

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

Date of decision : 07.07.2022

Name of the builder		T.S Realtech Pvt. Ltd.	
COMPLAINT NUMBER		PARTIES	APPEARANCE
1.	CR/1572/2019	Krishnawanti, W/o Sh. Vijay Singh R/o: Flat no.001, Upper Ground Floor, Chowdhary Colony, Jyoty Park (Behind Geeta Bhawan), Gurugram-122001	Sh. Arun Kumar (Advocate)
		Versus	
		M/s T.S. Realtech Pvt. Ltd. R/o: IRIS Tech Park, 808, Tower A, Sector 48, Sohna Road, Gurugram-122018	Sh. Ishaan Dang (Advocate)
2.	CR/ 451/2020	M/s T.S. Realtech Pvt. Ltd. R/o: IRIS Tech Park, 808, Tower A, Sector 48, Sohna Road, Gurugram-122018	Sh. Ishaan Dang (Advocate)
		Versus	
		Krishnawanti R/o: Flat no.001, Upper Ground Floor, Chowdhary Colony, Jyoty Park (Behind Geeta Bhawan), Gurugram-122001	Sh. Arun Kumar (Advocate)

CORAM:

Dr. KK Khandelwal

Chairman

Shri Vijay Kumar Goyal

Member

ORDER

1. This order shall dispose of the above mentioned two complaints filed before the authority in form CRA under section 31 of the real estate (regulation and development) Act, 2016 (hereinafter

referred as "the Act" read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017(hereinafter referred as "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 its obligations, responsibilities and functions to the allottees as per the agreement for sale executed inter se between parties.

2. The core issues emanating from them are similar in nature and the complainant in the above refereed matters is an allottee of the project, namely, Iris Broadway (commercial colony) being developed by the same respondent/ promoter i.e., Isis Broadway. The terms and conditions of the builder buyer's agreement, fulcrum of the issue involved in the cases pertains to failure on the part of the promoter to deliver timely possession of the unit in question, seeking refund of the paid-up amount from the promoter. Since both the cases relate to the allotted unit, one filed by the allottee and the other one filed by the builder, so for deciding both the cases, the facts of first case are being taken. But before that the particulars of the project, the details of the sale consideration, the amount paid by the complainant, the date of proposed handing over the possession, delay period, if any are being given in the tabular form.

S.No.	Heads	Information
1.	Project name and location	"Iris Broadway", Sector 85-86 Manesar, Gurugram, Haryana
2.	Project area	2.8 acres
3.	Nature of the project	Commercial colony
4.	DTCP License	40 of 2012 dated 22.04.2012 valid upto 21.04.2025
5.	Name of the licensee	TS Realtech Pvt. Ltd.

6.	RERA Registered/ not registered	Registered 168 of 2017 dated 29.08.2017
	RERA Registration valid up to	31.12.2021=6 months COVID=30.06.2022
7.	Unit no.	F-142, First floor (Page 31 of the complaint 1572/2019)
8.	Unit measuring (super area)	481.44 sq. ft (Page 31 of the complaint 1572/2019)
9.	Date of Application	01.04.2013 (Page 66 of the complaint no. 1572/2019)
10.	Date of allotment	N/A
11.	Date of execution of space buyer agreement	23.07.2013 (Page 28 of the complaint)
12.	Possession clause	<i>"11.1. If for any reason other than those given in clause 11.1, the Company is unable to or fails to deliver possession of the said unit to the allottee(s) within forty two (42) months from the date of application or within any extended period or periods as envisaged under this Agreement, then in such case, the allottee(s) shall be entitled to give notice to the company, within ninety(90) days from the expiry of the said period of forty two (42) months or such extended periods, as the case may be, for terminating the Agreement."</i>
13.	Due date of possession	01.10.2016 (The same is inadvertently mentioned as 23.07.2016 in proceedings dated 07.07.2022) (Due date is calculated from date of application form i.e., 01.04.2013)
14.	Total sale consideration	Rs. 42,90,984/- (As per BBA on page 32 of complaint no. 1572/2019)

15.	Total amount paid by the complainant	Rs.16,89,000/- (Page no. 56 of the complaint in CR/1572/2019)
16.	Payment plan	Construction Linked Payment Plan (Page 16 of synopsis of arguments for complainant in CR/1572/2019)
17.	Occupation Certificate	29.03.2019
18.	Offer of possession	Not offered
19.	Cancellation Letter	15.12.2014/02.01.2015/ 31.12.2018 (Pages 59, 60 and 67 of the complaint in CR/ 451/2020)

A. Facts of the Case:

3. A unit measuring 481.44 sq. ft. in the project "Iris Broadway" at sector 85-86, Gurugram bearing no. F-142, First Floor was booked by Mrs. Krishnawanti allottee/complainant with the promoter/builder for a sum of Rs. 42,90,834/- in April, 2013. It led to execution of buyer's agreement between the parties on 23.07.2013. The due date for completion of the project & offer of possession was agreed upon as 01.10.2016. It is the case of complainant/ allottee that though she paid a total sum of RS. 16,89,000/- i.e., 29% of the total sale consideration but the respondent failed to get execute buyers agreement. When she received a pre-printed space buyer agreement it was containing unfair and biased terms and conditions and the same was not as per the assurances given at the time of booking. But finding no alternative and being cheated, she had to execute buyers' agreement on 23.07.2013.
4. It is further the case of complainant that after the expiry of the due date, she requested the respondent about the status of the project and offer of the possession of the allotted unit. But she was

surprised to receive a letter dated 31.12.2018 cancelling the allotment of the unit violating the terms and conditions of the booking.

5. It is the case of the complainant that as and when the demands against the allotted unit were raised, she used to pay and paid a total sum of Rs. 16,89,000/- in all but the allotment of the unit was cancelled illegally and without following the due procedure and as per the terms and conditions of the buyers agreement.
6. So on these broad averments, she filed the complaint seeking setting aside the cancellation of the allotted unit ,its possession , delay possession charges besides litigation expenses.

B. Relief sought by the complainant-allottee:

7. The complainant-allottee has sought following relief(s):
 - i. Direct the respondent to pay interest at the prescribed rate of 24% per annum compound for causing inordinate delay in delivery of possession of the unit on the amount deposited by complainant to be calculated from the due date of delivery till its full realisation to immediately handover the possession of the unit
 - ii. To set aside the letter dated 03.12.2018.
 - iii. Direct the respondent to pay Rs. 5,00,000/- towards litigation expenses.

C. Reply by respondent-builder:

8. The case of respondent as set up in the written reply is that though the complainant is its allottee but the complaint filed by her is not maintainable before this authority.

9. It is pleaded that a space buyer agreement was executed between the parties on 23.07.2013 but the same is not the "Agreement for Sale" as stipulated under the Act of 2016 and thus no adjudication on such agreement can take place.
10. It is submitted that the respondent company had started the construction work after getting all the approvals from the concerned authorities.
11. It is humbly submitted that the said unit of the complainant falls under phase I which is complete in every respect and the Occupation Certificate for the same was also obtained on 29.03.2019. The respondent has, in fact, offered the possession to several allottees in the said project.
12. The complainant has filed the instant complaint for the possession of the said allotted unit but has failed to mention the various defaults since 2013. Thus, the respondent was constrained by the repeated defaults of the complainant to send various reminders for four years from 2014 to 2018 and offered to collect the refund amount after deduction of charges as per the agreement but the complainant has not reverted till date.
13. It is pertinent to mention here that the complainant has failed to fulfil the obligations towards the payment against the said unit. The complainant has made payment of Rs.16,28,611/- after deduction of tax only against unit no. F-142 i.e., up to 30% out of the total consideration. The respondent had raised the various demand letter/requests against the complainant for the outstanding amount, which has not been paid by her till date.
14. That the complaint despite default did not collect the refund amount and execute the requisite documents. Rather she had filed

the instant complaint, wherein it has been categorically admitted by her that only 30% amount had been paid by her till 2013. In response due to such number of defaults, the respondent has expressly mentioned in his intention in cancellation letters to the complainant. Thus, the complainant is only liable to get the refundable amount after deduction of the earnest money as per the said agreement.

15. Thus, the complaint has become infructuous as the relief claimed by him/her has already been offered by the respondent as per the said agreement. Thus, in view of the submissions made above, no relief much less as claimed can be granted to the complainant.

D. Jurisdiction of the Authority

D. I Territorial jurisdiction

16. 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 completed territorial jurisdiction to deal with the present complaint.

D. II Subject matter jurisdiction

17. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee 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.

18. 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 leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.
19. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in *Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2020-2021 (1) RCR (c) 357* and reiterated in case of *M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022* wherein it has been laid down as under:

"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that

although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. if the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."

20. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the cases mentioned above, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

E. Relief Sought:

E.1 To set aside the letter dated 31.12.2018 and direct the respondent to pay interest at the prescribed rate of 24% per annum compound for causing inordinate delay in delivery of possession of the unit.

E.2 Hold respondent responsible for delay in execution of the said project and direct the respondent to pay proportionate interest of bank loan amount taken by the complainant to complete the project within stipulated time frame:

21. Both these issues being inter- connected and are being taken together. As per section 19(6) & 19(7) of the Act, timely payment of instalment is the liability of the allottee. Clause 10.2 of the Space Buyers agreement also stipulates that timely payment of instalment is of essence of the contract. It is undoubted that the complainant-allottee was in default in making timely payments leading to cancellation of the allotted unit by the respondent as per the term and conditions of allotment. Now, the issue that arises for consideration is to whether the cancellation of unit on account of this non-payment is valid or not.
21. Several demand letters including reminders and cancellation notices dated 20.08.2013, 15.01.2014, 25.01.2014, 04.08.2014, 25.11.2014, 15.12.2014, 02.01.2015, 12.01.2015, 20.08.2015, 07.03.2016, 05.07.2016, 31.12.2018, were issued to the complainant-allottee to make payment to the respondent-builder. Ultimately, a final notice for cancellation for allotted unit was issued on 31.12.2018 giving 30 days' time to collect the amount due after deduction as per BBA. But neither the allottee turned up to make remaining payment nor to receive the remaining amount of Rs. 4,22,574/- by way of account payee cheque after cancellation. Thus, the allotment of the unit has already been cancelled by the respondent-builder vide letter dated 31.12.2018 and the earnest money forfeited while preparing cheque for

Rs.4,22,574/- in favor of the allottee as per clause 3 and 4 of the space buyers' agreement.

23. The unit allotted to the complainant has already been cancelled by the respondent builder vide letter dated 05.07.2016 followed by another letter dated 31.12.2018 as per the provisions of space buyers' agreement executed between the parties and that act of the respondent-builder has not been challenged by the complainant-allottee. So, no cause of action in favour of complainant- allottee for setting aside the cancellation of the allotted unit issued letter dated 31.12.2018 survives.
24. However, while cancelling the allotted unit, the builder deducted more than 10% of the basic sale price, as against the provisions of clause 3 of the SBA. As per clause 3 of the SBA, the earnest money is 10% of basic sale price. The cancellation of any allotted unit by the respondent builder must be as per the provisions of regulation 11 of 2018 framed by the Haryana Real Estate Regulatory Authority, Gurugram providing deduction of 10% of total sale consideration as earnest money and sending the remaining amount to the allottee immediately.
25. So, the deduction should be made as per the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, which states that-

"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."

26. Moreover, the Hon'ble Apex Court of the land in cases of in ***Maula Bux V/s Union of India AIR 1970 SC, 1955 and Indian Oil Corporation Limited V/s Nilofer Siddiqui and Ors, Civil Appeal No. 7266 of 2009 decided on 01.12.2015*** observed that forfeiture of earnest money more than 10% of the amount is unjustified. Even the same view was followed by the Hon'ble national consumer disputes redressal commission New Delhi in consumer case no 2766 of 2017 decided on 26.07.2022 wherein it was held that 10% of the basic sale price is reasonable amount to be forfeited in the name of the earnest money.
27. Keeping in view the above-mentioned facts and since the allottee accepted the cancellation by filling a form dated 23.05.2018. Hence the authority hereby directs to deduct 10% of the basic sale price i.e., Rs. 3,85,000/- and return the remaining amount with interest with interest at the rate of 9.70% (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 from the date of cancellation i.e., 31.12.2018 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017.

E.3 Legal expenses:

28. The complainant/ allottee is seeking above mentioned relief w.r.t. compensation. Hon'ble Supreme Court of India in *civil appeal nos. 6745-6749 of 2021* titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors.*, has held that an allottee is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses. Therefore, the complainant is advised to approach the adjudicating officer for seeking the relief of litigation expenses.

F. Directions of the Authority:

29. Hence, the Authority hereby passes this order and issue 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/ builder is directed to refund the amount of Rs.16,89,000/- after deducting 10% of the basic sale price of the allotted unit from the date of cancellation i.e., 31.12.2018


till the date of its payment along with interest at the prescribed rate.

ii) A period of 90 days is given to the respondent/ builder to comply with the directions given in this order and failing which legal consequences would follow.

30. A copy of this order be placed on the connected case file bearing no. CR/ 451/2020.

31. Both the complaints stand disposed of.

32. Files be consigned to the Registry.


(Vijay Kumar Goyal)

Member

Haryana Real Estate Regulatory Authority, Gurugram


(Dr. KK Khandelwal)

Chairman

Dated: 07.07.2022

HARERA
GURUGRAM