

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

Complaint no.:	490 of 2021
Date of filling of complaint:	11.02.2021
Oder reserved on:	19.04.2023
Date of pronouncement:	12.07.2023

1. Mr. Sunil Bhalla 2. Mrs. Manchila Bhalla Both R/o: -D-13, First floor, South Extension 1, New Delhi	Complainants
Versus	
Ocus Skyscrapers Realty Ltd. Address:- C-94, First Floor, Shivalik, New Delhi - 110017	Respondent

CORAM:	
Shri Ashok Sangwan	Member
APPEARANCE:	
Sh. Harprit Singh Arora (Advocate) Sh. Lokesh Bhola (Advocate)	Complainants Respondent

ORDER

1. This complaint has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 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 provisions of the Act or the

Rules and regulations made there under or to the allottees as per the agreement for sale executed *inter se*.

A. Unit and project details

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

S. N.	Particulars	Details
1.	Name of the project	Ocus 24K, Sector 68, Badshahpur, Gurgaon
2.	Project area	4.44 acres
3.	Nature of the project	Commercial complex
4.	DTCP license no. and validity status	76 of 2012 dated 01.08.2012 valid up to 27/10/2022
5.	Name of licensee	M/s Perfect Constech Private Limited
6.	RERA Registered/ not registered	Registered vide no. 220 of 2017 dated 18.09.2017 valid upto 17.09.2022
7.	Unit no.	As per BBA: 709, 7 th floor (Page 31 of complaint) As per offer of possession: 1509 (Page 20 of reply)
8	Date of execution of Apartment Agreement Buyer's	24.02.2014 (Page 28 of complaint)
9	Possession clause	11(a) Schedule for possession of the Said Unit <i>The Company based on its present plans and estimates and subject to all just</i>

		<p><i>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.</i></p>
10	Due date of possession	<p>24.02.2019 (Calculated as 60 months from the date of execution of BBA i.e., 20.02.2015)</p>
11	Basic sale consideration	<p>Rs. 66,20,525/- (As per BBA on page 32 of complaint)</p>
12	Amount paid by the complainant	<p>Rs. 17,00,000/- (As stated by the complainants)</p>
13	Occupation certificate /Completion certificate	<p>17.07.2019 (As per annex R2 at page no 18 of the reply)</p>
14	Offer of possession	<p>08.08.2019 (Page 20 of reply)</p>
15	Reminder Letters	<p>07.09.2019, 09.10.2019 (Page 28-29 of the reply)</p>

16	Cancellation Letter	07.02.2020 (Page 41 of complaint)
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B. Fact of the complaint

3. The complainants have made the following submissions: -

- i. That in the initial phase of the deal the complainants were made to apply vide application in the month of August 2013, for a unit number 709, 7th Floor, measuring 685 sq. ft., for a consideration of Rs.56,78,650/- (without charges), in the said project. Booking was confirmed after application dated 05.08.2013, followed by execution of BBA, dated 24.02.2014.
- ii. That the complainants submitted payments against the other demand letters issued by the respondent, followed by the timely payments by the complainants. Demand Letters were issued, even before the execution of Builder Buyer Agreement. Further construction was not carried, as per scheduled commitments, but the respondent kept on raising demands, for payments. In all the complainants have made a payment of 17,00,000/-, as per statement incorporated in cancellation letter, dated 7th July 2020.
- iii. That as the complainants expressed their desire to know the status of construction in the project respondent again allured and motivated the complainants and assured timely delivery of possession of the unit. In order to mask its own lapse, the respondent had issued unauthorized demand letters, thereby raising demands of alleged balance payment, without making an offer of possession with occupancy certificate thereby threatening

the complainant to impose holding charges, without completing construction in the project in contravention of the terms of builder buyer agreement and made a unilateral and illegal act of Cancellation Letter dated 7th July, 2020. The cancellation was not acceptable to the complainants, since the same is done during the delayed tenure. Respondent has attempted to mask its delay under the pretext of cancelling the unit.

- iv. That without complying with the requisite pace of construction, the respondent had raised another demand for balance amount, in contravention of the statutory provisions of Law. The Project, being ongoing, was registered in RERA. Respondent has not executed an Agreement to Sell, in the Format prescribed in the Act. Respondent has also invited payment from the complainants in excess of the specified limits. Under the circumstances, prevailing at the time, and considering the status of the project, the complainants decided to withdraw from the project. All the requests for refund could fetch no positive result.
- v. That the construction in this project is not likely to be delivered in near future, as per commitment. The complainants have realized that their money is being misused by the respondent, and the complainants are being cheated by the respondent, by tendering fake excuses in order to misuse their hard earned money. As per agreement, the possession was to be delivered within 60 months.
- vi. That it shall not be out of the way to mention here that the construction in the project was being carried on by the respondent, at the time of booking by the Complainants. The

project is already delayed, and the priorities of the complainants are entirely changed, and had expressed their desire not to pay further and willingness to withdraw from the project.

C. Relief sought by the complainants

4. The complainants have sought the following relief sought: -

- i. Direct the respondent to refund the amount of Rs.17,00,000/- deposited by the complainants with interest @ 18% of every month from date of payment till the realisation of full amount.
- ii. Direct respondent to pay compensation for mental harassment and reimbursement of legal expenses.

D. Reply by the respondent

5. The respondent contested the complaint on the following grounds :

- (i) That the complainants had booked a unit being No.709, on 7th Floor, admeasuring 685 sq. ft. for a total consideration of Rs.66,20,525/- , excluding taxes, in the project of the respondent being "Ocus 24K" which is earmarked as Service Apartments. The Builder Buyer Agreement for the said unit was executed between the parties on 24.02.2014
- (ii) That on a combined reading of Clause 11 (a) read and Clause 14 of the builder buyers agreement dated 24.02.2014, 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 Buyers agreement dated 24.02.2014, said unit was to be completed by 19.08.2019.

- (iii) That in order to deliver the said unit to the complainants before the time period promised, the respondent was constructing the said project at a fast pace and therefore, the same was completed in July, 2019. It is most respectfully submitted that the respondent had obtained the Occupation Certificate with respect to said Project on 17.07.2019.
- (iv) That the respondent offered the possession of the said Unit to the complainants vide letter, dated 08.08.2019 and E-mail dated 09.09.2019. Despite receiving the above letter / emails for offer of possession from the respondent, the complainants did not come forward to take possession of the said unit by paying outstanding amount.
- (v) That the complainants never made the payments as agreed as per the Builders Buyer Agreement and never ever bothered to reply to the repeated reminders sent for the remaining payment. That the last payment of an amount of Rs.16,574/- (Rupees Sixteen Thousand Five Hundred Seventy Four Only) was made by complainant towards VAT Charges way back on 04.04.2017. After that till date, complainant failed to discharge its liability under the Buyers Agreement of paying the balance payment towards the allotment of said Unit.
- (vi) That the respondent addressed numerous reminders to the complainants for payment of the balance consideration with respect to the said unit. The said reminders are listed herein below:

<u>Sr. No.</u>	<u>Date</u>	<u>Letter</u>
1.	01.08.2017	Reminder-I
2.	29.08.2017	Reminder-II
3.	24.01.2018	Reminder-I
4.	23.02.2018	Reminder-II
5.	19.03.2018	Final Opportunity Letter
6.	29.03.2018	E-mail dated 29.03.2018 for making payment, enclosed payment plan
7.	09.08.2019	E-mail dated 09.08.2019 for payment of outstanding amount, enclosed final statement of account.
8.	07.09.2019	Reminder I
9.	09.10.2019	Reminder-III

(vii) That the complainant never paid heed to the above-mentioned reminders issued by the Appellant. It is further submitted that timely possession of the said unit, in terms of the Builders Buyer Agreement was offered to the complainants. However, despite numerous e-mails and reminders, complainants willfully defaulted in fulfilling its obligation under Builder's Buyer Agreement, despite knowing the fact that timely payment of the consideration of the said Unit is essence of the said Agreement as was recorded in the said Agreement at Clause No.8. Clause No.8 is reproduced here below for the ready reference,

8. Time is the essence

The Allottee(s) agrees that time is the essence with respect to payment of Total Price and other charges, deposits and amounts payable by the Allottee(s) as per this Agreement and/or as demanded by the Company from time to time and also to perform/observe all the other obligations of the Allottee(s) under this Agreement. The Company is not under any obligation to send any reminders for the payments to be made by the

Allottee(s) as per the schedule of payments and for the payments to be made as per demand by the Company or other obligations to be performed by the Allottee(s).

(viii) The alleged submissions of the complainants that the Respondent has illegally cancelled the Unit of the Complainant is false on the face of it. As the Complainants has very cleverly concealed that they themselves had failed to make the payment in terms of the Builders Buyer Agreement and also, they have concealed the above reminders / emails dated letters / emails dated 01.08.2017, 29.08.2017, 24.01.2018, 23.02.2018, 19.03.2018, 29.03.2018, 09.08.2019, 07.09.2019, and 09.10.2019 wherein they were directed to pay the balance payment. Complainants themselves have failed to make the balance payment as per the terms of the Buyers Agreement and violated the terms.

(ix) When despite numerous emails /letters, complainants did not make the balance payment as agreed as per the Terms of Builder Buyer Agreement. The respondent does not have any other option but to cancel the said Unit, vide Cancellation Letter dated 07.02.2020. the said cancellation was done as per clause 4 of the Builder Buyer Agreement. Clause 4 is reproduced here below, for the ready reference ,

Clause 4. Earnest Money

"The Allottee(s) agrees and confirms that out of the total amount(s) paid/ payable by the Allottee(s) for the said Unit, 20% of the Basic Sale Price of the said Unit amounting to Rs. 11,64,500/- shall be treated as Earnest Money to ensure fulfillment of the terms and conditions as contained in the Application and this Agreement. In the event, the Allottee(s) fails to perform any obligations or commit breach of any of the terms and conditions, mentioned in

*the Application and/or this Agreement, including but not limited to the occurrence of any event of default as state in this Agreement and the failure of the Allottee(s) to sign and return this Agreement in original to the Company within 30 days of dispatch, the Allottee(s) agrees, consents and authorizes the Company to cancel the allotment and on such, **the Allottee(s) authorizes the Company to forfeit the Earnest Money, brokerage, interest or delayed payments alongwith Non Refundable Amounts.** Thereafter the Allottee(s) shall be left with no right, interest and lien on the Said Unit/Said Complex. This is in addition to any other remedy/right, which the Company may have."*

- (x) That the said Builders Buyer Agreement was executed on 24.02.2014. In this regard, it is submitted that the Act, was published in the Gazette of India on 26.03.2016, after receiving the assent of the President of India on 25.03.2016. The said agreement was signed much prior to the operation of the RERA Act and Haryana RERA Rules.
- (xi) That the present complaint is the very first document wherein the complainants are alleging deficiency in services. This clearly shows that the present complaint is a sham complaint by the complainants to wriggle out of his obligations towards the respondent. Thus, the present complaint out to be dismissed with heavy cost.
- (xii) It is humbly submitted that the said project of the respondent is ready and operational since July 2019 and all the amenities and facilities are being provided by the respondent as they have been mentioned in the buyer's agreement.

6. 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

7. 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

8. 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

9. 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:

Section 11

(4) The promoter shall-

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

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

10. 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 complainants at a later stage.
11. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2020-2021 (1) RCR (C), 357*** and reiterated in case of ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*** wherein it has been laid down as under:

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

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adjudicating officer under Section 71 and that would be against the mandate of the Act 2016.”

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

F. Findings on the relief sought by the complainants

13. Direct the respondent to refund the amount of Rs.17,00,000/- deposited by the complainants with interest @ 18% of every month from date of payment till the realisation of full amount.
14. In the present complaint, the complainants intend to withdraw from the project and are seeking return of the amount paid by it in respect of subject unit along with interest at the prescribed rate as provided under section 18(1) of the Act. Sec. 18(1) of the Act is reproduced below for ready reference.

“Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building:-

- (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or**
(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided 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 the possession, at such rate as may be prescribed.”

15. The complainants were allotted unit no. 709, 7th floor in the project "Ocus 24K, Sector-68" by the respondent-builder for a basic sale consideration of Rs. 66,20,525/- and they paid a sum of Rs. 17,00,000/- which is approx. 25% of the basic sale consideration. A builder buyer's agreement dated 24.02.2014 was executed between parties and according to the clause 11(a) of the BBA, the due date of possession comes to be 24.02.2019. The complainants failed to pay amount due against the allotment unit.

16. As per 8 the terms of the builder buyer agreement the complainants were liable to made the payment as per the payment plan and the relevant clauses of the builder buyer agreement are reproduced under for ready reference:

8. Time is the essence

The Allottee(s) agrees that time is the essence with respect to payment of Total Price and other charges, deposits and amounts payable by the Allottee(s) as per this Agreement and/or as demanded by the Company from time to time and also to perform/observe all the other obligations of the Allottee(s) under this Agreement. The Company is not under any obligation to send any reminders for the payments to be made by the Allottee(s) as per the schedule of payments and for the payments to be made as per demand by the Company or other obligations to be performed by the Allottee(s).

17. The respondent issued reminders on 07.09.2019 and 09.10.2019 thereafter, issued cancellation letter i.e., 07.02.2020 to the complainants. The Occupation Certificate for the project of the allotted unit was granted on 17.07.2019. It is evident from the above mentions facts that the complainants paid a sum of Rs. 17,00,000/- against basic

sale consideration of Rs. 66,20,525/- of the unit allotted to them. The complainants have failed to adhere to the terms and conditions of the builder buyer agreement. The respondent cancelled the unit of the complainants with adequate notices. Thus, the cancellation of unit is valid.

18. The Hon'ble Apex court of the land in cases of *Maula Bux Vs. Union of India (1973) 1 SCR 928* and *Sirdar K.B Ram Chandra Raj Urs Vs. Sarah C. Urs, (2015) 4 SCC 136*, and followed by the National Consumer Dispute Redressal Commission, New Delhi in consumer case no. 2766/2017 titled as *Jayant Singh and Anr. Vs. M/s M3M India Ltd.* decided on 26.07.2022, took a view that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in nature of penalty, then provisions of Section 74 of Contract Act, 1872 are attracted and the party so forfeiting must prove actual damages. After cancellation of allotment, the flat remains with the builder as such there is hardly any actual damage. So, it was held that 10% of the basic sale price is reasonable amount to be forfeited in the name of earnest money. Keeping in view, the principles laid down by the Hon'ble Apex court in the above mentioned two cases, rules with regard to forfeiture of earnest money were framed and known as Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018, which provides as under-

"5. AMOUNT OF EARNEST MONEY

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

19. Keeping in view, the aforesaid legal provision, the respondent/promotor directed to refund the paid-up amount after deducting 10% of the basic sale consideration and shall return the amount along with interest at the rate of 10.70% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017, from the date of cancellation i.e., 07.02.2020 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

F.II. Litigation expenses and compensation for mental agony

20. The complainants in the aforesaid head are seeking relief w.r.t compensation. Hon'ble Supreme Court of India, in case titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP &Ors.* (Civil appeal nos. 6745-6749 of 2021, decided on 11.11.2021), has 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. Therefore, the complainants are advised to approach the adjudicating officer for seeking the relief of compensation.

G. Directions of the authority

21. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

- i. The respondent is directed to refund the paid-up amount of Rs. 17,00,000/- after deducting 10% of the basic sale consideration of Rs. 66,20,525/-with interest at the prescribed rate i.e., 10.70% p.a. on such balance amount, from the date of cancellation i.e., 07.02.2020 till the actual date of refund.
- ii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

22. Complaint stands disposed of.

23. File be consigned to registry.


Ashok Sangwan
(Member)

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 12.07.2023