

**BEFORE THE HARYANA REAL ESTATE REGULATORY
AUTHORITY, GURUGRAM**Date of decision: **01.09.2023**

Name of the Builder		Tashee Land Developers Private Limited	
Project Name		Capital Gateway	
S.n	Complaint No.	Complaint title	Attendance
1.	CR/6015/2019/3060/2019	Abhishek Saha and Meenakshi Karmarkar V/s Tashee Land Private Limited	Mr. Sonu Saini Mr. Rishabh Jain
2.	CR/6091/2019/3057/2019	Meenakshi Karmarkar and Abhishek Saha V/s Tashee Land Private Limited	Mr. Sonu Saini Mr. Rishabh Jain

CORAM:

Shri Sanjeev Kumar Arora

Member

ORDER

1. This order shall dispose of 2 complaints titled as above filed before this authority in form CAO 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(s) in the above referred matters are allottees of the project, namely, Capital Gateway being developed by the same respondent/promoter i.e., Tashee Land Developers Private Limited. The terms and conditions of the builder buyer's agreements fulcrum of the issue involved in these cases

pertains to failure on the part of the promoter to deliver timely possession of the units in question, and now allottees are seeking award of refund of the paid-up amount.

3. The details of the complaints, reply status, unit no., date of agreement, possession clause, due date of possession, offer of possession, total sale consideration, amount paid up, and reliefs sought are given in the table below:

Project: Capital Gateway, Sector-111, Gurugram

Possession clause: Clause 2.1

Subject to clause 9 or any other circumstances not anticipated and beyond control of the first party/conforming party and any restraints/restrictions from any court/authorities and subject to the purchaser having complied with all the terms of this agreement including but not limited timely payment of total sale consideration and stamp duty and other charges and having complied with all provisions, formalities documentation etc. as prescribed by the first party/conforming party proposes to handover the possession of the flat to the purchaser within approximate **period of 36 months from the date of sanction of building plans of the said colony.** The purchaser agrees and understands that the first party/conforming party shall be entitled to a grace period of 180 days after the expiry of 36 months for applying and obtaining OC in respect of the colony from the concerned authority.
(Taken from another file of same project)

Note:

- 1. Date of sanction of building plans-** Date of sanction of building plans is not provided.
- 2. Grace period-** Since possession clause 2.1 of the BBA incorporates qualified reason which provides a pre-condition that the entitlement of said grace period of 6 months is dependent of the situation of respondent applying for or obtaining occupation certificate from the competent Authority but as per the given facts it has failed to apply for occupation certificate to the competent authority within the stipulated time. Accordingly, the authority disallows this grace period of 6 months to the promoter wherein the respondent has itself failed to comply with the condition incorporated by it. Therefore, such grace period of six months as per clause 2.1 of buyer's agreement is disallowed and not included while calculating the due date of handing over of possession.

3. Due date of handing over of possession- As per clause 2.1 of buyer's agreement, the due date of handing over of possession is to be calculated from 36 months from date of **sanction of building plans** and as specified above but the same is not available in the file so the date of handing over of possession is calculated from date of execution of

agreement which is 20.10.2016 so the due date of possession comes out to be 20.10.2019.

4. Occupation certificate- Not obtained

5. DTCP License no. 34 of 2011 dated 16.04.2011 - KNS Infracon Pvt. Ltd. is the licensee for the project as mentioned in land schedule of the project and payment has been made to Tashee Land Developers Pvt. Ltd. as annexed in the payment plan of the agreement

6. RERA registration - 120 of 2018 dated 10.08.2018 valid upto 31.12.2020

Sr. no	Complaint no./title/ date of complaint	Reply status	Unit No. and area admeasuring (Carpet area)	Date of Execution of apartment buyer's agreement	Due date of possession & Offer possession	Total sale consideration and amount paid by the Complainant (s)	Relief Sought
1.	CR/6015/2019/3060/2019 Abhishek Saha and Meenakshi Karmarkar Vs. Tashee Land Developers Pvt. Ltd. DOF- 03.12.2019.	Reply received	H-703 admeasuring 2295 sq. ft. (As per page no. 20 of complaint)	20.10.2016 (As per page no. 20 of complaint)	20.10.2019 Offer of possession- Not offered	TSC: Rs.1,58,79,130/- (Page no. 2 of the written submission filed by complainant) AP: Rs.1,37,80,517/ (Page no. 2 of the written submission filed by complainant)	Refund
2.	CR/6091/2019/3057/2019 Meenakshi Karmarkar and Abhishek Saha Vs. Tashee Land Developers Pvt. Ltd. DOF- 03.12.2019.	Reply received	H-503 admeasuring 2295 sq. ft. 20. (Page no. 2 of the written submission filed by complainant)	20.10.2016 (As per page no. 20 of complaint)	20.10.2019 Offer of possession- Not offered	TSC: Rs.1,59,93,880/- (Page no. 2 of the written submission filed by complainant) AP: Rs.1,11,38,449/ (Page no. 2 of the written submission filed by complainant)	Refund

Note: In the table referred above certain abbreviations have been used. They are elaborated as follows:

Abbreviations Full form

DOF- Date of filing complaint

TSC- Total Sale consideration

AP- Amount paid by the allottee(s)

4. The aforesaid complaints were filed by the complainants against the promoter on account of violation of the builder buyer's agreement executed between the parties *inter se* in respect of said unit for seeking award of refund of paid up amount.
5. It has been decided to treat the said complaints as an application for non-compliance of statutory obligations on the part of the promoters/respondents in terms of section 34(f) of the Act which mandates the authority to ensure compliance of the obligations cast upon the promoters, the allottee(s) and the real estate agents under the Act, the rules and the regulations made thereunder.
6. The facts of all the complaints filed by the complainant(s)/allottee(s) are also similar. Even the allottees/complainants are same in both the complaints. Out of the above-mentioned case, the particulars of lead case **CR 6015/2019/3060/2019 titled Abhishek Saha and Meenakshi Karmarkar Vs. M/s Tashee Land Developers Private Limited** is being taken into consideration for determining the rights of the allottee(s) qua refund of amount.
 - A. **Project and unit related details**
7. The particulars of the project, the details of sale consideration, the amount paid by the complainant(s), date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

CR/6015/2019/3060/2019 titled as *Abhishek Saha and Meenakshi Karmarkar Vs. M/s Tashee Land Developers Private Limited*

S. N.	Particulars	Details
1.	Name of the project	Capita Gateway, Sector - 111, Gurugram
2.	Project area	10.462 acres
3.	Nature of the project	Residential
4.	DTCP license no. and validity status	34 of 2011 dated 16.04.2011 valid up to 15.04.2024
5.	Name of licensee	M/s KNS Infracon Pvt. Ltd. and others
6.	RERA Registered/ not registered	Registered vide no. 120 of 2018 dated 10.01.2018
7.	Unit no.	H- 703, 7 TH floor (Page 20 of complaint)
8.	Unit area admeasuring	2295 sq. ft. (Page 20 of complaint)
9.	Date of execution of agreement	20.10.2016 (Page 19 of complaint)
10.	Date of tripartite agreement	20.10.2016 (Page 45 of complaint)

		(Abhishek Saha, L and T Housing Finance Limited and KNS Infracon Pvt. Ltd.)
11.	Due date of possession	20.10.2019 The possession clause has been taken from another file (36 months from sanctioning of building plan the same is not available in the file so we have calculated the due date from date of execution of agreement i.e., 20.10.2016)
12.	Total sale consideration	Rs.1,58,79,130/- (Page 2 of written submission filed by complainant)
13.	Amount paid by the complainant	Rs.1,37,80,517/- (Page 2 of written submission filed by complainant)
14.	Occupation certificate	Not obtained

B. Facts of the complaint

- i. That It is submitted that the complainants came to know of the housing project of "CAPITAL GATEWAY", Sector-111, Gurugram. That during discussions prior to booking of the said flat, the complainants were told that as construction work of all towers were

in full swing after receipt of all relevant approvals from the competent authorities, the said flat would, in all probability, be completed by September 2018.

- ii. That at the time of allotment of the flat vide allotment letter which was issued in the month of Oct.2016. They were assured that the flat would be available for occupation by September 2018. They entered into an agreement dated 20.10.2016 w.r.t. said unit. That as per the agreement read with schedule of payment they were to make payments of the entire amount in 6 parts, depending on the progress of the project.
- iii. They paid a sum of Rs.1,37,80,517/- with 87% of preferred location charges from 19.09.2016 till 31.10.2016. That respondent issued a letter to them on 24.10.2016 for demanding the balance payment with EDC/IDC charges total of Rs.1,04,10,665/-
- iv. They have paid almost 87.5 % of the sale consideration towards the cost of the subject unit till January 2016, including costs towards other facilities. The respondent had deliberately remained silent on the project and kept the complainant and other buyers at bay with respect to the status of the project. The true fact is that even after 24 months of the proposed time of handover the



possession there was no sign of development and in fact at the site the construction of the project has almost stopped. They have made several visits and enquiries to the respondent office and the project site to enquire about the reasons for slow progress. They sent a notice through regd. post to the respondent on 14.06.2018 and sent a legal notice through advocate on dated 10.01.2019 for cancellation and refund amount with interest, despite the receiving of said notice the respondent failed to make the payments against cancellation the unit and not given any reply of the letter. They have already invested good part of his savings in the newly negotiated residential property. It is submitted that the respondent had filed a fake and fabricated agreement to sell copy dated 02.12.2016 before this Hon'ble Authority on 04.07.2022, whereby stating that complainants had sold the above said property to one Geemed Land and Building Pvt. LTD. But on the contrary they have neither sold the above said flat/unit to Geemed Land and Building Pvt. Ltd. nor executed or entered into any sale agreement w.r.t the above said property. It is also further submitted that they had not purchased any stamp paper in this respect. As per

Hon'ble authority's direction, complainants had filed Affidavit before this authority.

C. Relief sought by the complainants:

8. The complainants have sought following relief(s):

i. Direct the respondents to provide refund of the paid-up amount along with interest.

9. On the date of hearing, the authority explained to the respondent/ promoter about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the act to plead guilty or not to plead guilty.

D. Reply by the respondent

10. The respondent has contested the complaint on the following grounds.

I. That at the outset, it is most respectfully submitted that the instant complaint of the complainants is not maintainable on facts or in law and is as such liable to be dismissed/rejected.

II. That it is relevant to state herein that the construction at the project site is going on in full swing. The project is nearing completion and almost ready for possession

III. It is submitted that while there are allegations by customer of some delay in the respondent's project and as a result, proceeded with

institution of RERA proceedings before the authority which is being defended by the petitioner.

IV. That it is germane to state that there is no deficiency in the services as rendered by the respondent and hence no occasion has occurred deeming the indulgence of this authority.

V. It is submitted that any delay in the execution of works have been largely on account of force majeure reasons beyond its control or even cannot be prevented by exercise of reasonable diligence or despite the adoption of reasonable precautions or alternative measures.

11. 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 and submission made by the parties.

E. Jurisdiction of the authority

12. The respondents have raised preliminary objection regarding jurisdiction of authority to entertain the present complaint. 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

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

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.

So, in view of the provisions of the Act of 2016 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 respondent:

F.I Objection regarding force majeure conditions:

13. The respondent-promoter has raised the objection that the construction of the project was delayed due to reasons beyond the control of the respondent

such as COVID-19 outbreak, lockdown due to outbreak of such pandemic and other force majeure reasons. The authority put reliance judgment of Hon'ble Delhi High Court in case titled as *M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr. bearing no. O.M.P (I) (Comm.) no. 88/ 2020 and I.As 3696-3697/2020 dated 29.05.2020* wherein it has been observed that-

"69. The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non- performance of a contract for which the deadlines were much before the outbreak itself."

In the present complaint also, the respondent was liable to complete the construction of the project in question and handover the possession of the said unit by 20.10.2019. The respondent is claiming benefit of lockdown which came into effect on 23.03.2020 whereas it is noted that the due date of handing over of possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non- performance of a contract for which the deadlines were much before the outbreak itself and for the said reason the said time period is not excluded while calculating the delay in handing over possession and no other force majeure situation was specifically mentioned in the contentions of the respondent.

G. Findings on the relief sought by the complainant:

14. The common relief of refund are involved in these two cases.
15. The project detailed above was launched by the respondent as residential complex and the complainants were allotted the subject unit vide agreement for sale dated 20.10.2016 (detailed area specifications, payment plan and other terms and conditions of allotment as mentioned earlier). As per clause 2.1 of the said agreement executed between the parties, the possession of the subject apartment was to be delivered by 20.10.2019. The grace period of 6 months is not allowed being conditional and qualified so the same is not allowed the reasons for the same has been quoted in the table of para 3. It has come on record that the complainants have paid an amount of Rs. 1,37,80,517/- towards sale consideration of Rs. 1,58,79,130/- . The respondent took plea that the project of the respondent was delayed due to force majeure circumstance and the project is near completion.
16. The Authority observes that Section 18(1) is applicable 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 failed to offer possession of the unit as the occupation certificate has not been obtained and as per contentions the allottees had requested the promoter to refund their paid up amount as they are entitled for the same and also cannot be forced to wait till eternity but the said request was met with deaf

ears and promoter failed to refund the amount along with interest even after the existence of the right of allottees to claim such refund of an amount paid with interest at prescribed rate from the promoter under section 19(4) of the Act and the promoter was obligated under section 18(1) to return the amount along with interest at prescribed rate on demand to the allottee and allottee having clearly wished to withdraw from the project on account of promoter's failure to complete and 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.

17. The due date of possession as per agreement for sale as mentioned in the table above is 20.10.2019. Further, in the judgement of the **Hon'ble Supreme Court of India in the civil appeal nos. 6745-6749 of 2021 Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors.** observed as under:

25. The unqualified right of the allottees 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 allottees, 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 allottees/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 allottees 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

27. 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 allottees as per agreement for sale under section 11(4)(a). The promoter has failed to complete or unable to give possession of the unit in accordance with the terms of allotment letter or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottees, as they wish to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of the unit with interest at such rate as may be prescribed.
28. This is without prejudice to any other remedy available to the allottees including compensation for which they may file an application for adjudging compensation with the adjudicating officer under sections 71 & 72 read with section 31(1) of the Act of 2016.
29. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such, the complainants are entitled to refund of the entire amount paid by them at the prescribed rate of interest i.e., @ 10.75% p.a. (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 each

payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

30. Vide proceeding dated 06.10.2022, the counsel for the complainant was directed to file an affidavit by the complainant that they have never entered into an agreement to sell for the subject apartment as alleged by the counsel for the respondent and the documents placed on record. Further he was also directed to file the affidavit in this regard. The counsel for the complainant submitted an affidavit in compliance of the order of the authority.

H. Directions of the authority

31. 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 function entrusted to the authority under section 34(f):

- i. The respondent is directed to refund the amount received by it from the respective complainants in each case along with interest at the rate of 10.75% p.a. from the date of each payment till the actual date of refund of the deposited amount.
- ii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

32. This decision shall mutatis mutandis apply to cases mentioned in para 3 of this order.
33. The complaints stand disposed of. True certified copies of this order be placed on the case file of each matter.
34. Files be consigned to registry.



(Sanjeev Kumar Arora)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 01.09.2023

HARERA
GURUGRAM