

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

Complaint no. : 1461 of 2022
Date of complaint : 27.04.2022
Date of order : 11.10.2023

1. Sushil Kumar Agarwal,
2. Pomilla Agarwal,
Both R/o: - Flat no. 1601, Tower-3,
Fresco Nirwana Country,
Sector-50, Gurugram-122018.

Complainants

Versus

Imperia Structures Limited.
Regd. Office at: A-25,
Mohan Co-operative Industrial Estate,
Mathura Road, New Delhi-110044.

Respondent

CORAM:

Ashok Sangwan

Member

APPEARANCE:

Subham Tyagi (Advocate)
Nadeem Arman (Advocate)

Complainants
Respondent

ORDER

1. The present complaint has been filed by the complainant/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the



Rules and regulations made thereunder 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. 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.	Apartment no.	1704, 17 th Floor, Block D (page no. 28 of complaint)
8.	Unit area admeasuring	1435 sq. ft. (page no. 28 of complaint)
10.	Date of builder buyer agreement	12.09.2012 (Page no. 18 of complaint)
11.	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)
12.	Due date of possession	12.03.2016 [calculated as per possession clause]
14.	Total sale consideration	Rs. 67,44,202/- [as per the statement of account on page no. 13 of reply]
15.	Amount paid by the complainant	Rs. 62,64,563/- [as per the statement of account on page no. 16 of reply]
16.	Offer for fit out	07.09.2021 (Page no. 88 of complaint)
17.	Occupation certificate	Not received
18.	Offer of possession	Not offered

B. Facts of the complaint:

3. The complainants have made the following submissions: -

- I. That the complainants submitted an application on 29.08.2011 to purchase a unit in the project of respondent named "Esfera" at Sector 37C, Gurugram. Thereafter, an apartment buyer's agreement was executed between the parties vide which a unit bearing no. D-1704 admeasuring approx. 1435 sq.ft. on 17th floor was allotted in their favour for a total sale consideration of Rs.63,45,430/- against which they have paid a sum of Rs.62,83,771/- in all as and when demanded by the respondent.



- II. That despite making all timely payments by the complainants, the respondent company has failed to deliver the possession of the aforesaid unit on time as mentioned in the buyer's agreement even after passing almost 11 years since booking.
- III. That in the month of April 2016, just after the agreed date of delivery of possession, when the complainants visited the project site, they were shocked and surprised to see that the respondent has hardly developed 10-20% of the project while as per the agreement, it was supposed to handover the possession to complainants in the month of March 2016.
- IV. That the complainants raised their grievance regarding the delay in the construction and development, but to no avail. The complainants, after rigorous follow-ups, got to meet the team of respondents to know the actual status of the project. However, the respondent's team represented that the possession of the complainant's unit will be delivered maximum by the 4th quarter of 2019, along with other project developments. The respondent also agreed that it will not raise any demand notice till the possession and the remaining amount will be demanded from them only at the time of possession. As per the assurances and promises made by the respondent's representatives, the complainants agreed to continue with the project instead of the refund.
- V. That the complainants were shocked and surprised to receive the letter dated 07.09.2021 having subject "Demand Note Cum Possession Offer for Fit Outs" wherein the respondent is charging increased area charges, average escalation cost, the balance of GST, and service tax



without any explanation and reasoning. It is further stated that the Respondents has not taken any prior consent before increasing the area from the complainants and indeed never informed them regarding the same. In fact, when the complainant visited the project site, they were shocked to see that the status of the towers was nowhere near completion and the finishing and fit-outs work was not started at all.

- VI. That the complainant through their counsel sent the legal notice dated 06.10.2021 for the refund of its hard-earned money along with interest and compensation. However, despite receiving the legal notice, the respondent neither reverted to the legal notice nor refunded the money to the complainants. Thereafter, the complainants through their counsel sent a reminder to the legal notice on 27.11.2021, the same was also remained unanswered. Thus, the present complaint.

C. Relief sought by the complainants:

4. The complainants have sought following relief(s):
- I. To refund the entire paid-up amount along with prescribed rate of interest.
5. On the date of hearing, the authority explained to the respondent/promoter about the contraventions as alleged to have been committed in relation to section 11(4)(a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent.

6. The respondent vide reply dated 15.03.2023 contested the complaint on the following grounds: -



- i. That the complainants were provisionally allotted a unit bearing no. D-1704 for a total consideration amount of Rs.67,44,202/- vide booking dated 29.08.2011. Thereafter, a builder buyer agreement was executed between the parties on 12.09.2012.
- ii. That the respondent company has successfully completed the construction of the said project, way before the agreed timeline, and has applied to the competent authority for issuance of occupancy certificate on 15.04.2021 itself, after complying with all the requisite formalities, and the same is awaited to be procured anytime now between month of March to May.
- iii. That the complainants have not paid the outstanding instalments in time and it must be noted that till this day a large sum of amount is pending to be paid by them, despite receipt of numerous reminders.
- iv. That as per clause 8 of the buyer's agreement, time was agreed to be a matter of essence and the allottees were bound to make timely payments of the instalments due as per the payment plan opted by them. The complainants were neither coerced nor influenced by the respondent company to sign the said BBA. It was the complainants who voluntarily and knowingly breached the provisions of the said agreement.
- v. That despite numerous reminders, the complainants failed to comply by the obligations laid down by the BBA and a sum of Rs.4,79,639/- is still due to be paid by them.
- vi. That delay was caused in completion of construction of the said project due to certain unforeseeable circumstances which are not within the reasonable control of the developer like ban on construction activities



in the said region from 04.11.2019 onwards, nation-wide lockdown on 24.03.2020 due to pandemic of Covid-19.

- vii. That it was agreed between the parties that the respondent reserved its rights for alteration in the super-area of the unit at any stage of the development of the said project and it may charge/cause reduction in charges as per the said alterations as the super area stated in the agreement was tentative and is subject to change till the construction of the said building is complete.
7. 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

8. The respondent has raised a preliminary submission/objection that the authority has no jurisdiction to entertain the present complaint. The objection of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

9. 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

10. 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) The promoter shall-

(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.

11. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.
12. 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. 2021-2022(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*** and 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."

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

F. Findings on the objections raised by the respondent.

F.I Objection regarding force majeure conditions.

14. The respondent-promoter has raised the contention that the construction of the tower in which the unit of the complainants are situated, has been delayed due to force majeure circumstances such as orders/restrictions of the NGT as well as competent authorities, High Court and Supreme Court orders, spread of Covid-19 across worldwide etc. However, all the pleas advanced in this regard are devoid of merit. First of all, the possession of the unit in question was to be offered by 12.03.2016. Hence, events alleged by the respondent do not have any impact on the project being developed by the respondent. Moreover, some of the events mentioned above are of routine in nature happening annually and the promoter is required to take the same into consideration while launching the project. Thus, the promoter



respondent cannot be given any leniency on based of aforesaid reasons and it is a well settled principle that a person cannot take benefit of his own wrong.

G. Findings on the relief sought by the complainants.

G.I To refund the entire paid-up amount alongwith prescribed rate of interest.

15. The complainants intend to withdraw from the project and are seeking refund of the amount paid by them in respect of subject unit along with interest at the prescribed rate as provided under section 18(1) of the Act. Sec. 18(1) of the Act 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)

16. 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.”.”

17. The complainants have booked a residential apartment bearing no. 1704, 17th floor, Block-D in the project named as 'The Esfera' situated at sector 37-C, Gurugram for a total sale consideration of Rs.67,44,202/- out of which they have made a payment of Rs.62,64,563/-. The complainants were allotted the above-mentioned unit vide buyer's agreement dated 12.09.2012. As per the above possession clause, the respondent was obligated to complete the construction of the project in 3 years and 6 months from the date of execution of buyer's agreement. However, the same has not been completed till date which is evident from the fact that the respondent has not obtained OC from the competent authorities till date. Therefore, the due date for handing over of possession comes out to be 12.03.2016.
18. **Admissibility of refund along with interest at prescribed rate of interest:** However, the allottees intend to withdraw from the project and are seeking refund of the amount paid by them 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."

19. 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.
20. 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., 11.10.2023 is **08.75%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.75%**.
21. The definition of term 'interest' as defined under section 2(z a) of the Act provides that 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. The relevant section is reproduced below:
- "(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;"*
22. The authority has observed that even after a passage of more than 13 years (i.e., from the date of agreement till date) neither the construction is complete nor the offer of possession of the allotted unit has been made to the allottees by the respondent/promoters. The authority is of the view that the allottees cannot be expected to wait endlessly for taking possession of the unit which is allotted to them. The authority observes



that the respondent-builder has applied for occupation certificate/part occupation certificate on 15.04.2021 itself with a huge delay on part of the respondent. In view of the above-mentioned fact, the allottees intend to withdraw from the project and are well within the right to do the same in view of section 18(1) of the Act, 2016.

23. 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 allottees cannot be expected to wait endlessly for taking possession of the allotted unit 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....."

24. 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.** (supra) 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:

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.

25. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottee as per agreement for sale under section 11(4)(a). The promoter has failed to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottees, as the allottees wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by it in respect of the unit with interest at such rate as may be prescribed.
26. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such, the complainants are entitled to refund of the entire paid-up amount of Rs.62,64,563/- at the prescribed rate of interest i.e., @10.75% p.a. (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

H. Directions of the authority

27. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations

v



cast upon the promoter as per the function entrusted to the authority under section 34(f):

- i. The respondent/promoter is directed to refund the entire amount i.e., Rs.62,64,563/- received by it from the complainants alongwith interest at the rate of 10.75% p.a. 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 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.
28. Complaint stands disposed of.
29. File be consigned to the registry.

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 11.10.2023

HARERA
GURUGRAM