

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

Complaint no. :	4397 of 2021
Date of filing complaint:	08.11.2021
Date of Decision:	12.04.2023

Gagandeep Singh Joshan R/O: 318, Nirman Apartment, Mayur Vihar, Phase-1, Delhi-110091	Complainant
Versus	
M/s Imperia Structures Limited+ Regd. office: A-25, Mohan Cooperative Industrial Estate, New Delhi-110044	Respondent

CORAM:	
Shri Ashok Sangwan	Member
APPEARANCE:	
Sh. Gagandeep Singh (In person)	Complainant
Sh. Roopam Sharma	Respondent

ORDER

1. The present complaint 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 the project, the details of sale consideration, the amount paid by the complainant, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S. N.	Particulars	Details
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 licensee	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.	Unit no.	1402, 14th Floor, Block B (page no. 91 of complaint)
8.	Unit area admeasuring (super area)	1850 sq. ft. (page no. 91 of complaint)
9.	Date of booking	06.08.2012 (page no. 17 of reply)
10.	Date of welcome letter	28.08.2012 (page no. 56 of complaint)
11.	Cancellation of unit	02.12.2013 (page no. 61 of complaint)



12.	Date of tripartite agreement	21.03.2014 (page no. 77 of complaint)
13.	Date of builder buyer agreement	01.12.2014 [page no. 89 of complaint]
14.	Settlement agreement	11.12.2014 (page no. 69 of complaint)
15.	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.”
16.	Due date of possession	01.06.2018 [calculated as per possession clause]
17.	Total sale consideration	Rs. 1,04,65,328/-

		[as per the statement of account on annexure 2 on page no. 17 of reply]
18.	Amount paid by the complainant	Rs. 98,14,243/- [as per the statement of account on annexure 2 on page no. 17 of reply]
19.	Occupation certificate	Not obtained
20.	Offer of possession	Not offered

B. Facts of the complaint:

3. That the complainant booked an apartment admeasuring 1850 sq. ft. vide application form on 06.08.2012 and accordingly an amount of Rs.7,39,875/- through cheque.
4. That the complainant had paid Rs.14,79,975/- to the respondent till 09.11.2012 which includes 'development charges' of Rs.3,46,875/- along with other demands under the head of corner and park facing were raised amounting to total of Rs.14,67,397/-. The complainant raised an objection on the demand of 'development charges' as the same was no^{ed} explanatory on part of the respondent.
5. That instead of answering the queries put forward by the complainant, the respondent sent a demand letter dated 18.10.2013 through which Rs. 26,98,221/- was demanded by him which yet again includes 'development charges' of Rs.3,46,875/-.
6. That on 12.11.2013, respondent sent demand letter/final notice to the complainant and threatened him to make the payment of Rs.29,61,029/- else the booking will be cancelled. This was shocking and a complete act of extorting money illegally from the complainant



- instead of answering the queries and concern of the complainant pertaining to the demands of 'development charges' twice. Further booking of the flat was cancelled vide letter dated 02.12.2013 illegally.
7. That the complainant also disputed the preferential location charges (PLC) amounting to Rs.7,40,000/- as mentioned in the statement of account which the respondent has been demanding from him which was never opted by the complainant at the time of booking of the flat. The issue was then resolved when arbitration proceedings were initiated between the parties and in the month of December an application dt.15.12.2014 along with settlement agreement was filed before the arbitrator according to which the complainant agreed to pay an amount of Rs.4,93,248/- towards the PLC along with the interest on delayed payment of PLC. This arrangement was agreed by the complainant as there was no other option but to accept the same as the hard-earned money was now stuck and invested in the present project in dispute with the respondent.
8. That a tripartite agreement was duly executed between the parties on 21.03.2014. Further the apartment buyer's agreement was executed on 01.12.2014. As per the clause 3 of the said buyer's agreement the respondent confirms the payment of Rs.14,79,875/- received by the respondent at till this date.
9. That the respondent sent a 'confirmation of unit allotment' letter dated 12.12.2014. As per the said letter, unit no. B-1402 on 14th floor, tower-B, admeasuring 1850 sq. ft. was allotted to the complainant. Further, with this 'confirmation of unit allotment' letter, the complainant also received a demand letter dt. 12.12.2014 through which Rs.54,08,547/- was demanded from the complainant. The payment of Rs.55,30,177/- was paid by the complainant to the respondent on 16.12.2014.



10. That the complainant paid total of Rs.20,96,414/- in total between 30.12.2014 to 29.06.2016 as and when demands were raised pertaining to installments without any delay.
11. That the respondent on 06.05.2017, sent a demand letter of amount Rs.7,92,194/- to the complainant. In the same demand letter, it is clearly mentioned the out of the total of Rs.93,00,828/- the complainant has paid Rs.85,21,277/- which is the 95% payment of the total sale consideration but the status of the completion of the project has never been updated to the complainant despite numerous requests made to the respondent through personal visits as well as phone calls but the respondent evaded the requests and hopelessly failed to provide the updated status on completion of the project as the due date of handing over of the possession was approaching and the complainant has concerns regarding the timely offer of possession as he has already paid the 95% of the TSC.
12. That the possession of the allotted unit was to be offered on or before 01.06.2018 as per the clause 10.1 of the buyer's agreement. The respondent intentionally delayed the handing over of the possession and failed to comply with its own promise under the said agreement and did not offer the possession as promised to the complainant which has clearly violated the terms and conditions of its own buyer's agreement without any satisfactory cause of delay amounting to mental agony along with financial losses to the complainant which shattered his dream to own his unit for living. the respondent deprived the complainant from having the possession of the unit booked under the said project intentionally and used his hard-earned money paid under the said allotment for its own personal gain and motives.

13. That the complainant after 01.06.2018, regularly followed up with the officials of the respondent regarding obtaining information on completion of the said project and handing over of possession of his unit for almost 3 years now.
14. That to add to the miseries of the complainant, the respondent who failed to provide information of handing over of possession whenever asked by the complainant, sent a demand note-cum-possession of fit outs on 11.08.2021. The respondent shamelessly raised a demand of Rs.21,99,731/- from the complainant under the headings increased area charges, average escalation cost, delayed possession penalty @ Rs.5/- per sq. Ft. from 01.06.2018 till 31.05.2021 along with GST, Service Tax. The demand of delayed possession penalty was raised in the letter of possession of fit outs not even the actual offer of handing over of physical possession which is till date not offered. This shows the ways of illegal demands raised by the respondent which is nothing but a pure extortion on their part.

C. Relief sought by the complainant:

15. The complainant has sought following relief(s):
- (i) Direct the respondent to refund the entire amount paid to the respondent along with interest @ 18% till its realisation.
 - (ii) Direct the respondent to pay compensation to the amount of Rs. 20,00,000/- to the complainant.
 - (iii) Direct the respondent to pay the cost of litigation to complainant.

D. Reply by respondent:

The respondent by way of written reply made following submissions:

16. That after making independent enquiries and only after being fully satisfied about the project the complainant approached the respondent





company for booking of a residential unit respondent's project "The Esfera" located in sector-37-C, Gurugram, Haryana and paid an amount of Rs 98,14,243/- towards the booking of the said residential unit in favour of respondent.

17. That in the consideration of the booking amount paid by the complainant 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 B 1402, 14th floor admeasuring with of 1850 sq. ft. in favour of complainant for an agreed cost of Rs 1,04,65,328/- (including applicable tax) plus other charges.
18. That the complainant has failed to make out a case under section 18 of the RERA Act as the possession was offered before the agreed possession timeline in accordance with the buyer's agreement. The respondent company completed the construction and development of the tower's way before the agreed timeline and applied to the competent authority for the application for grant of occupancy certificate on 15-04-2021 after complying with all the requisite formalities. The project 'esfera' of two phases whereas OC of the Phase-1 of the project is duly issued by "Town and Country Planning Development, Haryana" on 07.02.2018 and more than 150 happy allottee soon with respective OC on the said project.
19. 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 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. The said project involving hundreds of allottees, who are eagerly



awaiting the 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 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.
21. That, 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. The respondent company is extremely committed to complete the Phase – 2 of Project Esfera, in fact the super structure of all towers in Phase – 2 (incl. Tower – B) 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 company fulfilled its promise and had constructed the said unit of the complainant and sent an offer of possession for fit out dated 29.07.2021 to the complainant 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. The complainant has till date made a payment of Rs. 98,14,243/- as raised by the respondent company in accordance with the payment plan and the terms of the buyer's agreement.
24. That the complainant hasn'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 the authority:

26. The authority 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. Entitlement of the complainant for refund:

F.I Direct the respondent to refund the entire amount paid to the respondent along with interest @ 18% till its realisation.

30. In the present complaint, the complainant intends to withdraw from the project and are seeking return of the amount paid by them in respect of subject unit along with interest as per section 18(1) of the Act and the same is reproduced below for ready reference:



"Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building.-

- (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or
(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case 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 that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

(Emphasis supplied)

31. Clause 10.1 of the buyer's agreement provides the time period of handing over possession and the same is reproduced below:

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."

32. The complainant had booked the unit in the project of the respondent company situated at sector 37-C for a total sale consideration of Rs. 1,04,65,328/-. The buyer's agreement was executed between the parties on 01.12.2014. As per possession clause 10.1 of the buyer's agreement, the possession of the unit was to be handed over within a period of three and half years from the date of execution agreement. The due date for handing over of possession comes out to be 01.06.2018.



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) of the Act. 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. **Admissibility of refund along with prescribed rate of interest:** The section 18 of the Act read with rule 15 of the rules provide that in case the allottee intends to withdraw from the project, the respondent shall refund of the amount paid by the allottee in respect of the subject unit with interest at prescribed rate as provided under rule 15 of the rules. Rule 15 has been reproduced as under:

"Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public."

38. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is



reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

39. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 12.04.2023 is 8.70%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.70%.
40. The authority hereby directs the promoter to return the amount received by him i.e., Rs. 98,14,243/- with interest at the rate of 10.70% (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 Rules *ibid*.

F.II Direct the respondent to pay compensation to the amount of Rs. 20,00,000/- to the complainant.

F.III Direct the respondent to pay the cost of litigation to complainant.

41. 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:

42. 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 promoters as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

- i) The respondent/promoter is directed to refund the entire amount of Rs. 98,14,243/- paid by the complainant along with prescribed rate of interest @ 10.70% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation & Development) Rules, 2017 from the date of each payment till the date of refund of the deposited 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.

43. Complaint stands disposed of.

44. File be consigned to the registry.

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 12.04.2023