

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

Complaint no. : 2749 of 2023
Date of complaint : 14.06.2023
Date of order : 04.12.2024

Prekshit Mehta,
R/o: 78 First Floor, Block C2, Sushant Lok I,
Gurugram-122001.

Complainant

Versus

M/s Ocus Skyscrapers Realty Limited.
Regd. Office at: S-33, Green Park, Main Market,
New Delhi-110016.
Also at: Ocus Technopolis, Golf Course Road,
Sector-54, Gurugram, Haryana-122002.

Respondent

CORAM:
Ashok Sangwan

Member

APPEARANCE:
Arpita (Advocate)
Sanjana (Advocate)

Complainant
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 provision of the Act or the rules and regulations made thereunder 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. N. | Particulars | Details |
|-------|--|---|
| 1. | Name of the project | "Ocus Medley", Sector 99, Gurugram |
| 2. | Nature of the project | Commercial |
| 3. | Unit no. | G-38, Ground Floor (page 21 of complaint) |
| 4. | Unit area admeasuring | 319 sq. ft. (super area) |
| 5. | Date of execution of Apartment Buyer's Agreement | 27.12.2013 (page 16 of complaint) |
| 6. | Possession clause | <p>11(a) Schedule for possession of the Said Unit</p> <p>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.</p> |
| 7. | Due date of possession | 27.12.2018 (calculated as per possession clause) |

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|-----|--|--|
| 8. | Total sale consideration | Rs.42,30,703/- (page 21 of complaint) |
| 9. | Amount paid by the complainant | Rs.15,39,643/- (As per applicant ledger dated 26.10.2015 at page 71 of complaint) |
| 10. | Occupation certificate /Completion certificate | 25.09.2018 (page 47 of reply) |
| 11. | Reminders | 30.11.2016, 21.12.2016, 17.01.2017 (page 43 to 45 of reply) |
| 12. | Cancellation letter | 14.06.2017 (page 46 of reply) |

B. Facts of the complaint

3. The complainant has made the following submission: -

- I. That relying upon the representations, warranties, and assurances of the respondent about the timely delivery of possession of the unit, the complainant booked a unit bearing no. G38, Ground Floor admeasuring super area 319.19 sq. ft. in the project of the respondent named "Ocus Medley" by making a payment of Rs.4,00,000/- as a booking amount on 06.11.2012. Thereafter, a buyer's agreement dated 27.12.2013 was executed between the parties against the said unit for a total sale consideration of Rs.42,30,703/- against which the complainant had made a total payment of Rs.15,39,643/-.
- II. That the terms of agreement are not in parity and are completely favouring the respondent. The provisions of the agreement are one-sided and arbitrary and was executed by the complainant under coercion and undue influence. As per the agreement, the rate of interest charged by the respondent for any default in making payment and the delay possession charges offered by the respondent are not in parity. Furthermore, the clause 4 of the agreement states that the earnest money was to constitute 20% of the total price of the unit. The respondent is charging the holding charges

of Rs.20/- per sq. ft. as per clause 13 of the agreement. Moreover, the respondent is also charging the IFMS and sinking fund both from the allottee as evident from clause 1.1 of the BBA. Further, as per clause 10 of the agreement the respondent is justified in case of alteration/modifications of plus and minus 25% change in the super area of the said unit any time prior to and upon the grant of occupancy certificate. Also, vide clause 12 of the agreement, the allottees upon taking possession of the said unit, shall have no claim against the company in respect of any item of the work in the said unit which may be alleged not to have been carried out or completed or for any design, tentative specifications, building materials used or for any other reason whatsoever and he/she shall be entitled to occupy the said unit without any interference but subject to the terms and conditions, stipulations and restrictions contained in that agreement. It is submitted that the respondent being in a dominant position has imposed unfair and arbitrary terms upon the complainant.

- III. That the respondent promised to handover the possession within 60 months from the date of agreement as per clause 11(a) of the agreement. However, even after a delay of more than 4 years, no possession has been offered to the complainant and hence, is liable for delay possession charges from the due date of possession i.e. 27.12.2018 till the date of handing over of possession.
- IV. That the respondent has utterly failed to fulfil his obligation timely completion and delivery of the possession of the said unit which has caused mental agony, harassment and huge losses to the complainant, hence the present complaint. Hence, the complainant is also completely entitled to get physical possession along with the interest.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s):
 - i. Direct the respondent to handover possession of unit, to execute conveyance deed and to pay delay possession charges.
 - ii. Direct the respondent to pay cost of litigation.
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.

6. The respondent has contested the complaint on the following grounds: -
 - i. That the present complaint is barred by limitation since the unit was cancelled by the respondent vide cancellation letter dated 14.06.2017; whereas the present complaint has been instituted by the complainant only in June 2023. It is submitted that the complainant after approximately 6 years has filed the present complaint to reap benefits out of the pocket of the respondent, which clearly establishes that the present complaint filed is an afterthought.
 - ii. That clause 4 of the agreement dated 27.12.2013 provides that 20% of the total price of the unit amounting to Rs.6,82,959/- shall be treated as earnest money to ensure the fulfilment of the terms and conditions of the said agreement.
 - iii. That clause 8 of the said agreement provides that the complainant agree and understands that the time is the essence with respect to the payment of the total price and other charges, deposits and amounts payable by the complainant as per the said agreement and/or as demanded by the respondent from time to time and also to perform/observe all the other obligations of the complainant under the said agreement.
 - iv. That the complainant is a chronic defaulter and has defaulted in making payment against the demands for the said unit as per the agreed terms and

conditions under the said agreement against which the respondent had also issued several reminder letters to the complainant for clearing the outstanding dues as per the "payment plan". However, the complainant has failed and neglected to make timely payments with respect to the said unit despite numerous reminders addressed to him. It is further submitted that the complainant has only paid 34% of the total sale consideration till date and the last payment made by the complainant of Rs.12,811/- was on 10.07.2014, which is evident from the ledger filed by the complainant alongwith its complaint. Since the complainant failed to reply to any of the reminder letters, the respondent was constrained to issue a cancellation letter dated 14.06.2017 to the complainant, thereby cancelling the said unit.

- v. That the respondent vide the cancellation letter dated 14.06.2017, had informed the complainant that the allotment made in favour of the complainant stands cancelled and the complainant was called upon to submit the original documents including but not limited to the allotment letter, BBA, original receipts, etc. However, the complainant miserably failed to come forward to submit the original documents as the entire amount paid by the complainant stands forfeited as per the terms and conditions of the said agreement.
- vi. That as per 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 afore-mentioned clause the said unit was to be completed by 26.06.2019.
- vii. That the respondent had completed the said project and applied for occupational certificate on 23.07.2018 and the same was granted on 25.09.2018. It is relevant to point out that the said project is complete within the time stipulated in the said agreement is ready since 23.07.2018.

- viii. That the complainant being himself in default in not adhering to the payment plans as agreed between the parties, has approached the Hon'ble Authority with unclean hands and with mala fide intentions. In view of same, the complainant is not entitled to any relief prayed by the complainant in the present complaint since the said project of the respondent was complete within the time stipulated in the said agreement and that there is no default on the part of the respondent, rather it's the complainant who is at default.
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 submission 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.

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.

F. Findings on the objections raised by the respondent.

F.I Objections regarding complaint being barred by limitation.

12. The respondent contended that the present complaint is not maintainable and barred by the law of limitation. The Authority observes that the cause of action arose in June 2017, when the cancellation letter was issued to the complainant. However, post cancellation of the unit, the respondent has failed to refund the refundable amount to the complainant so far, which clearly shows a subsisting liability. Moreover, the deductions made from the paid up amount by the respondent are not as per the law of the land as laid down by the Hon'ble apex court of the land in cases of *Maula Bux vs Union of India 1969(2) SCC 554* and where in it was held that a reasonable amount by way of earnest money be deducted on cancellation and the amount so deducted should not be by way of damages to attract the provisions of section 74 of the Indian Contract Act, 1972. Further, the law of limitation is, as such, not applicable to the proceedings under the Act and has to be seen case to case. Thus, the objection of the respondent w.r.t. the complaint being barred by limitation stands rejected.

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G. Findings regarding relief sought by the complainant

G.I Direct the respondent to handover possession of unit, to execute conveyance deed and to pay delay possession charges.

13. The complainant was allotted a commercial unit bearing no. G38, Ground Floor admeasuring super area 319.19 sq. ft. in the project of the respondent named "Ocus Medley" vide buyer's agreement dated 27.12.2013 for a total sale consideration of Rs.42,30,703/- against which the complainant has paid a sum of Rs.15,39,643/- in all. As per clause 11(a) of the buyer's agreement, the due date of possession was 27.12.2018, whereas occupation certificate for the project in question was obtained by the respondent from the competent authority on 25.09.2018. The respondent has submitted that the complainant has only paid 34% of the total sale consideration till date and the last payment made by the complainant of Rs.12,811/- was on 10.07.2014, which is evident from the ledger filed by the complainant alongwith his complaint. The complainant is a chronic defaulter and has defaulted in making payment against the demands for the said unit as per the agreed terms and conditions under the said agreement against which the respondent had also issued letter/reminders dated 18.01.2014, 01.02.2014, 03.04.2014, 01.10.2014, 30.10.2014, 25.11.2014, 25.02.2015, 23.03.2015, 20.04.2015, 19.04.2016, 12.05.2016, 06.07.2016, 08.11.2016, 30.11.2016, 21.12.2016 and 17.01.2017 to the complainant. However, the complainant defaulted in making payment and the respondent was to issue final opportunity letter dated 17.01.2017, requesting the complainant to comply with his obligation and to clear all the dues within 15 days from the date of that letter. Despite repeated follow ups and communications, the complainant failed to act further and comply with his contractual obligations and therefore the allotment of the complainant was finally cancelled vide cancellation letter dated 14.06.2017. The counsel for the complainant has

submitted the cancellation made by the respondent is bad in law as no reminder letter or cancellation letter was received by the complainant. The complainant came to know about all these letters and cancellation only after receipt of the reply filed by the respondent to the complaint. However, the said claim of the complainant cannot be relied upon as copies of all the documents mentioned above alongwith dispatch proof of the same to the complainant is available on record and are presumed to be delivered to him. Further, it is evident from the email dated 15.06.2017 that an intimation w.r.t cancellation of the unit due to non-payment of dues was also sent to the complainant by the respondent. Now the question before the Authority is whether the cancellation made by the respondent vide letter dated 14.06.2017 is valid or not.

14. On consideration of documents available on record and submissions made by both the parties, the authority is of the view that on the basis of provisions of allotment, the complainant has paid an amount of Rs.15,39,643/- against the total sale consideration of Rs.42,30,703/- and no payment was made by the complainant after July 2014. The respondent/builder has sent numerous reminders, before issuing a final notice dated 17.01.2017 asking the allottee to make payment of the amount due, but the same having no positive results and ultimately leading to cancellation of unit vide letter dated 14.06.2017. Further, section 19(6) of the Act of 2016 casts an obligation on the allottee to make necessary payments in a timely manner. Hence, cancellation of the unit in view of the terms and conditions of the payment plan annexed with the buyer's agreement dated 27.12.2013 is held to be valid. But while cancelling the unit, it was an obligation of the respondent to return the paid-up amount after deducting the amount of earnest money. The respondent has submitted that earnest money is clearly defined in the builder buyer's agreement as 20% of the sale consideration of the unit.

15. The Authority after taking into consideration the scenario prior to the enactment of the Act, 2016 as well as the judgements passed by Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, has already prescribed vide Regulations, 11(5) of 2018 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. Therefore, in view of the above, the contention of the respondent w.r.t forfeiture of 20% of the sale consideration/cost of the property to be considered/treated as earnest money stands rejected.
16. Further, the deductions made from the paid-up amount by the respondent are not as per the law of the land laid down by the Hon'ble apex court of the land in cases of *Maula Bux VS. Union of India, (1970) 1 SCR 928* and *Sirdar K.B. Ram Chandra Raj Urs. VS. Sarah C. Urs., (2015) 4 SCC 136*, and wherein it was held that *forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in the nature of penalty, then provisions of section 74 of Contract Act, 1872 are attached 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.* National Consumer Disputes Redressal Commissions in *CC/435/2019 Ramesh Malhotra VS. Emaar MGF Land Limited* (decided on 29.06.2020) and *Mr. Saurav Sanyal VS. M/s IREO Private Limited* (decided on 12.04.2022) and followed in *CC/2766/2017* in case titled as *Jayant Singhal and Anr. VS. M3M India Limited* decided on 26.07.2022, held that 10% of basic sale price is

reasonable amount to be forfeited in the name of "earnest money". Keeping in view the principles laid down in the first two cases, a regulation known as the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, was framed providing 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."

17. Keeping in view the aforesaid factual and legal provisions, the respondent is directed to refund the paid-up amount of Rs.15,39,643/- after deducting 10% of the sale consideration of Rs.42,30,703/- being earnest money along with an interest @11.10% 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 cancellation i.e., 14.06.2017 till actual refund of the amount within the timelines provided in rule 16 of the Rules, 2017 *ibid*.

G. II Cost of litigation.

18. The complainant is seeking above mentioned relief w.r.t. compensation. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors. (supra)*, has held that an allottee is entitled to claim compensation and litigation charges 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 and litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The

adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation. Therefore, the complainant is advised to approach the adjudicating officer for seeking the relief of compensation and litigation expenses.

H. Directions of the authority: -


19. 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 promoter as per the functions entrusted to the authority under sec 34(f) of the Act: -

- i. The respondent/promoter is directed to refund the paid-up amount of Rs.15,39,643/- after deducting 10% of the sale consideration of Rs.42,30,703/- being earnest money along with an interest @11.10% 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 cancellation i.e., 14.06.2017 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.

20. Complaint stands disposed of.

21. File be consigned to the registry.

Dated: 04.12.2024



(Ashok Sangwan)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram