

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

Complaint no. : 888 of 2022  
First date of hearing: 11.05.2022  
Date of decision : 13.12.2022

1. Namrata Kapoor  
2. Mukesh Kapoor  
R/o: Flat no. 1103, Emerald Green,  
Plot no. GH-20, Sector- 52, Gurugram.

**Complainants**

**Versus**

M/s Imperia Structures Pvt. Ltd.  
**Regd. Office at:** - A-25, Mohan Co-operative  
Industrial Estate, New Delhi-110044

**Respondent**

**CORAM:**

Shri Vijay Kumar Goyal  
Shri Sanjeev Kumar Arora

**Member  
Member**

**APPEARANCE:**

Ms. Deepika  
Shri Himanshu Singh

Advocate for the complainants  
Advocate for the respondent

**ORDER**

1. The present complaint dated 08.03.2022 has been filed by the complainant/allottees 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 complainants, 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.	402, 4 <sup>th</sup> Floor, Block A (page no. 26 of complaint)
8.	Unit measuring	1850 sq. ft. (page no. 26 of complaint)
9.	Date of builder buyer agreement	09.08.2013 (page no. 16 of complaint)
10.	Total consideration	Rs. 95,35,852/- [as per the statement of account on page no. 17 of reply]
11.	Total amount paid by the complainants	Rs. 78,43,095/-

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		[as per the statement of account on page no. 17 of reply]
12.	Possession clause	<p><b>10.1. SCHEDULE FOR POSSESSION</b></p> <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> <p><b>(emphasis supplied)</b></p>
13.	Due date of possession	09.02.2017 [calculated as per possession clause]
14.	Offer of possession	Not offered
15.	Occupation certificate	Not obtained

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**B. Facts of the complaint**

3. That the complainants applied for allotment of apartment in the project of the respondent namely "The Esfera" situated at sector 37-C, Gurugram.
4. That on 09.08.2013, a buyer's agreement was executed between the complainants and respondent for allotment of apartment no 402 admeasuring 1850 sq ft approx. in tower A for a total consideration of Rs. 86,65,750/-.
5. That as per the buyer agreement the opposite party was under an obligation to hand over physical possession of the apartment within 42 months from the date of execution of the builder buyer agreement. Hence the date of handing over of possession of apartment comes to 09.02.2017.
6. That till today the complainants have paid Rs. 75,46,773/- to them against the allotted apartment no 402 which is almost 90 % of the sale consideration.
7. That the complainants took loan of Rs. 60,00,000/- from State Bank of India and out of which 44,65,799/- has already been paid to the opposite party by the bank on behalf of the complainants as and when asked by the respondent.
8. That over the years complainants have paid interest over the loan amounting to Rs. 23,53,000/-.
9. That the complainants personally visited the site on 13th September 2021 and took pictures of different area of said project's site. The photographs clearly shows that the respondent has breached the fundamental term of the contract, by inordinately delaying the delivery of physical possession of the allotted apartment to the



complainants within the specified period as per the terms and conditions of agreement executed between parties.

10. That till date the opposite party is not in position to hand over the possession of allotted apartment to the complainants. The complainants can't wait anymore and want to cancel the allotment of apartment.
11. That on 01.10.2021 the complainants served opposite party with legal notice through its Advocate Ankita Yadav with request to cancel his allotment and to refund their amount of Rs. 75,46,773/- with interest @10.40% per annum. The said notice was duly served on the opposite party, but the opposite party failed to give any reply of notice nor returned abovementioned amount Rs. 75,46,773/- with interest @10.40% per annum, to complainants.
12. That as per the case of **Vipul Agarwal vs. M/s Imperia Structures Ltd** it was held by this authority that the complainant cannot be asked to wait indefinitely for delivery of possession of the allotted unit. Therefore, in such a situation where the opposite party was unable to complete the project and offer possession of the allotted unit to the complainant then as per Sec 18 of Rera Act,2016 the complainants are also entitled to get refund of the entire amount with interest.

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

13. The complainants have sought the following relief:
  - **Direct the respondent to cancel the allotment of apartment and direct to refund the amount of Rs. 75,46,773/- along with interest @ 10.40% per annum from the date of respective payments till the date of actual payment to the complainants.**





- **The cost of this complaint be awarded in favour of complainants and against the respondent.**

14. 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.**

15. That the complainants approached the respondent for booking of residential unit in the respondents' project and paid an amount of Rs. 78,43,095/- towards booking.
16. That in the consideration of the booking amount paid by the complainants and their commitments to comply with the terms of the booking/allotment and make timely payments, the respondent company provisionally allotted the unit bearing no. tower A 402, 4<sup>th</sup> floor, admeasuring with of 1850 Sq. ft. in favour of complainants for an agreed cost of Rs 95,35,852/- (including applicable tax) plus other charges.
17. That thereafter respondent company in furtherance of allotment had sent copies of buyer's agreement to the complainants for the execution at their end along with same was executed between the parties.
18. That the construction of the tower's way before the agreed timeline and applied to the competent authority for the application for grant of occupation certificate on 15.04.2021 after complying with all requisite formalities. That the project Esfera of two phases whereas

OC of the Phase 1 of the project is duly issued by DTCP, Haryana on 07.02.2018.

19. That the respondent is in extreme financial crunch at this critical juncture and has also been saddled with orders of refund from the authority and NCDRC in the project. The total amount payable in terms of these decrees exceeds an amount of Rs.40 Crores. The said project involves hundreds of allottees and who are eagerly awaiting possession of their apartments will be prejudiced beyond repair in case any monetary order be passed when the project is almost completed now.
20. 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.
21. That the respondent is extremely committed to complete the phase - 2 of project Esfera, in fact the super structure of all towers in phase - 2 has already been completed, the internal finishing work and MEP works is going in a full swing with almost 450 construction





labourers are working hard to achieve the intent of the appellant to complete the entire project despite all prevailing adversaries.

22. That the respondent fulfilled its promise and had constructed the said unit of the complainants and sent an offer of possession for fit out dated 29.07.2021 to the complainant's way before the agreed timeline.
23. That on account of wilful breach of terms of buyer's agreement by failing to clear the outstanding dues despite repeated requests.
24. That the complainants haven't approached the authority with clean hands and bonafide intentions and that depicts in their action as they haven't paid the instalments on time and still a large portion of amount is still due despite the fact that so many reminders have been sent to them asking for clearance of payment.
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 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

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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 complainants at a later stage.

### F. Findings on the relief sought by the complainants.

**Relief sought by the complainants:** The complainants had sought following relief(s):



- i. **Direct the respondent to cancel the allotment of apartment and direct to refund the amount of Rs. 75,46,773/- along with interest @ 10.40% per annum from the date of respective payments till the date of actual payment to the complainants.**
30. The complainants have booked the residential apartment in the project named as "The Esfera" situated at sector 37-C for a total sale consideration of Rs. 95,35,852/-. They were allotted the above-mentioned unit. The apartment buyer agreement was executed between the parties on 09.08.2013. As per possession clause 10.1 of the builder buyer agreement the possession of the unit was to be handed over within three and half years from the date of the agreement. The due date of handing over possession comes out to be 09.02.2017.
31. Keeping in view the fact that the allottee complainants 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.
32. The due date of possession as per agreement for sale as mentioned in the table above is 09.02.2017 and there is delay of 5 years 27 days on the date of filing of the complaint.
33. 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.....”*

34. 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 (c ), 357** 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 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.*



35. 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.
36. 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.
37. The authority hereby directs the promoter to return the amount received by him i.e., Rs. 78,43,095/- with interest at the rate of 10.35% (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*.
- ii. **The cost of this complaint be awarded in favour of complainants and against the respondent.**



38. The complainants in the aforesaid relief are 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 complainants are advised to approach the adjudicating officer for seeking the relief of compensation.

**G. Directions of the authority**

- i. 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 78,43,095/- received by him to the complainants with interest at the rate of 10.35% 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.
  - 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.



**HARERA**  
**GURUGRAM**

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iii. The respondent is further directed not to create any third-party rights against the subject unit before full realization of the paid-up amount along with interest thereon to the complainants, and even if, any transfer is initiated with respect to subject unit, the receivables shall be first utilized for clearing dues of allottee-complainants.

39. Complaint stands disposed of.

40. File be consigned to registry.

  
Sanjeev Kumar Arora  
Member

  
Vijay Kumar Goyal  
Member

Haryana Real Estate Regulatory Authority, Gurugram  
Dated: 13.12.2022

**HARERA**  
**GURUGRAM**