

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

**Complaint no. : 3175 of 2019**  
**First date of hearing: 11.12.2019**  
**Date of decision : 31.08.2022**

Sudha Sharma

**R/O:** M-51, New Palam Vihar, Phase I, Gurugram,  
Haryana-122002

**Complainant**

Versus

M/s. Imperia Structures Limited

**Registered Office:** - A-25, Mohan Cooperative  
Industrial Estate, New Delhi-110044

**Respondent**

**CORAM:**

Dr. K.K Khandelwal  
Shri Vijay Kumar Goyal

**Chairman  
Member**

**APPEARANCE:**

Complainant in Person  
Sh. Himanshu Singh (Advocate)

**Complainant  
Respondent**

**ORDER**

1. The present complaint dated 06.05.2019 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	"The Esfera", Sector 37C, Gurgaon
2.	Project area	17 acres
3.	Nature of the project	Group Housing Colony
4.	DTCP license no. and validity status	64 of 2011 dated 16.07.2011 valid up to 15.07.2024
5.	Name of licensee	Phoenix Datatech Services Pvt Ltd And 2 others
6.	RERA Registered/ not registered	Not registered
7.	Allotment Letter	26.06.2013 (Page 15 of the complaint)
8.	Unit no.	A704, 7 <sup>th</sup> floor, Tower A (Page 15 of the Complaint)
9.	Unit area admeasuring	1850 sq. ft. (super area) (Page 23 of the Complaint)
10.	Date of execution of Apartment Buyer's Agreement	03.07.2013 (Page 21 of complaint)

11.	Possession clause	<p><b>10.1 Schedule for Possession of the said Apartment</b></p> <p><i>"The Developer/Company based on its present plans and estimates and subject to all just exceptions, contemplates to complete construction of the said Building/said Apartment within a period of <b>three and half years from the date of execution of this Agreement</b> unless there shall be delay or there shall be failure due to reasons mentioned in Clauses 11.1, 11.2, 11.3 and Clause 41 or due to failure of Intending Allottee(s) to pay in time the price of the said Apartment along with other charges and dues in accordance with the schedule of payments given in Annexure For as per them demands raised by the Developer/Company from time to time or any failure on the part of the Intending Allottee(s) to abide by all or any of the terms or conditions of this Agreement".</i></p>
12.	Due date of possession	03.01.2017 (Calculated as 3 years and 6 months from the date of execution of Apartment Buyer's Agreement)
13.	Total sale consideration	Rs. 78,33,250/- (Page 27 of the complaint)
14.	Amount paid by the complainants	Rs. 24,38,639/- (As alleged by complainant on page 5 of complaint)
15.	Demand/Reminder Letters	10.12.2013,                      04.02.2014, 24.02.2014,                      07.03.2014, 25.03.3014,                      24.05.2014, 12.06.2014,                      03.07.2014, 13.08.2014,                      04.09.2014, 04.11.2014,                      22.12.2014,

		15.01.2015, 02.02.2015, 20.02.2015, 10.06.2015
16.	Cancellation Letter	24.06.2015 (Page 72 of complaint)
17.	Occupation certificate /Completion certificate	Not obtained
18.	Offer of Possession	Not offered

### B. Facts of the complaint

The complainant has submitted that:

3. That the complainant is an innocent allottee of the project "The Esfera" situated at sector 37C, Gurugram, Haryana being developed by the respondent. That the respondent is a real estate development company duly registered under the Companies Act, 1956
4. The project in question i.e., "The Esfera" is residential group housing colony situated at Sector 37C, Gurugram, Haryana. The project in question is spread over an area of 17 acres approx.
5. In the year 2011, the representatives of the respondent company approached the complainant and presented a rosy picture of the project in question and assured timely delivery of the possession of the project in question i.e., within a period of three and half years from the date of execution of apartment buyer agreement.
6. Based on the assurances given by the said agents and representatives of the respondent company to be true and correct, the complainant approached the respondent company and submitted application form dated 29.10.2011 and an amount of Rs 5,00,000/ vide cheque no

295578 drawn on State Bank of India for the allotment for apartment no 704 admeasuring 1850 sq. ft. located on 7<sup>th</sup> floor in A block. The respondent company accepted the application form on 09.11.2011 and issued acceptance letter dated 09.11.2011 in lieu of same.

7. The respondent company issued allotment letter dated 26.06.2013 in the name of present complainant i.e., Mrs Sudha Sharma for the booked unit.
8. The complainant and respondent executed the standard form of apartment buyer agreement on 03.07.2013 prescribed by the respondent company. The complainant had no scope of bargain and negotiation.
9. As per the assurances made by the respondent company and clause 10.1 of the apartment buyer agreement dated 03.07.2013, the respondent company was liable to deliver possession of the booked unit within a period of three and half years from the date of execution of apartment buyer agreement. Accordingly, the date of completion is calculated as 03.01.2017 which has already expired.
10. That the complainant also availed home loan facility from India Bulls Housing Finance Limited to purchase the unit in question based on assurances made by the respondent. The complainant is bearing unjustified burden of home loan monthly EMI's.
11. That the complainant has invested her hard-earned money in the booking of the apartment in the project in question on the basis of false

promises made by the respondent at the time of booking in order to allure the complainants.

12. That the complainant has already paid Rs 24,38,639/- (as per demand letter dated 13.08.2014) out of the total sale consideration i.e Rs. 78,33,250/- (as per apartment buyer agreement dated 03.07.2013)12. The respondent cancelled the booking of the complainant arbitrarily and issued a cancellation letter dated 24.06.2015.
13. The respondent has failed to refund the amount deposited by the complainant in respect of booked unit even after cancellation of the booking. As per decision of Hon'ble National Commission for Disputes Redressal Commission in the case of *Dlf Ltd. v Bhagwanti Narula*', the respondent was liable to refund the total amount deposited by the complainant after deduction of 10% of basic sale price of the booked unit. However, the respondent has failed to refund the amount deposited by the complainant in respect of the booked unit inspite of several requests by the complainant for same. The promoter is mis-using the funds deposited by the home buyers which is in ultimate violation of the objective of the Real Estate (Regulation and Development) Act, 2016.
14. As the promoter/respondent has failed to deliver the possession of the booked on the assured date and arbitrarily cancelled the booked unit, the complainant is forced to move before this authority by way of present complaint.

**C. Relief sought by the complainant:**

15. The complainant has sought following relief(s):

- (i) Direct the respondent to return the total amount paid to them along with interest at the prescribed rate calculated from the date of booking the apartment till the date of realization.
- (ii) Direct the respondent to pay litigation cost of Rs. 1,00,000/- along with compensation for mental agony

**D. Written submissions on behalf of the respondent.**

The respondent has contested the complaint on the following grounds: -

16. That, it was submitted that the present complaint has been filed by the complainant against the respondent company in respect of the tower-"A" being developed by the respondent company in its group housing project titled as "ESFERA Phase II" situated at Sector-37C, GURGAON, HARYANA (hereinafter 'Said Project').
17. It was submitted that the flat no. A-704, (hereinafter 'Said Flat') in tower-A (hereinafter 'Said Tower') situated in the said project, had been allotted to the complainant by the respondent company vide allotment letter dated 16-03-2012 (hereinafter 'Allotment Letter') on the terms and conditions mutually agreed by the allottee/complainant and the respondent company.
18. It was submitted that in clause 10.1, it is mentioned and duly agreed by the Complainant as under:

"10.1 SCHEDULE FOR POSSESSION OF THE SAID APARTMENT: The Developer/Company based on its present plans and estimates and subject to all just exceptions contemplates to complete 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.....”

19. In view of the above said, the respondent company had intended to complete the construction of the said flat on time. It is pertinent to mention 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 are completed and in habitable stage, due to certain force majeure circumstance, inter alia includes the Covid-19, the respondent company could not apply for obtaining the occupancy certificate but the company is going to apply for in next month. 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 Department, Haryana on 07.02.2018 and more than 100 happy allottee(s) are residing in that phase. That the possession of the unit will be tentatively delivered to its respective allottee(s) in May 2021 with respective OC on the said project.
20. That the respondent company is in extreme liquidity crunch at this critical juncture, the company has also been saddled with orders of refund in relation 15 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.10 crores. The said project involving hundreds of allottees who are eagerly awaiting the possession



of their apartments, will be prejudiced beyond repair in case any monitory orders be passed when the project is almost completed.

21. 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 - 1. 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 area of 99 cares. However, the funding is still to be received, and the company is hoping for the same to be released shortly.
22. That, it is to mention herein that several allottees have withhold the remaining payments, which is further severally affecting the financial health of the respondent company and 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. Both the parties i.e. the complainant as well as the respondent company had contemplated at the very initial stage while signing the allotment letter/agreement that some delay might have occurred in future and that is why under the force majeure clause as mentioned in the allotment letter, it is duly agreed by the complainant that the respondent company shall not be liable to perform any or all of its obligations during the subsistence of any force majeure circumstances and the time period required for performance of its obligations shall inevitably stand extended. It is unequivocally agreed between the complainant and the respondent

company that the respondent company is entitled to extension of time for delivery of the said flat on account of force majeure circumstances beyond the control of the respondent company and inter alia, some of them are mentioned herein below:

- i) That, the respondent company started construction over the said project land after obtaining all necessary sanctions/approvals/clearances 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 Air Quality Index (AQI) at the time was running above 900, which is considered severely unsafe for the city dwellers. Following the Central Pollution Control Board (CPCB) declaring the AQI levels as not severe, 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 14 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 24 of March, 2020 due to pandemic COVID-19,

and conditionally unlocked it in 3 May, 2020. However, this has left the great 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 back to their villages. It is estimated that around 6 lakh workers walked to their villages, and around 10 lakh workers are stuck in relief camps. The aftermath of lockdown or post lockdown periods has left great impact and scars on the sector for resuming the fast pace 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 detailed above, the said infrastructure could not be utilized and the labour was also left to 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) Moreover, it is also pertinent to mention here 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 the stay, 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, and day-to-day activities, since construction involves a lot of cash payment/transactions at site for several activities.
- vii) It is a well-known fact 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 (hereinafter referred to as "STP"). 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. The availability of treated water to be used at construction site was thus very limited and against the total requirement of water, only 10-15% of required quantity was available at construction sites.

23. That, owing to the above said force majeure circumstances and reasons beyond the control of the respondent company, it was extremely necessary to extend the intended date of offer of possession mentioned in the allotment letter.
24. That for the purpose of ensuring the delivery of the possession, despite lockdown, the respondent company was seeking permission to resume construction of the said project. The respondent company got the permission certificate on 01.05.2020 by the municipal Corporation of Gurugram, Haryana subject to certain safety restriction and conditions. Therefore, it is humbly submitted that this Hon'ble Authority may be pleased to consider the bona fide of the respondent company and distinguish the respondent company from the bad repute being imparted to real-estate builders. It is pertinent to mention here that the respondent company is extremely committed to complete the Phase - 2

of the said project in fact super structure/ civil works in all the towers in Phase - 2 (incl. Tower - A) has already been completed despite all prevailing adversaries, only finishing work is remaining now.

25. 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**

26. The respondent has raised objection regarding jurisdiction of authority to entertain the present complaint and the said objection stands rejected. The authority has complete territorial and 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;*

*The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA dated..... Accordingly, the promoter is responsible for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.*

**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.
30. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in *Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2020-2021*

**(1) RCR (c) 357 and reiterated in case of M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022** wherein it has been laid down as under:

*"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. If the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."*

31. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the cases mentioned above, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

**G. Findings regarding relief sought by the complainant.**



**(i) Direct the respondent to return the total amount paid to them along with interest at prescribed rate calculated from the date of booking the apartment till the date of realization.**

32. The complainant has booked the residential apartment in the project named as "The Esfera Phase 2" situated at sector 37C for a total sale consideration of Rs. 78,33,250/-. The complainant was allotted the above-mentioned unit vide allotment letter dated 26.06.2013. Thereafter the apartment buyer agreement was executed between the parties on 03.07.2013.

33. As per the payment plan the respondent started raising payments from the complainant. The complainant in total has made a payment of Rs. 24,38,639/-. The respondent vide letter dated 10.12.2013 raised the demand towards payment on casting of 1<sup>st</sup> floor followed by other demand letters dated 04.02.2014 on casting of 3<sup>rd</sup> floor followed by reminder letter dated 24.02.2014. Another demand letter dated 07.03.2014 on casting of 5<sup>th</sup> floor, was sent to the complainant and due to non-payment by complainant reminder letter sent dated 25.03.2014 was sent. Thereafter another demand letter for payment of instalment was sent which was not paid by the complainant even after reminder letters dated 12.06.2014 and 03.07.2014. The respondent again sent a demand letter dated 24.05.2014, 13.08.2014 followed by reminder letters dated 04.09.2014, 04.11.2014 and 22.12.2014. Thereafter the respondent cancelled the allotment of the unit vide letter dated 24.06.2015. The authority is of the view that cancellation is as per the terms and conditions of agreement and the same is held to be valid. However, while cancelling the allotment of the respondent forfeited the

total paid up amount by way of earnest money, interest on delayed payment, brokerage and applicable taxes.

34. The cancellation of unit was made by the respondent after the Act, of 2016 came into force. So, the respondent was not justified in forfeiting the whole of the paid amount and at the most could have deducted 10% of the basic sale price of the unit and not more than that. Even the Hon'ble Apex court of land in case 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**, 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 damage. The deduction should be made as per the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, which states that-

**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."*

35. Keeping in view the aforesaid legal provisions, the respondent is directed to refund the deposited amount i.e., Rs. 24,38,639/- after deducting 10% of the basic sale price of the unit within a period of 90 days from the date of this order along with interest @ 10.00% p.a. on the refundable amount from the date of cancellation i.e., 24.06.2015 till the date of its payment.

**(ii) Direct the respondent to grant litigation cost of Rs. 1,00,000/-**

36. The complainant in the aforesaid relief is seeking 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.** (Decided on 11.11.2021), has held that an allottee is entitled to claim compensation under sections 12, 14, 18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. 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.

**H. Directions of the authority: -**

37. 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 to the complainant after deducting 10% of the sale consideration of the subject unit being earnest money as per regulation Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018 along with interest @ 10.00% p.a. on the refundable amount, from the date of cancellation i.e., 24.06.2015 till the date of realization of amount.
- 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.

38. Complaint stands disposed of.
39. File be consigned to the registry.

  
(Vijay Kumar Goyal)  
Member

  
(Dr. K.K. Khandelwal)  
Chairman

Haryana Real Estate Regulatory Authority, Gurugram  
**Dated: 31.08.2022**