter Landmark Apartments Pvt. Ltd. on account of violation of clause 10.1 of the buyer's



agreement executed on 03.05.2014 for unit no. A-73, 7<sup>th</sup> floor, block A admeasuring super area of 1710 sq. ft' in the project "Landmark The Residency", Sector 103, Gurugram for not giving possession on the due date which is an obligation of the promoter under section 11(4)(a) of the Act ibid.

2. Since, the buyer's agreement has been executed on 3.5.2014 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 The Residency" in Sector 103, Gurugram
2.	Nature of real estate project	Group housing colony
3.	Project area	10.868 acres
4.	Unit no.	A-73, 7 <sup>th</sup> floor, block-A



5.	Unit area	1710 sq. ft'
6.	Registered/ not registered	Not registered
7.	DTCP license	33 of 2011 dated 19.04.2011
8.	Date of buyer's agreement	03.05.2014
9.	Total consideration (clause 1.1)	Rs.75,62,300/-
10.	Total amount paid by the complainant	Rs.67,21,975/- (Annexure P/2, page 37) Rs.63,64,381/- (as per ledger A/c dated 01.04.2009 to 20.07.2019)
11.	Payment plan	Construction linked instalment plan
12.	Due date of delivery of possession Clause 10.1- 48 months from date of execution of the agreement + 12 months grace period.	<b>03.11.2018</b>
13.	Delay of number of months/ years till date	Pre-mature
14.	Penalty clause as per builder buyer agreement	Clause 11.4 - Rs. 5/- per sq. ft' per month of the super area for delay



4. The details provided above have been checked on the basis of the record available in the case file which have been provided by the complainant and the respondent. A buyer's agreement dated 03.05.2014 is available on record for unit no. A-73, block no. A, 7<sup>th</sup> floor, admeasuring super area of

1710 sq. ft' according to which the possession of the aforesaid unit was to be delivered by 03.11.2018.

5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. The reply has been filed by the respondent and the same has been perused.

### **Facts of the complainant**

6. The respondent company approached the complainant and compelled him to buy a residential apartment and a cheque dated 03.02.2011 was made in favour of the respondent.
7. The complainant booked 1 unit and made advance payments dated 03.02.2011. Thereafter, the complainant was made to wait for more than 3 years to sign the buyer's agreement upto 03.05.2014. The complainant signed the construction linked plan but the respondent used to ask for payments frequently without sharing photographs on demand.
8. The complainant afterwards found that the agreement was one-sided which were only favouring respondent. This authority has held that an agreement which allows the



builder to cancel the agreement and doesn't allow the buyer to exercise his option is completely illegal, unfair and discriminatory and cannot be deemed to be binding upon the complainant.

9. The total sale consideration of the unit is Rs.75,62,300/- and the complainant has already paid Rs.67,21,975/-. Seven years have been elapsed since inception till now but the building is not ready for possession as the work was stalled. The complainant visited the project in 2014, 2015, 2017 and 2018 and was devastated to see the slow speed of construction. As per clause 19(4) of RERA, the allottees entitled to claim refund of the advance payment along with interest in the event if the project is delayed.

10. The complainant booked the above said apartment earlier in 2011 with the builder but when complainant was made to wait for three years for signing builder buyer agreement, complainant lost their faith in builder, but complainant had no choice. The complainant after visited project site in July, 2018 totally understood that respondent company is cheating him and playing with his hard earned money. Then



complainant went to respondent's office and asked to cancel his apartment A-73, in Landmark residency. Afterwards, the complainant said he will file case against respondent then complainant was threatened to see dire consequences.

11. As the respondent did not make refund of the complainant's money, the complainant had no option other than filing this complaint against respondent.

### **Issues raised by the complainant**

12. The relevant issues raised in the complaint are:
- I. Whether the complainant is entitled to full refund of Rs.67,21,975/-?
  - II. Whether the complainant is entitled to interest @24% p.a. as per respondent's payment demand letter?
  - III. Whether the buyer's agreement is to be declared as void in view of the fact that the agreement only has clauses which favour the builder?

13. **Relief sought**



- I. Direct the respondent to refund the amount of Rs. 67,21,975/- to the complainant which was paid by the complainant.
- II. To direct the respondent to pay interest @24% as per demand letter and as the complainant was also forced to pay penalty @24% p.a.
- III. Any other just and proper direction and relief which this honourable authority may deem fit.

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

14. The respondent submitted that the hon'ble authority in the similar matter titled as "Brhimjeet vs. Landmark Apartments Pvt. Ltd. last listed on 07.08.2018, 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. 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. 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 unneatable.

16. 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 **Dilip Singh 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 Huzoor Maharaj being RP No. 2562 of 2012 decided on 25.09.2013.**

17. 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.

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** (hereinafter referred to as the "said Act") 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**. Section 31, section 71 of the Act ibid read with rule-28 and rule-29 of the rules ibid.

19. It is submitted that the complainant booked the said unit on 03.02.2011 and opted for construction linked instalment payment plan and all the demands were raised in accordance with the same but the complainant on the contrary failed to make timely payment and resultantly paid delayed payment interest and the same can be seen from the ledger account statement. The complainant is trying to mislead this hon’ble authority by levelling false and baseless allegations. It is submitted that the project is ready and the intimation of possession will soon be sent. It is submitted that the complainant in order to achieve his malafide motives, is trying to mislead this authority. The project is already complete and respondent is still willing to give possession but the complainant is not ready for the same.



### Determination of issues

After considering the facts submitted by the complainant, reply by the respondent and perusal of record on file, the authority decides seriatim the issues raised by the parties as under:

20. With respect to **first and second issue** raised by the complainant, the authority came across clause 10.1 of the agreement which is reproduced hereunder:

*“48 months from date of execution of the agreement  
+ 12 months grace period”*

The due date of possession comes out to be 03.11.2019 and the complaint is pre-mature. The authority is of the view that since the due date has already crossed, the complainant is entitled for delayed possession charges at the prescribed rate. Counsel for the respondent stated that the unit will be delivered within a period of 6 months on receipt of OC. So at this stage, no refund can be allowed.

21. With respect to **third issue** raised by the complainant, the respondent company in the buyer's agreement has stipulated to pay delayed penalty @ Rs.5/- per sq. ft. per



month of the super area for the period of delay. The terms of the agreement are drafted mischievously by the respondent as in this case and are completely one sided as also held in para 181 of ***Neelkamal Realtors Suburban Pvt Ltd Vs. UOI and ors. (W.P 2737 of 2017)***, wherein the Bombay HC bench held that:

*“...Agreements entered into with individual purchasers were invariably one sided, standard-format agreements prepared by the builders/developers and which were overwhelmingly in their favour with unjust clauses on delayed delivery, time for conveyance to the society, obligations to obtain occupation/completion certificate etc. Individual purchasers had no scope or power to negotiate and had to accept these one-sided agreements.”*

### **Findings of the authority**

22. The preliminary objections raised by the respondent regarding jurisdiction of the authority stands rejected. 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 complainant at a later stage.



23. By virtue of this complaint, complainant is seeking the indulgence of the authority to direct the respondent to refund the amount deposited with the respondent with interest.
24. The case of the complainant is that he had booked a unit no. A-73, in Landmark The Residency in Sector 103, Gurugram and as per clause no.10.1. of the buyer's agreement the respondent was duty bound to deliver the possession within a period of 48 months + six months grace period which comes out to 03.11.2018. But till today, no possession has been offered.
25. Counsel for the respondent has stated that the complaint is premature at the time of filing i.e. 08.10.2018 and stated that unit will be delivered within a period of six months on receipt of occupation certificate. Since the due date has already been crossed, as such, the complainant is entitled for delayed possession charges at the prescribed rate of interest



26. The complainant made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above.
27. 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

#### **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) Since the project is not registered, as such, notice under section 59 of the Real Estate (Regulation and Development) Act, 2016, for violation of section 3(1) of the Act be issued to the respondent. Registration branch is directed to do the needful.



(ii) The respondent is directed to pay to the complainant delayed possession charges at the prescribed rate of interest i.e. 10.75% p.a. from 03.11.2018 till the actual handing over of possession to the complainant.

(iii) Interest accrued so far shall be paid within a period of 90 days from the issuance of this order and for subsequent each month on or before 10<sup>th</sup> of next month.

29. Complaint stands disposed of accordingly.

30. File be consigned to the registry.

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

Chairman

**(Subhash Chander Kush)**

Member

Real Estate Regulatory Authority, Gurugram

Date: 05.03.2019

Judgement Uploaded on 25.03.2019

