BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	4886 of 2020
First date of hearing:	26.02.2021
Date of decision :	25.07.2023

1. MC Joshi 2. Ankit Joshi **Both R/o**: Amrita Ashram, Gairvishali Bithoria No. 1, Unchapul, Haldwani, Uttarakhand- 263139	**Complainants**
Versus	
1. M/s Imperia Structures Pvt. Ltd. **Regd. Office at**: - A-25, Mohan Co-operative Industrial Estate, New Delhi-110044 2. Indiabulls Housing Finance Limited Office at: M-62 & 63, Block E, Connaught Place, New Delhi-110001	**Respondents**

CORAM:	
Shri Vijay Kumar Goyal	**Member**
Shri Ashok Sangwan	**Member**
Shri Sanjeev Kumar Arora	**Member**

APPEARANCE:	
Ms. Tejaswita	Advocate for the complainants
Shri Himanshu Singh	Advocate for the respondent no. 1
Ms. Arshita	Advocate for the respondent no. 2

ORDER

1. The present complaint dated 12.01.2021 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 provisions of the Act or the rules and regulations made there under or to the allottees 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, 4th Floor, Tower F (page no. 26 of complaint)
8.	Unit measuring	1650 sq. ft. (page no. 26 of complaint)
9.	Date of builder buyer agreement	26.12.2015 (page no. 24 of complaint)
10.	Date of tripartite agreement	28.12.2015 (page no. 41 of reply filed by R2)
11.	Date of supplementary agreement containing a	13.01.2016

	clause for buyback of the allotted unit	(page no. 75 of complaint)
12.	Request for refund as per buyback policy	22.06.2017 (page no. 78 of the complaint)
13.	Reminder for refund after cancellation (Email reminder)	15.01.2018 19.03.2018 (page no. 82-90 of the complaint)
14.	Legal Notice for refund	27.08.2018 (page no. 91 of the 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."

		(emphasis supplied)
16.	Total sale consideration	Rs. 1,03,91,250/- [as per agreement on page no. 33 of complaint]
17.	Total amount paid by the complainants	Rs. 10,85,640/- + Rs. 79,38,115 (the later amount being paid by respondent no. 2 to respondent no. 1 on behalf of the complainants)
18.	Occupation certificate	07.02.2018 (as pleaded by the respondent builder)
19.	Due date of possession	26.06.2019 [calculated as per possession clause]
20.	Offer of possession	Not offered

B. Facts of the complaint

3. That the complainants were approached by the officials of the respondent no. 1(herein after referred as respondent-builder) and were lured to buy an apartment in its project namely on "The Esfera" situated at sector-37C, Gurugram.
4. That believing such assurance's, the complainants vide an application dated 05.10.2015 applied for allotment of a residential apartment with the respondent/builder in the said project. Thereafter they entered into an apartment buyers' agreement dated 26.12.2015 leading to allotment of an apartment bearing no. F-402, 4th floor, block-F, admeasuring 1650 sq. ft. for a total sale consideration Rs. 1,03,91,250/- i.e., Rs.82,50,000/- towards basic sale price, Rs. 6,60,000/- towards preferential location charges, Rs. 3,50,000/- towards car parking space charges, and other charges, as set out in

the terms and conditions of the agreement. The complainants paid an amount of Rs. 10,85,640 /- to the respondent-builder at the time of execution of the apartment buyer's agreement.

5. That subsequently on 13.01.2016, the respondent-builder approached the complainants and offered them for a buyback scheme under a special scheme for the said apartment allotted to them. The complainants subsequent to various discussions, entered into and executed a supplementary agreement dated 13.01.2016 in continuation of the apartment buyers' agreement dated 26.12.2015.
6. That as per clause 5 of the supplementary agreement, the complainants paid the balance consideration amount of Rs. 79,38,117/- to the respondent-builder, through the respondent no. 2, i.e., India bulls Housing Finance Limited and the said loan amount was directly disbursed on 29.12.2015 and 31.12.2015 respectively on their behalf.
7. That as per clause 6 of the supplementary agreement, the respondent-builder also agreed and confirmed to pay the pre-EMI/ EMI of the housing loan granted by the respondent no. 2, for the initial period of 24 months or offer of possession, whichever is earlier from the date of disbursement of loan amount of Rs. 79,38,117/- .
8. That as per clause 7 of the supplementary agreement, the complainants had the option to cancel the allotment of the said apartment after a period of 24 months or at the time of offer of possession of the said apartment, whichever is earlier, from the date of disbursement of loan amount and the respondent-builder was to be liable to refund the entire booking amount of Rs. 10,85,640/- as deposited by them with an additional amount of Rs. 10,39,125/ under the buyback scheme i.e., 100% of the total booking amount excluding

service tax within a period of 30 days from the date of such cancellation opted by them. In case of delay of payment beyond 30 days, the respondent-builder was to be liable to pay interest @18% p.a. on the amount paid by the complainants.

9. That pursuant to clause 10 of the supplementary agreement, the respondent-builder further agreed that in case, the complainants opted to cancel the said apartment before expiry of 24 months or at the time of offer of possession and whichever was earlier, it would settle the loan account of the respondent no.2 including service tax of the said apartment by making the payment of the loan amount on the due date.

10. That the complainants paid the remaining amount of Rs. 79,38,115/- financed as unsecured loan through India bulls Housing Finance Limited i.e respondent no. 2 for the said apartment and the same was directly disbursed to the respondent-builder. As per clause 1.2A of the apartment buyer's agreement, the respondent-builder agreed to pay the pre-EMI/EMI to the bank/financial Institution, i.e., respondent no. 2, directly for an initial period of 24 months and thereafter the complainants agreed to pay the pre-EMI/EMI to it as per the terms of the bank/financial institution only in case they retain the said apartment.

11. That the complainants, under those constrained circumstances, vide letter dated 22.06.2017 exercised their option to cancel the allotment and informed the respondent-builder that they were no more interested in buying the said apartment in the said project and thus, asked it to buyback the said apartment, as per the terms of the supplementary agreement, and sought refund of the entire amount deposited by them along with an additional amount of Rs. 10,39,125/-

i.e., 100% of the booking amount paid by them as per the terms of the supplementary agreement. The respondent-builder was, thus, liable to refund the entire amount of Rs. 21,24,765/- to the complainants within 30 days from 22.06.2017 along with payment of ECS and cheque bouncing charges paid by them. It was liable to pay interest @18% p.a. to them from the date amount became due till actual date of realization of the said amount.

12. That the complainants vide email dated 23.01.2018, again requested and reminded the respondent-builder to honour the commitment and pay the outstanding amount of Rs. 21,24,765/-, followed by legal notice dated 27.08.2018 for foreclosure. However, it failed to adhere to the same and respond in complete disregard to the understanding entered between them and the respondent no.2.
13. That the respondent-builder never replied to any emails and letters and failed to adhere to the terms and conditions of the apartment buyer agreement and supplementary agreement.
14. That respondent no. 2 is the financial institution which had sanctioned and disbursed the loan amount on behalf of the complainants directly to the respondent-builder. But the builder defaulted in payment of the EMI/ pre-EMI and loan account has not been settled / foreclosed. Thus, the complainants were forced to make payment to the financial institution despite the respondent-builder being liable to make payments for the same.

C. Relief sought by the complainants:

15. The complainants have sought the following relief:

- Direct the respondent-builder to refund an amount of Rs. 21,24,765/- due towards the complainants as per

buyers/supplementary agreements dated 26.12.2015 and 13.01.2016 respectively.

- Direct the respondent-builder to pay a sum of Rs. 3,56,201/- towards ECS and cheque bouncing charges and other amounts paid by the complainants to the respondent no. 2 due to its default.
- Direct the respondent- builder to pay a sum of Rs. 1,60,000/- paid by the complainants to the respondent no. 2 as it failed to settle the loan account in respect of the said apartment and foreclosed the same despite cancellation of the said apartment vide letter dated 22.06.2017.
- Direct the respondent-builder to settle pre-EMI/EMI or the loan amount to be paid by it towards the respondent no. 2 and to clear all the outstanding dues pending in respect of the said apartment and to foreclose the loan account of the complainants in respect of the said apartment.
- Direct the respondent no. 2 to issue 'No dues certificate' to the complainants in respect of the said loan account and claim the amount from the respondent-builder in respect of the said loan account.
- Direct the respondent-builder to pay damages amounting to Rs. 10,00,000/- to the complainants for causing mental and emotional harassment, agony, inconvenience and discomfort to them.

16. 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.

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17. Both the respondents put in appearance through their respective counsel/AR and filed separate replies.

D. Reply by the respondent-builder.

The respondent-builder by way of written reply submitted the following submissions:

18. That the flat no. F-402, in tower F situated in the said project was allotted to the complainants by the answering respondent vide allotment letter dated 26.12.2015 on terms and conditions mutually agreed between them.

19. That the respondent company 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 complete and in a habitable condition. In fact, the respondent company had already applied for grant of occupation certificate for rest of the towers of project including the Tower - "F, where the allotted unit is situated. Further, it is pertinent to mention here that respondent company already intimated the complainants about the factum of its OC application. But due to certain force majeure circumstances, 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 it to offer the possession of the allotted unit to the complainants. It is reiterated that the allotted unit is ready for fit out possession. It is important to mention here that the project "ESFERA" comprises of two phases whereas OC of the phase I of the project was duly issued by "Town and Country Planning Development Haryana" on 07.02.2018 and more than 100 happy allottee(s) are

residing there. The possession of the subject unit would be tentatively delivered to its respective allottee(s) soon with receipt of OC in the said project.

20. That the answering 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 those decrees exceeds an amount of Rs.40 crores. The said project involves hundreds of allottees and who are eagerly waiting for possession of their apartments and would be prejudiced beyond repair in case any monetary order is passed when the project is almost complete.

21. That, on account of many allottees exiting the project and not paying the instalments due, 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, 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.

22. That this Hon'ble Authority may be pleased to consider the bona fide of the respondent company and distinguish it from the bad repute being imparted to real-estate builders. It is pertinent to mention here that the respondent company is extremely committed to complete the phase - 2 of project Esfera,. In fact, the super structure of all towers

in phase - 2 (incl. Tower F) has already been completed and the internal finishing work and MEP works is going in a full swing with almost 300 construction labourers are working hard to achieve complete the entire project despite all prevailing adversaries.

23. That both the parties i.e., the complainant as well as the respondent company had contemplated at the very initial stage while signing the allotment letter/agreement that some delay might have occurred in future and that is why under the force majeure clause as mentioned in the allotment letter, it was duly agreed by the complainant that the respondent company shall not be liable to perform any or all of its obligations during the subsistence of any force majeure circumstances and the time period required for performance of its obligations shall inevitably stand extended. It was unequivocally agreed between the parties that the respondent company would be entitled to extension of time for delivery of the said flat on account of force majeure circumstances beyond its control and inter-alia, some of them are mentioned herein below:

    - That, the respondent company started construction over the said project land after obtaining all necessary sanctions/approvals/ clearances from different state/central agencies/authorities and after getting building plan approved from the authority and named the project as "Esfera II'. The respondent company had received applications for booking of apartments in the said project by various customers and on their requests, the respondent company allotted the under-construction apartments/ units to them.

- That, owing to unprecedented air pollution levels in Delhi NCR, the Hon'ble Supreme Court ordered a ban on construction activities in the region from November 4, 2019, onwards, which was a blow to realty developers in the city. The Air Quality Index (AQI) at the time was running above 900, which is considered severely unsafe for the city dwellers. Following the Central Pollution Control Board (CPCB) declaring the AQI levels as not severe, the SC lifted the ban conditionally on December 9, 2019, allowing construction activities to be carried out between 6 am and 6 pm, and the complete ban was lifted by the Hon'ble Supreme Court on 14" February 2020.
- That, when the complete ban was lifted on 14" February 2020 by the Hon'ble Supreme Court, the Government of India imposed National Lockdown on 24 of March, 2020 due to pandemic COVID-19, and conditionally unlocked it in 3* May, 2020, However, that left the great impact on the procurement of material and labour. The 40-day lockdown in effect since March 24, which was further extended up to May 3 and subsequently to May 17, led to a reverse migration with workers leaving the cities to return back 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 has 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.
- 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 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 loss 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

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across all budget categories. Owing to its uniqueness as an economic event, demonetisation brought a lot of confusion, uncertainty - and, most of all, especially when it came to the realty sector. No doubt, everyone was affected by this radical measure, and initially all possible economic activities slowed down to a large extent, which also affected the respondent company to a great extent, be it daily wage disbursement to procuring funds for daily construction, and day-to-day activities, since construction involves a lot of cash payment/transactions at site for several activities.

- 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 CW No. 20032 of 2009 directed to use only treated water from available Sewerage Treatment Plants (hereinafter referred to as "STP"). As the availability of TP, basic infrastructure and availability of water from STP was very limited in comparison to the requirement of water in the ongoing constructions activities in Gurgaon District, it was becoming difficult to timely schedule the construction activities. The availability of treated water to be used at construction site was thus very limited and against the total requirement of water, only 10-15% of required quantity was available at construction sites.

24. That for the purpose of ensuring the delivery of the possession, despite lockdown, the respondent company was seeking permission to resume construction of the said project. The respondent company

got the permission certificate on 01.05.2020 by the municipal corporation of Gurugram, Haryana subject to certain safety restriction and conditions. Therefore, this Hon'ble Authority may be pleased to consider the bona fide of the respondent company and distinguish it from the bad repute being imparted to real-estate builders. It is pertinent to mention here that the respondent company is extremely committed to complete the phase - 2 of the said project; in fact super structure/ civil works in all the towers in phase -2 has already been completed despite all prevailing adversaries only final finishing work is pending now.

E. Reply of respondent no. 2.

The respondent no. 2 by way of separate written reply submitted as under:

25. That the compliant filed is not maintainable being false frivolous and beyond the scope of the authority. The answering respondent granted loan facility to the complainant and no cause of action against it survives. Moreover, it is neither an allottee nor developer or real estate agent to be impleaded as one of the respondents.

26. That it a matter of record that vide loan agreement dated 23.12.2015 the answering respondent sanctioned a sum of Rs. 79,38,117/- to the complainants against mortgaged of the subject unit and the same led to execution of tripartite agreement dated 28.12.2015. it was the obligation of the complainants to pay the loan amount by way of instalments irrespective of any arrangement between them and the respondent-builder. So, if any default is committed by the loanee then it is liable to pay the same with interest as per contractual obligations.

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27. That though there may be a buyers agreement executed between the complainants and the respondent-builder, but the answering respondent is not a party to the same and the same is not binding upon it.
28. All other averments made in the complaint were denied in toto.
29. A rejoinder to the written reply filed on behalf of the respondent-builder was also filed controverting its pleas and reiterating the one taken in the complaint.
30. 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 written submissions made by the parties and the same have been perused.

F. Jurisdiction of authority

31. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

F. I Territorial jurisdiction

32. 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.

F. II Subject matter jurisdiction

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33. 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.

34. 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 the compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

35. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2020-2021 (1) RCR (c) 357 and*** *reiterated in case of* ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022***wherein it has been laid down as under:

"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that

when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. if the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."

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

G. Findings on the objections raised by the respondent-builder.

G.I Objection regarding delay due to force majeure.

37. 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 buyer's agreement was executed between the parties on 26.12.2015. So, the due date for completion of project and handover possession of the subject unit comes out to

be 26.06.2019. 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, it cannot be given any leniency based on aforesaid reasons. It is well settled principle that a person cannot take benefit of his own wrongs.

H. Findings on the relief sought by the complainants.

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

- Direct the respondent-builder to refund an amount of Rs. 21,24,765/- due towards the complainants as per buyers/supplementary agreements dated 26.12.2015 and 13.01.2016 respectively.
- Direct the respondent-builder to pay a sum of Rs. 3,56,201/- towards ECS and cheque bouncing charges and other amounts paid by the complainants to the respondent no. 2 due to its default.
- Direct the respondent- builder to pay a sum of Rs. 1,60,000/- paid by the complainants to the respondent no. 2 as it failed to settle the loan account in respect of the said apartment and foreclosed the same despite cancellation of the said apartment vide letter dated 22.06.2017.
- Direct the respondent-builder to settle pre-EMI/EMI or the loan amount to be paid by it towards the respondent no. 2 and to clear all the outstanding dues pending in respect of the said apartment and to foreclose the loan account of the complainants in respect of the said apartment.
- Direct the respondent no. 2 to issue 'No dues certificate' to the complainants in respect of the said loan account and claim the

amount from the respondent-builder in respect of the said loan account.

Findings on Issues no. 1-5

38. All these issues being interconnected are being taken together.

39. A project by the name of The Esfera Phase II situated in sector-37C, Gurugram, a group housing complex was being developed by respondent-builder over land bearing 17 acres on the basis of license bearing no. 64 of 2011 dated 06.07.2011 and valid upto 15.07.2017. This project was got registered with the authority vide registration no. 352 of 2017 issued on 17.11.2017 and valid upto 31.12.2020. The complainants coming to know about that project applied for allotment of the unit vide their application dated 05.10.2015 and were allotted the subject unit detailed above for a total sale consideration of Rs. 1,03,91,250/- inclusive of preferential location and car parking and other charges etc. It led to execution of builder buyer agreement between the parties on 26.12.2015 setting out the terms and conditions of allotment of the unit, its location, dimensions, the sale price besides other charges, layout plan and the due date for completion of the project and handing over possession of the allotted unit. That document was followed by a supplementary agreement dated 13.01.2016 containing a clause for buyback of the allotted unit. Meanwhile, the complainants approached respondent no. 2 for sanction of loan for the purchase of the allotted unit and the same lead to its sanction to the tune of Rs. 79,38,115/- . That amount was directly paid by respondent no. 2 to the respondent-builder on behalf of the complainants and who had already paid a sum of Rs. 10,85,640/- to the promoter against the allotted unit. A tripartite agreement dated 28.12.2015 was also executed between the parties

with regard to the loan so disbursed against the allotted unit, the details of the subvention scheme, its duration and other terms and conditions. The due date for completion of the project and handing over possession of the allotted unit as per the buyer's agreement was fixed to be 20.06.2019. It is the case of complainants that having paid more than Rs. 90,23,755/- against the total sale consideration of Rs. 1,03,91,250/- the respondent builder failed to complete the project and it did not honour its commitment to pay pre-EMI to the respondent no. 2 for a period 24 months as per terms and conditions of buyers as well as supplementary agreements dated 26.12.2015 and 13.01.2016 respectively. Secondly, as per the provisions of supplementary agreement, the complainants exercised their option for cancellation of allotment after a period of 24 months or at the time of offer of possession whichever being earlier. Thus, in such a situation, they are entitled to seek refund of the paid up amount.

40. But it is pleaded on behalf of respondent- builder that it has already paid 24 instalments of pre EMI's to respondent no. 2 upto December 2017 and there is no default in this regard. Secondly, the complainants have failed to pay the remaining amount due. Moreover, occupation certificate for the project has already been received on 07.02.2018.

41. It is pleaded on behalf of respondent no. 2 that it sanctioned a loan of Rs. 79,38,117/- in favour of the complainants against the mortgage of the allotted unit. A tripartite agreement in this regard was executed between the parties on 28.12.2015. After disbursement of the loan, it was the primary duty of the loanee i.e., the complainants to pay the loan amount to respondent no.2 irrespective of terms and conditions settled as per buyer's

agreement dated 26.12.2015. Thus, on committing default in repayments of the loan, the complainants are liable to pay the same with interest.

42. Some of the admitted facts of the case as per the pleadings of the parties are that the complainants were allotted a unit in the project detailed above by the respondent- builder for a sum of Rs. 1,03,91,250/- leading to a buyer's agreement between the parties on 26.12.2015. Though a part of that amount was paid by the complainants from their own resources, but they raised a loan of Rs. 79,38,117/- against the allotted unit by getting it mortgaged with respondent no. 2 and which led to tripartite agreement between the parties on 28.12.2015. The due date for completion of the project and offer of possession of the allotted unit was agreed upon between the parties as 26.06.2019. After the execution of buyer's agreement dated 26.12.2015, a supplementary agreement dated 13.01.2016 was executed between the allottees and the builder, containing a clause for buyback of the allotted unit on certain terms and conditions mentioned therein. The complainants relying upon the stipulations in that document made a request to the builder for refund of the paid-up amount vide letter dated 22.06.2017 followed by reminders dated 15.01.2018, 19.03.2018 and legal notice dated 27.08.2018 respectively. Though in the written reply of the respondent-builder, there is no whisper with regard to payment of pre EMI's to respondent no. 2 as agreed upon but the written submissions filed shows otherwise. It is pleaded in the same that as per clause 1.2 A of the buyer's agreement dated 26.12.2015 corroborated by supplementary agreement dated 13.01.2016, the respondent-builder paid a sum of Rs. 1,05,34,163/- to respondent

no. 2 w.e.f 11.01.2016 to 10.12.2022 respectively (as detailed at page 3 of the written submissions of respondent no. 1). Out of the amount detailed above, the respondent/builder had already paid approximately a sum of Rs.21,64,876/- to respondent no. 2 by way of pre-EMI's as agreed upon. That arrangement continued till 10.12.2022 and so in this way, a sum of Rs.1,05,34,163/- in all was paid against the amount of pre-EMI's to the financial institution i.e., respondent no. 2. not being disputed by it and corroborated from statement of account placed on the record with effect from 14.12.2015 to 23.02.2021 (Page 48 of the written reply filed by respondent no. 2). It is not disputed that as per term and conditions mentioned in the buyer/supplementary agreements, the payments of pre-EMI's were made despite the fact that the allotees opted to withdraw from the project and sought refund of the paid-up amount vide request dated 22.06.2017 followed by reminders dated 15.01.2018, 19.03.2018 and a legal notice dated 27.08.2018 respectively. Though the due date for completion of the project and offer of possession of the allotted unit as per buyer's agreement was fixed as 26.06.2019 (clause 10.1), but the complainants exercised their option on 22.06.2017 i.e. before the expiry of 24 months. A reference in this regard may be made to in clause 1.2(a) and 7 of buyer's and supplementary agreements providing as under: -

> ***1.2A of BBA:*** *The Developer has agreed to pay the pre-EMI/EMI to the Bank/Financial institution directly for an initial period of 24 months and thereafter the intending allottee(s) agrees to unconditionally pay the Pre-EMI/EMI without fail to the Bank/ Financial institution as per the terms and conditions of the Bank/Financial Institution.*

7 of supplementary agreement: *It is hereby agreed by the allottee that subsequent to the execution of the present agreement the allottee cannot create any third party interest or transfer or withdraw or terminate the builder buyer agreement dated 26th Day of December, 2015 and this supplementary agreement for 24 months or on offer of possession whichever is earlier from the date of first disbursement of "Loan Amount" and the said period shall be termed as a "Lock in Period". It is however agreed between both the parties that the allottee has an option to cancel its booking after the expiry of said lock in period i.e., 24 months or at the time of offer of possession whichever is earlier, wherein on the request of the Allottee as per Clause 9 of the present agreement the Developer shall refund the entire booking amount of Rs. 10,85,640/- i.e., 10% of the total consideration including service tax paid by the Allottee) with an additional amount of Rs. 10,39,125/- (i.e., 100% of the booking amount excluding service tax) within a period of 30 days, in case of delay of payment to Allottee beyond 30 days the developer shall pay interest @ 18% P.A. on the amount payable to Allottee. If any EMI is debited to Allottee's Bank Account due t default on the part of developer or Bank the developer shall reimburse the same to the Allottee.*

43. It is evident from a perusal of the above-mentioned terms and conditions in both the documents that the developer was required to pay pre-EMI/EMI to the financial institute directly initially for a period of 24 months and thereafter the same were to be paid by the allottee. Similarly, clause 7 of the later document provides a lock-in period of 24 months for exercising an option of cancellation by the allottee and not prior to that. But, as per the tri-partite agreement executed between the parties on 28.12.2015, the lock-in period expired on 28.12.2017. However, before the expiry of that date, the complainants exercised their option vide letter dated 22.06.2017 followed by reminders dated 15.01.2018, 19.03.2018 and legal notice dated 27.08.2018 respectively. Thus in the face of above

mentioned terms and conditions of buyer agreement w.r.t. due date for completion of the project, offer of possession and as per buy back policy dated 13.01.2016 the request made by the complainant for withdrawal for the project and seeking refund vide letter dated 22.06.2017 was premature and was rightly rejected by the respondent builder and who continued to make payments against pre EMI to respondent no. 2 upto date as occupation certificate has not been received of the tower where the allotted unit is situated. But the question for consideration arises as to whether in the facts and circumstances detailed above, the builder-respondent can force the complainants to take possession of the allotted unit and pay the remaining amount though they withdrew from the project on 22.06.2017 followed by reminders dated 15.01.2018, 19.03.2018 and legal notice dated 27.08.2018 respectively. Though it is contended on behalf of respondent builder that the allottees are bound to take possession of the unit after paying the amount due but there plea advanced in this regard is devoid of merit. No doubt the complainants booked the unit under the subvention plan after paying some amount and raising loan from respondent no. 2 but midway withdrew from the project and sought refund. Though there request in this regard was rejected as the respondent builder continued to pay pre EMI even after period of 24 months to respondent no. 2 but when the allottees have already withdrawn from the project though prematurely, they are entitle to refund of paid up amount after deduction of 10% of the basic sale price of the unit as settled by the Hon'ble Apex Court in number of cases and even leading to framing of Regulation 11 in the year 2018 by the authority.

44. The deduction should be made as per the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, which states that-

"5. AMOUNT OF EARNEST MONEY

Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment/plot/building as the case may be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer."

45. It is not disputed that the subject unit was booked by the complainants against total sale consideration of Rs. 1,03,91,250/- leading to execution of buyer's agreement dated 26.12.2015 and followed by supplementary agreement dated 13.01.2016 respectively. The due date for completion of the project and offer of possession of the allotted unit was fixed as 26.09.2019. But as per the supplementary agreement, there was lock in period of 24 months from the date of disbursement of the loan amount i.e., 29.12.2015 during which the allottees were not entitled to withdraw from the project. But they withdrew from the project on 22.06.2017 even prior to that period and the respondent builder continued to pay pre-EMI against the allotted unit on behalf of the allottees. As per clause 4 of the tripartite agreement executed between the parties on 28.12.2015, the builder assumed liability on account of interest payable by the borrower to IHFL during the period to be

referred as the liability period in terms of ...... months from the date of first disbursement of loan facility i.e., till June 2017 and/or any other period as agreed by and between the borrower and the builder. A perusal of schedule 1 of that document shows liability period till June 2017and the subvention period was to commence from 31.12.2015 to 30.06.2017 with the liability of borrower to pay pre-Emi/Emi interest on balance term of loan with effect from 01.02.2017. There was lock-in period of 24 months or on offer of possession whichever being earlier from the date of first disbursement of loan amount as per clause 7 of the supplementary agreement dated 13.01.2016 and the governing clauses in this regard are 09 and 10 of that document. But without waiting for the lock-in period to expire, the complainants withdrew from the project by writing letter dated 22.06.2017 followed by reminders and legal notice. Thus, in view of these facts, the withdrawal of the complainants from the project was premature even prior to the due date and so they are entitled to refund of the paid-up amount after deduction of 10% of the sale consideration besides paying for interest on the amount paid as pre EMI's upto 30.06.2017, the liability of which was that of builder as per tripartite as well as supplementary agreement but subject to fulfilment of certain terms and conditions as detailed above. It is a fact that the complainants paid only a sum of Rs. 10,85,640/- and the remaining amount was paid against the unit by the financier on their behalf. So, after deduction of 10% of sale consideration of Rs. 1,03,91,250/-, the remaining amount if any be paid back to the complainants by the respondent builder but only after clearing the loan amount taken

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against that unit upto the date of withdrawal from the project i.e., 22.06.2017.

- Direct the respondent-builder to pay damages amounting to Rs. 10,00,000/- to the complainants for causing mental and emotional harassment, agony, inconvenience and discomfort to them.

46. The complainants in the aforesaid relief are also seeking relief w.r.t compensation. Hon'ble Supreme Court of India in case titled as ***M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors.*** (Supra), 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.

I. Directions of the Authority

i. The respondent builder is directed to refund the amount paid-up by the complainants after deducting 10% of the basic sale consideration of Rs. 1,03,91,250/- of the allotted unit.

ii. The respondent is further directed that the outstanding loan amount paid by the financial institution be refunded to the concerned financial institution.

iii. 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.

47. Complaint stands disposed of.

48. File be consigned to registry.

Ashok Sangwan Member	Sanjeev Kumar Arora Member	Vijay Kumar Goyal Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 25.07.2023

HARERA
GURUGRAM