

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

Complaint no.:	977 of 2021
Date of filling of complaint:	16.03.2021
Oder reserved on:	12.07.2023
Date of pronouncement:	23.08.2023

Mr. Manish Saini Address: - C-2035, Ground Floor, Sushant Lok, Phase 1, Sector 43, Gurugram 122002, Haryana	Complainant
Versus	
Ocus Skyscrapers Realty Limited Address: - C-94, First Floor, Shivalik, New Delhi- 110017 and its office Corporate Office at Ocus Technopolis, Golf Course Road, Sector 54, Gurugram, Haryana -122002	Respondent
CORAM:	
Shri Ashok Sangwan	Member
APPEARANCE:	
Sh. Karan Sehgal (Advocate) Sh. Harshit Batra (Advocate)	Complainant Respondent

ORDER

1. This 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 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 complainant, 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.	G-216, Ground floor (Page 9 of complaint)
8.	Unit area admeasuring	213 sq. ft. (Page 9 of complaint)
9.	Date of execution of Apartment Buyer's Agreement	05.05.2014 (Page 4 of complaint)

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10	Possession clause	<p>11(a) Schedule for possession of the Said Unit</p> <p><i>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.</i></p> <p>(Emphasis supplied)</p>
11	Due date of possession	<p>05.05.2019</p> <p>(Calculated as 60 months from date of execution of BBA i.e., 05.05.2014)</p>
12	Basic sale consideration	<p>Rs. 29,60,700/-</p> <p>(As per BBA on page 10 of complaint)</p>
13	Amount paid by the complainant	<p>Rs. 8,58,189/-</p> <p>(As per cancellation letter on page 63 of complaint)</p>

14	Occupation certificate /Completion certificate	17.07.2019 (Page 50 of reply)
15	Offer of possession	Not offered
16	Reminder Letters	17.05.2019, 12.06.2014, 15.07.2014, 17.04.2015, 13.05.2015
17	Cancellation Letter	18.01.2017 (Page 58 of reply)

B. Fact of the complaint

3. The complainant has made the following submissions: -

- i. That in april 2013, respondent approached complainant through your channel partner/ broker M/s Uydhunik Estates, M.G. Road, Gurugram, to book the unit in Respondent's upcoming commercial project "OCUS 24K" in Sector 68, Sohna Road, Gurugram. Application form dated 20.04.2013 was submitted by Complainant in pre-printed format provided by the Respondent, for allotment of a commercial unit having super area measuring 19.79 square meter (213 Square feet) in the said project. Total Sale Consideration was settled at Rs. 29,60,700/- and Complainant had paid Rs. 2,86,063/- as booking amount. Complainant further paid Rs. 3,58,189/- on 06.07.2013 vide cheque no. 556306. Thereafter, Complainant paid Rs. 2,13,937/- to Respondent and the Buyer's Agreement was executed between the parties on 05.05.2014 wherein detailed terms and conditions of the allotment were shared first time with Complainant at such



belated stage. As per the Buyer's Agreement dated 05.05.2014, a unit was allotted on the ground floor bearing number G-216 having super area of 19.79 sq. meter (213 Square feet). The terms and conditions of the Agreement were arbitrary and one sided however since a huge sum was already paid by the Complainant, he had no other option but to sign on the pre- printed format of Agreement.

- ii. Thereafter Complainant enquired about the construction status and project details from Respondent's office but they have failed to share the requisite details with him.
- iii. Since there was no construction-in-progress at site at that time and approvals were to be procured for constructing the project, Complainant withheld the demands until receipt of satisfactory response from Respondent's side. Since no response as to status of construction and procurement of necessary approvals was shared with Complainant, he was constrained to stop making the payments of demands raised by you.
- iv. Despite of payment of Rs. 8,58,189/- to Respondent, Allotment was wrongfully cancelled by the Respondent vide cancellation letter dated 18.01.2017 and stated that a sum of Rs. 12,26,462/- stand forfeited. As per cancellation letter, since Complainant had made payment of Rs. 8,58,189/- the entire amount stood forfeited and he had left with no right to claim any refund or allotment. The forfeiture of the entire amount paid by Respondent is arbitrary and illegal.

C. Relief sought by the complainant



4. The complainant has sought the following relief sought: -

- i. Direct the respondent to refund the full amount along with interest.
- ii. Direct the respondent to pay legal expenses of Rs. 70,000/-.

D. Reply by the respondent

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

- i. The complainant approached some broker, M/s Adhunik Estates for investment purposes and after satisfying himself of the future prospects and with investment purposes, signed the application form on 20.04.2013 for allotment of a Commercial Unit in project "OCUS 24K" of the Respondent. It is submitted that after being satisfied of the terms of the terms the complainant must have signed the application form only for the investment purposes. A provisional Unit No. G-216 was allotted to the complainant.
- ii. Thereafter, Buyers Agreement was signed and executed between the parties on 05.05.2014 (hereinafter referred to as the "said Agreement"), with regard to the unit being No. G-216 admeasuring 213 square feet (hereinafter referred to as the "said Unit") for a consideration of Rs.29,60,700/- excluding taxes, in the project of the Respondent being "Ocus 24K" (hereinafter referred to as the "said Project"), which is earmarked as Service Apartments. The Builder Buyer Agreement for the said Unit was executed between the parties on 05.05.2014.
- iii. The Complainant alleged contentions that the Unit of the complainants is non-existing and are not likely to be delivered in



near future are wrong and baseless on the face of it. Because on a combined reading of Clause 11 (a) read and Clause 14 of the Builder Buyers agreement dated 05.05.2014, 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 05.05.2014, said Unit was to be completed by 05.11.2019.

- iv. In order to deliver the said Unit to the Complainant 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.
- v. That the Respondent was not under any obligation to send any reminders to the Complainant to make the outstanding payments, it is humbly submitted that the Respondent had in fact, addressed numerous reminders to the Complainant for payment of the balance consideration with respect to the said Unit.
- vi. Despite receiving the various letter of Reminder for clearing the outstanding dues from the Respondent, the Complainant did not come forward to take over the said Unit by paying outstanding amount.
- vii. It is submitted that when the complainant despite the above number of reminders and letters failed to pay the outstanding dues, the respondent left with no other option but to cancel the



said booking against the said allotted Unit vide cancellation letter dated 18.01.2017.

viii. It is pertinent to mention here that after 2 years and 5 months of the cancellation of the said Unit, Mrs. Ritika Saini, wife of complainant sent a letter dated 30.05.2019 to the respondent on behalf of the Complainant and requested for revocation of the said Unit, as due to some unavoidable circumstances in their life due to which they were unable to make the payment.

ix. In view of the above, it is submitted that the Complainant is chronic defaulters as they have failed and neglected to make timely payments with respect to the said Unit despite numerous reminders addressed to him. The above default has been committed by the Complainants, 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).

x. The Complainant has very cleverly concealed the above Reminders dated 17.05.2014, 12.06.2014, 15.07.2014, 12.08.2014, 17.04.2015 and 13.05.2015, wherein he has been directed to pay



the balance payment. Complainant has failed to make the balance payment as per the terms of the Buyers Agreement and violated the terms.

- xi. It is further submitted that till date the Complainant has never written even a single letter to the Respondent seeking any refund or complaining about any false promise made by the Respondent or any deficiency of services on the part of Respondent. This present Complaint is the very first document wherein the Complainant is alleging deficiency in services. This clearly shows that the present Complainants is a sham Complaint by the Complainant 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 dated 05.05.2014.
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 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 complainant



- i. Direct the respondent to Refund the full amount along with interest.
 - ii. Direct respondent to pay legal expenses of Rs. 70,000/-
13. The complainant was allotted unit no. G-216, Ground floor in the project "Ocus 24K, Sector-68" by the respondent-builder for a basic sale consideration of Rs. 29,60,700/- and he has paid a sum of Rs. 8,58,189/- which is approx. 28% of the basic sale consideration. A builder buyer's agreement dated 05.05.2014 was executed between parties and according to the clause 11(a) of the BBA, the due date of possession comes to be 05.05.2019. The complainant failed to pay amount due against the allotment unit.
14. As per clause 8 of the builder buyer agreement the complainant was liable to make 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).

15. The respondent issued reminders on 17.05.2019, 12.06.2014, 15.07.2014, 17.04.2015 and 13.05.2015 thereafter, issued cancellation letter i.e., 18.01.2017 to the complainant. The Occupation Certificate



for the project of the allotted unit was granted on 17.07.2019. It is evident from the above-mentioned facts that the complainant paid a sum of Rs. 8,58,189/- against basic sale consideration of Rs. 29,60,700/- of the unit allotted to him. The complainant has failed to adhere to the terms and conditions of the builder buyer agreement. The respondent cancelled the unit of the complainant with adequate notices. Thus, the cancellation of unit is valid.

17. 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 Singhal 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.

18. 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 10.75% (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 cancellation i.e., 18.01.2017 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

F.II. Direct the respondent to pay legal expenses of Rs. 70,000/-

19. The complainant in the aforesaid head is 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 complainant is advised to approach the adjudicating officer for seeking the relief of compensation.

G. Directions of the authority

20. 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. 8,58,189/- after deducting 10% of the basic sale consideration of Rs. 29,60,700/- with interest at the prescribed rate i.e., 10.75% p.a. on such balance amount, from the date of cancellation i.e., 18.01.2017 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.
21. Complaint stands disposed of.
22. File be consigned to registry.

Ashok Sangwan
(Member)

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 23.08.2023



HARERA
GURUGRAM