

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

Complaint no. : 4832 of 2020
First date of hearing: 26.02.2021
Date of decision : 11.05.2022

Jaspreet Singh
Address: Plot no. 285, Sector-14,
Gurugram

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 Vinay Kumar Saini
Ms. Tanya Swarup

Advocate for the complainant
Advocate for the respondent

ORDER

1. The present complaint dated 18.01.2021 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 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.	903, 9th Floor, Tower A (page no. 25 of complaint)
8.	Unit measuring	2400 sq. ft. (page no. 25 of complaint)
9.	Date of builder buyer agreement	12.10.2012 [page no. 14 of complaint]
10.	Date of tripartite agreement	07.06.2014 [annexure R-3 on page no. 44 of reply]



11.	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."
12.	Due date of possession	12.04.2016 [calculated as per possession clause]
13.	Total consideration	Rs. 96,50,000/- [as per agreement on page no. 24 of complaint] Rs. 1,00,96,410/- [as per the statement of account on page no. 67 of complaint]

14.	Total amount paid by the complainant	Rs. 87,63,800/- [as per statement of account on page no. 67 of complaint] Rs. 95,86,140/- [as alleged by complainant]
15.	Occupation certificate	Not received
16.	Offer of possession	Not offered

B. Facts of the complaint

3. That the complainant is the original allottee of the flat bearing no. 903 on 9th floor having super area admeasuring 223.04 sq. metres along with one covered parking space no. 01 located at sector-37, Gurugram.
4. That the respondent is a registered company under the provision of Company Act and engaged in development and construction of residential and commercial buildings in Gurugram.
5. That the respondent had approached the complainant and offered for sale a residential flat in the project "ESFERA" situated in sector-37, Gurugram, Haryana, falling in Village Garoli Khurd and commenced operations vide licence no. 64 of 2011 issued by DTCP Haryana vide memo number LC 1301-JE(B) -2011/2664 valid till 15.7.2017.
6. That on the representation made by the respondent as above, the complainant booked aforesaid said flat vide application dated 29.09.2011 for the sale consideration sum of Rs. 96,50,000/- and paid the booking amount of Rs. 6,00,000/-.

7. That the complainant further paid sum of Rs. 27,85,000/- at the time of signing of apartment buyer agreement dated 12.10.2012 which was signed by the complainant only and the respondent never delivered the duly executed signed copy of the same and only gave assurances to deliver the same.
8. That as per terms and clause No. 10.1 of the apartment buyer agreement, the physical possession of the apartment complete in all respect was to be handed over within 42 months from the signing of the agreement i.e., 12.04.2016 (including grace period of 6 months).
9. That the complainant paid Rs.50,69,257/- from his own pocket and raised a loan in 2014 from "Indiabulls" of Rs. 39,16,883/- to finance the said flat, subsequent to signing of the apartment buyer agreement and is paying EMI sum of Rs. 52,162/- as on 02.10.2020.
10. That the complainant had already paid more than 90% of the cost of the flat to the respondent and is bearing the additional burden of interest cost and rental cost sum of Rs.33,000/-per month besides EMI to the Indiabulls sum of Rs.52,162/- as per the construction-link-payment plan. The respondent without completing the construction continued to raise the demand on the false pretext of having achieved the milestone as per the apartment buyer agreement by sending demand letters contending that the delayed payment would attract heavy penal interest thereby forcing the complainant to make timely payment.

11. That the complainant to avoid unwanted interest paid sum of Rs. 95,86,140/- out of which the respondent had issued only receipt for the sum of Rs. 89,86,140/- and for the balance amount of INR 6,00,000/- paid in cash the respondent had neglected to issue the receipt of the same despite regular follow-up.
12. That the respondent had despite receiving huge amount of money to the tune of INR 95,86,140/- had neglected to complete the construction and handover the possession of the flat/apartment till date. Even the date for completion of construction and possession also stood expired on 12/04/2016 and the Licence no.64 of 2100 on 15/3/2017 has also expired however, the construction remains incomplete till date.
13. That the complainant is residing in an apartment at Dwarka, awaiting the possession of the said flat and is paying monthly rent of INR 33000/-.
14. That despite regular follow ups by the complainant, all the efforts to seek possession and or refund the sale consideration had proved futile as the respondent had refused to complete or refund on one pretext or the other pretext and is avoiding refund since the complainant had expressly stated that he is no more interested in purchasing the said flat/apartment. Therefore, the complainant is left with no other efficacious remedy available except to file the present complaint before this authority to seek refund of sale consideration as above

with penalty and interest charges for wilful breach of apartment buyer agreement.

C. Relief sought by the complainant:

15. The complainant has sought the following relief:

- Direct the respondent to refund an amount of Rs. 95,86,140/- paid by the complainant to the respondent.

16. 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.

17. That present case is a loan case where the complainant has subrogated all his rights and interest in the allotted unit in favour of Indiabulls Housing Finance Ltd. which has provided loan facility to him to purchase the unit. Now, it is Indiabulls Housing Finance Ltd. which has got the first/exclusive right on any receivables from the respondent company in any event including the case where the allotment of allotted unit gets cancelled under any circumstances.

18. That the said Indiabulls Housing Finance Ltd. is a necessary and proper party to this case for fair adjudication, as the same has got the equitable mortgage rights over the allotted unit. So,

without hearing the Bank the whole proceeding would be vitiated.

19. That the flat no. A 903, in tower-A situated in the said project, had been allotted to the complainant by the respondent company vide allotment letter dated 26.10.2013 on the terms and condition mutually agreed between them.
20. That the complainant hasn't approached the Authority with clean hands and bonafide intentions and that depicts in his action as he hasn't paid the installments on time and still a large portion of amount is due despite the fact that so many reminders have been sent to him asking for the clearance of the payments due but in vain.
21. That the respondent company 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 complete and is in habitable stage. In fact, the respondent company had already applied for grant of occupation certificate for rest of the towers of project including the tower - "A", where the allotted unit situated. Further, it is pertinent to mention here that respondent company has already intimated the complainant about the factum of its OC application before DGTCP, Haryana though due to certain force majeure circumstances, 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 respondent to offer the physical possession of the allotted

unit to the complainant. 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. It is also important to mention here that the project "Esfera" comprises of 2 phases whereas OC of the phase I of the project has been 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. The physical possession of the unit would be tentatively delivered to its respective allottee(s) soon with receipt of OC on the said project.

22. 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 20-25 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.20 Crores. The said project involves hundreds of allottees, who are eagerly awaiting possession of their apartments, and would be prejudiced beyond repair in case any monetary order is passed when the project is almost completed now.
23. 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. The first transaction of installment has already been received by the respondent company from the said fund as loan.

24. 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, the respondent company 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.

25. 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

26. 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

27. 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

28. 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.

29. 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 12.10.2012. So, the due date comes out to be 12.04.2016. 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. 95,86,140/- paid by the complainant to the respondent.

30. Admittedly on the basis of application dated 29.09.2011 the complainant booked a unit for Rs. 96,50,000/- in the project of respondent known as Esfera situated at sector 37, Gurugram. The builder buyer agreement was executed between the

parties on 12.10.2012 setting out the terms and conditions of allotment, payment, dimensions of the unit and due date. Though the complainant had paid a sum of Rs. 50,69,257/- by arranging funds but raised a loan of Rs. 39,16,883/- from Indiabulls in the year 2014 and is paying Rs. 52,162/- per month as loan instalment. There is a tripartite agreement in this regard executed on 07.06.2014 between the parties and India bulls Housing Finance Limited. The due date for completion of the project as per the buyer's agreement comes out to be 12.04.2016 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.

31. The due date of possession as per agreement for sale as mentioned in the table above is 12.04.2016 and there is delay of 4 years 9 months 6 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 case 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

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 he wishes to withdraw from the project, 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 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.
36. The authority hereby directs the promoter to return the complainant the amount received by him i.e., Rs. 87,63,800/- 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*.

37. It has come on record that the complainant availed a loan of Rs. 39,16,883/- against the allotted unit from the Indiabulls Housing Finance Limited. A tripartite agreement in this regard was executed on 07.06.2014. So, while refunding the amount paid by the complainant to the respondent the amount received from the financial institution i.e., Indiabulls 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 87,63,800/-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.

39. Complaint stands disposed of.

40. File be consigned to registry.


(Vijay Kumar Goyal)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 11.05.2022

HARERA
GURUGRAM