

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

**Complaint no. : 938 of 2018**  
**First date of hearing : 23.01.2019**  
**Date of decision : 23.01.2019**

1.Radha Vasudevan  
2.Viswanathan Vasudevan  
R/o H.no. 234,2<sup>nd</sup> floor, C Block  
Mayfield Garden, Sector 51, Gurugram

**Complainants**

Versus

1.M/S Ocus Skyscrapers Realty Limited  
Office: S-33, Green Park, Main Market,  
New Delhi-110016  
2. M/s Perfect Constech Pvt. Ltd.  
Office: A-307, Ansal Chamber 13  
Bhikaji Cama Place ,New Delhi

**Respondents**

**CORAM:**

Shri Samir Kumar  
Shri Subhash Chander Kush

**Member**  
**Member**

**APPEARANCE:**

Shri Abhimanyu Dhawan with Advocate for the complainant  
Complainant in person.

Shri Sumesh Malhotra with Advocate for the respondent

Shri Gaurav Kapoor  
authorized representative on  
behalf of respondent-  
company



## ORDER

1. A complaint dated 14.09.2018 was filed under section 31 of the Real Estate (Regulation and Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 by the complainants Mrs. Radha Vasudevan and Mr. Viswanathan Vasudevan, against the promoters M/S Ocus Skyscrapers Reality Limited. and M/s Perfect Constech Pvt. Ltd. , on account of violation of the clause 11(a) of buyer's agreement executed on 06.06.2014 in respect of unit described as below for not handing over possession by the due date which is an obligation of the promoter under section 11(4)(a) and section 11(5)of the Act *ibid*.
2. Since, the buyer's agreement has been executed on 06.06.2014 i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, therefore, the penal proceedings cannot be initiated retrospectively, hence, the authority has decided to treat the present complaint as an application for noncompliance of contractual obligation on the part of the promoters/respondents in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016



3. The particulars of the complaint are as under: -

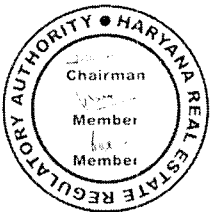
1.	Name and location of the project	"OCUS 24 K", Sector 68, Gurugram, Haryana
2.	Nature of project	Commercial complex
3.	Project area	4.44 acres
4.	Registered/unregistered	<b>Registered (220 of 2017)</b>
5.	Revised date of competition as per registration certificate	17.09.2022
6.	DTCP license no.	76 of 2012
7.	Unit admeasuring	751 sq. ft.
8.	Date of execution of buyer's agreement	06.06.2014
9.	Unit no.	912 A, 9 <sup>th</sup> floor
10.	Payment plan	Possession linked payment plan
11.	Date of booking	23.08.2013
12.	Provisional allotment	23.08.2013
13.	Cancellation letter dated	02.06.2018
14.	Basic sale price	Rs. 61,28,160/-
15.	Total consideration amount as per statement of buyer's agreement	Rs. 68,41,610/-
16.	Total amount paid by the complainant till date	Rs. <b>17,62,549/-</b> demand letter(annx 5)
17.	Date of delivery of possession as per clause 11(a) of buyer's agreement i.e. 60 months from the execution of buyer's agreement	06.06 2019
18.	Delay in handing over possession till date	Premature



19.	Penalty clause as per buyer's agreement	Clause 14 of the agreement i.e. the company shall pay compensation @ Rs. 20/- per sq. ft. of the super area per month
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4. The details provided above have been checked on the basis of record available in the case file which has been provided by the complainants and the respondents. A buyer's agreement is available on record for the aforesaid unit according to which the possession of the same was to be delivered by 06.06.2019. Neither the respondents have delivered the possession of the said unit as on date to the complainants nor they have paid any compensation as per clause 14 of the buyer's agreement. Therefore, the promoter has not fulfilled his committed liability as on date.

5. Taking cognizance of the complaint, the authority issued notice to the respondents for filing reply and for appearance. The respondents through their counsel appeared on 23.01.2019. The case came up for hearing on 23.01.2019. The reply filed on behalf of the respondent has been perused.



### **Brief facts of complaint**

6. The complainants submitted that they booked a commercial unit no. 912A in the commercial/retail project of the respondent known as “Ocus 24K” (the “Project”) situated at Sector-68, Sohna Road, Gurugram, Haryana and got the provisional allotment vide email dated 23.08.2013 of the commercial unit no.912 A having super area 821 sq. ft. located on 9th floor.
7. The complainants made payments amounting to Rs. 17,62,549/- towards booking of the said commercial much prior to execution of buyer’s agreement on 06 06.2014.
8. The complainants submitted that the letter for execution of buyer’s agreement for the said commercial unit was issued by the respondent in February 2014.
9. The complainants submitted that they were further induced to sign pre-printed buyer’s agreement dated 06.06.2014 by virtue of which they were allotted commercial unit no. 912 A having super area 751 sq. ft. located on 9th floor in ‘Ocus 24K’ situated at Sector-68, Sohna Road, Gurugram, Haryana. That the agreement did not have the right to terminate or cancel such allotment as stipulated under the RERA Rules.



10. The complainants submitted that the buyer's agreement dated 06.06.2014 was executed among the respondent no. 1 and respondent no.2 and the complainants and as per the said agreement, the respondent no.2 is the owner of project's land who also obtained license no.76 dated 01.08.2012 ( the license) which was granted by Director Town and Country Planning, Haryana to **M/s Perfect Constech Private Limited** (hereinafter referred as land owing company) of land admeasuring 4.44 acres(approx.) falling in revenue estate of Village Badshahpur, Sector 68, District Gurgaon, Haryana on the said land with whom company has entered into a collaboration agreement duly registered vide Vasika no. 30112 dated 25.03.2013 in the office of Sub-Registrar, Gurgaon, Haryana and subsequent agreements dated 26.03.2013 and 30.04.2013 (hereinafter referred to as the project Land) for using the said land for the construction and development of the group housing colony/said project and the respondent no.1 is developer of the said project.



11. The complainants submitted that respondents in the month of June 2017 raised a sudden demand of approx. Rs. 8,00,000/- .However, the complainants were not prepared for such massive payments and decided to personally visit the office of the respondents expressing their inability due to family financial constraints. The objective of the said meeting was to seek a refund without having to pay any more instalments to the respondents.

12. The complainants were constrained to withdraw from the project and had intimated the same to the respondents in August 2017. After various telephonic conversations complainants were informed that under the buyer's agreement, the complainants have no right to cancel allotment. It is further submitted that the complainants vide letter dated 30th August 2017 also expressed the interest in exploring its options, in the absence of the right to cancel the allotment. Owing to financial constraints, the complainants, informed the respondents that they are unable to pay any further amounts and sought clarifications on buy back or refund as may be applicable. But during the pendency of this conversation, the



respondents cancelled the allotment on 02.06.2018 and forfeited the entire payment of Rs. 17,62,549/-.

13. The complainants submitted that the said commercial unit buyer's agreement is totally one sided which imposes completely biased terms and conditions upon the complainants, thereby tilting the balance of power in favour of the respondents. The terms of the agreement are non-negotiable and the complainants had no option of modifying it or even deliberating it with the respondents. This aspect has been unfairly exploited by the respondents whereby they have imposed unfair and discriminatory terms and conditions. Furthermore, the complainants had paid a substantial amount equal to Rs. 17,62,549/- all in cheque/ bank transfer towards the allotment of the commercial unit before the execution of the buyer's agreement. It is further submitted that the respondent had resorted to malpractice in the agreement. That unfair conditions were imposed on the complainants from the very inception and continued through the buyer's agreement, which is signed by the buyer's after having paid a substantial amount, thereby, leaving no option to the





complainants to object to the loop-sided provisions of the agreement. For e.g. the super area mentioned in the provisional allotment letter is 821 sq. ft. whereas super area mentioned in buyer's agreement is 751 sq. ft. lacks of right to cancel the allotment, unilateral power to make changes in the agreement and the power to supersede without any right to the complainants. It is submitted that there is unequal bargaining power between the parties and that the impunity with which these clauses have been imposed clearly evidences the brutal disregard to the consumer's rights that has been displayed in its action of cancelling the allotment and forfeiting the deposit despite the desire of the complainants to cancel the allotment at their own behest and seek a refund of their hand earned money.



14. The complainants submitted that since early 2017 they have been requesting the respondents regarding the financial difficulty and refund of the money and therefore, the complainants were constrained to stop making payments towards the projects and withdraw from the said project. The complainants had withdrawn from the said project and vide

letter/ emails also cancelled the booking of said allotment with immediate effect and also requested to the respondents to refund the paid amount of Rs. 17,62,549/- along with interest orally during the visit to the respondents office at Ocus Technopolis, Golf Course Road, Gurgaon. But despite the said express demand the respondent pointed out that the buyer's agreement does not provide the right to the complainants to cancel the allotment. To the dismay of the complainant, owing to this impasse, complainants agreed to explore options for buy back.

15. The complainants submitted that the absence of the right to the complainants to cancel the allotment is arbitrary and contrary to law. As per the Haryana Real Estate (Regulation and Development) Rules 2017, Rule 8 the agreement to sell must be in the form as provided under annexure A of the rules. Further any other document including any allotment letter, or any other documentation shall not limit or restrict the rights as under the agreement to sell. It is pertinent to mention herein that under annexure A of the rules, the complainants



shall have the right to cancel/withdraw the allotment at any time as follows:

*"If the allottee proposes to cancel/withdraw from the project without any fault of the promoter, the promoter herein is entitled to forfeit the booking amount paid for the allotment and interest component on delayed payment (payable by the customer for breach of agreement and non-payment of due payable to the promoter). the rate of interest payable by the allottee to the promoter shall be the state bank of india highest marginal cost of lending rate plus two percent. The balance amount of the money paid by the allottee shall be returned by the promoter to the allottee within ninety days of such cancellation."*

16. The complainants submitted that the respondents cancelled the allotment w.e.f. 02.06.2018 and also forfeited an amount of Rs. 17,62,549/- paid by the complainants towards allotment of said commercial unit. It is stated that the complainants paid approx. 30% of the total basic sale price towards the allotment of said commercial unit and the respondents have forfeited the entire paid amount of Rs. 17,62,549/- in violation of provisions/norms of the Real Estate (Regulation and Development) Act,2016.



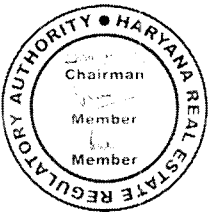
17. The complainants submitted that owing to the wrongful cancellation of the allotment arbitrarily by the respondents and forfeiture of the entire payment made to them, the complainants issued a legal notice dated 5th August 2018 calling upon the respondents to deduct the legally tenable amount and to refund the rest.
18. The complainants submitted that in reply to the complainant's notice the respondent sent a reply dated 20th August 2018, whereby the respondents have clarified that its operations and arbitrary practices herein do not fall under the purview of RERA. It is submitted that in the landmark order in the case of **Madhu Sareen vs. BPTP Ltd. & ors.**, the Haryana Real Estate Regulatory Authority (Panchlula) held that only developers who got completion/occupation certificate before publishing of the State Real Estate (Regulatory and Development) Rules 2017 are exempted from the RERA rules. Owing to the same the respondents are wrong in alleging that their activities are beyond the purview of regulation of the Act & rules *ibid*.



19. Therefore, the present complaint is filed by the Complainant for refund of paid amounts along with interest as per provisions of Act and rules ibid before this Id. authority.

**Issues raised by the complainants are as follow:**

- i. Whether the respondents are liable to refund the amount deposited by the complainants along with interest @18% p.a.?
- ii. Whether the respondents are legally empowered to forfeit the entire amount of Rs. 17,62,594/-paid by the complainants as per provisions of Act?
- iii. Whether the buyer's agreement dated 06.06.2014 is contrary to the provisions of RERA and HARERA?
- iv. Whether the respondent has violated the RERA/HARERA/Laws/Rules/Guide line by extracting more than 10% of basic sale price of the unit without entering or executing the buyer's agreement or any other agreement?



**Relief sought**

The complainants are seeking the following reliefs:

- i. Direct the respondents to refund a sum of Rs. 17,62,549/- along with interest @ 18% per annum from the date when payments were made till realization of the amount in full.

**Respondent's reply:**

20. The respondents submitted that the complaint of the complainants suffers from concealment and suppression of material facts and records, as the complainants have suppressed the fact that they had booked the commercial units in the project for investment and the fact that they were irregular in making payments, that upon their own request submitted vide letter dated 23.01.2014 they had received a waiver of late payment charges to be adjusted at the time of possession from the respondent and also the fact that they did not make payment towards their commercial units, which resulted in cancellation of their commercial unit. Additionally, the fact that the complainants had requested the respondent, for reinstatement of booking for their unit vide email dated 05.06.2018, which is contrary to the demands and assertions made in the complaint under reply and in legal notice dated 05.08.2018 Therefore, the complainants have approached this



hon'ble authority with unclean hands and hence for this reason alone the complaint is liable to be dismissed.

21. The respondents submitted that without prejudice and admitting the complaint and its cause, the alleged cause of action of the complainants arose on 06.06.2014 when they were allegedly reduced area, came to their knowledge, therefore it has been more than 4 years since then that the complainants have been sitting on their alleged cause and have not given any reason for the said delay in their whole complaint. Therefore, the present complaint is not maintainable and is liable to be dismissed.

22. The respondents submitted that the complainants are not a consumers as defined in the Consumer Protection Act, 1986. As per the record the complainants had booked the commercial units with the respondents in their project Ocus 24 K, which is self-evident and clearly show that the complainants did not intend and book the commercial unit for his own personal use, and admittedly, have purchased the same for earning profit through investment, as the project seemed lucrative to him 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 profit by selling the same further and now the complainants want refund of the amount alleged paid by them, because property market is more lucrative. Had the complainants booked the said unit for their own use, the complainants would not have sought refund of the amount alleged paid by them. Hence, the complaint of the complainants is liable to be dismissed solely on this ground.

23. The respondents submitted that complaint is 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" of Rs.8,10,229/- and subsequent demand letter dated 27.11.2017 of Rs.14,67,482 previous demand dated 30.06.2017 along with delay interest payable on account of payment to be made within 90 days of completion of structure from the respondents. Both demands were as per the agreed payment





schedule and payment plan, which were deliberately ignored by the complainants and the demands contrary to terms and condition 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 respondents, as per terms of buyer's agreement. That the complainants have on several occasions defaulted on payments on some excuse or other. The said irresponsible and wrongful actions of the complainants 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.

24. The respondents submitted that the present complaint is not maintainable before this hon'ble authority. It is respectfully submitted that complaints pertaining to possession, compensation and refund are to be decided by the adjudicating officer under section 71 of the Real Estate (Regulation and Development) Act, 2016 read with rule 29 of the Haryana Real Estate (Regulation and Development) Rules,



2017, and not by this hon'ble authority. The present complaint is liable to be dismissed on this ground alone.

25. The respondents submitted that complainants have no locus standi or cause of action to file the present complaint. The present complaint is based on a erroneous interpretation of the provisions of the act as well as an incorrect understanding of the terms and conditions of buyer's agreement dated 06.06.2014, as shall be evident from the submissions made in the following paras of the present reply.

26. The respondents submitted that **clause 54** of the builder buyer's agreement further provides that in case of default in making payment the unit in question can be cancelled by the respondents on their sole discretion. The complainants, having defaulted in making timely payment of instalments, have thus lost any entitlement to the unit in question under the buyer's agreement.



27. The respondents submitted that the construction of the project stands near completion, and the respondents are in the process of applying for occupation certificate in respect of the same.

28. The respondents submitted that all the demands that have been raised by the respondents are 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 respondent. It is the complainants who have consciously refrained from making the payments for the unit by raising false and frivolous excuses, pursuant to which the provisional allotment of the unit in question to complainant stood cancelled. 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.

### **Determination of issues**

After considering the facts submitted by the complainant, reply by the respondent and perusal of record on file, the issue wise findings of the authority are as under:



29. With respect to **issues** raised by the complainants, that the respondent is directed to withdraw the cancellation letter dated 02.06.2018 issued to the complainant and complainant should pay the balance amount. The respondent is further

directed not to levy any interest on the delay payment to be made by the complainant and offer the possession of the said unit by the due date i.e. 06.06.2019. As the project is registered and the revised date of completion is 17.09.2022 therefore refund cannot be allowed as it will prejudice the rights of other allottees who wish to continue with the project as the authority is of consistent view that if the project is near completion, the allottee should not be allowed to withdraw as the Act was enacted to promote harmony in the real estate sector

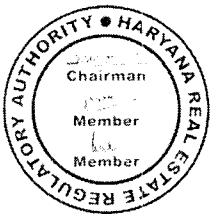
### **Findings of the authority**

30. The authority has complete jurisdiction to decide the complaint in regard to non-compliance of obligations by the promoter as held in ***Simmi Sikka V/s M/s EMAAR MGF Land Ltd.*** leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage. As per notification no. 1/92/2017-1TCP dated 14.12.2018 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.

31. The complainants are investors who have invested in a studio apartment which was never intended to be occupied by them and instead to be leased out as per respondents optional leasing, for returns on investments. However, the complainants stopped making payments and even after several reminders and opportunities given by the respondents for well over 1 year, did not respond to the same and on the pretext of financial difficulty kept on prolonging and delaying the payment. The complainants vide their letter dated 24.01.2014 made requests to the respondents for waiving of delay payment interest which was duly approved on the condition that they will make timely payment in future.



32. Thereafter, after giving several reminders vide letters dated 30.06.2017, 27.11.2017, 01.08.2017, 29.08.2017, 24.01.2018, 23.02.2018 and 19.03.2018, and due opportunity, which remained unanswered, that out of compulsion the

respondents cancelled the unit on 02.06.2018 as per the terms and conditions of BBA.

33. The complainants, after the unit was cancelled, called the respondents and manifested their interest in retaining the unit, provided, some concession on delayed payment interest is given to them or proposed to make payment after one and half year which is contrary to payment terms and against BBA, stating that they have financial difficulty.

34. The complainants thereafter, called up respondent and manifested their interest in retaining their unit, however, requested for time in making further payment. Even while the possibility was being explored, the complainants, sent a legal notice, which was duly replied and now have filed their complaint before, the authority.



35. The buyer's like the instant complaint, not only affect project deliverables by not making payment on time, but also jeopardise the entire project, affecting interest of other buyers.

36. The complainants are seeking refund, as they have not received anticipated gains, as the project is located in Sohna

road and the price of real estate on the said road has not increased, as was anticipated by lot of investors. They have mentioned incorrectly before the authority that they had requested for cancellation of unit. their unit was cancelled in natural course and no confirmed request was ever made by them for refund, which was to be as per buyer's agreement.

37. The respondents has completed the construction and is carrying out the remaining finishing work at the site within time, even though the market conditions are not favourable, by availing loan and financing from banks at higher rate of interest than the buyers pay to the developers. If the prayer of the complainants is allowed, then it would disastrous for the already fragile and suffering finances of the company and as given the market scenario it is already becoming difficult to service the debt taken from the bank.



38. The respondents are ready to give possession of the unit, ignoring the cancellation, as respondent had not sold the unit further, specifically on the request of the complainants, any adverse order will materially harm the respondents. The respondent also agreed not to charge delayed payment

interest of cancellation period. Alternatively, option may be given to the complainant, in case refund is to be given, then respondent shall be allowed to retain 10% of earnest money, along delay payment interest and brokerage and other taxes paid to government.

### **Directions of the authority**

39. After taking into consideration all the material facts as adduced and produced by both the parties, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issues the following directions to the respondent in the interest of justice and fair play:

- i. The complainant is given an option to pay the balance amount due towards the respondent and the respondent shall withdraw the cancellation letter dated 02.06.2018 issued to the complainant and offer possession without charging any interest on delay payment to be made by the complainant during the period of cancellation of unit. Alternatively, option may be given to the complainant, in case refund is to be given, then





respondent shall be allowed to retain 10% of earnest money, along delay payment interest and brokerage and other taxes paid to government

40. The order is pronounced.

41. Case file be consigned to the registry.

  
**(Samir Kumar)**  
Member

  
**(Subhash Chander Kush)**  
Member

Dated: 23.01.2019

