

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

Complaint no. : 3006 of 2020
First date of hearing: 21.01.2021
Date of decision : 11.05.2022

Shashank Kumar

Address: D-802, Gala Aura, Near Sobo Centre,
South Bopal, Ahemdabad, Gujarat, 380058

Complainant

Versus

M/s Imperia Structures Ltd.

Regd. Office at: - A-25, Mohan Cooperative
Industrial Estate, Mathura Road, New Delhi,
110044

Respondent

CORAM:

Shri KK Khandelwal
Shri Vijay Kumar Goyal

**Chairman
Member**

APPEARANCE:

Shri Sukhbir Yadav
Ms. Tanya Swarup

Advocate for the complainant
Advocate for the respondent

ORDER

1. The present complaint dated 06.10.2020 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 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.	Name and location of the project	"The Esfera" Phase II 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.	1703, 17th Floor, Block B (page no. 31 of complaint)
8.	Unit measuring	2400 sq. ft. (page no. 31 of complaint)
9.	Date of builder buyer agreement	28.08.2015 [page no. 29 of complaint]
10.	Possession clause	10.1. SCHEDULE FOR POSSESSION



		<p>"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."</p>
11.	Due date of possession	28.02.2019 [calculated as per possession clause]
12.	Total consideration	Rs. 1,38,10,800/- [as per the agreement on page no. 36 of complaint]
13.	Total amount paid by the complainant	Rs. 99,80,472/- [as alleged by complainant]
14.	Occupation certificate	Not received
15.	Offer of possession	Not offered

B. Facts of the complaint

3. That the respondent through various representations lured the complainant to book a unit in the project detailed above and they booked a 4 BHK, apartment/unit/flat with servant room and 1 parking being unit no- 1703, 17th floor, block- B, admeasuring 2400 sq. ft. in the residential project "Esfera", situated at, sector-37 C, Gurugram. The flat was purchased under the interest subvention payment plan for total sale consideration of Rs. 1,38,10,800/- including B.S.P., PLC, IFMS, club membership charges.
4. That at the time of accepting application money, the respondent has assured about having all requisite approval and sanctioned plans to develop the project and showed licence and sanctioned plans to the complainant. Moreover, the respondent represented that project is at advanced stage as structure is completed at 18th Floor, hence apartment / flat would be handover over by August - September 2016.
5. That on 28.08.2015, a pre-printed, arbitrary, unilateral and ex-facie buyer agreement was executed between the parties. As per clause no. 10.1 of builder buyer agreement, respondent has to give the possession of flat "within a period of three and half years from the date of execution of this agreement", therefore the due date of possession was 28.02.2019.
6. That the respondent raised the demand Rs. 1,13,57,483/- for the payment of the balance amount as per payment plan, so the complainant availed home loan of Rs. 90,00,000/- from Tata

Capital Housing Finance Ltd. against the allotted flat with permission of the respondent to Mortgage on 28.08.2015 in favour of Tata Capital Housing Finance Ltd.

7. That on 13.08.2019, the complainant severed a legal notice to the respondent through counsel, Manu Beri, Advocate and asked for refund of money along with interest.
8. That contrary to the assurance given at the time of booking that no EMI/ monthly instalments would be payable for a period of three years from the date of booking of the said apartment, the EMI/ monthly instalments became due and payable by the complainant from February 2016. Since then, the complainant is burdened with the payment of EMI every month without getting the possession of the said apartment.
9. That the complainant has already paid more than 72 % payment of the total consideration i.e., Rs.99,80,472/- (out of the total cost of the apartment i.e., Rs. 1,38,10,800/- (inclusive of all allied charges. But when he observed not desirable progress on project site, he started raising his concerns.
10. That there is already a delay of possession of more than 1 year and the project is still not completed. It clearly shows the negligence of the builder. As per project site conditions it seems that project would further take more than 12 months to complete in all respect, subject to willingness of respondent to complete the project.
11. That the respondent is not raising the construction and therefore, it might be possible that the builder had siphon off

the funds. Moreover, the respondent did not give the possession of the flat on time which has caused huge financial losses and mental agony to the complainant. Hence, the complainant has lost his faith in the builder and therefore, would like to withdraw from the project.

C. Relief sought by the complainant:

12. The complainant has sought the following relief:

- Direct the respondent to refund an amount of Rs. 99,80,472/- paid to the respondent along with interest.

13. 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.

14. That the flat no. B-1703, in tower-B situated in the said project, had been allotted to the complainant by the respondent company vide allotment letter dated 28.08.2015 on the terms and condition mutually agreed between them.

15. That the respondent had intended to complete the construction of the said flat on 27.02.2019 and 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 complete and in habitable stage, but due to certain force

majeure circumstance, interalia includes Covid 19, the respondent could not apply for obtaining the occupation certificate but is going to apply for in next month. It is important to mention here that the project "Esfera" comprises of 2 phases whereas OC of the phase I of the project was duly issued by "Town and Country Planning Development Haryana" on 07.02.2018 and more than 100 happy allottee(s) are residing in that phase. The physical possession of the unit would be tentatively delivered to its respective allottee(s) in May 2021 with respective OC on the said project.

16. That, the respondent is in extreme liquidity crunch at this critical juncture, and has also been saddled with orders of refund in relation to around 15 apartments in the project, on account of orders passed by various other courts. The total amount payable in terms of those decrees exceeds an amount of Rs.10 Crores. The said project involves hundreds of allottees and who are eagerly awaiting possession of their apartments, and would be prejudiced beyond repair in case any mandatory order is passed when the project is almost completed.
17. That, on account of many allottees exiting the project and many other allottees not paying the 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 its status and its subject project "Esfera" for the amount of Rs.99 crores. However, the funding is still to be received and the company is hoping for the same to be released shortly.

18. That several allottees have withhold the remaining payments, which is severally affecting the financial health of the respondent. Further due to the force majeure conditions and circumstances/reasons, which were beyond the control of the respondent company as mentioned herein below, the construction works got delayed at the said project.
 - i. That the respondent company 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 respondent company 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 14h 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, led 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 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 respondent company 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 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 respondent company 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 respondent company to a great extent, be it daily wage disbursement to procuring funds for daily construction.

19. 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 authority

20. 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

21. 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

22. 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.

23. 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.

F. Findings on the objections raised by the respondent:

F.I Objection regarding force majeure conditions:

32. 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 28.08.2015. So, the due date comes out to be 28.02.2019. 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.

G. Findings on the relief sought by the complainant.

- G.I** Direct the respondent to refund an amount of Rs. 99,80,472/- paid to the respondent along with interest.
24. The subject unit was allotted to the complainant by the respondent/builder for a total sum of Rs. 1,38,10,800/-. A builder buyer agreement was executed between the parties on 28.08.2015. The complainant on the basis of agreement

started making various payments against the allotted unit. He was also sanctioned a loan of Rs. 99,00,000/- under home loan subvention by Tata Capital Housing Finance Limited and a sum of Rs. 90,00,000/- paid to the respondent against the mortgage of the unit. Thus, in total complainant has paid an amount of Rs. 99,80,472/- to the respondent against the allotted unit. The due date for completion of the project as per the buyers agreement comes out to be 28.02.2019 which has already expired and the project is still not ready. So, keeping in view the fact that the allottee complainant wishes to withdraw from the project and is 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.

25. The due date of possession as per agreement for sale as mentioned in the table above is **28.02.2019** and there is delay of 1 year 7 months 8 days on the date of filing of the complaint.
26. 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....."

27. 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.2021-2022 (1) RCR (civil), 357*** and followed by the Hon'ble High Court of Punjab & Haryana in case ***Ramprashtha Promoters and Developers Pvt Ltd Vs Union of India and Ors. in CWP No.6688 of 2021*** decided on 04.03.2022, it was observed as under:

25. The unqualified right of the allottee to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be

entitled for interest for the period of delay till handing over possession at the rate prescribed

28. 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 he wishes to withdraw from the project, to return the amount received by them in respect of the unit with interest at such rate as may be prescribed.
29. This is without prejudice to any other remedy available to the allottee including compensation for which he 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.
30. The authority hereby directs the promoter to return the complainant the amount received by him i.e., Rs. 99,80,472/- with interest at the rate of 9.40% (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*.

31. It has come on record that the complainant availed a loan of Rs. 90,00,000/- against the allotted unit by way of its mortgage from the Tata Capital Housing Finance Limited. It is evident from the letter dated 29.08.2015 issued by the financial institution that a sum of Rs. 92,56,414/- was disbursed to the complainant. So, while refunding the amount paid by the complainant to the respondent 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

32. 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 99,80,472/-received by him from the complainant along with interest at the rate of 9.40% 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 bank 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.

33. Complaint stands disposed of.

34. File be consigned to registry.

v.l - 
(Vijay Kumar Goyal)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 11.05.2022

HARERA
GURUGRAM