BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**4462 of 2020**
Date of filing complaint:	**03.12.2020**
Date of decision :	**14.10.2022**

1. Bhagat Singh Negi 2. Sushma Negi **both R/o:** H.No. 862, Sector 40, Gurugram, Haryana	**Complainants**
Versus	
Ocus Skyscrapers Realty Limited **Registered office at:** Ocus Technopolis Building, Golf Course Road, Sector-54, Gurugram, Haryana – 122001	**Respondent**

CORAM:	
Shri Vijay Kumar Goyal	**Member**
Shri Ashok Sangwan	**Member**
Shri Sanjeev Kumar Arora	**Member**
APPEARANCE:	
Complainant in person with Sh. Harshit Batra and Ms. Tanya (Advocates)	Complainants
Sh. Kapil Bakshi (Advocate)	Respondent

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 29 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 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. Unit and project related details

2. The particulars of the project, the details of sale consideration, the amount paid by the allottee, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Project name and location	"Ocus Medley", Sec 99, Gurugram
2.	Project area	4.14 acres
3.	Nature of the project	Commercial project
4.	DTCP License	173 of 2008 dated 27.09.2018 and valid up to
5.	Name of the licensee	Moonlight Buildwell Pvt. Ltd and others
6.	RERA Registered/ not registered	Registered 218 of 2017 dated 18.09.2017
	RERA Registration valid up to	17.09.2022
7.	Unit no.	G190, Ground floor [page no. 37 of amended complaint]
8.	Unit measuring (super area)	258 sq. ft. [page no. 37 of amended complaint] Change in unit area- 336.99 sq. ft. [page no. 95 of amended complaint]
9.	Date of application	04.05.2012 [page 33 of amended complaint]
10.	Date of execution of builder buyer agreement	07.08.2013 [page no. 32 of amended complaint]

11.	Possession clause	***11(a)*** *The company based on its present plans and estimates and subject to all just exceptions endeavours 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.* (emphasis supplied)
12.	Due date of possession	07.08.2018 [Calculated from the date of buyer's agreement i.e., 07.08.2013] **Grace period is not allowed**
13.	Total sale consideration	Rs.18,55,536/- [As per payment plan at page 107 of amended complaint] Rs. 25,60,343/- [As per payment plan at page 93 of amended complaint]
14.	Total amount paid	Rs.17,01,265/- [As per payment plan at page 93 of amended complaint]
15.	Occupation Certificate	25.09.2018 [page no. 17 of the amended reply]
16.	Offer of possession	22.10.2018 [page no. 19 of the amended reply]
17.	Cancellation Letter	06.07.2019 [Page 98 of the amended complaint]

B. Facts of the complaint:

3. That the grievance of the complainants pertain to Unit no. G – 190 (earlier 290) ("**Unit**") allotted to the complainants in the project known under the name and style of OCUS Medley at Sector 99, Gurugram ("**Project**"). The complainants-allottee had, relying on the assurances and representations of the respondent, booked unit no. G-209 admeasuring 274 sq. ft vide application form dated 04.05.2012 Thereafter the unit was changed to G-190 admeasuring 258 sq. ft. and the buyer's agreement was executed on 07.08.2013.

4. That thereafter, the respondent gave an offer of possession with final statement of account on 22.10.2018 along with a letter dated 22.10.2018 for change in the area as per which, the change in the area of the unit was noted from 258 to 336.99 = 30.62% change. That resultantly, the respondent demanded additional payment for the increase of 30.62% of the area.

5. That shocked by the same, the complainants objected to such increased charges being levied, change in the area without the consent of the complainants, as evident from emails dated 07.03.2019 and 29.06.2019, but the same was to no avail. That it is categorical to note that ever since the complainants have gotten the knowledge of the charge of such arbitrary amounts and the unlawful increase, the complainants have vehemently protested the same, through emails and personal visits. A legal notice was also given by the complainants to the respondent. However, running from post to pillar was of no avail to the complainants and the respondent continued to charge for the increased amounts.

6. That altering the area to 31% is an exorbitant increase. It changes the very essence of the purchase of the unit by gravely changing the amounts to be paid against the unit. That, had it been within the financial capacity of the complainants to pay for an extra 31%, a unit of such area would have been bought, initially only. That the total amount to be paid was increased from Rs. 18,55,536 as per the payment plan annexed with the agreement to Rs. 25,60,343 at the time of offer of possession.

7. That the respondent attempts to hide such arbitrary and *malafide* action behind clause 10 of the agreement which sets the modification limit to +-25% change in super area. However, the same cannot be allowed. That the mere language of the clause that the respondent had *malafide* intention to curb the rights of the complainant wherein he is not even allowed to raise an objection or deny consent with respect to any alteration and modification in super area of the unit because in case he will raise such an issue, the respondent on his sole discretion may cancel the agreement and the unit. This clause is an attempt to create undue pressure on the complainant to accept every modification/alteration made in the unit.

8. That the respondent has violated section 14 of the Real Estate (Regulation and Development) Act, 2016 ("**Act**") in making changes and altering the unit and the project without consent of the complainants and without obtaining the consent of 2/3rd allottees. It is pertinent to note that section 14 allows only minor alterations and modifications to be made, however, modifications resulting in

31% of increase in super area, cannot, under any circumstance whatsoever, be said to be a minor addition/modification. That the model RERA agreement provides for a modification of only +-5% and accordingly, that complainants can only be rightfully made to pay an increase to the extent of +-5% and not any amount over and above the same. That even previously, in its order dated 19.11.2020, the Hon. Authority had noted that the increase in the area can be to a maximum extent of 5%,

9. That the respondent thereafter unilaterally and arbitrarily cancelled the unit vide letter dated 06.07.2019 and made unlawful deductions therein. The complainants protested the same and had also sent a legal notice in this regard. It needs to be categorically noted that the out of the total price of Rs. 18,55,536/- as per the payment plan annexed with the agreement, the complainants have paid Rs. 17,01,266/- as evident from the final statement of account with the offer of possession. That the cancellation of the unit was made without any default on part of the complainants and despite the complainants having already paid **90.07%** of the total sale consideration. It needs to be categorically noted that it was only the additional amounts that were being unlawfully demanded by the respondent, were not paid and the ppayments to be made at the offer of possession was unilaterally increased which hindered the payment of the remaining 10%.

10. That as per clause 11 (a) of the agreement, the due date of possession is to be determined from 60 months from the BBA and accordingly, the same comes out to be **07.08.2018**. That the offer

of possession made was one-sided and arbitrary as had levied one-sided and arbitrary demands with the unlawful increase in area and hence, the same cannot be relied on.

11. That it is important to note that apart from the rate of the increase in the super area, the prices of other changes payable was also increased unilaterally and unlawfully by the respondent. The same can be noted from below:

Particular	Agreed Prices at time of BBA	Increased prices	Increased Amount
BSP @6000/sq. ft	15,48,000	20,21,940	4,73,940
IFMS@100/sq. ft (Clause 19)	25,800	33,699	7,899
Sinking Funds:	77,400	1,01,097	23,697
EDC and IDC	1,26,936	1,65,799	38,863
PLC @5%	77,400	1,01,097	23,697
Total price payable excluding taxes	18,55,536	25,60343	Total increased amount = 5,68,096

12. That no justification whatsoever, has been given for such an increase in rate. The conduct of the respondent needs to be categorically highlighted in this instance. Firstly, an exorbitant increase in area was done, resulting in an increase in price; then, even the rates were increased. Moreover, the respondent has been wrongfully changing both IFMS and sinking funds. There is no provision in the Act or any rule or regulation for the payment of sinking funds and in fact, the purpose of taking sinking funds and

IFMS is the same hence, in such a circumstance, sinking funds cannot be demanded. Moreover, without the sinking funds being on a rate basis, the demand against the same was arbitrarily increased, as noted in the chart abovementioned. That additionally, as can be noted from the final statement of account, a total sum of Rs. 17,01,266 has been charged as interest, which has been wrongly computed and is not as per the rates as prescribed under the Act.

13. The conduct of the respondent has been utterly malafide since the very beginning and is *ex facie* and *prima facie* visible. That the dominant position of the respondent cannot be allowed to prevail through its arbitrary, unlawful and *malafide* conduct.

C. Relief sought by the complainant:

14. The complainant has sought following relief(s):

i. Direct the respondent to recall/revoke/set aside the cancellation letter dated 06.07.2019;

ii. Direct the respondent to pay the delayed possession charges at the prescribed rate of MCLR+2%, from the due date of possession, i.e., 07.08.2018 till a fresh, legal, and valid offer of possession is issued by the respondent. Upon non-payment of timely interest, the arrears be paid till realization of the amount;

iii. Direct the respondent to not charge for the arbitrary and unlawful increase in 30.62% of the super area of the unit;

iv. Direct the respondent to charge the demands only as per the rates agreed in the agreement and not at increased rates,

unilaterally increased by the respondent;

v. Direct the respondent to issue a fresh, legal, and valid offer of possession without arbitrary demands of almost 31% increase in area of the unit and without raising the rates payable;

vi. Direct the respondent to not charge sinking funds as are unlawful and since the same should not be paid as the IFMS is also being charged;

vii. Direct the respondent not to charge the interest of Rs. 17,01,266/-.

viii. If any amount is due on part of the complainant, on the rates as agreed in the agreement and after removing the unilateral increase, no interest be charged from the complainants since 05.09.2019 as the issues of the complainants are pending under the Act.

D. Reply by respondent

15. That the complaint filed by the complainants contains various frivolous and baseless allegations against the respondent. The present complaint is an abuse of the process of law and deserves to be dismissed with exemplary costs. The complainants here has miserably failed to substantiate any of the allegations made against the respondent.

16. At the outset, it was submitted that the complainants on 30.09.2011 had approached the respondent through a real estate agent and paid advance for the priority booking in the project of the

respondent. The complainants had paid a sum of Rs.5,48,000/- vide three different cheques.

17. That thereafter on 04.05.2012, application form dated 04.05.2012 was signed by complainant through the sale organizer / property dealer (shree investments) and a provisional unit no. G-209 was allotted to the complainants and the said amount of Rs.5,48,000/-, which the complainants had already paid was adjusted towards the provisionally allotted unit.

18. That on a combined reading of clause 11 (a) read with clause 14 of the builder buyer agreement dated 05.05.2014, the construction of the said unit shall be completed within 66 months from the date of execution of said agreement. Therefore, as per the builder buyer agreement dated 07.08.2013, said unit was to be completed by 07.02.2019.

19. That respondent, in order to deliver the said unit to the complainants before the time period promised, was constructing the said project at a fast pace. It is pertinent to mention that the respondents had completed the project and applied for occupational certificate on 23.07.2018 and same was granted on 25.09.2018, it can be observed that the project was ready since 23.07.2018, which well within 60 months from the date of agreement. It is most respectfully submitted that the respondent had obtained the occupation certificate with respect to said project on 25.09.2018. In pursuant to the same, the respondent had offered the possession of the said unit to the complainant on 22.10.2018,

which is within the said time period as prescribed in the said agreement.

20. It was submitted that the complainants are chronic defaulters as they have failed and neglected to make timely payments with respect to the said unit despite numerous reminders addressed to the complainant. The above default has been committed by the complainant, despite knowing the fact that timely payment of the consideration of the said unit is a matter of essence. It is pertinent to mention that as per the final statement of accounts send along with the offer of possession the complainants were liable to pay an amount of Rs.10,77,348/- to the respondent which stands unpaid by the complainants even after sending several reminders. In pursuance to which the unit of the complainants were cancelled in July 2019 and later the said unit was endorsed in January 2020.

21. It was submitted that the said project of the respondent is ready and operational since September 2018 and all the amenities and facilities are being provided by the respondent as they have been proposed at the time of making the booking of the said unit.

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

E. Jurisdiction of the authority:

E. I Territorial jurisdiction

23. 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 the obligations upon the promoter.

> **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.*

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 complainant:

F.I. Direct the respondent to recall/revoke/set aside the cancellation letter dated 06.07.2019.

F.II. Direct the respondent to pay the delayed possession charges at the prescribed rate of MCLR+2%, from the due date of possession, i.e., 07.08.2018 till a fresh, legal, and valid offer of possession is issued by the respondent.

24. Both the issues being interconnected are being taken up together. It is a peculiar case wherein the complainants have approached the authority seeking delayed possession charges for the unit that has already been cancelled by the respondent-promoter and even third-party rights have already been created on the unit.

25. In the instant case, the complainants booked a unit in the respondent's project and were allotted a unit admeasuring 258 sq. ft. Thereafter, a buyer's agreement was executed between the parties on 07.08.2013 wherein the super area was specified to be 258 sq. ft. However, clause 1.7 of the said agreement clearly specifies that super area of the unit was tentative. Subsequently, the occupation certificate for the tower where complainants' unit is situated was obtained on 25.09.2018 and the possession of the unit was offered on 22.10.2018. In the offer of possession, the super area of the unit was increased from 258 sq. ft. to 336.99 sq. ft. The complainants vide email dated 07.03.2019 clearly specified that they won't be able to pay for the increased super are and thus want refund of the paid-up amount thus objecting to increased super area. The complainants objecting to such increase in super area, and refused to make payments to the excess demand raised. Thereafter, on account of such non-payment, the respondent exercising its discretion, cancelled the unit on 06.07.2019 and even third-party rights were created on the said unit on 27.01.2020. *It is amply clear that the change in super area has been made unilaterally without prior consent of the complainant-allottees as required by section 14 of the RERA act, 2016, and the variation is even beyond the clause 10 of BBA which provides for alteration/modification upto*

25% change in super area, but in the instant case the respondent demanded increased price with an increase of 30.62% which is a violation of the conditions of the BBA.

The Content of clause 10 of the said BBA has been reproduced below:

> ***"10. Alteration/Modification***
>
> *In case of any alteration/modifications resulting in +/-25% change in the Super Area of the Said Unit any time prior to and upon the grant of occupation certificate, the Company shall intimate in writing to the Allottee(s) the changes thereof and the resultant change it any in the Total Price of the said unit to be paid by the Allottee(s) and the Allottee(s) agrees to deliver to the Company written consent or objections to the changes within 30 days from the date of dispatch by the Company. In case the Allottee(s) does not send his written consent the Allottees) shall be deemed to have given unconditional consent to all such alterations/modifications and for payments, if any, to be paid in consequence thereof.* ***If the Allottee(s) objects in writing indicating his non-consent/objections to such alterations/modifications then in such case alone the Company may at its sole discretion decide to cancel this Agreement without further notice and refund the entire money received from the Allottee(s) within thirty (30) days from the date of receipt of fund by the Company from resale of the said unit****. Upon the decision of the Company to cancel the Said Unit, the Company shall be discharged from all its obligations and liabilities under this Agreement and The Allottee(s) shall have no right, interest or claim of any nature whatsoever on the Said Unit and the Parking Spaces), if allotted".*
>
> ***(emphasis supplied)***

26. *It is now settled that the cancellation of the unit is invalid as per the provisions of RERA act, 2016 and in accordance with the terms of the agreement between the parties. Therefore, the complainants are entitled to possession of an alternate unit of the similar size and in the similar location as is acceptable to them.*

27. The authority hereby directs the promoter to provide the complainant-allottees, the possession of an alternate unit of the same size in a similar location, with a fresh offer of possession.

28. **Admissibility of delay possession charges at prescribed rate of interest:**

1. The complainants are seeking delay possession charges however, proviso to section 18 provides 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 possession, at such rate as may be prescribed and it has been prescribed 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.

2. 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.

3. 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., 14.10.2022 is @8.00%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.00%.

4. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottees by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottees, in case of default. The relevant section is reproduced below:

> *"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.*
>
> *Explanation. —For the purpose of this clause—*
>
> *(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default.*
>
> (ii) *the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

5. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 10.00% by the respondent/promoter which is the same as is being granted to the complainants in case of delayed possession charges.

6. The on consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the act by not handing over possession by the due date as per the agreement. By virtue of the clause 11(a) of agreement executed between the parties on 07.08.2013, the possession of the subject apartment was to be delivered within stipulated time i.e. by 07.08.2018. As far as grace period is concerned, the same is not allowed for the reasons quoted above. Therefore, the due date of handing over possession is 07.08.2018. The respondent has delayed in offering the possession and the same is offered on i.e. 22.10.2018. Also, as the offer of possession was for the increased area, which has been declared a nullity for reasons above mentioned. There has been no valid offer of possession till date of this order. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the act on the part of the respondent is established. As such the allottee shall be paid, by the promoter,

interest for every month of delay from due date of possession i.e. 07.08.2018 till the actual handing over of the possession plus two months at prescribed rate i.e. 10.00 % p.a. as per proviso to section 18(1) of the act read with rule 15 of the rules.

F.III. Direct the respondent to not charge for the arbitrary and unlawful increase in 30.62% of the super area of the unit.

F.IV. Direct the respondent to not charge for the arbitrary and unlawful increase in 30.62% of the super area of the unit;

F.V. Direct the respondent to charge the demands only as per the rates agreed in the agreement and not at increased rates, unilaterally increased by the respondent;

F.VI. Direct the respondent to issue a fresh, legal, and valid offer of possession without arbitrary demands of almost 31% increase in area of the unit and without raising the rates payable;

F.VII. Direct the respondent to not charge sinking funds as are unlawful and since the same should not be paid as the IFMS is also being charged;

F.VIII. Direct the respondent not to charge the interest of Rs. 17,01,266/-.

F.IX. If any amount is due on part of the complainant, on the rates as agreed in the agreement and after removing the unilateral increase, no interest be charged from the complainants since 05.09.2019 as the issues of the complainants are pending under the Act.

29. In view of the findings in above mentioned reliefs F.I and F.II, all these reliefs become redundant.

G. Directions of the Authority:

30. Hence, the Authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoters as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

i. The respondent-promoter is directed to revoke/set-aside/recall the cancellation letter dated 06.06.2019 issued against the unit issued to the allottee and simultaneously provide an alternate unit of same size and in a similar location to the complainant allottee. Also, the Respondent-promoter is directed to issue a fresh offer of possession.

ii. The complainant is entitled for delayed possession charges as per the proviso of section 18(1) of the Real Estate (Regulation and Development) act, 2016 at the prescribed rate of interest i.e., 10.00%p.a. for every month of delay on the amount paid by the complainant to the respondent from the due date of possession i.e. 07.08.2018 till the offer of possession of alternate unit or actual hand over of possession whichever is earlier.

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

31. Complaint stands disposed of.

32. File be consigned to the Registry.

(Sanjeev Kumar Arora)
Member

(Ashok Sangwan)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 14.10.2022