

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

Complaint no. : 522 of 2018
Date of first hearing : 11.09.2018
Date of decision : 11.12.2018

Mr. Raj Kumar Kansal
R/o H.no.503, Sawarn Jayanti Apartment,
Sector-54, Gurugram, Haryana.

Complainant

Versus

M/s Landmark Apartments Pvt. Ltd.,
Address: Landmark House-85, Sector-44,
Gurugram-122001, Haryana.

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Rajan Gupta Advocate for the complainant
Shri Amarjeet Kumar Advocates for the respondent

ORDER

1. A complaint dated 10.07.2018 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. Raj Kumar Kansal, against the promoter M/s Landmark Apartments Pvt. Ltd. on account of violation of clause 3(a) of the builder buyer agreement(BBA) executed between the parties on 09.12.2011, in respect of the serviced office/unit described as below for



not handing over the possession by due date which is an obligation of the promoter under section 11(4)(a) of the Act *ibid*.

2. Since, the builder buyer agreement has been executed on 09.12.2011 i.e. prior to the commencement of the Act *ibid*, therefore, the penal proceedings cannot be 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 :-

• **Nature of the project: Commercial (I.T. Park)**

1.	Name and location of the project	Landmark Corporate Center, a part of Landmark Cyber Park, Sector-67, Gurugram.
2.	Registered/ not registered	Not registered
3.	Applied for OC	In 2015 (as alleged by the respondent in the reply)
4.	Intimation of possession for fit outs on (Note: without obtaining occupation certificate)	23.06.2015
5.	Serviced office/unit no.	07, 5 th floor
6.	Unit area	300 sq. ft.
7.	Builder buyer agreement (BBA) executed on	09.12.2011



8.	Payment plan	Construction linked payment plan
9.	Basic sale price as per BBA	Rs.23,00,100/- (approx.)
10.	Total amount paid by the complainant as per ledger account from 01.04.2010 to 01.11.2013	Rs.20,01,000/-
11.	Date of delivery of possession as per clause 3(a) of the BBA. [i.e. three years from the date of signing of the BBA i.e. 09.12.2011]	09.12.2014
12.	Delay in handing over possession till date	4 years and 2 day
13.	Penalty clause as per the said agreement	Clause 3(c) of the agreement i.e. @ Rs.5/- per sq. ft. per month.
14.	Cause of delay in delivery of possession as stated by the respondent.	Waiting for occupation certificate from the competent authority and the respondent alleges that they have applied for OC in 2015 itself but the same has not been granted till date despite having received NOC for fire.

4. 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 builder buyer agreement dated 09.12.2011 is available on record for the aforesaid unit according to which the possession of the same was to be delivered by 09.12.2014. Neither the respondent has delivered the possession of the said unit as on date to the complainants nor they have paid any compensation as per



clause 3(c) of the builder buyer agreement. Therefore, the promoter has not fulfilled his committed liability as on date.

5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. The respondent through his counsel appeared on 11.12.2018. The case subsequently, came up for hearing on 11.09.2018 and 11.12.2018. The reply filed on behalf of the respondent has been perused.

Brief facts of the complaint

6. Briefly stated, the facts of the complaint are that the respondent had proposed to develop “Landmark Corporate Centre” a part of Landmark Cyber Park in Sector 67, Gurugram an information and technology park (I.T. Park) in the year 2010.
7. The complainant submitted that he booked office space in the above mentioned project and accordingly the respondent company allotted 300 sq. ft. area bearing no. 7 on 5th floor. That the total cost of the said unit was Rs.23,00,000/- i.e.7667/- per sq. ft. The complainant made first payment of Rs.50,000/- in



July 2010 and till today made a total payment of Rs.20,01,000/-.

8. The complainant submitted that the respondent has entered into builder buyer agreement with the complainant on 09.12.2011 i.e. after expiry of more than one year and five months from the date of first payment made to the respondent. That as per clause 3 of the said agreement, the respondent company assured the complainant that the possession of the said unit would be handed over to the complainant within 3 years i.e. by 09.12.2014 and in case of delay, respondent will pay delay possession charges.

9. The complainant submitted that the respondent vide letter dated 19.12.2014 has raised a demand of Rs.4,39,000/- and in the said demand letter the amount received from the complainant was shown as Rs.18,51,000/- even though the complainant had already made a payment of Rs.20,01,000/-.

The complainant having no other option decided to visit the respondent office to settle the above issues. However, instead of deciding the above payment issue, the respondent's representative informed the complainant that it was not



possible to allot the said unit of 300 sq. ft. office space on the 5th floor and therefore fresh area was allotted on 1st floor.

10. The complainant submitted that it was further informed that new area allotted on 1st floor is less than the area earlier allotted to the complainant but on the same rate i.e. Rs.23,00,000/-. That the above act of the respondent is illegal as the same is without the consent of the complainant.

11. The complainant submitted that the possession of the said unit was to be delivered till 09.12.2014, however there is already delay of more than 4 years and till today no possession has been offered to the complainant despite the fact that more than 90% of the cost of the said unit has already been paid and the complainant is ready to pay the balance sale consideration.

Issues to be decided

12. The issues raised by the complainant are as follows:

- i. Whether the complainant is entitled for late possession charges along with interest if the respondent is ready to offer possession of the said unit?



- ii. Whether the complainant is entitled to refund of the amount along with interest in case the respondent failed to comply with the terms of the agreement?
- iii. Whether the demand raised by the respondent vide letter dated 19.12.2012 is illegal as the complainant had already made a payment of Rs.20,01,000/- on that day?
- iv. Whether the respondent can change the allotment of office space bearing no. serviced office no.7 on 5th floor having area 300 sq. ft. out of its own wish without the consent of the complainant?

Reliefs sought by the complainant

13. The complainant is seeking the following reliefs:
 - i. The complainant is seeking possession of the said office space and late possession charges along with interest; OR
 - ii. The complainant is seeking refund of the amount paid i.e. Rs.20,01,000/- along with interest.



Reply on behalf of the respondent

14. The respondent submitted that the hon'ble authority in the similar manner titled as ***Brhimjeet vs. Landmark Apartment***

Pvt. Ltd. (HRR/GGM/VRN/141/2018) last listed on 7.8.2018 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. It is pertinent to mention that the facts related to aforesaid case and the present case in dispute are identical in nature and thus the present complaint should also be dismissed.

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 complaint. It is submitted that the respondent vide letter dated 23.06.2015 has already offered possession and requested to clear the EDC/IDC and other charges; but the complainant has not cleared the dues amounting to Rs.6,66,728/-.

16. The respondent submitted that in the present complaint, apart from seeking possession of the unit along with late possession charges and delayed interest, the complainant is alternatively



seeking refund of the amount along with the interest and the same is required to be filed before the adjudicating officer under rule 29 of the Rules ibid read with section 31 and section 71 of the Act ibid and not before this hon'ble authority under rule 28.

17. The respondent submitted that as per clause 3 of the builder buyer agreement, the possession of the unit was proposed to be delivered within 3 years from the date of signing of the builder buyer agreement, subject to force majeure circumstances.
18. The respondent submitted that the demand dated 19.12.2014 was raised due to typographical error of the accounts department of the respondent. It is submitted that when the complainant mentioned the said error, the accounts department of the respondent corrected the error and the same was communicated to the complainant. It is pertinent to mention that no further demand letter or reminder was ever raised by the respondent.



Determination of issues

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

19. With respect to the **first and second issues** raised by the complainant, as per clause 3(a) of builder buyer agreement, the possession of the unit was to be handed over within 3 years from the date signing of the builder buyer agreement. The builder buyer agreement was executed on 09.12.2011, therefore, the due date of possession shall be computed from 09.12.2011. The clause regarding the possession of the said unit is reproduced below:

“That possession of the said office space is proposed to be delivered by the company to the office space(s) allottee(s) within three years from the date of signing of the builder buyer agreement subject to force majeure circumstances. It is, however understood by the parties that various blocks comprised in landmark cyber park shall be ready and completed in phases and handed over to the allottee accordingly. The company shall be entitled to reasonable extension in delivery of possession of “the said unit” to the allottee in the event of any default or negligence attributable to the allottee fulfilment of terms of conditions of this allotment.”



20. Accordingly, the due date of possession was 09.12.2014 and the possession has been delayed by four years and two days

till the date of decision. The delay compensation payable by the respondent @ Rs. 5/- per sq. ft. per month for the period of delay as per clause 3(c) of builder buyer agreement is held to be very nominal and unjust. The terms of the agreement have been drafted mischievously by the respondent and are completely one sided and unilateral. It has also been observed 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.”

21. In the present complaint, the complainant is seeking refund of the entire money paid towards the said unit along with interest @ 18% p.a. However, keeping in view the present status of the project and intervening circumstances, the authority is of the view that in case refund is allowed in the present complaint, it shall adversely affect the right of allottees who wish to continue with the project. Further, it will also hamper the completion of the project as the project is almost



complete and the respondent has applied for occupation certificate. However, the OC has not been granted by the concerned authority. Therefore, keeping in view the principles of natural justice and in public interest, the relief sought by the complainant regarding refund of the deposited amount cannot be allowed.

22. Therefore, as the possession of the said unit was to be delivered by 09.12.2014, the authority is of the view that the promoter has failed to fulfil his obligation under section 11(4)(a) of the Act *ibid*. The authority is of the considered opinion that the promoter is liable under section 18(1) proviso read with rule 15 of the Rules *ibid*, to pay interest to the complainant, at the prescribed rate, for every month of delay till the handing over of possession.

23. With respect to the **third issue** raised by the complainant, the respondent has admitted that the demand was raised due to typographical error of the accounts department of the respondent and the same has been corrected and communicated to the complainant. Therefore, the issue is decided in negative.



24. With respect to the **fourth issue** raised by the complainant, there is no documentary evidence in support of the averments of the complainant regarding shifting of the said unit. Otherwise also the BBA dated 09.12.2011 is executed between the parties for unit situated on 5th floor which is unit in question. Hence, the complainant is entitled to unit as mentioned in the said agreement.

Findings of the authority

25. 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. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Department of Town & Country Planning, 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.

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

Directions of the authority

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 Act ibid hereby issues the following directions to the respondent:

- i. The respondent is directed to pay the interest so accrued on the amount paid by the complainant i.e. Rs.20,01,000/- at the prescribed rate i.e. 10.75% for every month of delay from the due date of possession i.e. 09.12.2014 till the actual date of handing over of the possession.
- ii. The respondent is directed to pay accrued interest i.e. Rs.8,62,198/- to the complainant from the due date of



possession till the date of decision, on account of delay in handing over of possession to the complainants within 90 days from the date of decision. Thereafter, the monthly payment of interest i.e. Rs.17,925/- till handing over of the possession, so accrues shall be paid by 10th of every succeeding month.

Principal amount paid by the complainant	Interest accrued up to date of decision	Monthly interest to be paid till handover of possession
Rs.20,01,000/-	Rs.8,62,198/-	Rs.17,925/-

28. The project is registerable and has not been registered by the promoters. The authority has decided to take suo-moto cognizance for not getting the project registered and for that separate proceeding will be initiated against the respondent under section 59 of the Act *ibid*.
29. The order is pronounced.
30. Case file be consigned to the registry.



(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 11.12.2018

(Subhash Chander Kush)

Member