



## HARYANA REAL ESTATE REGULATORY AUTHORITY PANCHKULA

Website: www.haryanarera.gov.in

<b>Complaint no.:</b>	<b>193 of 2023</b>
<b>Date of filing:</b>	<b>10.02.2023</b>
<b>Date of first hearing:</b>	<b>20.04.2023</b>
<b>Date of decision:</b>	<b>22.04.2024</b>

Kavinder Tomar S/o Sh. Jagpal Singh Tomer  
R/o 381, HUDA, Sector-11,  
Panipat, Haryana

....COMPLAINANT

VERSUS

TDI Infrastructure Limited.  
Second Floor, TDI Corporate Headquarters  
Mahindra Towers, 2A Bhikaji Cama Place,  
New Delhi- 110066

....RESPONDENT

**CORAM:**                      **Nadim Akhtar**                      **Member**  
   **Chander Shekhar**                      **Member**

**Present: -**                      Mr. Kavinder Tomar, Complainant in person through VC.  
   Mr. Shubhnit Hans, Counsel for the respondent through VC.

### **ORDER (NADIM AKHTAR - MEMBER)**

1. Present complaint has been filed on 10.02.2023 by complainant under Section 31 of the Real Estate (Regulation & Development) Act, 2016

*Nadim Akhtar*

(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 heights, NH-1, Sonipat
2.	Name of the promoter	TDI Infrastructure Ltd
3.	RERA registered/not registered	Registered. HRERA-PKL-SNP-161-2019 dated 15.11.2019
4.	DTCP License no.	1065-1068 of 2006,
	Licensed Area	12.64 acres
5.	Unit no.	EH-03/0401, 4 <sup>th</sup> floor
6.	Unit area	1390 sq. ft.
7.	Date of allotment	24.03.2012
8.	Date of builder buyer agreement (executed)	19.04.2012

	between respondent and Mrs. Sheela Tomar)	
9.	Due date of offer of possession	19.10.2014
10.	Possession clause in BBA -30 months	Clause 28 “.....However, if the possession of the apartment is delayed beyond a period of 30 months from the date of execution thereof and the reasons of delay are solely attributable to the wilful neglect or default of the company then for every month of delay, the purchaser shall be entitled to a fixed monthly compensation/ damages/ penalty quantified @ Rs 5 per square foot of the total super area of the apartment. The purchaser agrees that he shall neither claim nor be entitled for any further sums on account of such delay in handing over the possession of the apartment.”
11.	Total sale consideration	₹ 25,88,067/-
12.	Amount paid by complainants	₹ 37,55,563.86/- Complainant in his pleadings has stated paid amount as Rs 37,35,312/- but statement of account of Rs 37,55,563.86/- has been placed on record. Accordingly, complainant during arguments stated that paid amount as reflected in statement of account be taken into consideration for refund of paid amount with interest.
13.	Offer of possession (fit-out)	11.06.2018.



## B. FACTS OF THE COMPLAINT

3. Facts of complaint are that complainant's mother Smt. Sheela Tomar had booked a unit in the project of the respondent namely; Espania, Heights situated in Sonipat by making payment of Rs 2,50,000/- on 13.10.2011, following which builder buyer agreement was executed between Smt. Sheela Tomer and respondent on 19.04.2012 and in terms of clause 28 of it, possession was supposed to be delivered within 30 months i.e. upto 19.10.2014.
4. Complainant has paid an amount of Rs 37,55,563/- against total sale consideration of Rs 25,88,067/- but respondent has failed to abide by the timeline of construction and the construction was delayed way behind the schedule.
5. That complainant's mother died on 14.05.2018 and thereafter, vide transfer agreement dated 07.09.2019 the said flat was transferred in the name of the complainant. Before said transfer, 100% of flat dues were cleared by the complainant except club charges. Accordingly, respondent on the same day issued NOC to complainant to take possession of the flat, then complainant enquired from respondent about receipt of relevant approvals like completion certificate and occupation certificate which were denied by respondent with an assurance that approvals will be provided soon. Thereafter,



complainant without taking possession of the flat and without completing official possession formalities made enquiries and learnt that neither the said project is complete nor the said project is having promised overview. Moreover, respondent has raised construction in contravention to the building bye-laws and due to this occupation certificate has not been given by the concerned authorities. Respondent has cheated and played fraud upon the complainant.

6. That after waiting for almost 11 years, the complainant gave up the hope and vide legal notice dated 01.10.2022 issued through his advocate terminated the apartment buyers agreement dated 19.04.2012 and called upon the respondent to refund the paid amount with interest at a rate of 24% within 30 days of receipt of said legal notice. Respondent has duly received legal notice but till now respondent has not refunded the amount. Therefore, complainant is left with no other option but to approach this Authority. Hence the present complaint has been filed before this Hon'ble Authority.

#### **C. RELIEF SOUGHT**

7. Complainant in his complaint has sought following reliefs:
- i. Allow the present complaint.
  - ii. Direct the respondent to refund Rs 37,35,312/- (correct paid amount is Rs 37,55,563/- as mentioned in statement of account and admitted



by complainant at the time of hearing) with interest @24% p.a. from the date of payment till realization of the said amount to complainant.

iii. Award compensation for harassment of Rs 25 Lakhs to the complainant and against the respondent for the mental agony caused and loss of opportunities.

iv. Award penalty for hardship against the respondent for compensating for the rent paid by the complainant for residential flat for duration between the possession date (19.10.2014 as per signed apartment buyer agreement) to till today as complainant would not have paid rent if got possession on time.

v. Any other relief which the Hon'ble Authority deems fit may also be granted.

#### **D. REPLY SUBMITTED ON BEHALF OF RESPONDENT**

Learned counsel for the respondent filed detailed reply on 12.09.2023 pleading therein:

8. That due to the reputation of the respondent company, the complainant had voluntarily invested in the project of the respondent company namely-Espania Heights, Main NH-1, Sonipat, Haryana.
9. That the builder buyer agreement between the complainant and respondent has been executed on 19.04.2012 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.

10. 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.
11. That respondent had vide letter dated 12.09.2016 applied for grant of occupation certificate before the Director, Town & Country Planning Department, Haryana. Due to unforeseen circumstances, the respondent had to apply again to the Director, Town and Country Planning, Haryana for grant to occupation certificate vide letter dated 17.02.2022. Respondent had also paid a substantial amount of Rs 10,00,000/- requesting the Ld. DTCP to compound the offence of offering the possession with occupation certificate.
12. That complainant has concealed that vide letter dated 11.06.2018 respondent has already offered possession of the booked floor and complainant has already signed the NOC dated 26.08.2019. Copy of NOC is annexed as Annexure R-5.
13. 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 COMPLAINANT AND LEARNED COUNSEL  
FOR RESPONDENT**

14. During oral arguments 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 11.06.2018 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. With regard to NOC, it has been stated that said document was signed by the complainant under threat of forfeiture of paid amount and said NOC cannot be relied upon as the actual possession has not yet been delivered by the respondent to the complainant after receipt of occupation certificate. In view of the constraining circumstances, complainant is willing to surrender the possession of the flat and seek original relief which is refund of the paid amount along with interest.

15. 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 is at fault by not coming forward to accept actual possession of the floor even after signing of NOC dated 26.08.2019.





Moreover, respondent has already filed a fresh application for grant of occupation certificate on 17.02.2022 and it is expected to be received soon.

**F. ISSUES FOR ADJUDICATION**

16. 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. FINDINGS ON THE OBJECTIONS RAISED BY THE RESPONDENT.**

**G.I Objection regarding execution of BBA prior to the coming into force of RERA Act,2016.**

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 and objection raised by the respondent regarding maintainability of the present complaint is rejected.

**G.II Objections raised by the respondent stating that complainant herein is an investor and have invested in the project of the Respondent Company for the sole reason of investing, earning profits and speculative gains.**

The complainant herein is the allottee/homebuyer who has made a substantial investment from his hard earned savings alongwith borrowing of money from bank under the belief that the promoter/real estate developer will handover possession of the booked unit within 3-4 years of allotment but his bonafide belief stood shaken when the promoter failed to offer a valid possession of the booked unit till date without any reasonable cause. It is after an inordinate delay in handing over of possession that complainant has approached this Authority for seeking refund of paid amount with



interest in terms of provisions of RERA Act,2016 being allottee of respondent-promoter. As per definition of allottee provided in clause 2(d) of RERA Act,2016, present complainant is duly covered under it and is entitled to file present complaint for seeking the relief claimed by him. Clause 2(d) of RERA Act,2016 is reproduced for reference:-

*“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”.*

Complainant has been allotted flat in the project of respondent by the respondent/promoter itself and said fact is duly admitted by the respondent in the builder buyer agreement dated 19.04.2012. Also, the definition of allottee as provided under Section 2 (d) does not distinguish between an allottee who has been allotted a unit for consumption/self utilization or investment purpose. So, the plea of respondent to dismiss the complaint on the ground that complainant herein is investor does not hold merit and same is rejected.



## H. OBSERVATIONS AND DECISION OF THE AUTHORITY

17. 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) Admittedly, complainant's mother in this case had purchased the floor in the project of the respondent in the year 2011 against which an amount of Rs 37,55,563/- has been paid to the respondent. Out of said paid amount, last payment of Rs 1,53,000/- was made to respondent on 26.08.2019 which implies that respondent is in receipt of total paid amount since year 2019 whereas fact remains that no valid offer of possession duly supported with occupation certificate of the booked floor has been made till date.

(ii) Authority observes that the floor in question was booked in the October, 2011 by the complainant's mother. Builder buyer agreement was executed between the parties on 19.04.2012 and in terms of clause 28 of it, respondent was under an obligation to deliver possession within 30 months, i.e., latest by 19.10.2014. In present situation, respondent failed to honour its contractual obligations without any reasonable justification.



(iii) Fact remains that complainant's mother died on 14.05.2018 and then unit in question stands transferred in the name of complainant vide transfer agreement date 07.09.2019. Endorsement to this effect has been made by respondent in its records on 07.09.2019.

(iv) Respondent vide letter dated 11.06.2018 had offered possession for fit-out to the complainant alongwith demand of Rs 8,16,545/- but said offer of possession was issued without obtaining occupation certificate. Complainant filed present complaint seeking refund of paid amount along with interest, as the respondent failed in its obligation to deliver possession as per the terms of buyers agreement. Complainant under the apprehension of losing his hard earned money accepted the offer of possession issued by the respondent and deposited a further payment of ₹ 8.16 lakh on 26.08.2019 to the respondent as full and final payment for taking possession of flat. An NOC for handing over of possession was issued to the complainant on 26.08.2019. As per information gathered in similar cases pertaining to same project of the respondent, it is to mention here that on 28.06.2022 Indian Bank issued a "Notice for Indented Sale" to the respondent for the project "Espania", i.e, the project in concern, as the respondent has failed to repay an



amount of ₹ 48,22,00,000/- of the Indian Bank and the bank is intending to sell off the entire project land of 12.64 acres including all the units build by way of auction. The case regarding the supposed auction is pending adjudication before Hon'ble High Court in CWP No. 15082-2022 titled TDI ESPANIA RESIDENTS WELFARE ASSOCIATION vs INDIAN BANK (ALLAHABAD) AND ORS.

(v) Despite making a full and final payment towards booking of floor complainant has sought relief of refund of paid amount for the reason that respondent is not in a position deliver a valid possession of the flat. Though respondent in its reply has submitted that complainant is at fault in not taking possession of the unit after signing of NOC dated 26.08.2019, however respondent has only attached a copy of NOC for handing over of possession. No possession certificate, issued by promoter towards handing over of actual physical possession has been attached by the respondent. The complainant has denied accepting the actual possession or signing any possession certificate, which shows that the complainant has not taken the actual physical possession. Complainant had invested his hard earned money in the project with hopes of timely delivery of possession. However, possession of flat was offered to the

had

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

(vi) 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 capital as the possession of the flat in question is shrouded by a veil of uncertainty. Complainant had invested a huge amount of ₹ 27 Lakh with the respondent by the year 2016 and a further amount of ₹ 8.16 lakh in 2019 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 and that the entire project





“Espania” is under legal dispute before Ho’ble High Court. Complainant is justifiably under apprehension with regard to the security of his investment in the project. Since respondent is not in a position to offer a valid offer of possession in foreseeable future, complainant who has already waited for more than eight years does not wish to wait for a further uncertain amount of time for a valid possession. Complainant is at liberty to exercise his rights to withdraw from the project on account of default on the part of respondent to deliver possession and seek refund of the paid amount.

(vii) 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.”*

18. 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.
19. 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;

20. 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. 22.04.2024 is 8.85%. Accordingly, the prescribed rate of interest will be MCLR + 2% i.e., 10.85%.

21. 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".*

22. 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 37,55,563/- 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 10.85% (8.85% + 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 10.85% till the date of this order and said amount works out to Rs 37,88,700/- as per detail given in the table below:

Sr. No.	Principal Amount in ₹	Date of payment	Interest Accrued till 22.04.2024
1.	2,50,000	13.10.2011	340066
2.	2,06,459	08.11.2011	279243
3.	2,28,693	11.01.2012	304964
4.	4,83,370	13.06.2012	622451
5.	1,16,091	12.07.2012	148493
6.	1,14,688	08.07.2013	134391
7.	1,14,773.52	21.11.2013	129852
8.	1,15,401.21	11.12.2013	129876
9.	1,15,126.60	19.02.2014	127171
10.	2,30,692.71	03.05.2014	249822
11.	1,17,047.09	14.08.2014	123169
12.	1,17,262.97	24.10.2014	120921
13.	1,18,572.35	26.11.2014	121108
14.	1,16,332.27	14.11.2015	106613
15.	4,75,510.14	12.02.2016	423061
16.	18,998	04.05.2017	14378
17.	6,25,000	26.08.2019	316211
18.	1,53,000	26.08.2019	77408
19.	38,546	26.08.2019	19502
20.	Total=37,55,563.86/-		Total=37,88,700./-
21.	Total Payable to complainant	37,55,563.86 +37,88,700=	74,55,263.86/-

## H. DIRECTIONS OF THE AUTHORITY

23. 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 paid amount of Rs 37,55,563.86/- with interest of ₹ 37,88,700/- to the complainant. It is further clarified that respondent will remain liable to pay interest to the complainant till the actual realization of the amount.
  - (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.
24. **Disposed of.** File be consigned to record room after uploading of order on the website of the Authority.

  
.....  
CHANDER SHEKHAR  
[MEMBER]

  
.....  
NADIM AKHTAR  
[MEMBER]