

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

Complaint no. : 2064 of 2022
Date of complaint : 27.05.2022
Date of order : 04.10.2023

Santdas Gurmukhdas Wadhvani,
R/o: - C39/A3, LGF, Ardee City,
Gurgaon, Haryana.

Complainant

Versus

M/s Ocus Skyscrapers Realty Limited.
Regd. Office at: C-94, 1st floor,
Shivalik, New Delhi-110017.

Respondent

CORAM:
Ashok Sangwan

Member

APPEARANCE:
Pooja Sareen (Advocate)
Harshit Batra (Advocate)

Complainants
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 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 complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Project name and location	Ocus 24K, Sec 68, Gurugram
2.	Project area	4.44 acres
3.	Nature of the project	Commercial project
4.	DTCP License	76 of 2012 dated 01.08.2012 and valid up to 31.07.2020
5.	Name of the licensee	Perfect Constech Pvt. Ltd.
6.	RERA Registered/ not registered	Registered 220 of 2017 dated 18.09.2017
	RERA Registration valid up to	17.09.2022
7.	Unit no.	As per BBA: 1401, 14 th floor (Page 47 of complaint) Revised unit: 1701, 17 th floor (Page 19 of reply)
8.	Unit measuring (super area)	1194 sq. ft. [page no. 47 of the complaint] Revised area- 1219 sq. ft. [page no. 19 of the reply]
9.	Date of allotment	N/A
10.	Date of execution of builder buyer agreement	18.04.2014 [page no. 42 of the complaint]
11.	Possession clause	11(a) The company based on its present plans and estimates and subject to all just exceptions endeavours to complete construction of the said building/said unit within a period of sixty (60) months from the date of this agreement unless there shall be delay or failure due to department delay or due to any circumstances

		beyond the power and control of the company or force majeure conditions including but not limited to reasons mentioned in clause 11(b) and 11(c) or due to failure of the allottee(s) to pay in time the total price and other charges and dues/payments mentioned in this agreement or any failure on the part of the allottee(s) to abide by all or any of the terms and conditions of this agreement. (emphasis supplied)
12.	Due date of possession	18.04.2019 Calculated as 60 months from the date of the agreement
13.	Total sale consideration	Rs.1,10,32,560/- [As per BBA at page no. 48 of the complaint]
14.	Total amount paid	Rs. 52,77,334/- [As per SOA at page 20 of reply]
15.	Letter for withdrawal from project	Vide email dated 09.08.2019 [page 66 of complaint]
16.	Consent letter for leasing out of abovementioned unit dated	15.09.2018
17.	Occupation Certificate	17.07.2019 [Annexure R/4 at page 15 of reply]
18.	Offer of Possession	23.07.2019 [page 17 of reply]
19.	Change of unit letter	23.07.2019 (Page 19 of reply)

B. Facts of the complaint

3. The complainant has made the following submissions: -

- I. That the complainant booked a unit in the project of respondent named "OCUS 24K" and thereafter a builder buyer agreement was executed between the parties on 18.04.2014, vide which a unit



- bearing no. 1401, 14th floor, having a carpet area of 1194 sq. ft. was allotted in his favour.
- II. That as per the terms of the agreement entered between the parties, the possession of the unit was to be given in 2019. However, when the complainant visited the site to check the stage/phase wise project completion of the said project and progress of his flat, he found that neither the construction was completed as promised nor the raw/building materials which were promised to be used while signing BBA were used for the construction.
 - III. That the complainant sent an e-mail to the respondent that he would be opting out of the BBA as neither the township-project was completed, nor the possession of the apartment unit was given as per the BBA within the stipulated time and even after a mad chase, the builder is yet to refund the invested amount plus compensation to the complainant.
 - IV. That even today in the year 2022 even after almost a decade of its inception, is incomplete, contrary to the tall claims made by the respondent. The amenities such as the swimming pool and gym on the terrace, the shopping complex, a functioning club, an entertainment zone, is yet incomplete even till date, till date the construction is half done or incomplete and also the building material which is used is of inferior and deteriorated quality than was promised during the booking of the said unit/ studio apartment.
 - V. That the respondent had deliberately remained silent on the status of the project and kept the complainant in a lucent situation with respect to the developments.
 - VI. That in the circumstances mentioned above, the responder t is in default of the contractual obligations and is liable for all the

compensation/ damages that are being constantly incurred by the complainant.

VII. That in the clause of delay in payments of the buyer's agreement; respondent has mentioned illegal interest rate compounded on delayed payment at the time of every succeeding installment from the due date of installment. Hence it was preplanned and the ulterior motive of the respondent to financially exploit complainant.

C. Relief sought by the complainant:

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 03.11.2022 on the following grounds: -
 - i. That the complainant vide an application form dated 09.09.2013 had approached the respondent and applied for the booking of the unit in one of its project namely Ocus 24K. Thereafter, a builder buyer agreement, dated 18.04.2014 was executed between the parties and the complainant was provisionally allotted a unit bearing no.14-01 on 14th floor in the said project.
 - ii. That the said unit was allotted to the complainant provisionally which is subject to change on the basis of consent provided/given by him regarding the usage of the said unit in accordance with clause 20(c) of the said agreement.



- iii. That on the combined reading of clause 11 (a) and clause 14 of the said agreement, the construction of the said unit shall be completed within 66 months from the date of execution of said agreement. Therefore, as per the said agreement, said unit was to be completed on or before 18.09.2019.
 - iv. That the respondent had also sought the consent from the complainant for leasing of the said unit for the management purposes, as per the agreed clause 20 (c) of the said Agreement and he had provided his consent for leasing of the said unit for the management purpose vide the consent letter dated 15.09.2013.
 - v. That the occupancy certificate was granted to respondent on 17.07.2019, hence it is clearly evident that the said project is ready and operational since March 2019. Accordingly, the respondent has sent the offer of possession of the said unit, alongwith unit change letter and final statement of accounts to the complainant on 23.07.2019.
 - vi. That the complaint is a chronic defaulter and has defaulted in making payment against the outstanding dues for the unit as per the agreed terms and conditions under the said agreement, despite the fact that respondent had issued several reminder letters to him for clearing the outstanding dues to which complainant never paid a heed. Hence, the respondent cannot be held liable for default committed by the complainant and he is not entitled to any of the relief prayed in the complaint.
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 parties.



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 which is to be decided by the adjudicating officer if pursued by the complainant 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 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."

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 complainant.

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

14. In the present complaint, the complainant intends to withdraw from the project and is seeking return of the amount paid by him 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., 18.04.2014. Therefore, the due date for handing over of possession comes out to be 18.04.2019.
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 complainant stated that even after 9 years of the execution of the BBA, the township is yet not completed. Therefore, vide email 09.08.2019, he requested the respondent to refund the amount paid by him as per agreement. However, the respondent neither even bother to reply nor refund the amount paid. The respondent contended that occupancy certificate was granted to respondent on 17.07.2019 hence it is clearly evident that the said project is ready and operational since March 2019 and the offer of possession was made on 23.07.2019.
20. After considering the documents available on record as well as submissions made by the parties, it is concluded that the OC/CC of the Tower in which the unit of complainant is situated has been obtained by it. The due date of possession as per buyer's agreement was 18.04.2019 and the complainant has surrendered the unit on 09.08.2019 after possession of the unit was offered to him after obtaining occupation certificate by the promoter. The OC was received on 17.07.2019 whereas, offer of possession was made on 23.07.2019. 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 and demand for due payment was raised, then only, he has filed a complaint before the authority.
21. 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 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 allottees interest for the money he has paid to the promoter is protected accordingly and the same was upheld by 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; that: -

25. The unqualified right of the allottees 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 allottees, 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 allottees/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 allottees 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.

22. 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. This judgement of the Supreme Court of India recognized unqualified right of the allottees and liability of the promoter in case of failure to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by



the date specified therein. But the complainant-allottee failed to exercise his right although it is unqualified one rather tacitly wished to continue with the project and thus made himself entitled to receive interest for every month of delay till handing over of possession. It is observed by the authority that the allottee invest in the project for obtaining the allotted unit and on delay in completion of the project never wished to withdraw from the project and when unit is ready for possession, such withdrawal on considerations other than delay such as reduction in the market value of the property and investment purely on speculative basis will not be in the spirit of the section 18 which protects the right of the allottees in case of failure of promoter to give possession by due date either by way of refund if opted by the allottee or by way of delay possession charges at prescribed rate of interest for every month of delay.

23. In case the allottee wishes to withdraw from the project, the promoter is liable on demand to return the amount received by it with interest at the prescribed rate if it fails to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale. The words liable on demand need to be understood in the sense that the allottee has to make intentions clear to withdraw from the project and a positive action on his part to demand return of the amount with prescribed rate of interest if he has not made any such demand prior to receiving occupation certificate and unit is ready then he impliedly agreed to continue with the project i.e. he do not intend to withdraw from the project and this proviso to sec 18(1) automatically comes into operation and the allottees shall be paid interest at the prescribed rate for every month of delay by the promoter.



24. In the instant case, the unit was provisionally allotted vide buyer's agreement dated 18.04.2014 and the due date for handing over for possession was 18.04.2019. The OC was received on 17.07.2019 whereas, offer of possession was made on 23.07.2019. However, it is observed that the complainant vide email dated 09.08.2019 surrendered the unit even before filing of the complaint. Therefore, in this case, refund can only be granted after certain deductions as prescribed under the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 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"

25. Thus, keeping in view the aforesaid factual and legal provisions, the respondent is directed to refund the paid-up amount of Rs.52,77,334/- after deducting 10% of the basic sale consideration of Rs.98,98,260/- being earnest money along with an interest @10.75% p.a. (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 on the refundable amount, from the date of surrender i.e., 09.08.2019 till actual refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

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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/builder is directed to refund the paid-up amount of Rs.52,77,334/- after deducting 10% of the basic sale consideration of Rs.98,98,260/- being earnest money along with an interest @ 10.75% p.a. on the refundable amount, from the date of surrender i.e., 09.08.2019 till its 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.

27. Complaint stands disposed of.

28. File be consigned to the registry.


(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 04.10.2023

HARERA
GURUGRAM