

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

Complaint no. : 2438 of 2021  
First date of hearing: 25.08.2021  
Date of decision : 13.12.2022

**Seema Bharti**

R/o: SG8-1804, Saya Gold Avenue,  
Plot no. 10/1, Block A, Vaibhav Khand,  
Indirapuram, Ghaziabad, Uttar Pradesh, 201014

**Complainant**

**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:**

Shri Nitin Jaspal  
Shri Himanshu Singh

Advocate for the complainant  
Advocate for the respondent

**ORDER**

1. The present complaint dated 06.07.2021 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.	902, 9th Floor, Block B (page no. 14 of complaint)
8.	Unit measuring	1850 sq. ft. (page no. 14 of complaint)
9.	Date of builder buyer agreement	22.03.2016 (page no. 12 of complaint)
10.	Total consideration	Rs. 1,15,58,177 [as per the statement of account on annexure R-4 on page no. 46 of reply]
11.	Total amount paid by the complainant	Rs. 33,77,131/-

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		[as per the statement of account on annexure R-4 on page no. 46 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	<p>22.09.2019</p> <p>[calculated as per possession clause]</p>
14.	Offer of possession	Not offered

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15.	Occupation certificate	Not received for phase II of the project wherein the unit of the allottee is situated.
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**B. Facts of the complaint**

3. That the complainant applied for allotment of apartment in the project of the respondent namely "The Esfera" situated at sector 37-C, Gurugram.
4. That builder buyer agreement was executed between the parties on 22.03.2016. As per the possession clause 10.1 the possession was promised to be handed over within three and a half years from the date of execution of agreement, however till the date the possession of the said flat has not been handed over to the complainant.
5. That she has till date made a payment of Rs. 33,77,131/- to the respondent as and when demanded by it.
6. That the complainant has waited for 6 long years to take the possession of the said flat, but the project is far away from completion. The complainant kept on writing emails to the respondent to cancel the booking and refund the booking amount to the complainant, but respondent never reverted her emails and kept on delaying the refund process just to grab the hard-earned money of the complainant.
7. That the complainant has tried every possible way to take refund of the entire booking amount paid to the respondent. But the respondent has bad intention to grab the hard-earned money of the complainant by giving vague excuses.

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8. That it is, therefore, the complainant is constrained to initiate the legal proceedings to recover the hard-earned money from the respondent company.
9. That the act and conduct of the respondent has caused a lot of physical harassment, mental agony and huge financial loss to the complainant.

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

10. The complainant has sought the following relief:
  - Refund the entire amount of Rs. 33,77,131/-paid to the respondent along with the interest @18% per annum.
  - Direct the respondent to pay Rs. 5,00,000/- on account of mental harassment, agony, physical pain, monetary loss etc.
11. 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.**

12. That the present complaint has been filed by the complainant against the respondent in respect of the tower "B" being developed by the respondent in its group housing project titled as "Esfera Phase II", situated at sector-37C Gurgaon, Haryana.
13. That the flat no. B\_902, in tower- B situated in the said project, was allotted to the complainant by the respondent vide allotment letter dated 27.05.2015 on the terms and condition mutually agreed by the parties.

14. That the respondent had intended to complete the construction of the said flat on time. It is pertinent to mention that it had successfully completed the construction of the said tower and procured the occupancy certificates for three towers out of 9 towers in the said project. However, the construction of all the towers is completed and in habitable stage, in fact the respondent company had already applied for the grant of occupation certificate for the rest of the towers of project including tower B where the allotted unit situates.
15. That respondent company already intimated the complainant about the factum of its OC application before DGTCP, Haryana though due to certain force majeure circumstance, majorly the outbreak of second COVID wave in April 2021 and subsequent lockdown in Haryana State, the DGTCP, Haryana could not issue the OC well in time enabling the respondent to offer the physical possession of the allotted unit to the complainant. That it is reiterated that allotted unit is ready for fit out possession, and communication with regard to this aspect have already been sent to all eligible allottees including the complainant herein. That it is important to mention here that the project "Esfera" comprises of 2 phases whereas OC of the phase I of the project is duly issued by "Town and Country Planning Development Haryana" on 07.02.2018 and more than 150 happy allottee(s) are residing in that phase. That the physical possession of the unit will be tentatively delivered to its respective allottee(s) soon with respective OC on the said project.
16. That, the respondent company is in extreme liquidity crunch at this critical juncture, the company has also been saddled with orders of

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refund in relation to around 20-25 apartments in the project, on account of orders passed by various other courts. The total amount payable in terms of these decrees exceeds an amount of Rs.20 crores.

17. That, on account of many allottees exiting the project and many other allottees not paying their installment amounts, the company, with great difficulty, in these turbulent times has managed to secure a last mile funding of Rs.99 crores from SWAMIH Investment Fund - I. The said alternate investment fund (AIF) was established under the special window declared on 6.11.2019 by the Hon'ble Finance Minister to provide priority debt financing for the completion of stalled, brownfield, RERA registered residential developments that are in the affordable housing /mid-income category, are net-worth positive and require last mile funding to complete construction. The company was granted a sanction on 23.09.2020 after examination of the status of the company and its subject project "Esfera" for the amount of Rs.99 crores. The first transaction of installment has already been received by the respondent company from the said fund as loan.

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.

- That the respondent company started construction over the said project land after obtaining all necessary approvals and sanctions

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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.

- 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.
- 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 on 3rd May, 2020, However, that has left a big impact on the procurement of material and labour. The 40-day lockdown in effect since March 24, which was further extended up to May 3 and subsequently to May 17, leading to a reverse migration with workers leaving cities to return to their villages. It is estimated that around 6 lakh workers walked to their villages, and around 10 lakh workers were stuck in relief camps. The aftermath of lockdown or post lockdown periods the same have left great impact and scars on the sector for resuming the fast-paced construction for achieving the timely delivery as agreed under the allotment letter.

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- 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.
- 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.
- 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.

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

19. 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**

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**

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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;*

*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.*

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 delay due to force majeure.**

24. 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 22.03.2016. So, the due date comes out to be 22.09.2019. 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.**

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

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- i. **Refund the entire amount of Rs. 33,77,131/-paid to the respondent along with the interest @18% per annum.**
25. The complainant has booked the residential apartment in the project named as "The Esfera" situated at sector 37-C for a total sale consideration of Rs. 1,15,58,177/-. They were allotted the above-mentioned unit. The apartment buyer agreement was executed between the parties on 22.03.2016. 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 22.09.2019.
26. Keeping in view the fact that the allottee complainant wishes to withdraw from the project and demanding return of the amount received by the promoter in respect of the unit with interest on failure of the promoter to complete or inability to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. The matter is covered under section 18(1) of the Act of 2016.
27. The due date of possession as per agreement for sale as mentioned in the table above is 22.09.2019 and there is delay of 1 years 9 months 14 days on the date of filing of the complaint.
28. The occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondent-promoter. The counsel for the respondent confirms that OC for phase II is applied and likely to be granted by the concerned authority within next 2-3 months. The authority is of the view that the allottee cannot be expected to wait endlessly for

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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.....”*

29. 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.*





30. 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.
31. 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.
32. The authority hereby directs the promoter to return the amount received by him i.e., Rs. 33,77,131/- 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. **Direct the respondent to pay Rs. 5,00,000/- on account of mental harassment, agony, physical pain, monetary loss etc.**

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33. 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**

- 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 33,77,131/- received by him to the complainant 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.

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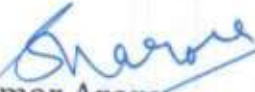
**HARERA**  
**GURUGRAM**

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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 complainant, and even if, any transfer is initiated with respect to subject unit, the receivables shall be first utilized for clearing dues of allottee-complainant.

34. Complaint stands disposed of.

35. 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**