

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

Complaint no. :	63 of 2020
Date of filing complaint:	16.01.2020
First date of hearing:	12.02.2020
Date of decision :	04.07.2022

M/s. Vats Advisory Private Limited Through its Director Mr. Vineet Toshniwal Registered Office: D-102, Adarsh Residency 4 th Cross, Jayanagar 8 th Block, Bangalore, Karnataka-560082.	Complainant
Versus	
M/s TS Realtech Pvt. Ltd. Registered Office: E-26, LGF, Panchsheel Park, New Delhi-110017.	Respondent

CORAM:	
Dr. KK Khandelwal	Chairman
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Ms. Taniya Sharma (Advocate)	Complainant
Sh. Mukul Sanwariya (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, 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 obligations, responsibilities and functions under the provision of

the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

2. The particulars of the project, the details of sale consideration, the amount paid by the complainant, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S. N.	Particulars	Details
1.	Name of the project	"Iris Broadway", Sector 85-86, Gurugram
2.	Project area	2.8 acres
3.	Nature of the project	Commercial Colony
4.	DTCP license no. and validity status	40 of 2012 dated 22.04.2012 valid up to 21.04.2025
5.	Name of licensee	T.S. Realtech
6.	RERA Registered/ not registered	Registered vide no. 168 of 2017 dated 29.08.2017
7.	Unit no.	309, 3 rd floor, Block-A (Page no. 29 of complaint)
8.	Unit area admeasuring	804 sq. ft. (Page no. 72 of complaint)
9.	Date of Application	22.04.2013 (As alleged by the respondent on page 6 of reply)
10.	Date of execution of space buyer agreement	20.08.2013 (Page no. 26 of the complaint)

11.	Possession clause	<p>11.1 Possession</p> <p>The company is unable to or fails to deliver possession of the said unit to the allottee within 42 months from the date of application or within any extended period or periods as envisaged under this agreement, then in such cases, the allottee shall be entitled to give notice to the company, within 90 days from the expiry of said period of 42 days months or such extended periods, as the case may be, for terminating this agreement.</p>
13.	Due date of possession	<p>28.02.2017</p> <p>(Calculated from the date of application)</p>
14.	Total sale consideration	<p>Rs. 62,63,920/-</p> <p>(As per customer ledger dated 16.12.2013 page no. 116 of complaint)</p>
15.	Amount paid by the complainant	<p>Rs.59,98,600/-</p> <p>(Page no. 15 of the CRA dated 21.04.2022)</p>
16.	Occupation certificate /Completion certificate	<p>29.03.2019</p> <p>(As per page 58 of reply)</p>
17.	Offer of possession	<p>12.04.2019</p> <p>(As per page 62 of complaint)</p>

B. Facts of the complaint:

3. The complainant is a private limited company involved in legal, accounting, book-keeping, auditing, tax consultancy, market research, public opinion polling, business and management

consultancy, having registered office at D-102, Adarsh Residency 47th Cross, Jayanagar 8th Block, Bangalore, Karnataka-560082.

4. The respondent company made several representations of its project to the complainant, alluring them to book a retail/office space in its project "**Iris Broadway**" situated in Revenue Estate of village Badha, Sector - 85-86, Gurgaon Manesar Urban Complex, Gurgaon, and Haryana. Based on these assurances, the complainant booked a unit in the project and was allotted a unit bearing no. 309, 3rd floor, Block A.
5. Thereafter a Space Buyer's Agreement was executed between the parties on **20.08.2013** which contained various arbitrary and unilateral clauses made in favour of the respondent company. As per Space Buyer's Agreement, the possession was to be handed over to the Complainant by **22.10.2016** but the respondent has miserably failed to complete the construction of the Project by such time and has delayed the project for years without any cogent reasons.
6. That the total consideration of the property in the present case is **Rs. 62,63,920/- and the complainant** has till date paid a total amount of **Rs 59,98,600/-**.
7. The possession was supposed to be delivered by 22.10.2016 but the same was offered on 12.04.2019 i.e., after three years of delay. On top of the delayed offer of possession, the respondent also raised a demand of Rs 11,29,261/- with that offer.
8. The delay in offering possession to the complainant has defeated the purpose of buying the property. The complainant is thus not interested in taking the possession of the unit booked.

9. That the provisions of the RERA Act, 2016 are very clear on the mentioned aspect. The complainant is entitled to immediate refund of its money along with the prescribed rate of interest. The complainant is also entitled to payment of compensation.

C. Relief sought by the complainant:

10. The complainant has sought following relief(s):
- Direct the respondent to refund immediately **Rs. 59,98,600/- (Rupees Fifty Nine Lakh Ninety Eight Thousand and Six Hundred Only)**, the amount already paid by the Complainant to the Respondent Company along with interest calculated at the rate of 18% p.a.; and
 - Direct the Respondent to make the compensation for all the mental and physical harassment which the Complainant had to go through for all this years to the tune of Rs.3,00,000/- and Rs.1,00,000/- as the litigation cost of the case

D. Reply by respondents:

The respondents by way of reply dated 27.03.2020 made the following submissions:

11. The case of respondents as set up in the written reply is that the complainant is their allottee in the project detailed above but neither the complaint is maintainable in the present form nor he has any cause of action against them.
12. The complainant is an allottee in the project detailed above and the Space Buyer Agreement was executed between the parties on 20.08.2013 without any sign of protest from the complainant. It is however pleaded that the same is not an agreement for sale in

terms of provisions of Act of 2016 and 2017 Haryana Rules. The Agreement was executed much prior to coming into force of this Act and thus cannot be adjudicated upon.

13. It was accepted that there has been a delay in delivery of possession of the unit. The same was attributed to the demise of the company's managing director (promoter) on 30.12.2013 which led to stopping of construction work for a certain period. The delay was also attributed to demonetisation in 2016. So, delay in such a situation if any is natural and is covered by force majeure events.
14. It was further submitted that the respondent had sent letter for intimation of possession to the complainant vide letter dated 12.04.2019 after obtaining the occupation certificate on 29.03.2019 and also informed the outstanding amount related to the said allotted unit vide letter dated 20.05.2019 but the complainant never showed their willingness to such letters even after knowing the status of construction well.
15. It was the complainant who failed to fulfil the obligation towards payment against the unit even after issuing various reminder letters and has thus violated Section 19(6) of the Act of 2016.
16. That at a stage where the unit is ready for possession, the complainant is filing this complaint instead of taking over the possession of the unit. Thus, no case of refund lies before this Authority.
17. All other averments made in the complaint were denied in toto.
18. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint

can be decided on the basis of these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority:

19. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

21. 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.

E. II Subject matter jurisdiction

22. 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.

23. 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.

F. Findings on the objections raised by the respondents:

F.1 Objection regarding Agreement not executed in terms of 2016 Act:

24. The Agreement, in this case, was executed on 20.08.2013 i.e., before the Act came into force. The Respondent has pleaded that since the present agreement was executed before the enactment of the Act and hence, a complaint based upon the same cannot be adjudicated upon by the Authority.

25. At this stage, it is important to note Section 88 of the Act and the same is reproduced below for ready reference,

"The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force."

26. Thus, the Act is in addition to the law of land in force at the time its coming into force. Keeping in view this provision, the Maharashtra RERA in the case titled *Avinash Saraf, Neha Duggar Saraf vs. Runwal Homes Pvt. Ltd.*, ruled that the Authority can take cognizance of the agreements executed before enactment of the Act

also and is equally competent to grant the relief relating to it. Thus, the Agreement entered into between the party would be taken into cognizance and the objection doesn't stand.

F.2 Objection regarding default in making payments due by the complainant:

27. The respondents have alleged that the complainant having breached the terms and conditions of the agreement and contract by defaulting in making timely payments. Further the above-mentioned contention is supported by the space buyer agreement executed between both the parties. Clause 5 provides for timely payments of the instalments and other charges as stated in the schedule of payment is essence of the agreement.
28. But the plea raised in this regard is devoid of merit. The unit in question was booked by the complainant in 2013 and over the course of time, the complainant has paid a sum of Rs. 59,98,600/- out of Rs. 62,63,920/-. It is pertinent to mention that the complainant didn't pay the last instalment as demanded by respondent. Though the complainant paid payments on time, it felt aggrieved by delayed offer of possession and thus, refused to pay the last instalment. After refusal of such payment, it approached this Authority for refund which makes the objection devoid of merits. Thus, the plea in this regard is just for the sake of objection and is untenable.

F.3 Objection regarding force majeure conditions:

29. The respondent-promoter raised the contention that the construction of the project was delayed due to force majeure conditions such as death of the managing director(promoter) and demonetisation. The flat buyer's agreement was executed between the parties on 20.08.2013 and the death of the Managing director happened 30.12.2013. Though this could have explained a delay of few months, a delay of 2 years cannot be attributed to this. Similarly, demonetisation cannot be accepted as a valid reason for delay of 2 years. Thus, the promoter respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

G. Entitlement of the complainant for refund:

G.1 Direct the respondents to refund of amount of Rs. 59,98,600/- paid along with interest along with interest calculated at the rate of 18% p.a.

30. The complainant was allotted the subject unit by the respondents for a total sale consideration of Rs. 62,63,920/- against payment of Rs.5,00,000/- as booking amount. A space buyer's agreement dated 20.08.2013 was executed between the parties with regard to that unit. The due date of possession of the subject unit was calculated as per clause 11.1 where the possession of the unit was to be delivered to the allottee within **42 months from the date of application or within any extended period or periods as envisaged under this agreement** comes to be 28.02.2017. After

execution of space buyer's agreement, the complainant started depositing various amounts against the allotted unit and paid a sum of Rs. 59,98,600/- from January 2013 to February 2014 as is evident from the Statement of Account (Page 57 of the reply). The possession of the allotted unit was to be offered to the complainant as per clause 11.1 within 42 months **from the date of application or within any extended period or periods as envisaged under this agreement.** That date has already expired. However the project is complete as the respondent has obtained OC on 29.03.2019 i.e., before filing of the complaint.

31. So, in view of abovementioned facts, the complainant wants to withdraw from the project but the same is now complete and the offer of possession has been given. The section 18(1) is applicable only in the eventuality where the promoter fails to complete or unable to give possession of the unit in accordance with terms of agreement for sale or duly completed by the date specified therein. This is an eventuality where the promoter has offered possession of the unit after obtaining occupation certificate and on demand of due payment at the time of offer of possession the allottee wishes to withdraw from the project and demand return of the amount received by the promoter in respect of the unit with interest at the prescribed rate.
32. The due date of possession as per agreement for sale as mentioned in the table above is **20.02.2017** and there is delay of 2 years 10 months 27 days on the date of filing of the complaint. The allottee in this case has filed this application/complaint on 16.01.2020 after possession of the unit was offered to him after obtaining occupation certificate by the promoter. The allottee

never earlier opted/wished to withdraw from the project even after the due date of possession and only when offer of possession was made to him and demand for due payment was raised he filed a complaint before the authority. The occupation certificate /part occupation certificate of the buildings/towers where allotted unit of the complainant is situated is received after obtaining occupation certificate. Section 18(1) gives two options to the allottee if the promoter fails to complete or is unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein:

- i. Allottee wishes to withdraw from the project; or
- ii. Allottee does not intend to withdraw from the project

33. The right under section 18(1)/19(4) accrues to the allottee on failure of the promoter to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein. If allottee has not exercised the right to withdraw from the project after the due date of possession is over till the offer of possession was made to him, it impliedly means that the allottee has tacitly wished to continue with the project. The promoter has already invested in the project to complete it and offered possession of the allotted unit. Although, for delay in handing over the unit by due date in accordance with the terms of the agreement for sale, the consequences provided in proviso to section 18(1) will come in force as the promoter has to pay interest at the prescribed rate of every month of delay till the handing over of possession and

allottee's interest for the money he has paid to the promoter are protected accordingly.

34. Further in the judgement of the Hon'ble Supreme Court of India in the cases of ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors.*** (supra) reiterated in case of ***M/s Sana Realtors Private Limited & others Vs Union of India & others*** (SLP (Civil) No. 13005 of 2020) decided on 12.05.2022, observed as under

25. The unqualified right of the allottee to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed

35. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottee as per agreement for sale under section 11(4)(a). This judgement of the Supreme Court of India recognized unqualified right of the allottee and liability of the promoter in case of failure to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified

therein. But the allottee has failed to exercise this right although it is unqualified one. He has to demand and make his intentions clear that the allottee wishes to withdraw from the project. Rather tacitly wished to continue with the project and thus made him entitle to receive interest for every month of delay till handing over of possession. It is observed by the authority that the allottee invest in the project for obtaining the allotted unit and on delay in completion of the project never wished to withdraw from the project and when unit is ready for possession, such withdrawal on considerations other than delay such as reduction in the market value of the property and investment purely on speculative basis will not be in the spirit of the section 18 which protects the right of the allottee in case of failure of promoter to give possession by due date either by way of refund if opted by the allottee or by way of delay possession charges at prescribed rate of interest for every month of delay.

36. In the case of ***Ireo Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors.*** (Civil appeal no. 5785 of 2019 decided on 11.01.2021), some of the allottees failed to take possession where the developer has been granted occupation certificate and offer of possession has been made. The Hon'ble Apex court took a view that those allottees are obligated to take the possession of the apartments since the construction was completed and possession was offered after issuance of occupation certificate. However, the developer was obligated to pay delay compensation for the period of delay occurred from the due date till the date of offer of possession was made to the allottees.

As per proviso to sec 18(1)



Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such as rate as may be prescribed.

37. In case allottee wishes to withdraw from the project, the promoter is **liable on demand** to the allottee return of the amount received by the promoter with interest at the prescribed rate if promoter fails to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale. The words liable on demand need to be understood in the sense that allottee has to make his intentions clear to withdraw from the project and a positive action on his part to demand return of the amount with prescribed rate of interest if he has not made any such demand prior to receiving occupation certificate and unit is ready then impliedly he has agreed to continue with the project i.e. he does not intend to withdraw from the project and this proviso to sec 18(1) automatically comes into operation and allottee shall be paid by the promoter interest at the prescribed rate for every month of delay. This view is supported by the judgement of Hon'ble Supreme Court of India in case of of ***Ireo Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors.***(supra) and also in consonance with the judgement of Hon'ble Supreme Court of India in case ***of M/s Newtech Promoters and Developers Pvt Ltd Versus State of U.P. and Ors.***(supra)

38. The authority hereby directs that the allottee shall be paid by the promoter an interest for every month of delay till handing over of possession at prescribed rate i.e. 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 within the timelines provided in rule 16(2) of the Haryana Rules 2017 *ibid*. The allottee is obligated to take the possession of the apartment since the construction is completed and possession has been offered after obtaining of occupation certificate from the competent authority. However, the developer is obligated to pay delay compensation for the period of delay occurred from the due date till the date of offer of possession was made to the allottees.

G.2 Legal expenses and Compensation:

39. The complainant is claiming compensation under the present relief. The Authority is of the view that it is important to understand that the Act has clearly provided interest and compensation as separate entitlement/rights which the allottee(s) can claim. For claiming compensation under sections 12,14,18 and Section 19 of the Act, the complainant may file a separate complaint before the adjudicating officer under Section 31 read with Section 71 of the Act and rule 29 of the rules.

H. Directions of the Authority:

40. 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 promoters as per the functions entrusted to the Authority under section 34(f) of the Act of 2016:

- i) The respondent is directed to pay interest at the prescribed rate of 9.70% p.a. for every month of delay from the due date



of possession i.e., 28.02.2017 till offer of possession plus two months i.e., 12.06.2019.

- ii) The respondent is directed to issue a revised account statement after adjustment of delay possession charges to the complainant within 15 days.
- iii) The respondent shall not charge anything from the complainant which are not part of the buyer's agreement.
- iv) The allottee shall make payment of outstanding dues, if any, after adjustment of delay possession charges to the respondent within 30 days and take possession of the unit in next 30 days.
- v) The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.70% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.
- vi) No holding charges shall be recoverable from the allottees even being part of builder buyer agreement as per the directions of the Hon'ble Supreme Court in civil appeal nos. 3864-3899/2020 decided on 14.12.2020 (supra).

41. Complaint stands disposed of.

42. File be consigned to the Registry.

V.I-3
(Vijay Kumar Goyal)
Member


(Dr. KK Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 04.07.2022

