

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

Complaint no.	6090/3126 of 2019
Date of filing complaint	26.07.2019
Reserved on:	07.02.2023
Date of pronouncement	03.05.2023

Rameshwar Address:- Village Allaudinpur, VPO Budhera, Tehsil-Loharu, Bhiwani-127201	Complainant
Ocus Skyscrapers Realty Limited Registered office at: C-94, First Floor, Shivalik, New Delhi-110017	Respondent

CORAM:	
Shri Ashok Sangwan	Member
Shri Sanjeev Kumar Arora	Member
APPEARANCE:	
Complainant in person along with Shri Pardeep Singh (Advocate)	Complainant
Sh. Lokesh Bholra (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 allottees 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 complainants, date of proposed handing over the possession and 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, Gurugram
2.	Nature of the project	Commercial
3.	DTCP license no. and validity status	76 of 2012 dated 01.08.2012
4.	RERA Registered/ not registered	Registered as 220 of 2017 dated 18.09.2017 valid upto 17.09.2022
5.	Allotment Letter	27.05.2013 (Page 75 of CRA form)
6.	Unit no.	G-204, Ground floor (Page 16 of reply)
7.	Unit area admeasuring	334 sq. ft. (Page 16 of reply) Revised area: 439 sq. ft. (Page 47 of complaint)
8.	Date of execution of Apartment Buyer's Agreement	13.12.2013 (Inadvertently mentioned as 15.12.2013 in proceedings dated 11.10.2022 and the same stands corrected by this proceeding)



		(Page 11 of reply)
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 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.</i>
10.	Due date of possession	13.12.2018 (Calculated as 60 months from the date of execution of BBA i.e., 13.12.2013)
11.	Total sale consideration	Rs. 46,91,030/- (As per BBA on page 42 of reply)
12.	Amount paid by the complainant	Rs. 29,05,246/- (As per demand letter, page 85 of reply)
13.	Reminder Letters	10.08.2019, 30.08.2019, 04.10.2019, 22.11.2019
14.	Occupation certificate /Completion certificate	17.07.2019 (Page 111 of complaint)

15.	Offer of possession	18.07.2019 (Page 45 of complaint)
16.	Application for request for refund	14.11.2019 also acknowledged by the respondent on the same date (Page 30 of complaint)

B. Facts of the complaint:

3. The complainant has made the following submissions in the complaint:

- i. That the complainant has paid an amount of Rs. 29,05,246/- between 12/04/2013 and 10/04/2015 to the respondent company. That the total amount of 29,05,246/- has been paid by the complainant to the respondent. That according to the commitment between the parties, the respondent was supposed to deliver the possession of the shop within 60 months from the date of booking of shop, that is, 12/04/2013. But even after receiving payment of 14,07,182/- from the complainant which is around 32% of the total amount, the respondent did not enter into a builder - buyer agreement (BBA) for the next 9 months. After several visits to their office, the promoter entered into the agreement with the complainant on 25/12/2013 and put another clause of 60 months in agreement but justified that they would make it sooner than that.
- ii. That the Promoter had taken a sum of Rs.14,07,182/-, from the complainant, which makes up an approx 32.17% of the basic sale price of Rs. 43,73,730/- and did not enter into the builder - buyer agreement (BBA) even after several repeated calls and visits and finally entered after 9 months of the date of allotment, that is, on 13/12/2013. It is specifically mentioned in clause VIII of the



Certificate of Registration of Project given by HRERA Authority to Ocus that it could not receive more than 10 % amount of the basic sale price from the allottee before entering into builder buyer agreement (BBA). That having faith in the reputation of the Ocus Company, the complainant made further payments on demands till April 2015. That when in May 2015, the complainant visited the site of construction, the work was not even started on the project site, it came to the knowledge of the complainant that the ocus company did not even had a permission from the DCP Haryana for collaboration with the land owners and never had joint development and permission for marketing rights and were only applied in march, 2019 moreover the High court of Punjab and Haryana had stayed the occupation certificate of the area in CWP no. 23839 of 2014. After which, the complainant wanted to withdraw from the project and asked for refund, for which they replied that they would forfeit the amount of Rs. 9,01,800/ paid by the complainant.

- iii. Thereafter, the complainant was asked to wait till possession and was continuously threatened by the demand letters and phone messages saying that the allotment would be cancelled, or the shop will be given to someone else if the complainant did not pay the pending amount along with an interest of 15%. That the complainant got alert and observed that the builder is neither cancelling his allotment nor does is he returning his investment, so, he stopped paying further instalments That the complainant has been requesting the respondent to return the amount paid by the complainant but there is no response till date. The final request for refund was made by complainant to the respondent

- company on 14/11/2019 for which there is no response till date. That recently after filing the present Complaint in the HRERA Authority, the complainant received the reply of the Respondent company in the present complaint and also a letter dated 30.08.2019, after which the Complainant has come to know, that, the Complainant had booked the shop of 334 Sqft in the project of the respondent company as per the BBA for a Basic Sale price of Rs. 43,73,730/- and a Total Sale Price (including EDC/IDC/IFMS/Sinking fund) for Rs. 46,91,030/-. But now, as per the final offer possession (as per letter dated 30.08.2019), the shop which is being offered to the complainant is 439 Saft which is 105 Sqft more in super area, that is 31.43 % , than the earlier Booked Shop of the complainant which was of 334 Sqft super area.
- iv. That this increase in the super area size of the shop and the burden of the same on the complainant without even informing and giving any written notice of change in super area is wrong and against the builder - buyer agreement (BBA). It is specifically mentioned in Clause No. 1.7 and 10 of the agreement, which says that the promoter will inform and send a written notice to the Allottee and will also take acknowledgement of the allottee about the alterations and modifications in the Super Area of the Project. The complainant was never informed by the respondent company of the same.
- v. Now, the change in the super area, has also increased remaining and pending payment to Rs. 42.91,246/- which was earlier just Rs 15-16 Lacs pending. That the amount of Rs 42,91,246 as asked by the Promoter is unjust and beyond the paying capacity and not



acceptable to the complainant. That recently, the complainant has also come to know, that, the Promoter had changed the Building Sanction Plan without informing and giving any written notice to the allottee and without even taking any acknowledgement of the allottee for the same. It is specifically mentioned in clause 1.6 of the builder buyer agreement (BBA) , that, the allottee will be informed by way of written notice at his address as mentioned in the agreement and acknowledgement of the allottee will also be taken for the change in building plan. But till date no notice and information was ever given to the complainant, even after the offer of possession by the respondent company. That it is very much important to bring to the notice of this Authority, that, the Respondent has tried to play smart and cheat not only with the Allottee but also with The Town & Country Planning Department of Haryana, by giving a false Affidavit -cum- Undertaking about informing the Allottees about the change in building plan and that no allottee objected for the change of building plan. But the real fact, is that no allottee was ever informed about the change in building plans.

- vi. Now, the position of the lobby is changed, the lift was in front of the shop earlier which is now backside of the shop for which the shop does not even have a way to go to the lift and, the shop of the complainant (G - 204) is facing west direction which was earlier in East direction of the project as per the BBA, as per the annexure I and VI of BBA, for which the complainant was never informed till date.
- vii. That the promoter has not revealed the carpet area, built up area area of the shop as per the RERA Rules, 2017 as mentioned in



Section - 4 clause (2) specifically. Till date the complainant is not even aware of the actual carpet area, built up area of the shop he booked in the project of the respondent company. As per the RERA rules, 2017, it was a legal duty and obligatory on part of the Promoter to disclose the carpet area, built up area to the allottee.

viii. The payment for plaster is specifically mentioned in the Annexure III of the BBA, but on ground, no plaster is made in the shop till date. Copy of photos clicked by the complainant in March with newspaper and on 14th October 2019 without newspaper. That the complainant had filed this complaint in June also which could not be entertained due to ongoing change of rules in the Rera authority. That the complainant has been duped and befooled in the name of commercial project which could never be brought to reality by the respondent as promised. The complainant has suffered mentally, emotionally because of the promoter company. That the promoter has infringed the agreement and also liable for the loss suffered by the complainant. Moreover, the genuine demands of the complainant for withdrawal from the project and refund of his money was never entertained and always ignored by the respondent company, hence being aggrieved has filed this Complaint.

C. Relief sought by the complainant:

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

- i. Direct the respondents to refund the entire paid-up amount along with interest at the prescribed rate.

D. Reply by respondent:

5. The respondent by way of written reply made following submissions:

- i. That at the outset it is stated that the present complaint filed by the complainant is wholly misconceived, erroneous, unjustified and untenable in law besides being unnecessary and irrelevant having regard to the facts and circumstances of the case.
- ii. The present Complaint suffers from concealment and suppression of material facts and records, as the complainant have suppressed them with mala-fide intentions. The Complainant booked the commercial unit bearing number G-204, ground floor, Ocus 24K at Badshahpur, sector-68, Gurugram, Haryana. 5. It is imperative to note that the complainant stopped making payment towards his commercial unit from June, 2015 despite many reminders and even extension of final opportunities communicated to him.
- iii. That it is important to place on record that the complaint is premature and without merit as the time period mentioned in the agreement is 60 Months from the date of execution of Buyer's Agreement ie 13 December 2013 to Offer of Possession of the said Unit. That the respondent has already offered possession well within the time period as mentioned in the agreement. It is further pertinent to mention that the developer in the said agreement also has the discretion to extend the time-line for delivery by an additional 06 Months beyond 60 months. Thus, there is no unreasonable delay in delivery of the said project/unit.
- iv. That the complaint is liable to be dismissed on the ground that the complainant have themselves committed breach by not adhering to agreed payment schedule as mentioned in Annexure-III of the BBA despite receiving demand letter from dated 9th June 2017 and many reminder letters dated 30/06/2017, 26/06/2018,

18/7/2018/, 08/08/ 2018, 19/09/2018, 10/10/2018, 31/10/2018 sent by the Respondent for making the payment with due interest, the payment to be made within 90 days. But the complainant has deliberately ignored all the above letters and final opportunities. Due to this irresponsible and wrongful conduct of the complainant had serious implications on the completion of project.

- V. That the complaint is liable to be dismissed on the ground that the complaint is not maintainable as there is no cause of action either in favour of the Complainant or against the Respondent. It is the complainant who have failed to discharge the obligations of making the timely payments towards the said commercial unit, whereas the Respondent has already offered possession of the commercial units to all its buyers. Undoubtedly, there was no Unreasonable Delay in construction by the Respondent that is claimed by the Complainant. Therefore, the complainant is not entitled to any compensation.
- vii. That it is submitted that all the demands that have been raised by answering Respondent, are strictly in accordance with the terms and conditions of Buyer's Agreement between the parties. There is no default or lapse on the part of the Respondent. It is evident from the entire event that no illegality can be attributed to the Respondent. The allegations levelled by the complainant are totally baseless. Thus, it is most respectfully submitted that the present application deserves to be dismissed at the very threshold.

6. An affidavit was filed by the respondent on 27.04.2023 wherein it is submitted as follows:

- i. The Respondent submits that the building plans of the project were revised in due compliance of the prescribed procedure and after due satisfaction of the Senior Town Planner, Gurgaon as well as Director of Town and Country Planning, Haryana.
- ii. That the Chief Town Planner, Haryana vide its letter, dated 28.11.2017, had given in-principal approval for the revised building plans submitted by the Respondent with certain terms and conditions.
- iii. In compliance of the aforesaid conditions, the Respondent invited objections with respect to the proposed revision of building plan through public notice in three different newspapers, i.e., Hindustan Times in Hindi, Indian Express in English and The Tribune in English on 04.12.2017. The Respondent had also published the information with respect to the proposed revision of building plan on the website of the Respondent for information for the Allottees.
- iv. The Respondent also submitted an Affidavit-cum-Undertaking to the Senior Town Planner, HUDA Office, Gurgaon, to the effect that the public notice inviting objections to the revised building plans were already published in three newspapers. It was further affirmed that the rights of existing customers have not been infringed and that the Respondent had not received any objection from the existing Allottees on proposed revision of building plans.

Copy of the Affidavit-cum-Undertaking submitted to the Senior Town Planner, HUDA Office, Gurgaon by the Respondent.

- v. The Respondent vide its letter, dated 04.01.2018, issued to the Senior Town Planner, Gurgaon, informed that all the compliances with respect to the proposed revision of building plans as mentioned in letter, dated 28.11.2017, have been complied with by the Respondent and even after lapse of 30 days from the date of public notice no objection had been received by the Respondent from the existing allottee(s).
- vi. The Chief Town Planner, Haryana, granted permission for the revision of building plans vide its letter, dated 19.01.2018, since there was no objection received from the exiting Allottee(s) of the project of the Respondent.
7. 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 those undisputed documents and written submissions made by the parties.

E. Jurisdiction of the authority:

8. 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

9. 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

10. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

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 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.

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

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 complainant/allottee.

F.I Direct the respondent to refund the entire paid-up amount along with interest at the prescribed rate.

12. In the instant case, the complainant booked a unit in respondent project and was allotted a unit in the project vide letter dated 27.05.2013. A BBA was also executed between the parties on 13.12.2013 and according to the clause 11(a) of BBA, the due date of possession comes out to be 13.12.2018. The complainant has till now paid an amount of Rs. 29,05,246/- out of sale consideration of Rs. 46,91,030/-. The respondent has also obtained the occupation certificate on 17.07.2019 and has even offered possession of the unit

on 18.07.2019. However, the complainant did not come forward to take possession of the unit and in fact sent a withdrawal/surrender letter dated 14.11.2019. The complainant thus wants to withdraw from the project which can also be ascertained by the fact that the instant complaint for refund was filed by it.

13. Section 18(1) is applicable only in the eventuality where the promoter fails to complete or is unable to give possession of the unit in accordance with terms of agreement for sale or duly completed by the date specified therein. This is an eventuality where the promoter has offered possession of the unit after obtaining occupation certificate and on demand of due payment at the time of offer of possession, the allottee wishes to withdraw from the project and is demanding return of the amount received by the promoter in respect of the unit with interest at the prescribed rate.
14. This is an eventuality where the promoter has offered possession of the unit after obtaining occupation certificate and on demand of due payment at the time of offer of possession the allottee wishes to withdraw from the project and demand return of the amount received by the promoter in respect of the unit with interest at the prescribed rate. The allottee in this case has filed this application/complaint on 26.07.2019 after possession of the unit was offered to him after obtaining occupation certificate by the promoter. The allottee never earlier opted/wished to withdraw from the project even after the due date of possession and only when offer of possession was made to him and demand for due payment was raised then only filed a complaint before the authority. The occupation certificate /part occupation certificate of the buildings/towers where allotted unit of the complainant is situated is received after obtaining occupation

certificate. Section 18(1) gives two options to the allottee if the promoter fails to complete or is unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein:

- (i) Allottee wishes to withdraw from the project; or
- (ii) Allottee does not intend to withdraw from the project

15. The right under section 18(1)/19(4) accrues to the allottee on failure of the promoter to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein. If allottee has not exercised the right to withdraw from the project after the due date of possession is over till the offer of possession was made to him, it impliedly means that the allottee has tacitly wished to continue with the project. The promoter has already invested in the project to complete it and offered possession of the allotted unit. Although, for delay in handing over the unit by due date in accordance with the terms of the agreement for sale, the consequences provided in proviso to section 18(1) will come in force as the promoter has to pay interest at the prescribed rate of every month of delay till the handing over of possession and allottee's interest for the money he has paid to the promoter are protected accordingly. Further in the judgement of the Hon'ble Supreme Court of India in the cases of **Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra)** 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. it was observed

The unqualified right of the allottee to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not

dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed.

16. Further, 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 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 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."

17. In view of aforesaid circumstances, the respondent is directed to refund the amount after deducting 10% of the basic sale consideration of the unit being earnest money as per regulation Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018 within 90 days from the date of this order



along with an interest @ 10.70% p.a. on the refundable amount, from the date of surrender i.e., 14.11.2019 till the date of realization.

G. Directions of the Authority:

18. 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 is directed to refund the amount of Rs. 29,05,246/- after deducting 10% of the basic sale consideration of the unit by deducting the earnest money as per regulation Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018 along with an interest @ 10.70% p.a. on the refundable amount, from the date of surrender i.e., 14.11.2019 till the date of realization
 - 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.
19. Complaint stands disposed of.
20. File be consigned to the registry.


(Sanjeev Kumar Arora)
Member


(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 03.05.2023