

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

Complaint no. : 3048 of 2019
Complaint filed on : 20.08.2019
Date of decision : 18.08.2023

Yogesh Mohan
S/o Sh. Bridge Nandan Lal
R/o: House No. 168, Sector- 3, R.K. Puram, New Delhi-
110023

Complainant

Versus

M/s TS Realtech Private Limited.
Registered Office at: - E-26, LGF, Panchsheel Park,
New Delhi - 110017
Corporate Office at: - IRIS Tech Park, 808, Tower-A,
Sector- 48, Sohna Road, Gurugram - 122018

Respondent

CORAM:

Shri Sanjeev Kumar Arora

Member

APPEARANCE WHEN AGRUED:

Shri Daljit Singh Dalal (Advocate)

None

Complainant

Respondent

ORDER

1. The present complaint has been filed by the complainant/allottee in under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 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 to the allottee as per the agreement for sale executed inter se them.

A. Project and unit 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, delay period, if any, have been detailed in the following tabular form:

S. No.	Particulars	Details
1.	Name of the project	"IRIS Broadways", 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.	RERA registration valid up to	31.12.2021
8.	Unit No.	G-122, Super area - 565.20 sq. ft. (Page no. 38 of the complaint)
9.	Date of allotment letter	N. A



10.	Date of builder buyer agreement	23.07.2013 (Page no. 34 of the complaint)
11.	Possession clause	11.1 Possession If for any reasons other than those given in clause 11.1, the company is unable to or fails to deliver possession of the said unit to the allottees within <i>forty two months from the date of application or within extended period or periods under this agreement</i> , then in such case, the allottees shall be entitled to give notice to the company, within ninety days from the expiry of said period of forty two months or such extended periods, as the case may be, for terminating this agreement. (Page no. 44 of the complaint)
12.	Due date of possession	23.04.2017 (Calculated from the date of space buyer's agreement i.e., 23.07.2013 + 90 days grace period)
13.	Total sale consideration	Rs.64,99,800/- (As per demand note provided on page 62 of the complaint)



14.	Total amount paid by the complainant	Rs.26,96,325/- (As per demand letter cum service invoice provided on page 75 of the complaint)
15.	Date of environment clearance	15.04.2014 (Page no. 53 of the reply)
16.	Date of approval of building plans	22.04.2013 (Page no. 43 of the reply)
17.	Occupation certificate	29.03.2019 (Page no. 84 of the reply)
18.	Withdrawal request made by the complainant	22.02.2015 (Page no. 71 of the complaint)
19.	Cancellation letter	22.02.2016 (Page no. 90 of the reply)

B. Facts of the complaint

3. The complainant has made following submissions in the complaint:

- i. That during early 2013 the respondent started with big promise of Assured Return of 12% per annum in their advertisements and confirmed that the Retail/Office Space as per the sanctioned plans and project specification to be the best in the field.
- ii. That the complainant booked a shop in the respondent project i.e., "IRIS Broadway" situated at Sectors 85 and 86, Gurugram on 11.04.2013 and made a payment of Rs.9,00,000/- as booking amount. On 01.06.2013, the respondent allotted a shop

admeasuring 565.20 sq. ft. for a total consideration of Rs.64,99,800/- including BSP, EDC, IDC etc. The space buyer agreement was executed on 23.07.2013 between the parties. As per clause 11.1, the possession of unit was proposed to be delivered within 42 months from the date of receipt of all permissions and commencement of construction/development work and consequently failed to deliver the possession of the allotted unit.

- iii. That the complainant had paid all dues as demanded by the respondent from time to time i.e., Rs.26,96,325/-. The due date of possession was in 23.04.2017 but looking at the negligible progress at the site and due to financial constraints of the complainant, he sent a letter dated 22.02.2015 and request to refund the entire paid-up amount along with interest. Despite request for refund of amount, the respondent sent a demand notice dated 20.08.2015 and raised a demand of Rs.32,72,866/-. Further, the respondent after one year of the said request for refund the allotted unit was cancelled vide letter dated 22.02.2016 on account of default of payment. It stated that only Rs.16,65,432/- is refundable (as per annexure P-11). The letter followed by the director of the respondent company dated 11.10.2018, wherein respondent accepted that there has been delay on its part and refund was not made due to the sudden in-house circumstances.

C. Relief sought by the complainants

4. The complainants have filed the present complaint for seeking following relief:

- i. To refund the entire amount of Rs.26,97,125/- along with interest at such rate as may be prescribed in this behalf including compensation in the manner provided under the Act.

D. Reply by the respondent

5. The respondent has raised certain preliminary objections and has contested the present complaint on the following grounds:

- i. That the complainant filed the case that his unit has been cancelled as per his request on 22.02.2015 and 27.02.2015 wherein he showed his inability to continue with the project and to pay the balance installments due to some circumstances. At his request the unit was cancelled vide letter dated 22.02.2016 i.e., Annexure R-8 of reply (page no. 90-91 of reply) annexed herewith as Annexure R-2. The complainant in his arguments raised the issue that deduction of delayed payment charges of Rs.2,84,507/- has been wrongly levied on the complainant.
- ii. That on the application of the complainant a cancellation letter dated 22.02.2016 was sent to the complainant and he was given the amount refundable to him after all statutory deductions and adjustments as per the application/space buyer's agreement between the parties. The complainant was also requested by the



respondent to contact the account department and get his refund amount after processing all formalities. But till date he has neither taken refund nor approached the office of the respondent. The respondent also served upon the complainant account statement in cancellation letter dated 22.02.2016 showing balance payable to the complainant which comes to Rs.16,65,432/- after deducting statutory deductions, earnest money and delayed payment charges as applicable and as per the agreement between the parties.

- iii. That thereafter a notice/application dated 14.03.2016 was served upon the respondent from Sh. Harish Kumar Bhrigu agent/broker with regard to the unit of the complainant stating that an amount of Rs.7,51,325/- is still payable by the complainant as the said amount was adjusted in the fourth installment of the unit as requested by the complainant. As the complainant had not paid the said amount to the agent Sh. Harish Kumar Bhrigu, the complainant vide letter dated 17.03.2016, duly signed by him, requested the respondent to pay to the agent the said amount directly and adjust the same in his refund amount. But now the complainant is denying such adjustment, i.e., an amount of Rs.7,51,325/- to be paid to the agent by the respondent and trying to recover the said amount along with refund amount from the respondent without showing any proof of payment



made directly to the broker. It is submitted that an amount of Rs.9,14,107/- is the balance refundable amount i.e., the final payable amount to the complainant after deductions of earnest money and interest due payable upto 22.02.2015 as adduced herein above. But again, the complainant instead of processing /meeting formalities for refund is avoiding the respondent.

- iv. That the above stated averments show that the complainant has concealed the material facts from this forum and taking advantage of the liberal attitude of the court by manipulating the facts and is trying to recover the amount from the respondent which the complainant is not legally entitled to recover.
- v. That the complainant booked the retail/office space being unit bearing no. G-122 having an approximate super area of 565.20 sq. ft., located at ground floor in block A in building known as "IRIS Broadway" situated in revenue estate of village Badha, Sector 85-86, Gurgaon Manesar, Urban Complex, Gurgaon, Haryana and executed Space Buyer's Agreement on 23.07.2013.
- vi. That the complainant was duly conversant of the terms and conditions of the said agreement while executing the same and he relied on its own judgment and investigation in deciding to enter into the said agreement. However, the complainant made several breaches which are adduced hereunder:

- a. The complainant contravened terms of schedule of payments since booking of the said unit which is evident from letter dated 01.05.2013 wherein it was clearly mentioned that the payment for the proposed booking of the said unit is outstanding and the complainant should make the payment by 31st May, 2013 failing which the complainant would be charged interest @ 24% per annum compounded monthly on the delay period. However, the complainant paid the said amount on 3rd June 2013 i.e., after due date and several requests of the respondent.
- b. Several reminders were given to the complainant from August 2013 to November 2013 to make payment against "commencement of Excavation" as per the agreed payment plan. But the complainant neither replied to such reminders nor made payment. It is only in Dec 2013, that the complainant requested to adjust the brokerage amount against outstanding dues that is evident from letter dated 01.12.2013.
- c. That the complainant kept on violating the terms of payment and never bothered to abide by the payment clause of the agreement that is evident from several demands/reminders of outstanding dues that were made to the complainant from January 2014.

- d. **Offer of chance of retrieval to complainant:** - That the complainant made several defaults in payments and did not abide by the terms of schedule of payment as opted by the complainant. Then also respondent made sincere effort to help the complainant to carry on the terms of the contract by giving him an opportunity to make the outstanding payment after deduction of interest charged on late payments as the interest had been waived off by the respondent and the due date had also been extended. However, the complainant did not acknowledge the genuineness of the respondent and did not clear the outstanding dues which shows that the complainant was intended only to harass the respondent and extracting money rather than getting the possession of the said unit.
- e. **Demand of refund by the complainant:** - That in the year 2015, the complainant made demand of refund of his entire amount paid by him that put the respondent in dismay as the respondent invested huge amount in said project and made all sincere efforts for its completion while facing all adversities. The complainant on the one hand harassed the respondent by repudiating the terms of agreement by making defaults in payments for which he is liable to be penalized and on the other hand demanded refund of the entire amount paid by him which exhibits the malafide intentions of the complainant that



he was carrying since entering into contract with the respondent i.e., of earning wrongful gain and causing wrongful loss to the respondent.

f. **Notice of termination and cancellation letter:** - That as the complainant did not clear the outstanding against him despite several reminders, the respondent served notice of termination. However, the complainant did not rectify his breach and did not regularize his outstanding payments which enforced the respondent to accept the cancelation request of the complainant against the said allotment of the unit.

g. **Right of respondent to forfeit the amount paid by complainant being loss suffered by respondent:** - that the complainant had never made payment in time and in accordance with the schedule of payment as agreed between the parties. As such the payments are also amenable to levy of interest. Moreover, as the complainant failed to adhere the terms and conditions of the agreement and made defaults in the payments of due installments, the respondent is authorized to forfeit certain payments made by the complainants as per clause 4 and 12 of the space buyer's agreement.



6. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents.
7. The application for refund was filed in the form CAO with the adjudicating officer. After taking reply and presuming the case file, the application was allowed vide order dated 03.09.2021, with a direction to the respondent "*Complaint in hands, is accordingly allowed and the respondent is directed to refund the amount paid by the complainant after deducting forfeitable amount as per Regulations, 2018. Same is also directed to pay interest @ 9.30% p.a. from the date of request of cancellation i.e., 22.02.2015, till realization of amount and also cost of litigations Rs.50,000/- to the complainant.*" Felling aggrieved with the same, the order was challenged by the respondent before the Haryana Real Estate Appellate Tribunal, Chandigarh and who vide order dated 15.03.2023, set aside the same with a direction to the authority for fresh decision of the compliant in accordance with law. So, in pursuant to those direction, both the parties put in appearance before the authority. Therefore, the complaint is being deal with the authority. Now, the issue before authority is whether the authority should proceed further without seeking fresh application in the form CRA for cases of refund along with prescribed interest in case allottee wishes to withdraw from the project on failure of the promoter to give possession as per agreement for sale. It has been deliberated in the proceedings dated



10.05.2022 in CR No. 3688/2021 titled Harish Goel Versus Adani M2K Projects LLP and was observed that there is no material difference in the contents of the forms and the different headings whether it is filed before the adjudicating officer or the authority.

8. Keeping in view the judgement of Hon'ble Supreme Court in case titled as **M/s Newtech Promoters and Developers Pvt Ltd Versus State of U.P. and Ors. (2021-2022 (1) RCR (C), 357**, the authority is proceeding further in the matter where allottee wishes to withdraw from the project and the promoter has failed to give possession of the unit as per agreement for sale irrespective of the fact whether application has been made in form CAO/ CRA. Both the parties want to proceed further in the matter accordingly. The Hon'ble Supreme Court in case of **Varun Pahwa v/s Renu Chaudhary, Civil appeal no. 2431 of 2019** decided on 01.03.2019 has ruled that procedures are hand made in the administration of justice and a party should not suffer injustice merely due to some mistake or negligence or technicalities. Accordingly, the authority is proceeding further to decide the matter based on the basis of proceedings and submissions made by both the parties.

9. The complainant has filed an application dated 21.04.2023, for restoration of the present complaint as per direction by the Hon'ble Haryana Real Estate Appellate Tribunal, Chandigarh. The same application was allowed, and both the parties are directed to appear before the authority on 07.07.2023. The counsel for the complainant



has put in appearance but the respondent company has failed to appear before the authority. So, vide order dated 07.07.2023, the respondent was directed to appear before the authority and to file the reply.

10. Further, vide proceeding dated **07.07.2023, a last and final opportunity was given to the respondent to file a reply within 15 days. However, neither the respondent has put in appearance before the authority nor has failed any reply till date. Therefore, the defence of the respondent is hereby struck off.** Now, the matter will be decided as per the documents and submission made by both of the parties.

E. Jurisdiction of the authority

11. 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

12. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana, 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.

E.II Subject-matter jurisdiction



13. Section 11(4)(a) of the Act 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) The promoter shall-

- (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.

14. 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 as per provisions of section 11(4)(a) of the Act leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the reliefs sought by the complainants

F.I Direct the respondent party to refund the entire amount of Rs.26,97,125/- along with interest at such rate as may be prescribed in this behalf including compensation in the manner provided under the Act.

15. The complainant was allotted a unit no. G-122, on 1st floor, in tower/block- G, in the project "IRIS Broadway" by the respondent /builder for a total consideration of Rs.64,99,800/- and he has paid an



amount of Rs.26,96,325/- in the year 2013. Further, the complainant wrote a letter to the respondent on 22.02.2015, and even requested withdrawal/surrender of the allotment of the said unit due to the harsh circumstances of him as per page no. 71 of the complaint reproduced as under for ready reference: -

To,

TS. Realtech Private Limited,
6-26, LGF Panchsheel Park,
New Delhi-110017

Sub: Shop No. G-122, in "IBIS BROADWAY" at Sector 85-86. Gurugram, Haryana.

Dear Sir,

It is to bring to your notice that I had booked a shop No. G-122 in "IRIS BROADWAY" and made all payments as required at the time of Booking and so on, amounting to Rs. 27.01.2651-30 far. And curiously I have been making all efforts to reach to the situation of completion of the Project. In spite of all sincere efforts my circumstances are not going favourable and not supporting me anymore. So, under the unfortunate circumstances, I would like to say that I am not able to continue further with the project and surrender my unit as mentioned above. Hence it is requested that the amount, I have deposited so far, may please be refunded to me at the earliest.

Thanking you.

16. Tat the respondent further, submitted that the complainant had never made payment in time and in accordance with the schedule of payment as agreed between the parties. As such the payments are also amenable to levy of interest. Moreover, as the complainant failed to adhere the terms and conditions of the agreement and made defaults in the payments of due installments, the respondent is authorized to forfeit certain payments made by the complainants as per clause 4 of the space buyer's agreement.



17. The OC for the project of the allotted unit was granted on 29.03.2019. It is evident from the above-mentioned facts that the complainant has paid a sum of Rs.26,96,325/- against sale consideration of Rs.64,99,800/- of the unit allotted on 23.07.2013. As per possession clause 111. of the space buyer agreement, the due date of possession comes out to be 23.04.2017. In the present complaint, the complainant wrote a letter to the respondent on 22.02.2015, and even requested for withdrawal/surrender of the allotment of the said unit due to the harsh circumstances and requested for the refund of the paid-up amount. Thereafter, the respondent cancelled the unit of the complainant on 22.02.2016.
18. The Hon'ble Apex Court of land in cases of *Maula Bux Vs. Union of India, (1970) 1 SCR 928* and *Sirdar K.B. Ram Chandra Raj Urs Vs. Sarah C. Urs, (2016) 4 SCC 136*, held that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in the nature of penalty, then provision of the section 74 of the Contract Act, 1872 are attracted and the party so forfeiting must prove actual damage.
19. Even keeping in view, the principle laid down by the Hon'ble Apex Court of the land, the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018, framed regulation 11 provided as under-

"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."

20. Keeping in view the above-mentioned facts, the respondent is directed to refund the paid-up amount of Rs.26,96,325/- after deducting the earnest money which shall not exceed the 10% of the basic sale consideration of Rs.64,99,800/-. The refund should have been made on the date of surrender i.e., 22.02.2015. Accordingly, the interest at the prescribed rate i.e., 10.75% is allowed on the balance amount from the date of surrender till the actual date of refund of the amount within the timelines provided in rule 16 of the rules, 2017.

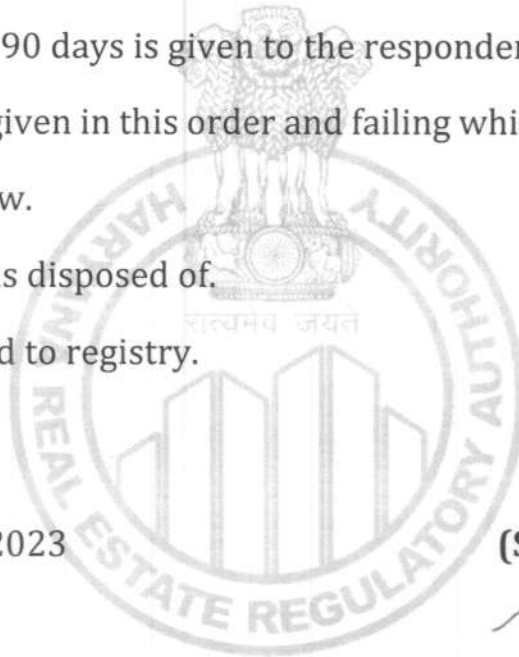
G. Directions of the authority


21. Hence the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):
- The respondent is directed to refund the paid-up amount of Rs.26,96,325/- after deducting the earnest money which shall not

exceed the 10% of the basic sale consideration of Rs.64,99,800/-.
The refund should have been made on the date of surrender i.e., 22.02.2015. Accordingly, the interest at the prescribed rate i.e., 10.75% is allowed on the balance amount from the date of surrender till the actual date of refund of the amount within the timelines provided in rule 16 of the rules, 2017.

- ii. A period of 90 days is given to the respondents to comply with the directions given in this order and failing which legal consequences would follow.
22. Complaint stands disposed of.
23. File be consigned to registry.

Dated: 18.08.2023




(Sanjeev Kumar Arora)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram

HARERA
GURUGRAM