HARYANA REAL ESTATE REGULATORY AUTHORITY PANCHKULA

Website: www.haryanarera.gov.in

Complaint no.:	**2580 of 2022**
Date of filing:	**11.10.2022**
Date of first hearing:	**06.12.2022**
Date of decision:	**02.08.2023**

Amit Mahajan S/o Sh. A.S.Mahajan
R/o C-1850, Sushant Lok,
Phase-1, Gurugram, Haryana-122002

....COMPLAINANT(S)

VERSUS

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

....RESPONDENT(S)

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

Present: - Mr. Kanish Bangia, Proxy Counsel for Advocate Kuldeep Kumar Kohli, Counsel for the complainant through VC.

Mr. Shubhnit Hans, Counsel for the respondent through VC.

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ORDER (DR. GEETA RATHEE SINGH - MEMBER)

1. Present complaint has been filed on 11.10.2022 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 complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following table:

S.No.	Particulars	Details
1.	Name of the project	Espania Floor-KEF, NH-1, Kundli, Sonipat
2.	Name of the promoter	TDI Infrastructure Ltd
3.	RERA registered/not registered	Unregistered.
4.	DTCP License no.	1065-1068 of 2006,
	Licensed Area	12.64 acres
5.	Unit no.	EF-68
6.	Unit area	1499 sq. ft.
7.	Date of allotment	04.01.2012

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8.	Date of builder buyer agreement	14.03.2012
9.	Due date of offer of possession (30 months)	14.09.2014
10.	Possession clause in BBA (clause 28)	.....However, if the possession of the floor 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 buyer shall be entitled to a fixed monthly compensation/ damages/ penalty quantified @ Rs.5 per square foot of the total super area of the floor. 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 floor.
11.	Total sale consideration	₹ 42,79,515/-.
12.	Amount paid by complainant	₹ 32,58,756/-
13.	Offer of possession (fit-out)	22.02.2022.

B. FACTS OF THE COMPLAINT

3. Facts of complaint are that complainant had booked a floor in a project of the respondent i.e. TDI Infrastructure Ltd by making payment of Rs 4,00,000/- on 22.07.2011, following which allotment letter dated 04.01.2012 was issued in favor of complainant and floor no. EF-68 having area 1499 sq ft in project "Espania Floor-KEF", NH-1, Kundli , Sonipat was allotted.

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4. That builder buyer agreement was executed between the parties on 14.03.2012 and in terms of it, the possession was supposed to be delivered upto 14.09.2014. Complainant has paid an amount of Rs 32,58,756/- against total sale consideration of Rs 42,79,515/-.

5. That upon many requests and reminders of the complainant, the respondent after a lapse of more than 7 years issued a letter of offer of possession for fit-out on 22.02.2022 alongwith demand of Rs 9,70,765/-. Complainant did not accept said possession and raised objections to the illegal demands on account of club membership charges, EDC, Preferential location charges, VAT, unilateral increase in area by 219 sq ft, delayed possession charges but the respondent did not pay any heed to his requests.

6. That the complainant did not make any payments towards acceptance of impugned offer of possession and due to non-payment the respondent issued a cancellation letter dated 22.03.2022. Said letter was replied by way of legal notice 27.07.2022. Further, the offer of possession for fit-out was not accepted by complainant as said offer possession was not supported with occupation certificate meaning thereby that it was not a valid offer and complainant was not bound to accept it.

7. That respondent failed to honor its contractual obligations by not offering a valid offer of possession within the time stipulated in

builder buyer agreement. Therefore, complainant is left with no other option but to approach this Authority. Hence the present complaint has been filed.

C. RELIEF SOUGHT

8. Complainant in his complaint has sought following relief:

i. Restrain the respondent from raising fresh demand with respect to the project.

ii. Restrain the respondent from creating third party rights in the said property till the time the entire amount with interest is refunded.

iii. Restrain the respondent from cancelling the allotment till the time the entire amount paid by complainant is refunded with interest.

iv. To order the respondent to refund the entire amount of Rs 32,58,756/- paid by the complainant to the respondent with interest @9.4% p.a.

v. To order the respondent to pay interest on the entire amount paid by the complainant at the rate as specified under The Real Estate (Regulation & Development) Act,2016 and the rules framed thereunder called the Haryana Real Estate (Regulation & Development) Rules, 2017.

D. REPLY SUBMITTED ON BEHALF OF RESPONDENT

Learned counsel for the respondent filed detailed reply on 01.08.2023 pleading therein:

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9. That due to the reputation of the respondent company, the complainant had voluntarily invested in the project of the respondent company namely-Espania floors, NH-1, Kamaspur, Sonipat, Haryana.

10. That the builder buyer agreement between the complainant and respondent has been executed on 14.03.2012 which is much prior from the date when the RERA Act, 2016 came into existence. Therefore, the present complaint is not maintainable and falls outside the purview of provisions of RERA Act.

11. That complainant herein as an investor has accordingly invested in the project of the Respondent Company for the sole reason of investing, earning profits and speculative gains, therefore, the captioned complaint is liable to be dismissed in limine.

12. That respondent had vide letter dated 12.09.2016 applied for grant of occupation certificate before the Director, Town & Country Planning Department, Haryana.

13. That vide letter dated 22.03.2022 respondent has already cancelled the allotment of unit for the reason that the complainant at its own free will stopped making payments to the respondent and did not bother to clear its pending dues despite numerous reminders/letters issued by respondent. Copy of letter dated 22.03.2022 is annexed as Annexure R-6.

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14. That handing over of possession has always been tentative and subject to force majeure conditions and the complainant has been well aware about the same.

E. ARGUMENTS OF LEARNED COUNSEL FOR COMPLAINANT AND RESPONDENT

15. During oral arguments learned counsel for the complainant submitted that the possession of the unit was supposed to be delivered by the year 2014. However, respondent has offered possession to the complainant on 22.02.2022 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. Complainant who has already waited for so many years does not wish to wait endlessly for delivery of possession of flat and insisted upon refund of the paid amount along with interest.

16. Learned counsel for the respondent reiterated arguments as were submitted in written statement and further stated that application for grant of occupation certificate is still pending with the DTCP. It is the complainant who defaulted by not coming forward to accept offer of possession dated 22.02.2022 and due to non-payment on behalf of complainant, the respondent was restrained to issue cancellation letter

dated 22.03.2022. After issuance of cancellation letter, the complainant is not left with any right/claim.

F. ISSUES FOR ADJUDICATION

17. Whether the complainant is entitled to refund of amount deposited by him along with interest in terms of Section 18 of Act of 2016?

G. OBSERVATIONS AND DECISION OF THE AUTHORITY

18. The Authority has gone through the rival contentions. In light of the background of the matter as captured in this order and also the arguments submitted by both parties, Authority observes as follows:

(i) One of the averments of respondent is that provisions of the RERA Act of 2016 will not apply on the agreements executed prior to coming into force of RERA Act,2016. Accordingly, respondent has argued that relationship of builder and buyer in this case will be regulated by the agreement previously executed between them and the same cannot be examined under the provisions of RERA Act. In this regard, Authority observes that after coming into force the RERA Act, 2016, jurisdiction of the civil court is barred by Section 79 of the Act. Authority, however, is deciding disputes between builders and buyers strictly in accordance with terms of the provisions of flat-buyer agreements. After RERA Act of 2016 coming into force the terms of agreement are not re-written, the Act of 2016 only ensure that whatever were the obligations of the promoter as per agreement for

sale, same may be fulfilled by the promoter within the stipulated time agreed upon between the parties. Issue regarding opening of agreements executed prior to coming into force of the RERA Act, 2016 was already dealt in detail by this Authority in ***complaint no. 113 of 2018 titled as Madhu Sareen v/s BPTP Ltd*** decided on 16.07.2018. Relevant part of the order is being reproduced below:

> *"The RERA Act nowhere provides, nor can it be so construed, that all previous agreements will be re-written after coming into force of RERA. Therefore, the provisions of the Act, the Rules and the Agreements have to be interpreted harmoniously. However, if the Act or the Rules provides for dealing with certain specific situation in a particular manner, then that situation will be dealt with in accordance with the Act and the Rules after the date of coming into force of the Act and the Rules. However, before the date of coming into force of the Act and the Rules, the provisions of the agreement shall remain applicable. Numerous provisions of the Act saves the provisions of the agreements made between the buyers and seller."*

Further, as per recent judgement of Hon'ble Supreme court in **Newtech Promoters and Developers Pvt. Ltd Civil Appeal no. 6745-6749 of 2021** it has already been held that the projects in which completion certificate has not been granted by the competent Authority, such projects are within the ambit of the definition of on-going projects and the provisions of the RERA Act,2016 shall be

applicable to such real estate projects, furthermore, as per section 34(e) it is the function of the Authority to ensure compliance of obligation cast upon the promoters, the allottees and the real estate agents under this Act, and the rules and regulations made thereunder, therefore this Authority has complete jurisdiction to entertain the captioned complaint.

Execution of builder buyer agreement is admitted by the respondent. Said builder buyer agreement is binding upon both the parties. As such, the respondent is under an obligation to hand over possession on the deemed date of possession as per agreement and in case, the respondent failed to offer possession on the deemed date of possession, the complainants are entitled to delay interest at prescribed rate u/s 18(1) of RERA Act or for refund of paid amount till actual realization. Therefore, obligation raised by the respondent with regard to maintainability of the present complaint is rejected.

(ii) The objection of the respondent that the project in which the complainant is seeking refund of paid amount is not registered with this Hon'ble Authority and therefore this Hon'ble Authority does not have jurisdiction to entertain the present complaint. This issue that whether this Authority has jurisdiction to entertain the present complaint as the project is not registered has been dealt and decided by the Authority in **complaint no. 191 of 2020 titled as Mrs. Rajni**

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and Mr. Ranbir Singh vs Parsvnath Developers Ltd. Relevant part of said order is being reproduced below:

"Looked at from another angle, promoter of a project which should be registered but the promoter is refusing to get it registered despite the project being incomplete should be treated as a double defaulter, i.e. defaulter towards allottees as well as violator of Sector 3 of the Act. The argument being put forwarded by learned counsel for respondent amounts to saying that promoters who violate the law by not getting their ongoing/incomplete projects registered shall enjoy special undeserved protection of law because their allottees cannot avail benefit of summary procedure provided under the RERA Act for redressal of their grievances. It is a classic argument in which violator of law seeks protection of law by misinterpreting the provisions to his own liking.

14. The Authority cannot accept such interpretation of law as has been sought to be put forwarded by learned counsel of respondent. RERA is a regulatory and protective legislation. It is meant to regulate the sector in overall interest of the sector, and economy of the country, and is also meant to protect rights of individual allottee vis-a-vis all powerful promoters. The promoters and allottees are usually placed at a highly uneven bargaining position. If the argument of learned counsel for respondent is to be accepted, defaulter promoters will simply get away from discharging their obligations towards allottee by not getting their incomplete project registered. Protection of defaulter promoters is not the intent of RERA Act. It is meant to hold them accountable. The interpretation sought to be given by learned counsel for respondent will lead to perverse outcome.

15. For the foregoing reasons, Authority rejects the arguments of respondent company. The application filed by respondent promoter is accordingly rejected."

(iii) The respondent in its reply has contended that the complainant is "speculative buyer" who has invested in the project

for monetary returns and taking undue advantage of RERA Act, 2016 as a weapon during the present down side conditions in the real estate market and therefore he is not entitled to the protection of the Act of 2016. In this regard, Authority observes that "any aggrieved person" can file a complaint against a promoter if the promoter contravenes the provisions of the RERA Act, 2016 or the rules or regulations. In the present case, the complainant is an aggrieved person who has filed a complaint under Section 31 of the RERA Act, 2016 against the promoter for violation/contravention of the provisions of the RERA Act, 2016 and the Rules and Regulations made thereunder. Here, it is important to emphasize upon the definition of term allottee under the RERA Act of 2016, reproduced below: -

Section 2(d) of the RERA Act:
(d) "allottee" in relation to a real estate project, means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;

(iv) In view of the above-mentioned definition of "allottee" as well as upon careful perusal of allotment letter dated 04.01.2012 and builder buyer agreement dated 14.03.2012, it is clear that complainant is an "allottee" as unit bearing no. EF-68 in the real

estate project "Espania Florr-KEF, NH-1, Kundli", Sonipat was allotted to him by the respondent promoter. The concept/definition of investor is not provided or referred to in the RERA Act, 2016. As per the definitions provided under section 2 of the RERA Act, 2016, there will be "promoter" and "allottee" and there cannot be a party having a status of an investor. Further, the definition of "allottee" as provided under RERA Act, 2016 does not distinguish between an allottee who has been allotted a plot, apartment or building in a real estate project for self-consumption or for investment purpose. The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled **as M/s Srushti Sangam Developers Ltd. Vs Sarvapriya Leasing (P)Ltd. And Anr.** had also held that the concept of investors not defined or referred to in the Act. Thus, the contention of promoter that allottees being investor are not entitled to protection of this Act also stands rejected.

(v) Admittedly, complainant in this case had purchased the floor in the project of the respondent in the year 2012 against which an amount of Rs 32,58,756/- has been paid by the complainant. Out of said paid amount, last payment of Rs 3,19,382/- was made to respondent on 08.09.2014 which implies that respondent is in receipt of total paid amount since year 2014

whereas fact remains that no valid offer of possession duly supported with occupation certificate of the booked floor has been made till date.

(vi) Authority observes that the floor in question was booked in the July,2011 by the complainant. Allotment letter dated 04.01.2012 was issued in his favour and thereafter builder buyer agreement got executed between the complainant and respondent on 14.03.2012. In terms of clause 28 of it, the possession was supposed to be delivered within a period of 30 months from the date of execution of the builder buyer agreement i.e. by 14.09.2014. In present situation, respondent failed to honour its contractual obligations till date without any reasonable justification.

(vii) Respondent vide letter dated 22.02.2022 had offered possession for fit-out to the complainant alongwith demand of Rs 9,70,765/- but said offer of possession was not supported with occupation certificate. Complainant filed present complaint seeking refund of paid amount along with interest, as the respondent failed in its obligation to deliver possession as per the terms of buyers agreement and even more, respondent is not in a position deliver a valid possession of the booked unit as of today as occupation certificate which stands applied on 12.09.2016 has not been

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received till date. Though respondent in its reply has submitted that allotment of unit has been cancelled on 22.03.2022 as complainant did not make payments in lieu of offer of fit-out possession dated 22.02.2022, said act of cancellation is not justified on part of respondent for the reason that offer of fit-out possession dated 22.02.2022 was not a valid offer of possession as the same was without occupation certificate and accompanied with huge illegal demands of Rs 9,70,765/-raised on account of club membership charges, EDC and maintenance charges. Further, since the occupation certificate has not been received till date it was not justifiable for the respondent to raise demand for increased area, club etc. In such circumstances, the complainant cannot be held responsible/liable for non-payment. Thus, the cancellation made on account of non-payment of dues was illegal and arbitrary exercise of powers by the respondent and complainant was not bound to make payment in acceptance of same. If we look at this case from another perspective, the respondent after cancellation of unit on 22.03.2022 should have acted upon in furtherance of it by refunding the paid amount after forfeiting the earnest money which has not been done by respondent till date. Paid amount by complainant is still lying with the respondent. Complainant had invested his hard earned money in the project with hopes of timely

delivery of possession. However, fit-out possession of unit was offered to the complainant after a delay of more than seven years. Fact remains that respondent is yet to receive occupation certificate meaning thereby that a valid possession is yet to be offered to the complainant.

(viii) 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 investment made for obtaining possession of unit as the possession of the flat in question is shrouded by a veil of uncertainty. Complainant had invested a huge amount of more than ₹ 32 Lakh with the respondent to gain possession of a residential floor. However, respondent is not in a position to offer a valid offer to the complainant since the project is yet to receive occupation certificate. 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 for a valid possession of the allotted flat. Complainant is at liberty to exercise his rights to

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withdraw from the project on account of default on the part of respondent to deliver possession and seeks refund of the paid amount alongwith interest.

(ix) Further, Hon'ble Supreme Court in the matter of "***Newtech Promoters and Developers Pvt. Ltd. versus State of Uttar Pradesh and others*** " in Civil Appeal no. 6745-6749 of 2021 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 terms agreed between them. 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.*"

19. 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.

20. 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;

21. Consequently, as per website of the state Bank of India i.e., https://sbi.co.in, the highest marginal cost of lending rate (in short MCLR) as on date i.e. 02.08.2023 is 8.75%. Accordingly, the prescribed rate of interest will be MCLR + 2% i.e., 10.75%.

22. Rule 15 of HRERA Rules, 2017 provides for prescribed rate of interest which is 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".*

23. From above discussion, it is amply proved on record that the respondent has not fulfilled its obligations cast upon him under RERA Act,2016 and the complainant is entitled for refund of deposited amount alongwith interest. Thus, respondent will be liable to pay the complainant interest from the date amounts were paid till the actual realization of the amount. Authority directs respondent to refund to the complainant the paid amount of Rs 32,58,756/- along with interest at the rate prescribed in Rule 15 of Haryana Real Estate (Regulation and Development) Rules, 2017 i.e. at the rate of SBI highest marginal cost of lending rate (MCLR)+ 2 % which as on date works out to 10.75% (8.75% + 2.00%) from the date amounts were paid till the actual realization of the amount. Authority has got calculated the total amount along with interest calculated at the rate of 10.75% till the date

of this order and total amount works out to Rs 38,18,849/- as per detail given in the table below:

Sr. No.	Principal Amount in ₹	Date of payment	Interest Accrued till 02.08.2023
1.	4,00,000	10.09.2011	511877
2.	5,23,175	20.10.2011	663339
3.	3,91,239	25.02.2012	481307
4.	3,45,264	16.04.2012	419562
5.	3,19,382	23.11.2012	367322
6.	3,19,382	26.02.2013	358386
7.	3,19,382	26.02.2013	358386
8.	3,19,382	13.05.2013	351237
9.	3,19,382	08.09.2014	305804
10.	2,168	08.02.2016	1629
14.	Total=32,58,756/-		Total=38,18,849/-
15.	Total Payable to complainant	32,58,756+ 38,18,849=	70,77,605/-

As per statement of accounts attached by both parties, i.e., complainant at page no. 100 of complaint and respondent at page no. 43 of reply, the total paid amount is mentioned as Rs 32,80,444/-. At this stage, it is worthwhile to mention here that complainant in the relief sought in his complaint have specifically claimed refund of Rs 32,58,756/- only [32,80,444- 21,688 (interest)] with interest. The complainant cannot be said to be entitled to more than the relief claimed. Therefore, the refund of paid amount of Rs 32,58,756/- with interest is awarded to the complainant.

H. DIRECTIONS OF THE AUTHORITY

24. 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 ₹ 70,77,605/- 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.

25. **Disposed of**. File be consigned to record room after uploading of order on the website of the Authority.

.....
NADIM AKHTAR
MEMBER]

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