

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

Complaint no. : 1465 of 2021
First date of hearing: 17.05.2021
Date of decision : 13.07.2022

Karan Sachdeva
Through SPA Holder Nirmal Chawla Bhalla
Address: D-7/7485, Vasant Kunj, New Delhi-
110070.
Present address: 50ELM Drive East, Unit808,
Mississauga, L5A 3X2, Canada

Complainant

Versus

1. M/s Imperia Wishfield Pvt. Ltd.
Regd. Office at: - A-25, Mohan Cooperative
Industrial Estate, Mathura Road, New Delhi,
110044
2. Tata Capital Housing Finance Limited
Address: B-36, 1st & 2nd Floor, Lajpat Nagar 2,
New Delhi-110021
3. M/s Seedwill Consulting Pvt. Ltd.
Address: Seedwill Tower, Plot no. 51, 2nd
Floor, Sector-18, Udyog Vihar, Gurugram-
122015

Respondents

CORAM:

Shri KK Khandelwal
Shri Vijay Kumar Goyal

Chairman
Member

APPEARANCE:

Shri Nirmal Chawla (SPA)
Shri Himanshu Singh

Advocate for the complainant
Advocate for the respondent
no. 1

Shri Sham Taneja

Advocate for the respondent
no. 2

Shri Nitish Kumar Singh

Advocate for the respondent
no. 3

ORDER

1. The present complaint dated 15.03.2021 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 there under or to the allottees as per the agreement for sale executed inter se.

A. Unit and project related details

2. The particulars of 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.	Name and location of the project	"The Esfera" at sector 37-C, Gurgaon, Haryana
2.	Nature of the project	Group Housing Complex
3.	Project area	17 acres
4.	DTCP license no.	64 of 2011 dated 06.07.2011 valid upto 15.07.2017



5.	Name of license holder	M/s Phonix Datatech Services Pvt Ltd and 4 others
6.	RERA Registered/ not registered	Registered vide no. 352 of 2017 issued on 17.11.2017 up to 31.12.2020
7.	Apartment no.	1701, 17th Floor, Block E (page no. 16 of complaint)
8.	Unit measuring	1650 sq. ft. (page no. 16 of complaint)
9.	Date of builder buyer agreement	12.03.2015 [page no. 10 of complaint]
10.	Date of tripartite agreement	30.09.2015 [page no. 44 of reply]
11.	Due date of possession	12.09.2018 [calculated as per possession clause]
12.	Possession clause	10.1. SCHEDULE FOR POSSESSION "The developer based on its present plans and estimates and subject to all just exceptions, contemplates to complete the construction of the said building/said apartment within a period of three and half years from the date of execution of this agreement unless there shall be delay or there shall be failure due to reasons mentioned in clause 11.1, 11.2, 11.3, and clause 41 or due to failure of allottee(s) to pay in time the price of the said unit along with other charges and dues in accordance with the schedule

		of payments given in annexure C or as per the demands raised by the developer from time to time or any failure on the part of the allottee to abide by all or any of the terms or conditions of this agreement.” (emphasis supplied)
13.	Total consideration	Rs. 1,02,26,250/- [as per agreement on page no. 23 of complaint]
14.	Total amount paid by the complainant	Rs. 77,63,063/- Rs. 5,03,063/- (paid by complainant) + 72,60,000/- (paid through THCFL) [as alleged by complainant]
15.	Occupation certificate	Not received
16.	Offer of possession	Not offered

B. Facts of the complaint

- That the complainant has purchased the above-mentioned project through brokers of the Investor Fortune, i.e., respondent no. 3 in the kingdom of Bahrain during the property show targeted towards NRI's sometimes in March 2015 and the builder buyer agreement was signed on 02.05.2015. The deal was signed under a subvention scheme and a down payment of Rs. 5,03,063/- was given by the complainant to the Imperia, i.e., respondent no.1 and also the housing loan amounting to Rs. 72,60,000/- was also

sanctioned by the TATA Capital Housing Finance Ltd., i.e., respondent no. 2 at the instance of the developer, i.e., respondent no.1.

4. That at the time of signing the documents it was assured by Sakshi and Manav Bhatia, owner/brokers of Investors Fortune and by TATA Capital Housing Finance Limited the representatives of respondent no.1 for timely possession of the flat, and further assured that the complainant is not liable to pay any type of interest till possession of the flat is handed over. But till date the complainant neither got the possession nor got his amount of Rs. 5,03,063/- refunded with interest as requested by the complainant from time to time through telephonically and emails. The complainant also handed over few blank signed cheque(s) as security to the respondent no.2 on the assurance that the same will not be used/misused by them in the manner.
5. That the TATA Capital Housing Finance Limited (respondent no.2) is continuously harassing the complainant for payment of Pre-EMI interest on loan amount, which is expected to be paid by them, respondent no.1 being developer of the property to the bank, i.e., respondent no.2 (TATA Capital Housing Finance Limited) as per the agreement. As the complainant is not liable to pay any dues to TATA Housing Capital Finance Ltd., i.e., respondent no.2, as claimed by them due to negligence and misrepresentations on behalf, i.e., respondent no.1/developer.

6. That the constant intimidations by the TATA Capital Housing Finance Limited are negatively impacting on the perfect credit rating of the complainant and also causing mental torture and harassment to the complainant.
7. That the respondent no.1 has defaulted, mis-represented and cheated the complainant by not complying with regard to clause 1.2A of agreement regarding payment of Pre-EMI to the bank, i.e., TATA Capital Housing Finance Limited (respondent no.2) directly till offer of possession and by usurping his hard-earned money.
8. That respondent no.1 further defaulted on clause 11.3 regarding the failure of delivering the possession within 3 years of the execution of apartment buyer agreement. That as per the terms of the said agreement was required to hand over the possession of the flat as per clause of the agreement.
9. That all the respondent(s) have failed to keep their commitment and lost the customer's faith as it has delayed the possession of the said flat innumerable times and now the complainant needs his money back after terminating this agreement as he is no more intended for any flat in the project of respondent no.1. The complainant has paid Rs. 5,03,063/- as the initial amount to the respondent no.1 on the assurance of representatives and agents of respondents at the time of the booking of flat and the complainant was also assured that he is not required to pay any amount or any interest till the possession of the flat is handed over, but respondent no.1 has



failed in his commitments. As the TATA Capital Housing Finance Limited is continuously asking for Pre-EMI interest from the complainant for which the complainant is not at all liable as per the agreement.

10. That the complainant is no more interested to continue with this agreement and henceforth cancel the allotment and want the refund of his hard-earned money of Rs. 5,03,063 with the interest @18%per annum and Rs. 5,00,000/- as damages for non-compliance of the agreement and for causing mental harassment by all the respondent(s) because of their misrepresentations and negligent behaviour towards the commitments made by all the respondent(s) and for breaching the terms written in the agreement by respondent no.1.

C. Relief sought by the complainant:

11. The complainant has sought the following relief:
 - Direct the respondent no.1 to refund an amount of Rs. 5,03,063/- paid by the complainant and Rs. 72,60,000/- paid by the financial institution on behalf of complainant to the them along with interest.
12. On the date of hearing, the authority explained to the respondent no. 1/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 no. 1.

13. That the present complaint has been filed by the complainant against the respondent no. 1 in respect of the tower "E" being developed by the promoter in its group housing project titled as "Esfera Phase II", situated at sector-37C Gurgaon, Haryana.
14. That the flat no. E_1701, in tower- A situated in the said project, was allotted to the complainant by the promoter vide allotment letter dated 01.08.2016 on the terms and condition mutually agreed by the parties.
15. That the promoter had intended to complete the construction of the said flat on time. It is pertinent to mention that it had successfully completed the construction of the said tower and procured the occupancy certificates for three towers out of 9 towers in the said project. However, the construction of all the towers is completed and in habitable stage, in fact the developer had already applied for the grant of occupation certificate for the rest of the towers of project including tower E where the allotted unit situates.
16. That promoter already intimated the complainant about the factum of its OC Application before DGTCP, Haryana though due to certain force majeure circumstance, majorly the outbreak of second COVID wave in April 2021 and subsequent lockdown in Haryana State, the DGTCP, Haryana could not issue the OC well in time enabling the promoter to offer the physical possession of the allotted unit to the complainant. That it is reiterated that allotted unit is ready for fit out possession, and communication with regard to this aspect



have already been sent to all eligible allottees including the complainant herein. That it is important to mention here that the project "ESFERA" comprises of 2 phases whereas OC of the phase I of the project is duly issued by "Town and Country Planning Development Haryana" on 07.02.2018 and more than 150 happy allottee(s) are residing in that phase. That the physical possession of the unit will be tentatively delivered to its respective allottee(s) soon with respective OC on the said project.

17. That, the promoter is in extreme liquidity crunch at this critical juncture, the company has also been saddled with orders of refund in relation to around 20-25 apartments in the project, on account of orders passed by various other courts. The total amount payable in terms of these decrees exceeds an amount of Rs.20 Crores.
18. That, on account of many allottees exiting the project and many other allottees not paying their installment amounts, the company, with great difficulty, in these turbulent times has managed to secure a last mile funding of Rs.99 crores from SWAMIH Investment Fund - I. The said alternate investment fund (AIF) was established under the special window declared on 6.11.2019 by the Hon'ble Finance Minister to provide priority debt financing for the completion of stalled, brownfield, RERA registered residential developments that are in the affordable housing /mid-income category, are net-worth positive and require last mile funding to complete



construction. The company was granted a sanction on 23.09.2020 after examination of the status of the company and its subject project "Esfera" for the amount of Rs.99 crores. The first transaction of installment has already been received by the promoter from the said fund as loan.

19. That several allottees have withhold the remaining payments, which is severally affecting the financial health of the respondent no. 1. Further due to the force majeure conditions and circumstances/reasons, which were beyond the control of the promoter as mentioned herein below, the construction works got delayed at the said project.
 - i. That the promoter started construction over the said project land after obtaining all necessary approvals and sanctions from different state/ central agencies/ authorities and after getting building plan approved from the authority and named the project as "Esfera II". The promoter had received applications for booking of apartments in the said project by various customers and on their requests, it allotted the under-construction apartments/ units to them.
 - ii. That, owing to unprecedented air pollution levels in Delhi NCR, the Hon'ble Supreme Court ordered a ban on construction activities in the region from November 4, 2019, onwards, which was a blow to realty developers in the city. The SC lifted the ban conditionally on December 9, 2019 allowing construction activities to be carried out

between 6 am and 6 pm, and the complete ban was lifted by the Hon'ble Supreme Court on 14th February, 2020.

- iii. That, when the complete ban was lifted on 14th February 2020 by the Hon'ble Supreme Court, the Government of India imposed National Lockdown on 24th of March 2020 due to pandemic COVID-19, and conditionally unlocked it in 3rd May, 2020, However, that has left a big impact on the procurement of material and labour. The 40-day lockdown in effect since March 24, which was further extended up to May 3 and subsequently to May 17, leading to a reverse migration with workers leaving cities to return to their villages. It is estimated that around 6 lakh workers walked to their villages, and around 10 lakh workers were stuck in relief camps. The aftermath of lockdown or post lockdown periods the same have left great impact and scars on the sector for resuming the fast-paced construction for achieving the timely delivery as agreed under the allotment letter.
- iv. That initially, after obtaining the requisite sanctions and approvals from the concerned authorities, the promoter had commenced construction work and arranged for the necessary infrastructure including labour, plants and machinery, etc. However, since the construction work was halted and could not be carried on in the planned manner due to the force majeure circumstances detailed above, the said infrastructure could not be utilized and



the labour was also left to sit idle resulting in mounting expenses, without there being any progress in the construction work. Further, most of the construction material which was purchased in advance got wasted/deteriorated causing huge monetary losses. Even the plants and machineries, which were arranged for the timely completion of the construction work, got degenerated, resulting into losses to the respondent no. 1 company running into crores of rupees.

- v. That every year the construction work was stopped / banned / stayed due to serious air pollution during winter session by the Hon'ble National Green Tribunal (NGT), and after banned / stayed the material, manpower and flow of the work has been disturbed / distressed. Every year the promoter had to manage and rearrange for the same and it almost multiplied the time of banned / stayed period to achieve the previous workflow.
- vi. The real estate sector so far has remained the worst hit by the demonetization as most of the transactions that take place happen via cash. The sudden ban on Rs 500 and Rs 1000 currency notes has resulted in a situation of limited or no cash in the market to be parked in real estate assets. This has subsequently translated into an abrupt fall in housing demand across all budget categories. Owing to its uniqueness as an economic event, demonetisation brought a lot of confusion, uncertainty – and, most of all,



especially when it came to the realty sector. No doubt, everyone was affected by this radical measure, and initially all possible economic activities slowed down to a large extent, which also affected the promoter to a great extent, be it daily wage disbursement to procuring funds for daily construction.

vii. That there is extreme shortage of water in State of Haryana and the construction was directly affected by the shortage of water. Further the Hon'ble Punjab and Haryana High Court vide an Order dated 16.07.2012 in CWP No. 20032 of 2009 directed to use only treated water from available sewerage treatment plants. As the availability of STP, basic infrastructure and availability of water from STP was very limited in comparison to the requirement of water in the ongoing constructions activities in Gurgaon District, it was becoming difficult to timely schedule the construction activities.

E. Reply by the respondent no. 2.

20. That the respondent no. 2 Tata Capital Housing Finance Limited is accompany incorporated under the Companies Act, 1956 and registered with the national housing bank as a housing finance company.
21. That the complainant had approached the answering respondent no. 2 for availing housing loan facility for purchasing the flat, which complainant, after verifying the



project, had selected its own and accordingly submitted the documents for sanctioning the loan. It is to be stated that answering respondent on considering the financial eligibility had sanctioned an amount of Rs. 72,60,000/- and as per request obtained by the complainant by way of disbursement request form, answering respondent no. 2 had disbursed a housing loan of Rs. 67,74,313/- out of the total sanctioned loan amount of Rs. 72,60,000/- which is to be paid in 180 months.

22. That the complainant had obtained the subvention scheme for a fixed "subvention period" of 24 months, whereby developer agreed and undertake to service the Pre-EMI interest, on the entire amount of loan disbursed by TCHFL, as payable by the borrower to TCHFL for a fixed period of 24 months and after expiry of said period, the borrower/ complainant shall be solely liable to pay the Pre-EMI as per the terms and conditions contained in the loan agreement. Since the complainant has miserably defaulted in repayment of the balance Pre-EMI for a long period of time in spite of repeated reminders, the answering respondent no. 2 had no other option but to initiate proceedings to recover its debts under the provision of the SARFAESI Act, 2002 after legally declaring the loan account of the complainant as Non-Performing Assets.
23. 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.

F. Jurisdiction of authority

24. 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

25. 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.

F. II Subject matter jurisdiction

26. 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)(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.

27. 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.

G. Findings on the objections raised by the respondent no. 1:

G.1 Objection regarding force majeure conditions:

28. The respondent-promoter raised the contention that the construction of the project was delayed due to force majeure conditions such as national lockdown, shortage of labour due to covid 19 pandemic, stoppage of construction due to various orders and directions passed by hon'ble NGT, New Delhi, Environment Pollution (Control and Prevention) Authority, National Capital Region, Delhi, Haryana State Pollution Control Board, Panchkula and various other authorities from time to time but all the pleas advanced in this regard are devoid of merit. As per the possession clause 10.1 of the builder buyer agreement, the possession of the said unit was to be delivered within three and half years from the date execution of agreement. The builder buyer agreement between the parties has been executed on 12.03.2015. So, the due date comes out to be 12.09.2018. The authority is of the view that the events taking place after the due date do not have any impact on the project being developed by the respondent/promoter. Thus, the promoter/ respondent cannot be given any leniency based



on aforesaid reasons. It is well settled principle that a person cannot take benefit of his own wrongs.

H. Findings on the relief sought by the complainant.

- Direct the respondent no. 1 to refund an amount of Rs. 5,03,063/- paid by the complainant and Rs. 72,60,000/- paid by the financial institution on behalf of complainant to them along with interest.

29. The subject unit was allotted to the complainant by the respondent/builder for a total sum of Rs. 1,02,26,250/-. A builder buyer agreement was executed between the parties on 12.03.2015. The complainant on the basis of agreement started making various payments against the allotted unit. He was also sanctioned a loan amount of Rs.72,60,000/- under home loan subvention scheme by Tata Capital Housing Finance Limited. Thus, in total complainant has paid an amount of Rs. 77,63,063/- to the respondent against the allotted unit. The complainant submitted that the Tata Capital Housing Finance Limited is demanding pre-EMI interest from them for which they are not liable as per agreement. It further noted that the tripartite agreement executed between the parties on 30.09.2015 wherein clause 12 is a relevant clause and reproduced as under:

12. Under the said Subvention Scheme as per the MOU executed between the Developer and TCHFL dated December 2014 as requested by both the developer and Borrower, the Developer agrees & undertakes to service the Pre-EMI interest, on the entire amount of loan disbursed by TCHFL, as payable by the borrower to



TCHFL for a fixed period of 24 months starting (End date) December 2016 from the first month of disbursement (Subvention Period). After the expiry of said period, the Borrower shall be solely liable to service/pay the Pre EMI/EMI as per the terms and conditions contained in the Loan Agreement.

30. The authority is of the view that the respondent builder as per clause 12 of the tripartite agreement is liable to pay the pre-EMI for a fixed period of 24 months i.e., from December 2014 to December 2016. Further the due date for completion of the project as per the buyer's agreement comes out to be 12.09.2018 which has already expired, and the project is still not ready. Thus, the respondent builder neither paid the Pre Emi nor completed the project as per the agreement. So, keeping in view the fact that the allottee complainant wishes to withdraw from the project and demanding return of the amount received by the promoter in respect of the unit 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.
31. The due date of possession as per agreement for sale as mentioned in the table above is 12.09.2018 and there is delay of 2 years 6 months 3 days on the date of filing of the complaint.
32. The occupation certificate/completion certificate of the project where the unit is situated has still not been obtained



by the respondent-promoter. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the allotted unit and for which he has paid a considerable amount towards the sale consideration and as observed by Hon'ble Supreme Court of India in **Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors., civil appeal no. 5785 of 2019**, decided on 11.01.2021

"... The occupation certificate is not available even as on date, which clearly amounts to deficiency of service. The allottees cannot be made to wait indefinitely for possession of the apartments allotted to them, nor can they be bound to take the apartments in Phase 1 of the project....."

33. Further in the judgement of the Hon'ble Supreme Court of India in the cases of **Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors.** (supra) reiterated in case of **M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020** decided on 12.05.2022. it was observed

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

34. 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). The promoter has failed 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. Accordingly, the promoter is liable to the allottee, as 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 the unit with interest at such rate as may be prescribed.
35. This is without prejudice to any other remedy available to the allottee including compensation for which allottee may file an application for adjudging compensation with the adjudicating officer under sections 71 & 72 read with section 31(1) of the Act of 2016.
36. The authority hereby directs the promoter to return the amount received by him i.e., Rs. 77,63,063/- with interest at the rate of 9.70% (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 actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

37. While refunding the amount paid by the complainant to the respondent builder the amount received from the financial institution i.e., Tata Capital Housing Finance Limited besides interest if any, would be a charge and the same would be paid to that institution before paying any amount to the complainant against the total amount.

H. Directions of the authority

38. 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 amount i.e., Rs 77,63,063/-received by him from the complainant along with interest at the rate of 9.70% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the deposited amount.
 - ii. The respondent is further directed that the outstanding loan amount paid by the financial institution be refunded to the concerned financial institution.

- iii. The balance amount with the respondent builder after paying to the financial institution be refunded to the complainant along with interest at the prescribed rate.
- iv. 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.

39. Complaint stands disposed of.

40. File be consigned to registry.

V-1-3
(Vijay Kumar Goyal)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 13.07.2022