



HARERA
GURUGRAM

Complaint No. 632/2018 and
others

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

Date of decision: 24.11.2022

NAME OF THE BUILDER		M/s OCUS SKYSCRAPERS REALTY LTD.	
PROJECT NAME		OCUS 24K	
S. No.	Case No.	Case title	Appearance
1	CR/632/2018	Rajender Amarnath and anr. V/S Ocus Skyscrapers Realty Ltd.	Complainant: Shri Jagdeep Yadav proxy counsel Respondent: Shri Kapil Bakshi Advocate
2	CR/633/2018	Sharda Amarnath and anr. V/S Ocus Skyscrapers Realty Ltd.	Complainant: Shri Jagdeep Yadav proxy counsel Respondent: Shri Kapil Bakshi Advocate
3	CR/621/2020	Adesh Kumar V/S Ocus Skyscrapers Realty Ltd.	Complainant: Shri S.S. Hooda Advocate Respondent: Shri Kapil Bakshi Advocate

CORAM:

Shri Vijay Kumar Goyal
Shri Ashok Sangwan
Shri Sanjeev Kumar Arora

Member
Member
Member

ORDER

1. This order shall dispose of all the 3 complaints titled as above filed before this authority 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, Ocus 24K being developed by the same respondent/promoter i.e., Ocus Skyscrapers Private Limited. The terms and conditions of the buyer's agreements fulcrum of the issue involved in all these cases pertains to failure on the part of the promoter to deliver timely possession of the units in question, seeking award of refund the entire amount along with interest.
3. The details of the complaints, reply to status, unit no., date of agreement, possession clause, due date of possession, total sale consideration, total paid amount, and relief sought are given in the table below:

Project Name and Location	Ocus 24K, Sector 68, Gurugram
Possession clause: - 11(a) Schedule for possession of the Said Unit	
<i>The Company based on its present plans and estimates and subject to all just exceptions endeavors to complete construction of the Said Building/Said Unit within a period of sixty (60) months from the date of this agreement unless there shall be delay or failure due to department delay or due to any circumstances beyond the power and control of the Company or Force Majeure conditions including but not limited to reasons mentioned in clause 11(b) and 11(c) or due to failure of the Allottee(s) to pay in time the Total Price and other charges and dues/payments mentioned in this Agreement or any failure on the part of the Allottee(s) to abide by all or any of the terms and conditions of this Agreement. In case there is any delay on the part of the Allottee(s) in making of payments to the Company then notwithstanding rights available to the Company elsewhere in this contract, the period</i>	

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for implementation of the project shall also be extended by a span of time equivalent to each delay on the part of the Allottee(s) in remitting payment(s) to the Company.

(Emphasis supplied)

Occupation certificate: -

➤ OC received dated **17.07.2019** from ground floor to 20th floor.

Common details: -

Occupation certificate-

17.07.2019 (Ground to 20th floor)

Offer of possession- Not offered unit cancelled

Due date of Possession - (Calculated as 60 (sixty) months from date of execution of buyer agreement)

RERA registration- 220 of 2017 dated 18.09.2017

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S. no	Complaint no/ title/date of filing	Date of execution of agreement	Unit no. and area admeasuring	Due date of possession	Total Sale consideration and amount paid	Demand/ reminder letters and cancellation letter
1.	CR/632/2018 Rajender Amarnath and Sharda Amartnath V/S M/s Ocus Skyscrapers Realty Ltd. DOF: 01.08.2018	24.01.2014	607, 6 th floor admeasuring 701 sq. ft.	24.01.20 19	TSC: Rs. 67,26,095 only Amount paid: Rs. 16,55,671 only	Demand Letter: 30.06.2017 Reminder Letters: 01.08.2017, 29.08.2017, 23.02.2018, 19.03.2018 Legal Notice: 02.07.2018 Cancellation: 02.06.2018

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2.	CR/633/2018 Sharda Amarnath and Karan Amarnath V/S M/s Ocus Skyscrapers Realty Ltd. DOF: 01.08.2018	23.12.2013	707, 7 th floor measurin g 701 sq. ft	23.12.20 18	TSC: Rs. 67,26,095 only Amount paid: Rs. 16,55,671 only (As per written arguments on behalf of respondent at page 4)	Demand Letter: 30.06.201 7 Reminder Letters: 01.08.201 7, 29.08.201 7, 24.01.201 8, 23.02.201 8, 19.03.201 8 Legal Notice: 02. 07.2018 Cancellati on: 17.07.201 9
3.	CR/621/2020 Adesh Kumar V/S M/s Ocus Skyscrapers Realty Ltd. DOF: 02.03.202	03.03.2014	407, 4 th floor admeas uring 701 sq. ft.	03.03.20 19	TSC: Rs. 67,43,620 only Amount paid: Rs. 16,60,120 only (As per receipts annexed by complainan t)	Demand Letter: 30.06.201 7 Reminder Letters: 24.01.201 8, 29.08.201 7, 23.02.201 8, 19.03.201 8

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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 in respect of said units for not handing over the possession by the due date, seeking award of refund the entire amount along with interest and compensation.
5. It has been decided to treat the said complaints as an application for non-compliance of statutory obligations on the part of the promoter /respondent 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. Out of the above-mentioned case, the particulars of **complaint case bearing no. CR/632/2018 titled as Rajender Amarnath and Sharda Amarnath V/S M/s Ocus Skyscrapers Realty Ltd. is being taken as a lead case in order to determine the rights of the allottee(s) qua refund the entire amount along with interest.**

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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/632/2018 titled as Rajender Amarnath and Sharda Amarnath V/S
M/s Ocus Skyscrapers Realty Ltd.**

S. N.	Particulars	Details
1.	Name of the project	Ocus 24K, Sector 68, Gurugram
2.	Project area	4.44 acres
4.	Nature of the project	Commercial Colony
5.	DTCP license no. and validity status	76 of 2012 dated 18.09.2017 valid up to 31.07.2020
6.	Name of licensee	Perfect Constech Pvt. Ltd.
7.	RERA Registered/ not registered	Registered 220 of 2017 dated 18.09.2017
8.	Unit no.	607, 6 th floor (Page 37 of reply)
9.	Unit area admeasuring	701 sq. ft. (As per page 37 of reply)
11.	Date of execution of apartment buyer agreement	24.01.2014 (Page 32 of amended complaint)
12.	Possession clause	11(a) Schedule for possession of the Said Unit <i>The Company based on its present plans and estimates and subject to all just exceptions</i>

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		<p><i>endeavors to complete construction of the Said Building/Said Unit within a period of sixty (60) months from the date of this agreement unless there shall be delay or failure due to department delay or due to any circumstances beyond the power and control of the Company or Force Majeure conditions including but not limited to reasons mentioned in clause 11(b) and 11(c) or due to failure of the Allottee(s) to pay in time the Total Price and other charges and dues/payments mentioned in this Agreement or any failure on the part of the Allottee(s) to abide by all or any of the terms and conditions of this Agreement. In case there is any delay on the part of the Allottee(s) in making of payments to the Company then notwithstanding rights available to the Company elsewhere in this contract, the period for implementation of the project shall also be extended by a span of time equivalent to each delay on the part of the Allottee(s) in remitting payment(s) to the Company.</i></p>
13.	Due date of possession	24.01.2019 (Calculated as 60 months from date of execution of agreement i.e., 24.01.2014)
14.	Total sale consideration	Rs. 67,26,095/- (As per BBA on page 12 of amended CAO)
15.	Amount paid by the complainants	Rs. 16,55,671/- (Page 88 of complaint)
16.	Occupation certificate /Completion certificate	17.07.2019 (Annexure R-5 of page 91 of reply)
17.	Offer of possession	Not offered
18.	Demand/ Reminder Letters	30.06.2017, 01.08.2017, 29.08.2017, 23.02.2018, 19.03.2018

19.	Surrender Letter	02.07.2018 (Annexure C-4 at page 87 of complaint)
20.	Cancellation Letter	02.06.2018 (Annexure C-3 at page 86 of complaint)

B. Facts of the complaint

8. That in the year 2013, the respondent invited applications from general public for the allotment of units for their upcoming project namely "Ocus 24K" to be constructed in Sector-68, Sohna Road, Gurgaon, Haryana.
9. That the complainants were allured by the representations of the officials of the respondent on the false representations that they have obtained all the necessary approval and solicited them to book a unit in their "Ocus 24K" project in sector 68, Gurugram. Relying upon the assurances of their representatives believing them to be true, the complainants signed application for registration/ allotment of a unit in the said project known as 'Ocus 24K' and paid a sum of Rs.4,88,831/- including service tax. vide cheque no. 690588 dated 30.07.2013 drawn on HDFC Bank Ltd. It is pertinent to mention herein that the payments were received by the respondent before sanctioning of demarcation and zoning plan. It is stated that before obtaining sanctioning, receipt of amount from public is illegal act on their part.
10. That the respondent provisionally allotted unit no. 607 on 6th floor having super area measuring 65.12 sq. mtrs. (701 Sq. Ft.) in the said project at a basic sale price of Rs. 57,62,220/- (Rupees Fifty Seven Lakhs Sixty Two Thousand Two Hundred Twenty only) to the complainants.

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11. That the respondent handed over already prepared buyer's agreement in respect of the said unit to the complainants for signing purposes and further asked them to sign on the dotted lines. The terms of the agreement were completely one sided. By the time the agreement was handed over by the respondent to the complainants to sign the agreement, the complainants were already coerced to pay huge sum of Rs. 16,55,671/-. The complainants had no alternative but to sign on the dotted lines of the agreement despite not agreeing to various terms and conditions of the agreement. On plain reading of the apartment buyer's agreement, it shows that all clauses of the apartment buyer's agreement were one dimensional and favouring only one party i.e., opposite party. The agreement was prepared by the respondent in arbitrary manner. The complainants tried to suggest few changes in the agreement, but the suggestions were declined arbitrarily by the builder and the complainants were asked to sign on the dotted line against his wishes. The complainants had no power of deliberation, negotiation or persuasive power to negotiate or change anything in the said agreement to sell was asked to sign on the dotted line. The complainants were feeling betrayed as they had already invested huge amount in the project and still have no claim/right in discussing the terms of the agreement. The apartment buyer's agreement prepared by the respondent is completely one sided and eccentric favouring only the interest of developer. The interest of the complainants is not even considered while preparing the said agreement. It is submitted buyer agreement is not binding between the parties.

12. Since November 2013 till mid of 2016, the complainants did not hear anything from the respondent. It is also pertinent to mention herein that the

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complainants had paid all the aforesaid amount on time, but the respondent deliberately did not issue the receipt on time to them as the same used to be dispatched by post later on. All the cheques issued by the complainants were within the stipulated time for payment and till November 2013, the complainants did not default even once in making the payments. But malafidely the respondent claimed to receive the same at belated stage.

13. That somewhere in 2017, the complainants financial condition deteriorated and due to financial crunch, they could not pay the instalments of the said unit to the on time. This fact was also informed by the complainants orally to the respondent's representatives, but the representatives assured them that as and when they are able to pay the said number of instalments, they will pay the same with interest on delayed payment as applicable.
14. That in January-February 2018, the complainants went to the respondent's office and met with its representatives and informed them about their financial difficulties and requested them to sale the said unit to any prospective/interested buyer and /or in case of alternative (if no buyer available), to refund the amount with interest and showed their willingness to surrender the said unit back to the respondent. The representatives of the respondent assured the complainants to discuss with higher management of the Respondent and revert on the same.
15. Surprisingly the complainants now received a cancellation letter dated 02.06.2018 from the respondent informing them that the allotment of the said unit stands cancelled due to non-payment of dues and demanded Rs.42,621/- more by forfeiting all the amount already paid by them till date.

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The amount deducted by the respondent is grossly illegal and unethical and unreasonable on its part and does not fall within section 74 of the Indian Contract Act. It is stated that earnest money is paid at the time of submitting the application and not 20% of basic price of unit as claimed by them. It is submitted that in the present case the earnest money in any case cannot be more than 4.8 lakhs and above. The claim of respondent to be earnest money being 20% of the basic sale price is highly exorbitant and wholly unreasonable, unethical and arbitrary and needs to be rejected and declared as null & void.

16. That as per clause 4 of the said agreement, the respondent treated 20% of basic sale price of the said unit i.e., Rs.11,91,700/- as earnest money which is not reasonable as the earnest money would constitute earnest money which is paid at the time of contract between the parties and not 20% as claimed by the respondent, so, they are legally bound to refund the total amount paid to them till date as detailed above. Even otherwise, the respondent unilaterally, illegally and arbitrarily further deducted various amounts on account of earnest money, service tax, VAT, brokerage paid, and interest on delayed payment which is completely illegal and unreasonable on its part.
17. That the complainants even issued a legal notice dated 02.07.2018 through their counsel by way of courier as well as by email to the respondent for refunding the total amount of Rs.16.55.671/- paid by them till date along with interest @ 12% per annum w.e.f. 30.11.2013 till realization in respect of the said unit within seven (07) days of receipt of this legal notice, but to no avail. That the respondent sent its reply dated 11.07.2018 to the said legal notice received through email dated 24.07.2018. That the said reply is vague,

false, baseless and bundle of lies. Hence, it is safely presumed that they don't have any defence to the claim/allegations leveled by the complainants.

C. Relief sought by the complainant: -

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

- I. Direct the respondent to refund the amount paid along with interest per annum.
 - II. Direct the respondent to give compensation for mental agony and harassment and also award litigation costs.
19. 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

The respondent has contested the complaint on the following grounds:

20. That at the outset it was stated that the present complaint filed by the complainants is wholly misconceived, erroneous, unjustified and untenable in law besides being extraneous and irrelevant having regard to the facts and circumstances of the case under reference and is thus liable to be dismissed at the very threshold.
21. That the complaint suffers from concealment and suppression of material facts and records, as the complainants have suppressed the fact that they had booked the commercial unit for investment and to make quick gains in the booming real estate market at the time and the fact that they were not able to make payment towards their commercial unit, which resulted in the

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cancellation of their commercial unit. Therefore, the complainants have approached the Hon'ble Authority with unclean hands and hence for this reason alone the complaint is liable to be dismissed.

22. That the unit had been cancelled due to the complainants not making payments, as per the agreed payment plan and only after affording all available opportunity to the complainants. Therefore, the present complaint is not maintainable and is liable to be dismissed.
23. That the complainants are not consumer as defined in the Consumer Protection Act, 1986. As per the record the complainants had booked the commercial unit with the respondent in its project Ocus 24K, as an investor only to earn returns through leasing or through further sale, which is evident from the fact that the complainants had booked two units with the respondent. The other unit being unit no. 607 in the same project. This clearly shows that the complainants did not intend and booked the commercial unit for their own personal use, and admittedly, had purchased the same for earning profit through investment, as the project seemed lucrative to them for earning quick gains in booming real estate market at that time. As a matter of fact, the complainants had booked the said unit in question to earn profits by selling the same further and now they want refund of the amount allegedly paid by them, because property market is no more lucrative than it was when the complainants booked their units. If the unit was booked for their own use, they would not have sought refund of the amount allegedly paid by them. Hence, the complaint is liable to be dismissed solely on this ground.

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24. That the complaint under reference is further liable to be dismissed on the ground that the complainants have themselves committed breaches by not adhering to agreed payment schedule despite receiving demand letter dated 30.06.2017 for making payment on account of achievement of project milestone of "completion of structure". The demand was as per the agreed payment schedule and payment plan, upon non-payment of which several reminder letters dated 01.08.2017, 29.08.2017, 24.01.2018, 23.02.2018, 19.03.2018 were sent by the respondent which were deliberately ignored by the complainants, and the demands contrary to terms and conditions of the agreement were made, as a result of which the booking of the present unit was cancelled vide cancellation letter dated 02.06.2018 by the answering respondent as per the terms of the BBA. That the complainants have on several occasions defaulted on payments on some excuse or the other. Their said irresponsible and wrongful had serious implications on the project completion targets, thereby jeopardizing the whole project. Therefore, the complainants cannot be allowed to take advantage of their own wrongs and defaults.
25. That the complainants have no locus standi or cause of action to file the present complaint. The present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the builder buyer's agreement dated 24.01.2014, as shall be evident from the submissions made in the following paras of the present reply.
26. That the complainants had been sitting idle all these years and therefore, the present complaint is purely an afterthought.



27. That clause 54 of the buyer's agreement further provides that in case of default in making payment the unit in question can be cancelled by the respondent on its sole discretion. The complainants, having defaulted in making timely payments of instalments, have thus lost any entitlement to the unit in question under the buyer's agreement.
28. That the complaint is also liable to be dismissed on the ground that the complaint is not maintainable as there is no cause of action against the respondent in as much as there is no unfair trade practice or malpractice on their part in rendering services. On contrary, it is the complainants who have failed to discharge the obligations of making the timely payments towards the said commercial unit, as undertaken by them at the time of making the application and further while executing the builder buyer's agreement dated 24.01.2014.
29. That the said project is complete and the respondent has even obtained the occupation certificate from the concerned department/ authority bearing No. ZP- 854/SD(DK)/2019/16980 dated 17.07.2019 and it would be highly inappropriate if the Hon'ble Authority entertains such pleas of the complainants for refund of money, grossly against the terms and conditions of the BBA executed between parties.
30. That it was submitted that all the demands that have been raised by the respondent, were strictly in accordance with the terms and conditions of the buyer's agreement between the parties. There is no default or lapse on the part of the respondents. It was the complainants who have consciously refrained from making the payments of the unit by raising false and frivolous excuses, pursuant to which the provisional allotment of the unit in question

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to complainants stood cancelled. It is evident from the entire sequence of events, that no illegality can be attributed to the respondent. The allegations levelled by the complainants are totally baseless. Thus, it is most respectfully submitted that the present application deserves to be dismissed at the very threshold.

31. 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.
32. 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. (Supra)* the authority is proceeding further in the matter where allottee wishes to withdraw from the project. Accordingly, the authority is proceeding further to decide the matter based on the pleadings and submissions made by both the parties during the proceedings.

E. Jurisdiction of the authority

33. 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, 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) 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.

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.

Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in *Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (Supra)* and reiterated in case of



***M/s Sana Realtors Private Limited & other Vs Union of India & others
SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*** wherein it has been
laid down as under:

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

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

F. Findings on the objections raised by the respondents:

F.I. Objection regarding complainants being investors:

34. It was pleaded on behalf of respondents that complainants are investors and not consumers. So, they are not entitled to any protection under the Act and the complaint filed by them under Section 31 of the Act, 2016 is not maintainable. It is pleaded that the preamble of the Act, states that the Act is

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enacted to protect the interest of consumers of the real estate sector. The Authority observes that the respondents is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states the main aims and objects of enacting a statute but at the same time, the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the buyer's agreement, it is revealed that the complainants are buyers and paid considerable amount towards purchase of subject unit. At this stage, it is important to stress upon the definition of term allottee under the Act, and the same is reproduced below for ready reference:

"Z(d) 'allottee' in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent."

35. In view of above-mentioned definition of allottee as well as the terms and conditions of the flat buyer's agreement executed between the parties, it is crystal clear that the complainants are allottees as the subject unit allotted to them by the respondents/promoters. The concept of investor is not defined or referred in the Act of 2016. As per definition under section 2 of the Act, there will be 'promoter' and 'allottee' and there cannot be a party having a status of 'investor'. The Maharashtra Real Estate Appellate Tribunal in its

order dated 29.01.2019 in appeal No.0006000000010557 titled as **M/s Srushti Sangam Developers Pvt Ltd. Vs Sarvapriya Leasing (P) Ltd. and anr.** has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottees being an investor are not entitled to protection of this Act also stands rejected.

G. Findings on the relief sought by the complainant

G. I. Direct the respondent to refund the amount paid by the complainant along with interest per annum.

36. In the present case, the complainants booked a commercial unit in the project of the respondent named as "Ocus 24K" situated at sector 68, Gurgaon, Haryana for a total sale consideration of Rs. 67,26,095/-. Thereafter, they were allotted unit no. 607 on 6th floor. The complainants have in total paid an amount of Rs. 16,55,671/-.
37. The buyer's agreement between the parties was executed on 24.01.2014. Clause 11(a) of the said agreement specifies the schedule for handing over possession. According to the aforementioned clause, the completion of the building was to be done **within a period of sixty (60) months from the date of this agreement.** In view of the clause of BBA, the due date of possession has been calculated as 60 months from date of execution of BBA i.e., 24.01.2014 which comes out to be 24.01.2019. Meanwhile, even before the expiry of due date of possession, the unit of the complainant-allottee was cancelled by the respondent vide letter dated 02.06.2018 after non-payment of demand letters dated 30.06.2017 followed by reminder letters dated 01.08.2017, 29.08.2017, 23.02.2018, 19.03.2018.

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38. The Authority is of the view that the cancellation of unit is valid. Both the parties have submitted written submission regarding what constitutes earnest money and forfeiture of amount. However, the cancellation of the unit was made by the complainant after coming into force of the Act of 2016. So, the respondent at the most can deduct 10% of the basic sale price of the unit and not more than that. Even the Hon'ble Apex court of land in case 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*, 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 damage.

39. So, the deduction should be made as per the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, which states that-

"5. AMOUNT OF EARNEST MONEY

Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment/plot/building as the case may be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer."

40. Keeping in view the above-mentioned facts and since the allottees' unit was cancelled on 02.06.2018, so the respondent was bound to act upon the same. Hence the authority hereby directs the promoter to return the amount after

forfeiture of 10% of sale consideration with interest at the rate of 10.35% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of cancellation i.e., 02.06.2018 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017.

G.II. Direct the respondent to give compensation for mental agony and harassment and also award litigation costs.

41. The complainants are 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 complainants 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

42. 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 respondent-promoter is directed to refund the paid-up amount after deducting 10% of the sale consideration of the unit being earnest money as per regulation Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder)



Regulations, 2018 with interest @ 10.35% p.a. on the refundable from the date of cancellation i.e., 02.06.2018 (in CR/632/2018) and date of surrender i.e., 02.07.2018 (in CR/633/2018), 22.12.2017 (in CR/621/2020) respectively till the actual date of refund of the amount.

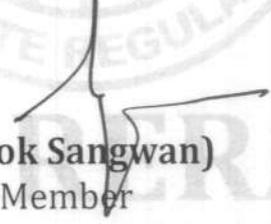
ii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

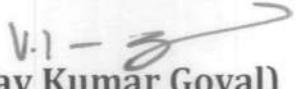
43. This decision shall mutatis mutandis apply to cases mentioned in para 3 of this order.

44. The complaints stand disposed of. True certified copies of this order be placed on the case file of each matter.

45. Files be consigned to registry.


(Sanjeev Kumar Arora)
Member


(Ashok Sangwan)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 24.11.2022