



HARYANA REAL ESTATE REGULATORY AUTHORITY PANCHKULA

Website: www.haryanarera.gov.in

Complaint no.:	1078 of 2019
Date of filing.:	29.04.2019
First date of hearing.:	30.07.2019
Date of decision.:	01.03.2023

1. Purushottam Kumar Bhardwaj
 2. Anju Bardwaj
- Both residents of 5412/1, Modern Housing Complex, Manimajra, Chandigarh-160101
-COMPLAINANT

VERSUS

TDI Infrastructure Limited.
Vandana Building, Upper Ground Floor
11, Tolstoy Marg, Connaught Place,
New Delhi- 110001

.....RESPONDENT

CORAM: **Dr. Geeta Rathee Singh** **Member**
 Nadim Akhtar **Member**

Date of Hearing: 01.03.2023

Hearing: 9th

Present: Mr. Roopak Bansal, Counsel for the complainant
 through VC.
 Mr Shubhnit Hans, Counsel for the respondent
 through VC

Rathee

ORDER (DR. GEETA RATHEE SINGH- MEMBER)

1. Present complaint has been filed by complainant under Section 31 of the Real Estate (Regulation & Development) Act, 2016 (for short Act of 2016) read with Rule 28 of the Haryana Real Estate (Regulation & Development) Rules, 2017 for violation or contravention of the provisions of the Act of 2016 or the Rules and Regulations made thereunder, wherein it is inter-alia prescribed that the promoter shall be responsible to fulfil all the obligations, responsibilities and functions towards the allottee as per the terms agreed between them.

A. Unit and Project Related Details:

2. The particulars of the project, the details of 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.	Particulars	Details
1.	Name of the project.	Espania Heights-KEH, Kamaspur, Sonipat, Haryana
2.	Nature of the project.	Integrated Township
3.	DTCP License no.	1065 to 1068 of 2006
4.	RERA Registered/not registered	Unregistered
5.	Details of unit.	Flat no. EH-07/1101, 1075 sq.ft

Geeta Rathee

6.	Date of Builder buyer agreement	23.10.2012
7.	Due date of possession	23.04.2015
8.	Possession Clause	“However, if the possession of the Apartment is delayed beyond a period of 30 months from the date of execution hereof and the reasons of delay are solely attributable to the wilful neglect or default of the Company then for every month of delay, the Purchaser shall be entitled to a fixed monthly compensation damages/penalty quantified @ Rs.5 per square foot of the total super area of the Apartment. The Purchaser agrees that he shall neither claim nor be entitled for any further sums on account of such delay in handing over the possession of the Apartment.”
9.	Total sale consideration	₹ 21,22,664/-
10.	Amount paid by complainant	₹ 28,48,381/- (as per statement of accounts dated 16.05.2022 issued by respondent.)
11.	Offer of possession.	20.05.2019

S. Fatue

B. FACTS OF THE COMPLAINT

3. Complainant in this case had booked a residential flat bearing no. EH-07/1101 in the real estate project of the respondent namely 'Espania Heights-KEH' situated at Kamaspur, Sonapat. The total sale consideration of said flat was ₹ 21,22,664/- against which the complainant had paid an amount of ₹ 18,85,454/-. An apartment buyer agreement was executed between both the parties on 23.10.2012. As per clause 28 of the agreement, possession of the unit was to be delivered within a period of 30 months from the date of execution of agreement i.e by 23.04.2015. It is alleged by the complainant that respondent has failed to completion construction of the flat and deliver possession within stipulated time as per terms of agreement. Aggrieved by the delay caused in delivery of possession, complainant served various notices to the respondent-promoter demanding possession, copies of notice dated 29.06.2017 , 22.07.2017, 04.09.2017 and 13.09.2017 are annexed as Annexure P-4 to P-7. Thereafter, due to failure on the part of respondent to deliver the possession complainant vide letter dated 14.12.2017 requested the respondent to refund the entire payment along with interest, copy of which is annexed as Annexure P-9. Complainant kept sending letters requesting for refund of paid amount to the respondent but received no response, copies of letters dated 13.02.2018, 14.03.2018,

19.04.2018, 11.06.2018 & 13.03.2019 are annexed as Annexure P-10 to P-14. Despite a lapse of more than four years respondent has failed to deliver possession of the flat and thereafter deliberately failed to respond to the request of the complainant seeking refund of the paid amount along with interest on account of failure in delivery of possession.

C. RELIEF SOUGHT

4. That the complainant seeks the following relief and directions to the respondent:-

- i. That the respondent be directed to refund the entire amount deposited by the complainant along with interest.
- ii. To pay compensation for amount of ₹ 2 Lakh for mental agony and harassment.
- iii. To pay cost of litigation for an amount of ₹ 50,000/- .
- iv. To refund the wrongfully charged taxes including service tax and other charges.

D. REPLY SUBMITTED ON BEHALF OF RESPONDENT

5. Respondent in its written submissions has submitted that filed an application for grant of occupation certificate on 12.09.2016 before the Director, Town & Country Planning Department, Haryana.

However, due to unforeseen circumstances, respondent company had again applied for grant of Occupation Certificate before Town & Country Planning Department, Haryana vide letter dated 17.02.2022. It is submitted by the respondent that there has been default on the part of complainant in making payment towards the booking of the flat. Construction of the project is complete and respondent has already offered possession for fit out of the flat vide letter dated 20.05.2019. It is the complainant who has failed to come forward to accept possession.

E. REJOINDER FILED BY COMPLAINANT

6. In response to the reply filed by respondent, complainant filed a rejoinder dated 10.01.2023 submitting that complainant had paid an amount of ₹ 18.86 Lakhs to the complainant by the year 2017 against total sale consideration of ₹ 21,22,664/-. However, on account of delay caused in delivery of possession, complainant had requested the respondent vide letter dated 14.12.2017 to refund the paid amount along with interest since respondent had failed to offer possession despite a lapse of more than two years from deemed date of possession. On receiving no response from the builder complainant had filed present complaint on 29.04.2019 seeking refund of paid amount along with interest. Initially there was no progress in the complaint case

as the complainant had sought the relief of refund of the paid amount however, cases pertaining to relief of refund were kept pending awaiting decision of Supreme Court in SLP No. 13005 of 2020 titled as M/s Sana Realtors Pvt Ltd vs Union of India & others . Complainant was under strain due to investment of nearly ₹ 19 Lakh being deposited with the respondent, impact of COVID-19 pandemic and the pendency of present complaint before the Authority. Meanwhile the respondent was continuously pressing the complainant for making balance payment in order to secure its investment. Under such compelling circumstances, the complainant under compulsion agreed to pay ₹ 7.28 Lakh on 07.08.2020 to the respondent as full and final payment for taking possession of flat. That a total payment of ₹ 26,14,454/- has been paid by the complainant to the respondent. The offer of possession of the flat was agreed by the complainant under duress and excessive fear of losing his hard earned money which had already been paid to the builder. The possession of the flat was offered to the complainant in October 2020 without obtaining occupation certificate.

7. It is further submitted by the complainant that in the month of June 2022, during the pendency of present complaint, complainant came to know that the the Indian Bank has issued a "Notice for Indented Sale" to the respondent for the project "Espania" i.e the project in concern, as the respondent has failed to repay an amount of ₹ 48,22,00,000/- of the

Indian Bank and the bank is intending to sell off the entire project land of 12.64 acres including all the units build by way of auction. It is the apprehension of the complainant that the offer of possession issued to complainant is a fraudulent offer as respondent promoter is not in a position to offer possession of booked flat.

F. ARGUMENTS OF LEARNED COUNSEL FOR COMPLAINANT

8. During oral arguments learned counsel for the complainant reiterated his submissions as mentioned above. He further submitted that possession of the unit was supposed to be delivered by the year 2015. However, respondent has offered possession to the complainant in October 2020 that too without obtaining occupation certificate. A valid offer of possession is yet to be made to the complainant. Even in its reply respondent has failed to provide surety in regard to the grant of occupation certificate. There has already been an inordinate delay in delivery of possession. Further, the allottees of 'Espania Floors', a part of the Espania project had filed **CWP No. 15082-2022 titled TDI ESPANIA RESIDENTS WELFARE ASSOCIATION vs INDIAN BANK (ALLAHABAD) AND ORS.** before Hon'ble Punjab & Haryana High Court, Chandigarh against sale of aforesaid project property and Hon'ble High Court vide its order dated 02.08.2022 has stayed the e-auction which was to be held on 06.08.2022 and that

there will be no further auction till the matter is pending adjudication. In such circumstances the complainant is under the apprehension that the land over which the unit of the complainant is situated has been declared as a Non performing asset by the Indian Bank because of which respondent will not be in a position to deliver possession of the unit. Complainant who has already waited for so many years does not wish to wait endlessly for delivery of possession of flat. In view of the constraining circumstances, complainant is willing to surrender the possession of the flat and seek original relief which is refund of the paid amount along with interest.

G. ARGUMENTS OF LEARNED COUNSEL FOR RESPONDENT

9. Initiating his arguments, learned counsel for the respondent submitted that an offer of possession was issued to the complainant on 20.05.2019 to take possession of the booked flat upon payment of balance amount. On 06.10.2020, Mr. Siddharth Sharma, authorised signatory on behalf of the complainant had approached the respondent to sign the No objection certificate and take possession. A copy of the NOC for hanover of possession of unit is annexed as Annexure A-2 along with the application filed by the respondent on 04.04.2022. It is submitted that complainant has already taken possession of the unit during the pendency of complainant and is therefore not entitled to relief of refund of the paid amount. Complainant has been enjoying

possession the flat for more than two years already. With regard to the "Notice for Intended Sale" of project in question by Indian Bank, the matter is pending adjudication before Hon'ble High Court and the proposed auction has already been stayed. There is nothing at site and the interests of the complainant are not hampered in any manner. Respondent has already filed a fresh application for grant of occupation certificate on 17.02.2022 and it is expected to be received soon.

H. OBSERVATIONS OF THE AUTHORITY

10. The Authority has gone through the rival contentions of both parties.

In light of the background of the matter as captured in this order and also the arguments submitted by both parties, Authority observes that as per the buyers agreement possession of the booked unit should have been delivered by the year 2015. Respondent had issued an offer of possession for fit out works 20.05.2019 but said offer of possession was issued without obtaining occupation certificate. Complainant filed present complaint seeking refund of paid amount along with interest, as the respondent failed in his obligation to deliver possession as per the terms of buyers agreement. However, due to the reasons that the jurisdiction to deal with matters pertaining to refund being subjudice before Hon'ble Supreme Court there was no progress in the case of the complainant before the Authority. Complainant

under the apprehension of losing his hard earned money accepted the offer of possession issued by the respondent and deposited a further payment of ₹ 7.28 Lakh on 07.08.2020 to the respondent as full and final payment for taking possession of flat. An NOC for handing over of possession was issued to the complainant on 06.10.2020. However on 28.06.2022 Indian Bank issued a "Notice for Indented Sale" to the respondent for the project "Espania" i.e the project in concern, as the respondent has failed to repay an amount of ₹ 48,22,00,000/- of the Indian Bank and the bank is intending to sell off the entire project land of 12.64 acres including all the units build by way of auction. The case regarding the supposed auction is pending adjudication before Hon'ble High Court in CWP No. 15082-2022 titled TDI ESPANIA RESIDENTS WELFARE ASSOCIATION vs INDIAN BANK (ALLAHABAD) AND ORS.

11. Despite making a further payment towards booking of flat complainant has sought for relief of refund of paid amount since respondent is not in a position deliver a valid possession of the flat. Though respondent in its reply has submitted that possession of the unit has been handed over to the complainant on 06.10.2020, however respondent has only attached a copy of NOC for hand over of possession. No possession certificate, issued after handing over of possession has been attached by the respondent . The complainant has

denied accepting the actual possession or signing any possession certificate (which is a proof of the fact that the complainant has taken the possession). Complainant had invested his hard earned money in the project with hopes of timely delivery of possession. However, possession of flat was offered to the complainant after a delay of more than five years. By that time, complainant had already approached the Authority seeking refund of the paid amount on account of failure on part of respondent to deliver possession as per agreed terms. However, at that time the complaint cases filed seeking refund of the paid amount were adjourned awaiting decision of Hon'ble Supreme Court in SLP No. 13093 of 2020 titled as M/S. TDI Infrastructure Ltd. Versus Union of India & Ors. along with other SLP's. Requisite relief could not be granted to the complainant during that period and complainant who had already invested a huge amount of ₹ 19 Lakh under pressure accepted the offer of possession and made a further payment towards final payment of flat to secure his already invested amount. However, even at that time respondent had not obtained occupation certificate and respondent has merely issued an NOC for hand over of possession. No proper possession certificate was issued to the complainant. Further, respondent is yet to receive occupation certificate meaning thereby that a valid possession is yet to be offered to the complainant. Further, the project in question is in limbo due to

the "Notice for Indented Sale" issued by the Indian Bank to the respondent for the project "Espania" on account of non payment of dues and subsequent court proceedings in CWP No. 15082-2022 titled TDI ESPANIA RESIDENTS WELFARE ASSOCIATION vs INDIAN BANK (ALLAHABAD) AND ORS. pending adjudication before Hon'ble High Court.

12. When an allottee becomes a part of the project it is with hopes that he will be able to enjoy the fruits of his hard earned money in terms of a safety and security of his own home. However, in this case due to peculiar circumstances complainant has not been able to enjoy the fruits of his labour as the possession of the flat in question is shrouded by a veil of uncertainty. Complainant had invested a huge amount of ₹ 18.86 Lakh with the respondent by the year 2017 and a further amount of ₹ 7.28 lakh in 2020 to gain possession of a residential unit. However, respondent not in a position to offer a valid offer to the complainant since the project is yet to receive occupation certificate and that the entire project "Espania" is under legal dispute before Hon'ble High Court. Complainant is justifiably under apprehension with regard to the security of his investment in the project. Since respondent is not in a position to offer a valid offer of possession in foreseeable future, complainant who has already waited for more than seven years does not wish to wait for a further uncertain amount of

time or a valid possession. Complainant is at liberty to exercise his rights to withdraw from the project on account of default on the part of respondent to deliver possession and seek refund of the paid amount.

13. Further, Hon'ble Supreme Court in the matter of "Newtech Promoters and Developers Pvt. Ltd. versus State of Uttar Pradesh and others" has highlighted that the allottee has an unqualified right to seek refund of the deposited amount if delivery of possession is not done as per agreed agreement. Para 25 of this judgement is reproduced below:

"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.”

14. The decision of the Supreme Court settles the issue regarding the right of an aggrieved allottee such as in the present case seeking refund of the paid amount along with interest on account of delayed delivery of possession. The complainant wishes to withdraw from the project of the respondent, therefore, Authority finds it to be fit case for allowing refund in favour of complainant. As per Section 18 of Act, interest shall be awarded at such rate as may be prescribed. Rule 15 of HRERA Rules, 2017 provides for prescribed rate of interest which is as under:

“Rule 15: Interest payable by promoter and Allottee. [Section 19] - An allottee shall be compensated by the promoter for loss or damage sustained due to incorrect or false statement in the notice, advertisement, prospectus or brochure in the terms of section 12. In case, allottee wishes to withdraw from the project due to discontinuance of promoter's business as developers on account of suspension or revocation of the registration or any other reason(s) in terms of clause (b) sub-section (I) of Section 18 or the promoter fails to give possession of the apartment/ plot in accordance with terms and conditions of agreement for sale in terms of sub-section (4) of section 19. The promoter shall return the entire amount with interest as well as the compensation payable. The rate of interest payable by the promoter to the

allottee or by the allottee to the promoter, as the case may be, shall be the State Bank of India highest marginal cost of lending rate plus two percent. In case, the allottee fails to pay to the promoter as per agreed terms and conditions, then in such case, the allottee shall also be liable to pay in terms of sub-section (7) of section 19:

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."

15. 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. 01.03.2023 is 8.70%. Accordingly, the prescribed rate of interest will be MCLR + 2% i.e. 10.70%.

16. The definition of term 'interest' is defined under Section 2(za) of the Act which is as under:

(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation.-For the purpose of this clause-

(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;

(ii) the interest payable by the promoter to the allottee shall be from the date the promoter

received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;

Accordingly, respondent will be liable to pay the complainant interest from the date amounts were paid by him till the actual realization of the amount.

17. Authority has got calculated the interest payable to the complainants till date of order i.e 01.03.2023 which works out to ₹ 21,89,692/- . Accordingly, total amount payable to the complainants including interest calculated at the rate 10.70% works out to ₹ 50,38,073/-.

18. In rejoinder dated 10.01.2023 complainant has submitted that a total amount of ₹ 26,14,454/- has been paid to the respondent till September 2020. However, as per the statement of account dated 16.05.2022 annexed at page 28 of the reply, the respondent has admitted to having received a total amount of ₹ 28,48,381/- from the complainant. Therefore the interest payable to complainant has been calculated for total paid amount of ₹ 28,48,381/- .

19. While filing the complaint in the relief sought, complainant has also prayed for compensation for amount of ₹ 2 Lakh for mental agony and

harassment and to pay cost of litigation for an amount of ₹ 50,000/.

The Authority is of the view that it is important to understand that the Act has clearly provided interest and compensation as separate entitlement/rights which the allottee can claim. For claiming compensation under sections 12,14, 18 & section 19 of the Act, the complainant may file a separate complaint before Adjudicating officer under section 31 read with section 71 of the Act and rule 29 of the HRERA rules. Therefore, the complainant is advised to approach the adjudicating officer for seeking the relief of compensation.

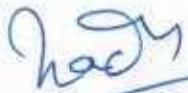
I. DIRECTIONS OF THE AUTHORITY

20.Hence, the Authority hereby passes this order and issues following directions under Section 37 of the Act to ensure compliance of obligation cast upon the promoter as per the function entrusted to the Authority under Section 34(f) of the Act of 2016:

- (i) Respondent is directed to refund the entire amount of ₹ 50,38,073/- (till date of order 01.03.2023) to the complainant.
- (ii) A period of 90 days is given to the respondent to comply with the directions given in this order as provided in Rule 16 of Haryana Real Estate (Regulation & Development)

Rules, 2017 failing which legal consequences would follow.

21. The complaint is, accordingly, **disposed of**. File be consigned to the record room and order be uploaded on the website of the Authority



.....
NADIM AKHTAR
[MEMBER]



.....
DR. GEETA RATHEE SINGH
[MEMBER]