

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

Complaint no. :	2567 of 2021
Date of filing complaint:	01.07.2021
First date of hearing:	12.08.2021
Date of decision :	24.08.2023

M/s AHUJA ESTATES

Regd. office: G-73, Aggarwal
Millenium Tower-II, Netaji Subhash
Place, District Centre, Pitam Pura,
Delhi-110034

Complainant

Versus

M/s OCUS SKYSCRAPERS REALTY LIMITED

Regd. office: C-94, 1st Floor, Shivalik,
New Delhi-110017

Respondent

CORAM:

Shri Vijay Kumar Goyal

Member

APPEARANCE:

Sh. Shreshth Nanda (AR)

Complainant

Sh. Harshit Batra (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 complainant, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S.no	Particulars	Details
1.	Name of the project	"Ocus 24K", Sector 68, Gurugram
2.	Nature of project	Commercial
3.	RERA registered/not registered	Registered as 220 of 2017 dated 18.09.2017
	Validity status	17.09.2022
	Licensed area	4.44 acres
4.	DTPC License no.	76 of 2012 dated 01.08.2012
	Validity status	31.07.2020
	Licensed area	4.44 acres
5.	Unit and floor no.	816 and 8 th [As per page no. 21 of complaint]
6.	Area admeasuring	701 sq. ft. [Super area] [As per page no. 21 of complaint]
7.	Date of execution of Apartment Buyer's Agreement	Not executed
8.	Application form dated	10.07.2013 [As per page no. 13 of reply]
9.	Allotment letter	08.07.2013 [As per page no. 21 of complaint]

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10.	Total sale consideration	Rs. 64,14,150/- (TSC) [As per page no. 2 of reply]
11.	Amount paid by the complainant	Rs. 3,00,000/- [As per page no. 5 of complaint]
12.	Possession clause (taken from BBA of same project from another file)	11(a) Schedule for possession of the Said Unit 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.
13.	Due date of possession	Cannot be ascertained
14.	Demand letters dated	11.10.2013, 01.11.2013 [As per page no. 19-21 of reply]
15.	Reminder letter dated	24.01.2014 [As per page no. 23 of reply]
16.	Pre-cancellation letter dated	03.04.2014 [As per page no. 30 of reply]
17.	Surrender letter dated	06.06.2014 [As per page no. 22 complaint]
18.	Cancellation letter dated	16.06.2017

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		[As per page no. 25 of reply]
19.	Occupation certificate	17.07.2019
20.	Offer of possession	Not offered

B. Facts of the complaint:

3. That the complainant had booked a unit in the project under the name and style "**Ocus 24K**" ("Project") and were allotted **Unit no.-816** on **8th floor** of the project. They were given assurances, representations, and warranties of the highest-class aesthetic apartment and timely delivery of the unit and completion of the development activities of the project. Thereafter, they were duped into buying the flat. The sale team of the respondent had wrongfully and with dishonest intention persuaded the complainant into believing the deceptive promises sold by them.
4. They booked an apartment for Rs. 64,14,150/- on 08.07.2013. The respondent had asked them to deposit the booking amount to book a flat in the said project. Therefore, they made an earnest deposit of amount Rs. 3,00,000/-.
5. That the respondent has sent demand letters to the complainant demanding the instalments. However, they refused paying such instalments due to the fact that an agreement to Sell/BBA was not executed by the respondent. The complainant paid an amount of Rs. 3,00,000/- towards the payment of the total sales consideration of the unit and there is not any documented proof of agreement to sell to be seen.
6. That the complainant, after timely communicating surrendered towards the said project and time and again requested the respondent for the payment of amount Rs. 3,00,000/- paid to it. But the amount has still not been received

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by the complainant. Such an action on the part of the respondent is illegal and goes against the essence of the formulation of RERA.

7. That, the complainant repeatedly vide letters dated 06.06.2014, 23.06.2014 and 17.09.2014 regularly requested the respondent, about the payment which was to be paid. However, on one pretext or another, the respondent avoided the said payment despite repeated follow-ups through various verbal discussions and repeated reminders. But the profound efforts of the complainant went in vain as the amount has not been received to date. The complainant suffered irreparable loss at the hands of the respondent, due to the wilful and malafide conduct and it should be held liable for the same.
8. That the complainant being aggrieved from the unfair practice of the respondent were put to financial and mental predicament and to constant ignorance by it with regard to the draft of the agreement to sell. The complainant was left with no option but to approach the Authority for refund of the paid-up amount.

C. Relief sought by the complainant:

9. The complainant has sought following relief(s):
 - i. Direct the respondent company to refund the entire amount of Rs. 3,00,000/- paid by the complainant along with interest @18% p.a. on the paid amount from the date of payment till actualisation; and
 - ii. Direct the Respondents to pay Rs. 1,00,000/- to the complainant for mental agony and harassment; and
 - iii. Direct the respondent to pay a sum of Rs. 50,000/- as litigation expenses to the complainant.

D. Reply by respondent:

The respondent by way of written reply made following submissions: -

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- i. Before raising objections to the present complaint, the respondent seeks to highlight the following relevant clauses of the application form and allotment letter which are germane for effective adjudication of the present dispute. It is relevant to note that vide clause 3 to the application form, the complainant agreed and undertook to pay all the amounts due to the respondent in accordance with the opted payment plan provided in the application form on or before the respective due date.
- ii. After agreeing to the opted payment plan in the application form, the complainant was required to make a payment towards application money (forming part of the Booking Amount). Further, in terms of the opted payment plan, the complainant was also required to make a payment of 10% of cost of property within 30 days from the date of booking. In pursuance of the payment schedule, the respondent sent several demand letters dated 10.11.2013 and 01.11.2013 along with an invoice dated 10.11.2013 and 01.11.2013 requesting the complainant to make a payment of Rs. 14,07,351/-. In terms of the plan, the due date of payment of the said demand was 16.11.2013. However, they failed to pay any amount after initial booking amount of Rs. 3,00,000/-.
- iii. Since no payment was received, the respondent sent various reminders to the complainant requesting them to fulfil their part of the obligations. Further, a reference was drawn to the invoice dated 01.11.2013 which was pending payment for many months and accordingly, the complainant was requested to make a payment of Rs. 14,07,351/- plus the accrued interest on the delay.
- iv. Even after many reminders, the complainant continuously defaulted in making the payments towards the total price. In view of the same, the respondent was constrained to issue a pre-termination letter dated

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24.01.2014. Vide the said pre-termination, the complainant was once again called upon to make the payments of the outstanding amount of Rs.14,53,367/- including the accrued interest. In pursuance of continuing defaults and after a year from the first default, the booking was terminated in terms of the application form and allotment letter vide termination notice dated 16.06.2017 ("**Termination Notice**"). It was informed to the complainant that as per the terms of the application form/ allotment letter, it was agreed that the respondent shall have a right to cancel/revoke/terminate the application/allotment in the event complainant failed to make payments as per the opted payment plan. In pursuance of the same, booking of the unit was terminated and an amount of Rs. 3,00,000/- stood forfeited. It is pertinent to mention that the complainant had only paid Rs. 3,00,000/- out of a total price of Rs. 64,14,150/-, which is not even 10% of the total price to be paid.

- v. Despite receiving the above letter for cancellation of the said unit from the respondent, the complainant did not come forward anytime to fulfil the obligation of the complainant regarding said unit by paying outstanding amount.
- vi. Despite the aforesaid, the complainant, de-hors the agreed terms in the application form and allotment Letter, have proceed to the file the present complaint, thereby unlawfully claiming refund of the amount. On the contrary, it is respectfully submitted that the respondent has suffered losses due to the complainant's breach of the terms and conditions of the application form. Delay in payment by a buyer is fatal to the very concept of the construction linked payment plan. And if such buyers are allowed to back out from the allotment mid-way, without consequence, it may have a cascading effect for the developers. Further,

the respondent has not only suffered a loss of forfeiting the entire booking amount as the complainant never paid the entire booking amount but also lost an opportunity to sell the said Unit to some other person, (at the time when complainant booked the unit) who would have adhered with the terms of the application form and timely paid the total price which would have not hindered the progress of the project.

- vii. All the averments made by the complainant are denied in toto.
- viii. Copies of all the relevant documents have been filed and placed on 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:

10. 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 allottees as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

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Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottee as per the agreement for sale, or to the association of allottee, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottee, or the common areas to the association of allottee or the competent authority, as the case may be;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoter, the allottee 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.

F. Entitlement of the complainant for refund:

F.I Direct to the respondent to refund an amount of Rs. 3,00,000/- along with interest.

11. The complainant was allotted a unit in the project of respondent "Ocus 24K", in Sector 68, Gurugram vide allotment letter dated 08.07.2013 for a total sum of Rs. 64,14,150/-. Though no buyer's agreement was executed between the parties, but the complainant started paying the amount due against the allotted unit and paid a total sum of Rs. 3,00,000/-. It was pleaded by complainant that respondent sent various demand letters demanding outstanding amount, which was due, but they refused paying such instalments as no agreement to Sell/BBA was executed.

12. On the contrary, it was submitted by respondent that even after many reminders, the complainant continuously defaulted in making the payments towards the total price. In view of the same, the respondent was constrained to issue a pre-termination letter dated 24.01.2014 demanding Rs. 14,53,367/- including the accrued interest but that was of no use. Subsequently vide dated 16.06.2017, it issued cancellation letter for the allotted unit for non-payment.
13. It is evident from the above mentions facts that the complainant paid a sum of only Rs. 3,00,000/- against sale consideration of Rs. 64,14,150/- of the unit allotted to them.
14. Now when the complainant approached the Authority to seek refund, the respondent already clarified their stance that the complainant is not entitled to refund as according to clause 11 of Annexure A (terms and conditions) of the application form the respondent-builder is entitled to forfeit the entire booking amount. Clause 11 is reproduced hereinbelow: -
- The applicant further agrees that in the event this application form is withdrawn/ cancelled by the applicant for reasons not attributable to the developers default then the developer shall be entitled to forfeit the booking amount and non-refundable amounts.*
15. Even otherwise, the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, 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

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*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.***

16. Keeping in view the aforesaid factual and legal provisions, the respondent can retain the amount paid by the complainant against the allotted unit as it is both the earnest money and 10% of the consideration amount. So, the same was liable to be forfeited as per clause 11 of Application form and Haryana Real Estate Regulatory Authority Regulation 11(5). However, the amount paid by the complainant i.e., Rs. 3,00,000/- constitutes only 4.67% of sale consideration of Rs. 64,14,150/- while amount up to 10% can be forfeited. Thus, no direction to this effect.

F. II Direct the respondent to cost of litigation and mental agony.

17. The complainant is seeking relief w.r.t compensation in the aforesaid relief, Hon'ble Supreme Court of India in civil appeal titled as **M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors. Supra** held that an allottee is entitled to claim compensation under sections 12, 14, 18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation.

H. Directions of the Authority:

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18. Hence, in view of the findings recorded by the authority on the aforesaid issues, no case of refund of the paid-up amount with interest is made out. Hence, the complaint is liable to be dismissed and as such is rejected.
19. Complaint stands disposed of. ~
20. File be consigned to the registry.

V.I - 3
(Vijay Kumar Goyal)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 24.08.2023



HARERA
GURUGRAM