BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**3973 of 2023**
Date of complaint	:	**15.09.2023**
Date of order	:	**04.09.2024**

1. Rajiv Kumar Garodia **2.** Annie Garodia, **Both R/o:** D174, DLF New Town Heights, Sector-90, Gurugram-122505.	**Complainants**
Versus	
1. KS Propmart Private Limited, **2.** VSR Infratech Private Limited **Both Having Regd. Office at:** A-22, Hill View Apartments, Vasant Vihar, New Delhi-110057.	**Respondents**

CORAM:

Ashok Sangwan **Member**

APPEARANCE:

Complainant in person	Complainants
Jagdeep Yadav (Advocate)	Respondent no. 1
Shriya Takkar (Advocate)	Respondent no. 2

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 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 as provided 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. Project and unit related details

2. The particulars of the project, the amount 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.	Heads	Details
1.	Name and location of the project	"Park Street" formerly known as "85 Avenue" Sector -85, Gurugram
2.	Project area	2.85 acres
3.	Nature of project	Commercial
4.	RERA registered/not registered	**Registered** **Vide no.** 41 of 2019 dated 30.07.2017 **Valid/renewed up to**- 31.12.2021
5.	DTCP license no. & validity status	100 of 2013 dated 02.12.2013 **Valid/renewed up to**- 01.12.2019 **Licensee-** M/s K.S Propmart Pvt. Ltd.
6.	Date of Allotment	12.07.2014 (page no. 66 of complaint)
7.	Unit No.	F-51, First Floor (page no. 66 of complaint)
8.	Unit admeasuring area	468.660 sq. ft. (super built up area) (page no. 66 of complaint)
9.	Space buyer's agreement	Not Executed
10.	Due date of possession	12.07.2017 **[Calculated as per *Fortune Infrastructure and Ors. vs. Trevor D'Lima and Ors. (12.03.2018 - SC); MANU/SC/0253/2018]***
11.	Total sale consideration	Rs.46,77,790/- (excluding applicable taxes and charges) (page no. 66 of complaint)

12.	Amount paid by complainants	Rs.8,35,208/- (as per allotment letter on page 66 of complaint)
13.	Final opportunity letter	06.09.2022 (page 38 of reply of R-1)
14.	Intimation of termination	28.12.2022 (page 74 of complaint)
15.	Surrender Request	19.01.2023 (page 40 of reply of R-1)
16.	Occupation certificate	Not obtained
17.	Date of offer of possession to the complainant	Not offered

B. Facts of the complaint:

3. The complainants have made the following submissions in the complaint:

I. That in March 2013, VSR Infratech Private Limited introduced a commercial unit project known as "85 Avenue," located at Sector-85, Gurugram, Haryana-122505.

II. That the complainants secured the reservation of a unit/shop bearing no. F-51, First floor admeasuring 468.66 sq. ft. within the retail space of aforesaid project on 13.03.2014. As part of the booking process, the complainants made a payment of a total sum of Rs.8,35,208/- to M/s VSR Infratech Private Limited between 13.03.2014 and 03.07.2014. On 12.07.2014, the respondent issued an allotment letter to the complainants for the aforesaid commercial unit in the said project.

III. That no builder buyer's agreement was formalized between the respondent and the complainants.

IV. That subsequent to their initial booking in the project, the

complainants undertook multiple visits to the construction site. It was evident that as of the year 2019, construction had not yet commenced.

V. That up until the year 2022, there was no update from the respondent. However, on 18.01.2023, the complainants received an email communication from Mrs. Ruchika Kapoor, DGM CRM of VSR Infratech Private Limited, along with an attached letter dated 28.12.2022 issued by M/s KS Propmart Private Limited indicating cancellation of the booking.

VI. That in the said letter, it was referred that in accordance with Clause 18 of the application form/buyer's agreement the earnest money amount along with brokerage, HVAT and interest on outstanding payment and other applicable charges (if any) is/are liable to be forfeited in the event of termination.

VII. That upon further inquiry, it was revealed that the project had been transferred from VSR Infratech Private Limited to KS Propmart Private Limited, which is another entity within the same group. Additionally, the project had been renamed as "Park Street." It is noteworthy that no prior formal communication had been issued regarding this project transfer and rebranding to the complainants.

VIII. That on 28.01.2023, the complainants requested a refund of the amount they had paid, along with the inclusion of interest. However, the complainants received no response from the respondent representatives despite regular follow-ups.

C. Relief sought by the complainants:

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

i. Direct the respondent to refund the entire paid-up amount alongwith prescribed rate of interest.

5. On the date of hearing, the authority explained to the respondent/ promoters 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 respondents.

6. The respondent no.1 by way of written reply made the following submissions:

i. That in terms of the application form submitted by the complainants, unit bearing no. F-51 having a tentative super area of 468.660 sq. ft. was provisionally allotted to them vide allotment letter dated 12.07.2014. It is submitted that the basic sales price of the unit in question as per the allotment letter was Rs.46,77,790/- exclusive of EDC/IDC, Power Back Up Charges, IFMS, IFCRF, FFC, AC, ECC, PLC, taxes and such other charges.

ii. That as per the application form and the allotment letter executed between the parties, the complainants were duty-bound to make payment timely and accordingly to the adopted payment plan. It is submitted that despite regular follow-ups, the complainants failed to come forward to clear their dues, due to which the respondents were constrained to issue a cancellation letter dated 28.12.2022 to the complainants. It is submitted that the post cancellation the respondent company is liable to forfeit the earnest money along with the interest component on delayed payment and other applicable charges. Thus, no amount is liable to be refunded to the complainant.

iii. That all the demands by the respondent are as per the schedule of payment opted by the complainants. Hence, being totally aware of the payment as per the payment plan, the complainants intentionally failed to make timely payments and therefore are chronic defaulters.

iv. That the unit is being cancelled there is no privity of contract between the parties and the complainants have no right, title or interest in the unit in question and neither are allottees of the same and therefore the complaint is infructuous.

7. The respondent no.2 by way of written reply made the following submissions:

i. That the present complaint is framed and filed before this authority is liable to be dismissed in limine solely on the ground of misjoinder of the necessary party. It is humbly submitted that the present complaint has been filed by the complainant who has deliberately chosen to make M/s. VSR Infratech Pvt. Ltd. a party to the present complaint being well aware that respondent no.2 is neither the promoter nor the developer of the project. Thus, the complaint is clearly defective in nature and is liable to be dismissed on the grounds of misjoinder of the parties.

ii. That the respondent no.1 is the land-owning company that has obtained license no.100 of 2013 for setting up of commercial colony. It is submitted that initially, respondent no.2 M/s. VSR Infratech had entered into an agreement dated 18.09.2013 with respondent No.1 M/s K S Propmart Pvt. Ltd. by virtue of which respondent no.2 had purchased the development rights of the project in question from respondent no.1. That the Government of Haryana vide its notification dated 18.02.2015 mandated that the original license holder only must

develop the project. Accordingly, considering the above facts the agreement dated 18.09.2013 entered between respondent no.2 i.e., VSR Infratech and respondent no.1 i.e., K S Propmart was cancelled vide a deed of cancellation. That post cancellation respondent no.1 is the developer and the same is being entirely developed and managed by respondent no.1 and accordingly post the cancellation all amounts paid by the allottees including the complainant herein were transferred to respondent no.1 and respondent no.2 had no role to play thereafter whatsoever. It is submitted that as per the license bearing no.100/2013 granted to respondent no.1, the developer is M/s. K S Propmart. Thus, as such there is no change in developer nor there is assignment of marketing rights therefore there is no requirement to get registered under the BIP Policy. Pertinently the complainant herein was duly informed about all the above developments and the complainant is fully aware that the project is being developed by respondent no.1 and not by respondent no.2.

iii. That since the project is being solely developed by respondent no.1 and the amount paid by the allottees including the complainant stood transferred to respondent no.1. Thus, the complainant has no privity of contract with respondent no.2 company.

iv. That as per Section 31 of RERA Act, 2016, a complaint can only be filed against the promoter, allottee or real estate agent. Thus, the complaint can only be filed against the promoter i.e. respondent no.1 herein. The name of respondent no.2 is liable to be deleted from the array of parties.

8. Copies of all relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided based on these undisputed documents and submissions made by parties.

E. Jurisdiction of the authority

9. The respondents have raised a preliminary submission/objection that the authority has no jurisdiction to entertain the present complaint. The objection 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

10. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by the 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

11. 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 promoter, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

12. 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.

F. Findings on the relief sought by the complainants.

F.I. Direct the respondent to refund the entire paid-up amount alongwith prescribed rate of interest.

13. In the present complaint, the complainants intend to withdraw from the project and are seeking return of the amount paid by them in respect of subject unit along with interest as per section 18(1) of the Act and the same is reproduced below for ready reference:

*"**Section 18: - Return of amount and compensation***
18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building. -
(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or
(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,
***he shall be liable on demand to the allottees**, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, **to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed** in this behalf including compensation in the manner as provided under this Act:*
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 the possession, at such rate as may be prescribed."
(Emphasis supplied)

14. **Due date of possession:** As per the documents available on record, no BBA has been executed between the parties and the due date of possession cannot be ascertained. A considerate view has already been taken by the Hon'ble Supreme Court in the cases where due date of possession cannot be ascertained then a reasonable time period of 3 years has to be taken into consideration. It was held in matter ***Fortune Infrastructure v. Trevor d' lima (2018) 5 SCC 442 : (2018) 3 SCC (civ) 1*** and then was reiterated in ***Pioneer Urban land & Infrastructure Ltd. V. Govindan Raghavan (2019) SC 725*** -:

> *"Moreover, a person cannot be made to wait indefinitely for the possession of the flats allotted to them and they are entitled to seek the refund of the amount paid by them, along with compensation. Although we are aware of the fact that when there was no delivery period stipulated in the agreement, a reasonable time has to be taken into consideration. In the facts and circumstances of this case, a time period of 3 years would have been reasonable for completion of the contract i.e., the possession was required to be given by last quarter of 2014. Further there is no dispute as to the fact that until now there is no redevelopment of the property. Hence, in view of the above discussion, which draw us to an irresistible conclusion that there is deficiency of service on the part of the appellants and accordingly the issue is answered."*

15. Accordingly, the due date of possession is calculated as 3 years from the date of allotment i.e., 12.07.2014. Therefore, the due date of handing over of the possession for the unit/shop comes out to be 12.07.2017.

16. **Admissibility of refund along with prescribed rate of interest:** The complainants intend to withdraw from the project and are seeking refund of the amount paid by them in respect of the subject unit with interest at prescribed rate as provided under rule 15 of the rules. Rule 15 has been reproduced as under:

> ***Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

17. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

18. Consequently, as per website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as on date i.e., 04.09.2024 is **9.10%.** Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **11.10%.**

19. The complainants were provisionally allotted a unit bearing no. F-51, First Floor having a tentative super area of 468.660 sq. ft. in the project of the respondents named "Park Street" formerly known as "85 Avenue" at Sector -85, Gurugram vide allotment letter dated 12.07.2014 for a sale consideration of Rs.46,77,790/- (excluding applicable taxes and charges) against which the complainants have paid a sum of Rs.8,35,208/- in all.

20. The respondent no.2 has submitted that that it is neither the promoter nor the developer of the project. The respondent no.2 had initially entered into an agreement dated 18.09.2013 with respondent no.1 by virtue of which respondent no.2 had purchased the development rights of the project in question from respondent no.1. Later the Govt. of Haryana vide its notification dated 18.02.2015 mandated that the original license holder

only must develop the project. Accordingly, considering the above facts, the agreement dated 18.09.2013 was cancelled vide a deed of cancellation dated 01.04.2015 and the project was transferred in the name of respondent no.1. Post cancellation, respondent no.1 is the developer and the same is being developed and managed by respondent no.1 and accordingly post the cancellation all amounts paid by the allottees including the complainants were transferred to respondent no.1 and the respondent no.2 has no role to play thereafter whatsoever. The complainants have submitted that they have made payments to respondent no.2 and have received the allotment letter from them. Therefore, it is untenable for respondent no.2 to disclaim their status as promoter or developer. Further, no communications w.r.t to transfer was provided to the complainants before, during or after the transfer. The complainants only acquainted with respondent no.1 during their visit to respondent's office in January 2023, subsequent to receiving mail communication on 18.01.2023. The respondent no.2 has further brought on record affidavit of Mr. Devendra Pandey (Director of respondent no.1 i.e., M/s KS Propmart Private Limited) dated 18.01.2024 submitted by respondent no.1 in complaint bearing no. CR/1560/2023 wherein, he has submitted that the liabilities of all the claims are to be borne by M/s KS Propmart Private Limited and not by M/s VSR Infratech Private Limited. Relevant points of affidavit reproduced here below: -

"7. I say that since the amount received by the M/s VSR Infratech Pvt. Ltd. from the third parties is duly transferred by the VSR to the M/s KS Propmart Pvt. Ltd. in terms of the Deed of Cancellation, therefore the M/s VSR Infratech Pvt. Ltd. has no rights or liabilities whatsoever qua the project that was been developed on the said land.

8. I say that pursuant to the Deed of Cancellation dated 01.04.2015, M/s VSR Infratech Pvt. Ltd. has no right or liability whatsoever qua the project that was been developed on the said land and all the rights and liabilities are solely with the M/s KS Propmart Pvt. Ltd., having to the extent detailed above,

stepped into the shoes of M/s VSR Infratech Pvt. Ltd. and M/s VSR Infratech Pvt. Ltd. is left with no interest or control of any kind in the project proposed to be developed on the said land.

9. I say that in view of thereof all the rights, claims, liabilities etc. are solely to be borne and controlled by M/s KS Propmart Pvt. Ltd."

21. After considering the documents available on record as well as submissions made by the parties, the Authority is of view that firstly no such documents as alleged to have been executed between the respondents have been placed on record by any of them. Secondly, as per point no.7 of the affidavit of respondent no.1, it is asserted that the respondent no. 2 has duly transferred the amount received by it from the third party to respondent no. 1. However, no such document pertaining to the said transfer has been furnished on record. Consequently, both the respondents are jointly and severally liable to bear the responsibility for the consequences arising from the present complaint.

22. The complainants have submitted the respondent failed to timely construct and develop the project. The complainants have further submitted that they have many times requested the respondents to refund the amount paid by them, but the respondents always delayed the matter on one pretext or the other. Respondent no.1 has submitted that in terms of the application form submitted by the complainants, unit bearing no. F-51 having a tentative super area of 468.660 sq. ft. was provisionally allotted to them vide allotment letter dated 12.07.2014. The basic sales price of the unit in question as per the allotment letter was Rs.46,77,790/- exclusive of EDC/IDC, power back up charges, IFMS, IFCRF, FFC, AC, ECC, PLC, taxes and such other charges. As per the application form and the allotment letter executed between the parties, the complainants were duty-bound to make payment timely and accordingly to the adopted payment plan. However, the complainants

defaulted in making payments and the respondent was to issue letter dated 06.09.2022, giving last and final opportunity to the complainants to comply with their obligation before finally cancelling the allotment of the unit vide cancellation letter dated 28.12.2022. It is further submitted that post cancellation the respondent company is liable to forfeit the earnest money along with the interest component on delayed payment and other applicable charges. Thus, no amount is liable to be refunded to the complainants. Now the question before the Authority is whether the cancellation made by the respondent no.1 vide letter dated 28.12.2022 is valid or not.

23. On consideration of documents available on record and submissions made by both the parties, the authority is of the view that on the basis of provisions of allotment, the complainants have paid an amount of Rs.8,35,208/- against the sale consideration of Rs.46,77,790/- and no payment was made by the complainants after July 2014. The complainants defaulted in making payments as per the payment plan agreed between the parties and no payment has been made by them post 03.07.2014. Therefore, the respondent has to issue letter dated 06.09.2022, giving last and final opportunity to the complainants to comply with their obligation to make payment of the amount due, but the same having no positive results and ultimately leading to cancellation of unit vide letter dated 28.12.2022. The Authority observes that Section 19(6) of the Act of 2016 casts an obligation on the allottees to make necessary payments in a timely manner. Hence, cancellation of the unit in view of the terms and conditions of the payment plan annexed with the application form is held to be valid. But while cancelling the

unit, it was an obligation of the respondents to return the paid-up amount after deducting the amount of earnest money. However, the deductions made from the paid-up amount by the respondents are not as per the law of the land laid down by the Hon'ble apex court of the 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., (2015) 4 SCC 136,*** and wherein it was 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 provisions of section 74 of Contract Act, 1872 are attached and the party so forfeiting must prove actual damages. After cancellation of allotment, the flat remains with the builder as such there is hardly any actual damage.* National Consumer Disputes Redressal Commissions in ***CC/435/2019 Ramesh Malhotra VS. Emaar MGF Land Limited*** (decided on 29.06.2020) and ***Mr. Saurav Sanyal VS. M/s IREO Private Limited*** (decided on 12.04.2022) and followed in ***CC/2766/2017*** in case titled as ***Jayant Singhal and Anr. VS. M3M India Limited decided on 26.07.2022,*** *held that 10% of basic sale price is reasonable amount to be forfeited in the name of "earnest money".* Keeping in view the principles laid down in the first two cases, a regulation known as the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, was farmed providing 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."*

24. Keeping in view the aforesaid factual and legal provisions, the respondents/promoter is directed to refund the paid-up amount of Rs.8,35,208/- after deducting 10% of the sale consideration of Rs.46,77,790/- being earnest money along with an interest @11.10% 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 on the refundable amount, from the date of cancellation i.e., 28.12.2022 till actual refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

G. Directions of the authority

25. 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):

i. The respondents/promoter is directed to refund the paid-up amount of Rs.8,35,208/- after deducting 10% of the sale consideration of Rs.46,77,790/- being earnest money along with an interest @11.10% 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 on the refundable amount, from the date of cancellation i.e., 28.12.2022 till the actual date of refund of the deposited amount.

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

26. The complaint stands disposed of.

27. File be consigned to registry.

Dated: 04.09.2024

(Ashok Sangwan)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram