

**BEFORE THE HARYANA REAL ESTATE APPELLATE  
TRIBUNAL**

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Appeal No. 291 of 2021  
Date of Decision: 17.01.2023

Alka Jain & Raj kumar Jain

Residence of both the appellants: A-603, Unique Apartments,  
Plot No. 38, Sector 6, Dwarka, New Delhi 110075

...Appellants

Versus

- (i) M/s Occus Skyscrapers Realty Limited.  
(a) R/o S-33, Green Park, Main Market, New Delhi-110016.  
(b) Ocus Technopolis, Golf Course Road, Sector 54,  
Gurugram-02.
- (ii) M/s Perfect Constech Private Limited  
Resident of A-307, Ansal Chamber-I, Bhikaji Cama  
Place, New Delhi-110066.

...Respondents

**CORAM:**

**Shri Inderjeet Mehta,  
Shri Anil Kumar Gupta,**

**Member (Judicial)  
Member (Technical)**

**Argued by:** Both the Appellants Shri Raj Kumar Jain &  
Smt. Alka Jain, in person.

Shri Lokesh Bholra, Advocate,  
Ld. counsel for respondent-promoter.

**ORDER:**

**Anil Kumar Gupta, Member (Technical):**

The present appeal has been preferred under  
Section 44(2) of the Real Estate (Regulation and Development)

Act, 2016 (hereinafter called the Act) against order dated 03.02.2021 passed by the Ld. Haryana Real Estate Regulatory Authority, Gurugram (hereinafter called 'the Authority'), whereby complaint No. 3105 of 2020 filed by the Appellant was disposed of by the following directions:

*“(i) Possession has already been offered on 23.07.2019 but the allottee has failed to take over the possession. He did not submit any proof that he approaches the promoter for taking possession although he has completed all pre-requisite formalities for taking over possession.*

*(ii) The promoter is hereby directed to hand over the physical possession of the unit to the complainants within 7 days.*

*(iii) There seems to be a dispute whether the promoter has failed to give possession or allottee has failed to take over possession, in these circumstances, the promoter will not charge any holding charges.”*

2. It was pleaded in the complaint by the appellants that the appellants, in July 2013, were approached by the Respondents through their broker Mr. Puneet Girdhar for the booking for the unit in Respondents' project "Occus 24K". The Respondent no. 1 had taken a cheque, for booking, on 19.07.2013, for an amount of Rs. 4,79,165/- and after collecting the payments, forced the appellants to sign on the 'Blank Application Form', on 20.07.2013, in a pre-printed document, for allotment of the said property. The copy of the

said duly filled up and signed 'Blank Application Form' was never handed over to the appellants.

3. It was further pleaded that the appellants had paid Rs.71,19,421/- (Rs. Seventy one lakh nineteen thousand four hundred twenty one only) to the respondents, till 31.08.2019. The respondents have taken more amount than the cost of the property but they did not refund the same. As per the Buyer's agreement (Further called as 'agreement') dated 07.03.2014, the completion period is of 66 months.

4. It was further pleaded that the respondents had committed fraud while issuing two dubious letters on 23.07.2019, one in the name of 'offer of possession' luring appellants, with a commitment that "we would require approximately 30 days after clearing outstanding dues to hand over the Keys and to fulfill possession formalities" and the second in the name of "Opportunity for Lease of Apartment". Respondents had also issued the third letter dated 23.07.2020, informing the appellants of the reduction in the Super Built-up area of the property from 685 Sq. ft. to 677 Sq. ft. The respondents are playing a dirty trick of neither processing the registration formalities nor handing over the possession of the said property though committed to complete the process within 30 days of on receipt of full payment, as defined in the Annexure iii of their demand letter dated 23.07.2019. That the respondents confirmed that the said property would be registered, only after the appellants would

shift to the lease option. The respondents threatened that the appellants would be charged Holding Charges, Maintenance Charges, and the interest factor, apart from withdrawal of the discount, if the appellants refused to be the part of the lease offer. Thereafter, the appellants had no option but to sign on the 'Blank Form, for the Lease Option', the copy of the which is not yet provided to the appellants. The appellants asked the respondents to process the registration and possession letter be released.

5. With these pleadings, the appellants filed the complaint inter alia claiming the following reliefs:-

*“i. To pay the complainants, penal interest, towards the delayed delivery of the said property and for not handing over the possession of the said Property and for not registering the said property, as yet, on the total paid amount of Rs.71,19,421/-.*

*ii. To refund back extra charged amounts towards EDC/IDC of Rs.4,400/-, towards PLC: Rs.4,012/- and towards TDS, 1% of the actual cost of the said property of Rs.71,200/-, which the respondent had, succinctly, taken from the complainants (which has to be deposited towards the TDS) totaling to Rs.79,412/- along with the due interest, towards the cost of money, as per Authority's guidelines.”*

6. The complaint was resisted by the respondents on the grounds that clause 11(a) of the agreement clearly stipulates that subject to all just exceptions the construction of the said project would be complete within a period of 60

months from the agreement. A further grace period of 6 months is also provided to the respondents for completion of the said project under clause 14 of the agreement. In the present case, the possession of the said unit was offered to the appellants by the respondent No.1 on 23.07.2019 i.e. within the stipulated period of 66 months, as per the terms of the agreement. Therefore, the complainant cannot claim that possession of the said unit has not been handed over to them. Offer of possession letter dated 23.07.2019 clearly states that after the clearance of the outstanding dues the respondent No.1 would hand over the keys of the said unit to the appellants within a period of approximately 30 days. Therefore, upon receiving the offer of possession letter dated 23.07.2019, it is the responsibility of the appellants to approach the office of the respondents in order to complete the possession formalities. However, in the present case the appellants never approached the respondent no. 1 in order to complete the said formalities and the appellants are now alleging that it is the respondent no. 1 who is refusing to hand over possession of the said unit.

7. It is further pleaded that the appellants have admitted that possession with respect to the said unit was offered to them on 23.07.2019. Therefore, the appellants cannot claim that the respondent no. 1 has refused to hand over the possession of the said unit to them. The clause 13 of the agreement clearly provides that if the appellants fail to

take possession of the said unit within the time prescribed by the respondent no. 1 then in that case the said unit shall be at risk and cost of the appellants and the respondent no. 1 shall have no liability or concern thereof.

8. The ld. authority after hearing pleadings of both the parties passed the impugned order which has been already reproduced in the upper part of this appeal.

9. We have heard the appellant Sh. Raj Kumar Jain on behalf of both the appellants and Shri Lokesh Bhola, Advocate, ld. counsel for the respondents. Both the parties have filed the written submissions, affidavits and counter affidavits. We have also carefully gone through the record of the case.

10. Initiating the arguments Sh Raj Kumar Jain appellant contended that the FBA was executed between the parties on 07.03.2014. The possession of the unit was to be handed over to the appellants within a period of 60 months plus 6 months of grace period which comes out to be 07.09.2019. He contended that the respondents have issued the offer of possession letter on 23.07.2019 in which it was mentioned that respondents would require approximately 30 days after clearing outstanding dues to hand over the keys and to fulfill possession formalities. He contended that on the same date, another letter dated 23.07.2019 was issued by the respondents regarding opportunity for lease of apartment

intimating that the respondents are making continues efforts for attracting best brands across spectrum for leasing of space in project OCUS 24K and the respondents have also executed a letter of intent with 'Intellistay Hotels' for lease of service apartments under their brand "Mango Suits-Select".

11. It was further contended that appellants had already refused for the leasing agreement vide letter dated 14.10.2018. However, the respondents continued insisting the appellants to accept the lease which is apparent from their letter dated 23.07.2019 wherein they offered more benefits over their previous scheme. It was further pleaded that respondents were duty bound to handover the possession of the said unit in 30 days of the final payment by the appellants. It was further contended that the 100% payment was made by the appellants (amounting to Rs. 71,19,421/-), the last payment being made on 31.08.2019, the respondents were duty bound to handover the possession of the unit within 30 days of having made the last payment on 31.08.2019. The details of the payments made by the appellants to the respondents were supplied to this Tribunal by the appellants vide application dated 11.11.2022. It was contended that the respondents inserted a clause in Annexure iii in the 'offer of Possession' letter dated 23.07.2019, which restricts the process of handing over of the said unit. This clause stipulates that 'Allotees should personally come at the corporate office Gurugram for signing

and collection of possession related documents and formalities and registration of the unit can be processed only after the release of Possession Letter.' However, the said possession letter was never issued.

12. It was further contended that the respondents never intended to hand over the said unit without the acceptance of the Lease offer, therefore, respondents continued to pressurize the appellants for the lease option. Under these circumstances, the appellants were forced to sign the lease option. After acceptance of the lease offer by the appellants, the respondents changed the said property from unit no. 1209 to 1509 vide their letter dated 07.02.2020. After the acceptance of the lease offer by the appellants, the respondents issued a letter dated 15.02.2020 showing their intention of handing over of the unit for leasing out the said unit to "Mango Intellistay". It was intimated in the letter dated 15.02.2020 that 'Definite agreement' with "Mango Intellistay" is under process and terms will be more or less the same as shared in LOI and requested for acceptance by signing the LOI, post which handover formalities will be initiated in coming month. However, said 'definite agreement' was never executed.

13. It was further contended that the respondent in view of the non-execution of the 'definite agreement' did not handover the said property to the appellants. Respondents vide their email dated 31.10.2020 and 07.12.2020 intimated



that 'definite agreement' with any third party for leasing could not be executed and sought seven days' time to enable the respondents to take the final decision in the matter.

14. It was further contended that under these circumstances, the appellants were forced to issue notice dated 23.07.2020 intimating therein that the respondents are not ready to hand over the said property to the appellants even on terms of the respondents. Therefore, through the above said notice the appellants also sought delayed possession interest on the total amount of Rs. 71,19,421/- paid by the appellants to the respondents. The appellants also issued another notice dated 23.07.2020 reminding the respondents of handing over the unit along with delayed possession interest. No reply to the above notices were received and the appellants were forced to issue legal notice on 25.08.2020 through their advocates intimating neither the possession is being handed over nor the delayed possession interest is being given. The appellants after having not got any response from the respondents sent another letter dated 06.09.2020 seeking full refund of the paid amounts along with interest @ 15% from the date of respective payments.

15. It was further contended that the respondents never responded to any of the notices and therefore the appellants issued last notice on 07.11.2020 intimating therein that respondents are neither interested in giving the

possession nor are ready with the lease option and sought penal interest towards the delayed delivery of the said unit.

16. It was further contended that after the impugned order was passed by the Id. Authority, the letter of possession was issued by the respondents on 12.02.2021 which was received through their e-mail on 19.02.2021. However, the said offer of possession was recalled on the same date i.e. on 19.02.2021. He contended that the respondents are wrongly denying having withdrawn the said offer of possession letter dated 12.02.2021. He contended that the chats with the Microsoft department, supplied with our affidavit dated 08.07.2022 and now with written submission on 10.01.2022, will confirm that the respondents have recalled on 19.02.2021 itself their offer of possession letter dated 12.02.2021 emailed on 19.02.2021. He contended that the appellants have now taken over the possession of the unit on 12.11.2021.

17. With these pleadings, it was contended that the impugned order may be set aside and the appeal filed by the appellants be allowed and sought delayed possession interest as per the Haryana Real Estate (Regulation and Development) Rules, 2017 (further called as 'Rules') w.e.f. 07.09.2019 to 12.11.2021 on the total amount paid by the appellants.

18. Per contra Id. counsel for the respondents contended that the agreement between the parties was

executed on 07.03.2014. As per the agreement, the unit was to be delivered within 60 months plus 6 months of grace period and accordingly the due date of delivery period comes out to the 07.09.2019. The occupation Certificate was received by the respondents on 17.07.2019. The offer of possession of the unit to the appellants was issued on 23.07.2019 i.e. well within the due date of possession. As per the provisions in the agreement there were two options with the appellants i.e. either they can use the unit for themselves or can give their option for leasing out by the respondents. The last opportunity for leasing out the unit was given vide letter dated 23.07.2019. The appellants gave consent for leasing out their unit and the same was confirmed vide our letter dated 07.02.2020. On receipt of the consent for leasing out by the respondents, the unit was changed from unit no. 1209 to unit no. 1509 vide the said letter dated 07.02.2020. He contended that in compliance to the impugned order dated 03.02.2021 passed by the Id. Authority, the respondent no. 1 had offered possession of the unit in question vide letter dated 12.2.2021 which was sent by email on 19.02.2021 and also by DTC courier and speed post. In response to the said email dated 19.02.2021 the appellants vide their email dated 20.02.2021 had intimated the receipt of the aforesaid possession letter. The appellants vide email dated 19.04.2021 had shown their intention to take over the physical possession of the said unit under protest against the

impugned order. The email dated 19.04.2021 of the appellants was replied by the respondents vide email dated 22.04.2021 intimating the appellants that due to the lockdown in Delhi most of the staff members of the respondent no. 1 are on leave and when the staff members would come back, the respondents will inform the date and time of possession of the unit. Thereafter, the respondent no. 1 vide email dated 05.07.2021 sent a letter to the appellants for registration of the conveyance deed. The appellants had replied to the respondent no. 1 vide email dated 07.07.2021, requesting the respondent no. 1 to incorporate a clause in the draft of conveyance deed that the respondent no. 1 will abide by the ultimate outcome of the decision in the present appeal. Thus, it is clear that the appellants were adamant in not accepting the possession of the unit on one pretext or the other.

19. It was further contended that the appellants have taken the possession of the unit only after this Tribunal's order date 08.11.2021 directing the appellants to take the possession of the unit allotted to them within a week.

20. It was further contended that the email dated 19.02.2021 alleged to having been recalled by the appellant is denied. No such email recalling our email dated 9.02.2021 has ever been issued by the respondent no. 1. Authenticity of third party chats filed by the appellants cannot be relied upon as this has not been filed as per the relevant procedure

prescribed under Section 65(B) of the Indian Evidence Act. It is well settled law by the Hon'ble Supreme Court in the matter of **Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal and others, reported as AIR 2020 SC 4908**, that in the absence of certification under Section-65B of the Evidence Act, the electronic record cannot be admitted and relied upon by the Courts.

21. With these pleadings it was contended that there is no merit in the appeal and same may be dismissed.

22. We have duly considered the aforesaid contentions.

23. The agreement between the parties for the unit no. 1209, 12<sup>th</sup> floor measuring 685 sq. ft in the respondent's commercial complex 'Ocus 24K', Sector 68, Gurugram was executed between the parties on 07.03.2014. The total sale consideration as per the final statement of the account dated 02.03.2020 is Rs. 63,42,561/- against which the appellants had paid an amount of Rs. 71,19,421/- as per the statement of account dated 02.03.2020. As per clause 11(a) of the agreement, the unit is to be delivered within 60 months from the date of the agreement and as per clause 14, a period of 6 months' grace period from the date of expiry of the said 60 months is also allowed to the respondents. The occupation certificate was received by the respondents on 17.07.2019 and the possession was offered on 23.07.2019 intimating that the appellants can take over the possession of the unit after

completing the possession formalities along with the outstanding dues attached with the offer of possession.

24. The respondents vide letter dated 22.01.2018 in terms of clause 20 (c) of the agreement had given the options to the Appellants for exercising their option for leasing out the unit. Clause 20 (c) of the agreement is reproduced as below:

*“That the collective set of floors earmarked as service apartment(s) will be dedicated by the company for self-use of the allottee(s) and other collective set of floors will be given to an “Operator” to operate further on behalf of the allottee(s), who will get a return on the said unit as per terms and conditions agreed between the company & operator. Allottee(s) will be given an opportunity to choose between the two options at the time of heading over of possession. Based on the allottee(s) choice the area, floor and location of the said unit is subject to change. The Allotment of the said unit will remain provisional until the allottee(s) chooses between the two options.”*

25. Therefore, in terms of the above said clause, another letter of the even dated 23.07.2019 (date of offer of possession) was written by the respondents to the appellants giving them the final opportunity for leasing of their unit no. 1209. The appellants were initially reluctant to lease out their unit through the respondents. However, later on asking of the respondents, the appellants agreed to lease out their unit through the respondents. Therefore, the respondents on

accepting of the lease offer by the appellants changed the unit no 1209 provisionally allotted to the appellants to unit no 1509 vide letter dated 07.02.2020. The respondents vide letter dated 15.02.2020 intimated the appellants that the 'definite agreement' is under process and terms will be more or less the same as shared in LOI and further asked the appellants for acceptance for leasing out by signing the LOI post which handover formalities will be initiated in coming month. Through the above said letter dated 15.02.2020, the respondents further informed the appellants that the agreement to lease out will be finalized with "Mango Intellistay" within the month of February. The respondents could not finalize the 'definite agreement' and through the letter dated 31.10.2020 and later through letter dated 07.12.2020 asked the respondents to give their final and binding consent to enable them to take final decision in management of the unit of appellants.

26. The appellants vide their letter dated 23.07.2020 and 10.08.2020 intimated the respondents that the respondents are neither giving possession nor leasing their unit and therefore sought possession of the unit along with delayed possession interest on the total amount paid by them to the respondents. The appellants issued legal notice on dated 25.08.2020 for possession of the unit along delayed possession interest. The appellants after having not got any response from the respondents sent another letter dated

06.09.2020 seeking full refund of the paid amounts along with interest @ 15% from the date of respective payments. The appellants issued another letter on 07.11.2020 intimating therein that respondents are neither interested in giving the possession nor are ready with the lease option and sought penal interest towards the delayed delivery of the said unit. Therefore, aggrieved with the above situation the appellants filed the complaint before the ld. authority on 12.10.2020 for the possession of the unit along with delay possession interest.

27. The appellants have given their option for leasing out the allotted to them 07.02.2020. It had become quite clear to the respondents by the time they received four notices 23.07.2020, 10.08.2020, 25.08.2020 and 07.11.2020 from the appellants that the leasing out of the unit is not fructifying. Therefore, the respondents should have handed over the possession of the unit to the appellants for their self-use at least on the receipt of final notice dated 07.11.2020. However, on the receipt of the impugned order dated 03.02.2021, respondents offered possession vide letter dated 12.02.2021 and e-mailed it to the appellants 19.02.2021. The said letter dated 12.02.2021 was sent through DTDC courier as well as through speed post. The respondents vide affidavit dated 02.02.2022 of their authorized representative have supplied photo copy of the receipts having couriered and speed posted the letter dated 12.02.2021. The appellant is



disputing the letter dated 12.02.2021 sent through email on 19.02.2021 on the ground that the respondents have recalled the said letter on the same date through another email dated 19.02.2021. The respondents are denying that they have ever recalled the email dated 19.02.2021. The appellants have supplied the chat with the Microsoft office pressing that the respondents have recalled its email dated 19.02.2021 on the same date through another email. As per section 19(10) of the Act, it is duty of the appellants allottees to take physical possession of the unit within two months of the issue of the occupancy certified. The appellants should have checked up with the respondents of any confusion about the recalling of the offer of possession particularly when the offer of possession dated 12.02.2021 has been sent through courier as well as speed post. Even further there has been correspondence between the parties about the possession of the unit vide appellants email dated 22.02.2021, when appellant intimated the receipt of email dated 19.02.2021. In yet another email dated 19.04.2021, the appellants informed the respondents that the email dated 19.02.2021 has been recalled and also intimated that they want to take over the possession of the unit under protest as they want to go in for appeal against the impugned order. After this both the parties took time for possession in view of the Covid pandemics. The respondents vide email dated 22.04.2021 and email dated 05.07.2021 informed the appellants by

sending conveyance deed papers. The appellants vide email dated 07.07.2021 asked the respondents for change of wordings in the conveyance deed draft. The appellant took possession of the unit 12.11.2021 after the orders dated 08.11.2021 of this Tribunal directing the appellants to take the possession within a week. Thus, we are of the opinion that when the matter regarding possession of the unit is moving forward then there is no question that the respondents have recalled the email dated 19.02.2021. In view of the aforesaid discussion, we are of the view that the appellants should have taken possession within a period of two months (Section 19(10)) after the offer of possession was again made by the respondents vide letter dated 12.02.2021 emailed on 19.02.2021 subject to their right to appeal against the impugned order. Therefore, the appellants should have taken possession of the unit on or before 19.04.2021.

28. No other points were raised before us.

29. Consequently, the appeal filed by the appellants is partly allowed and the impugned order is modified to the extent that the respondents shall pay delayed possession interest to the appellants for the period from 07.11.2020 to 19.04.2021 at the prescribed rate of interest as per rule 15 of the Rules i.e. SBI highest MCLR plus 2% i.e. 10.6% per annum on the total amount of Rs.71,19,421/- paid by the appellants.

30. No order to costs.

31. Copy of this order be sent to the parties/Ld. counsel for the parties and Ld. Haryana Real Estate Regulatory Authority, Gurugram.

32. File be consigned to the record.

Announced:  
January 17, 2023

Inderjeet Mehta  
Member (Judicial)  
Haryana Real Estate Appellate Tribunal  
Chandigarh

Anil Kumar Gupta  
Member (Technical)

*Rajni Thakur*

Judgment-HRET