

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

Complaint no. : 536 of 2021
Date of complaint : 27.01.2021
Date of order : 04.10.2023

1. Amar Bajaj,
2. Sunita Bajaj,
Both R/o: - H. No. 2231A, Sector-07,
Urban Estate, Karnal, Haryana.

Complainants

Versus

M/s Ocus Skyscrapers Realty Limited.
Regd. Office at: Ocus Technopolis,
Golf Course Road, Sector 54,
Gurugram, Haryana-122001.

Respondent

CORAM:
Ashok Sangwan

Member

APPEARANCE:
Mayank Gupta (Advocate)
Harshit Batra (Advocate)

Complainants
Respondent

ORDER

1. The present complaint has been filed by the complainant/a lottees 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 allottee as per the agreement for sale executed *inter se*.



A. Unit and project related details

2. The particulars of unit details, 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, 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	N/A
6.	Unit no.	As per BBA: 902, 9 th floor (Page 27 of complaint) Revised unit: 1411, 14 th floor (Page 95 of complaint)
7.	Unit area admeasuring	905 sq. ft. (Page 27 of complaint) Revised area:- 931 sq. ft. (Page 95 of complaint)
8.	Date of execution of Apartment Buyer's Agreement	03.03.2014 (Page 22 of complaint)
9.	Possession clause	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.
10.	Due date of possession	03.03.2019 (Calculated as 60 months from the date of execution of BBA i.e., 03.03.2014)
11.	Total sale consideration	Rs. 85,52,250/- (As per BBA on page 28 of complaint)
12.	Amount paid by the complainant	Rs. 41,37,403/- (As stated by the complainant)
13.	Occupation certificate /Completion certificate	17.07.2019 (Page 32 of reply)
14.	Offer of possession	23.07.2019 (Page 96 of complaint)
15.	Letter regarding change of unit	23.07.2019 (Page 95 of complaint)

B. Facts of the complaint

3. The complainants have made the following submissions: -

- I. That the complainants were approached by the representatives of respondent for booking a unit in its upcoming commercial project named 'Ocus 24K' at Sector 68, Gurugram. Further, it was also informed to them that at the time of possession, the complainants will be given an option to either lease out the unit to a management company/operator that will be appointed by the respondent for huge monthly rental returns, or to keep the unit for self-use of the allottees.
- II. That the complainants on believing the words and assurances made by the respondent booked a unit in the said project. Thereafter a unit bearing no. 902, 9th floor, admeasuring 905 sq.ft. was allotted to them vide allotment letter dated 07.09.2013. Subsequently a buyer's



- agreement dated 03.03.2014 was executed between the parties regarding the said unit for a total sale consideration of Rs.85,52,250/- and the complainants have paid a sum of Rs.41,37,403/- against the same in all as and when demanded by the respondent.
- III. That approximately one year before the possession of the unit was due as per the buyer's agreement, the respondent sent an email dated 03.08.2018 to the complainants informing about their partnership with a company by the name of BridgeStreet for management of service apartments and requested the complainant to opt between self-use and leasing out of unit to the management company. But the said email was unclear and ambiguous in terms of the agreement with BridgeStreet and the information provided in it was not sufficient for the complainants to make an informed choice. Accordingly, the complainants sought the same from the respondent over email. However, instead of providing any clarifications as sought, the respondent illegally presumed that the complainants had opted for self-use of the unit.
- IV. That when the complainants did not receive any clarity from the respondent, they again approached it and the representatives of the respondent informed that the proposal by BridgeStreet was withdrawn and the complainants will receive the complete details of the new management company soon and they can confirm their choice at that time itself.
- V. That in the year 2019, the complainants received three letters, all dated 23.07.2019 from the respondent. The details of all the three letters are as follows:
- a. In the first letter, the respondent had illegally and unilaterally changed the unit allotted to the complainants from unit no. 902 to



- unit no. 1411, 14th floor without any prior intimation/ concurrence or consent of the complainant thereby increasing the super area of the unit from 905 sq. ft. to 931 sq. ft.
- b. The second letter was offer of possession letter issued by the respondent for the illegally changed unit no. 1411 to the complainants.
 - c. The third letter was also received by the complainants whereby the respondent informed them about LOI with Intellistay Hotels for lease of service apartments under their brand name Mango Suites-Select. The respondent again gave an option to the complainants to choose between self-use and leasing out of the new unit no. 1411 to the management company.
- VI. That baffled by the illegal acts of the respondent, the complainants visited the respondent on 31.07.2019. However, the respondent failed to clarify the reason for the said changes. Therefore, the complainants sent an email dated 25.09.2019 to the respondent stating dissatisfaction with the illegal changes. However, due to no satisfactory reply from the respondent, the complainant was constrained to issue a legal notice dated 10.10.2019 to the respondent demanding refund of his hard-earned money along with interest and compensation., but the respondent deliberately omitted to reply to the said notice and instead started issuing reminders and imposing interest upon the final instalment payable only at the time of offer of possession of the originally allotted unit which has not been constructed till date.
- VII. That as per clause 20(c) of the buyer's agreement, the respondent was duty bound to appoint an operator and also to earmark separate floors for self-use of allottees and for operator. It was only based upon the



choice of the allottees, that the unit no. of the allottees could be changed at the time of possession. Contrary to the clause, the respondent not only failed to earmark/ demarcate any floors but has also failed to appoint any operator till date. Further, the respondent never offered possession for allotted unit no. 902 to the complainants as the same was never constructed. Instead, the respondent unilaterally changed unit of the complainants from 902 to 1411 to wriggle out of their obligation to construct the unit no. 902 allotted to them under the buyer's agreement.

- VIII. That as per clause 11(a) of the buyer's agreement, the respondent had to complete construction of the said building within a period of 60 months along with 6 months grace period from date of execution of buyer's agreement, which comes out to be till 02.09.2019 including grace period. However, the respondent has failed to offer possession or even construct unit no. 902 allotted to them till date.
- IX. That the respondent has failed to revert to the various communications of the complainants which has caused great mental agony and losses to them. Hence, the complainants are filing the present complaint seeking refund of the entire amounts paid by them along with interest and compensation.

C. Relief sought by the complainants:

4. The complainant has sought following relief(s).
 - i. Direct the respondent to refund the entire amount deposited alongwith prescribed rate of interest.
5. On the date of hearing, the authority explained to the respondent/promoter about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.



D. Reply by the respondent/builder.

6. The respondent contested the complaint by filing reply dated 05.08.2021 on the following grounds: -
- i. That the complainants had approached the respondent in the year 2013 for booking of a unit in its project namely "Ocus 24K" at Sector 68, Gurugram. Accordingly, the complainants were provisionally allotted a unit bearing no. 902, admeasuring 905 sq.ft. vide letter dated 07.09.2013. Thereafter, a buyer's agreement dated 03.03.2014 with respect to the said unit was executed between the parties with regard to the said unit for a total sale consideration of Rs.85,52,250/-.
 - ii. That the complainants after some time stopped making payments of the installments of the dues for the said unit, which they were bound as per the buyer's agreement as and when demands were raised. Therefore, several reminders were issued to make the payment.
 - iii. That the respondent vide email dated 15.06.2018, informed the complainants that, in terms of clause 20 (c) of the buyer's agreement, collective set of floors earmarked as service apartments will be dedicated by the company for the 'self-use' of the allottees and other collective floors will be given to an "Operator" to further operate on behalf of the allottees and further requested them to choose any one of the options to enable it to proceed ahead. Thereafter, the respondent vide letter dated 03.08.2018, requested them to give their consent in terms of clause 20 (C) of the buyer's agreement as they were to choose between "management-use" and "self-use". Further, the Respondent again, vide email dated 06.08.2018, requested them to revert to the said e-mail within 7 working days.
 - iv. That the complainant vide email dated 22.10.2018, stated specifically that they would not like to give consent for the management contract



for their unit at that point of time. Therefore, in that scenario as the said project was nearing completion and floors have to be given further for the management of them to the agency and categorized the usage of the said unit of the complainants as self-use. Therefore, another provisional unit no.1411, on a different floor was granted to the complainants. Thereafter, vide letter dated 23.07.2019 and email dated 25.07.2019, possession was offered to the complainants and they were also informed of the change of unit offered to them finally at the time of offer of possession and along with the same a final statement of account were sent with a request to clear the outstanding dues of the said unit.

- v. That the respondent vide letter dated 23.07.2019, informed the complainants to avail the final opportunity of leasing their service apartment and they were also informed that the allottee(s) who did not opt to proceed with the leasing of their respective unit(s) shall be liable to pay a monthly maintenance charge @Rs.12/- per sq.ft. of the super area.
 - vi. That the complainants neither complied with the offer of possession and not cleared the dues even after the repeated reminders and letters. Therefore, the present complaint is an abuse of the process of the law and deserves to be dismissed with exemplary costs.
7. 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 submissions made by the complainant.



D. Jurisdiction of the authority

8. The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

D.I Territorial jurisdiction

9. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. 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.

D.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) 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.

11. 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

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which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

12. 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. 2021-2022 (1) RCR (Civil), 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 cull 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."

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



E. Findings on the relief sought by the complainants.

E.I. Direct the respondent to refund the entire amount deposited alongwith prescribed rate of interest.

14. In the present complaint, the complainants intend to withdraw from the project and is seeking return of the amount paid by them 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."

(Emphasis supplied)

15. As per 11(a) of the agreement to sell dated 03.03.2014 provides for handing over of possession and is reproduced below:

11(a) Schedule for possession of the Said Unit

"That the Seller shall sincerely endeavor to give possession of the 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....."**



16. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the complainants not being in default under any provisions of these agreements and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.
17. **Due date of handing over possession and admissibility of grace period:** As per clause 11(a) of the agreement to sell, the possession of the allotted unit was supposed to be offered within a stipulated timeframe of 60 months from the date of execution of the buyer's agreement i.e., 03.03.2014. Therefore, the due date for handing over of possession comes out to be 03.03.2019.
18. The Section 18(1) is applicable only in the eventuality where the promoter fails to complete or 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 demand return of the amount received by the promoter in respect of the unit with interest at the prescribed rate.

19. The complainants stated that the respondent has unilaterally changed their allotment from unit no. 902 to 1411 vide letter dated 23.07.2019 without even getting their consent to do the same and even offered possession of the changed unit on 23.07.2019. Therefore, the complainants being aggrieved with the same, requested the respondent to refund their paid amount alongwith with interest vide email dated 25.09.2019, but the respondent did not even bother to reply or refund the amount paid. However, the respondent contended that vide letter dated 03.08.2018, it had requested them to give their consent in terms of clause 20 (C) of the buyer's agreement as they were to choose between "management-use" and "self-use". Accordingly, the unit of the complainant was changed to unit bearing no. 1411 under the provisions of clause 20 (C) of the agreement.
20. The complainants have drawn the attention of the authority towards email dated 25.09.2019 vide which they have specifically mentioned that as per clause 1.6 of the builder buyer's agreement, if the builder changes the plan, then it has to refund the entire amount paid to it alongwith interest. As per condition no. 1.6 of the BBA, the respondent was to refund the entire amount deposited along with interest @9% per annum in case of non-acceptance of the changed unit. Clause 1.6 of the BBA is reproduced hereunder:



*The Allottee(s) has/have examined the tentative building plans of the Complex on the Project Land and all other approvals and permissions and has satisfied himself/herself about the rights and authority of the Company to construct the Complex and allot/sell/lease or transfer the ownership rights thereof in full or parts to third parties on such terms as they may deem fit and receive the consideration for the same. The Allottee(s) agrees and acknowledges that any change in the sanction of the building plan, from time to time and Allottee(s) acknowledges that in such an eventuality, the dimensions of the Said Unit allotted to the Allottee can change. If such changes are made due to re-sanctioning of the Plan, offer for alternative unit or **in case the Allottee is not satisfied with the same the Company shall have the authority to refund the amount received from the Allottee along with interest 9% per annum.** The Allottee(s) shall be informed about the said changes by a written notice at the address mentioned in this agreement.*

21. As per the aforesaid clause, the respondent was under an obligation to inform the allottee about the changes made in the building plan. Admittedly, there is nothing on record to corroborate that the respondent-builder had either intimated the allottee about the revision of building plan nor has sought the consent of the complainant-allottees for such revision in the building plan. The changes being unacceptable to the complainant-allottees, they have approached the authority seeking refund of the entire amount paid by them as the respondent illegally, arbitrary and unilaterally changed the allotted unit of the complainant. In view of the above facts and circumstances as well as the terms of the BBA, the authority is of the view that in such a situation where the promoter has failed to take consent of the complainant-allottees and the respondent has failed to abide by the terms and conditions of BBA, the complainants are entitled to refund of the paid-up amount besides interest as per clause 1.6 of the BBA.
22. Keeping in view the fact that the allottee-complainants wishes to withdraw from the project and are demanding return of the amount received by the promoter in respect of the unit along with interest on



failure of the promoter to complete or inability to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. The matter is covered under section 18(1) of the Act of 2016.

23. 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)** has observed as under:-

25. 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

24. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottee as per agreement for sale under section 11(4)(a) of the Act. The promoter has failed to complete or unable to give possession of the unit in accordance with the terms of agreement for sale. Accordingly, the promoter is liable to the allottees, as the allottees wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by it in respect of the unit with interest at such rate as may be prescribed.
25. The authority hereby directs the respondent- promoter to return the amount received by it i.e., Rs.41,37,403/- with interest at the rate of 10.75% (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 each payment till the date of refund of the deposited amount.

F. Directions of the authority

26. 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- promoter is directed to refund the entire amount of Rs.41,37,403/- paid by the complainants with interest at the rate of 10.75% (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 each payment till the date of refund of the deposited amount.
- 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.

21. Complaint stands disposed of.

22. File be consigned to the registry.

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 04.10.2023