BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**19 of 2022**
Order reserved on:	**04.10.2024**
Order pronounced on:	**03.01.2025**

1. Mr. Kapil Pachori
2. Mrs. Anju Pachori

Both Address at: House No. A-36, Vidya Nagar, Near Jagatpura Railway Fatak, Jagatpura, Jaipur, Rajasthan-302017

Complainants

Versus

M/s Imperia Structures Ltd.
Regd. office: A-25, Mohan Co-operative Industrial Estate, New Delhi-110044

Respondent

CORAM:

Shri Arun Kumar

Chairman

APPEARANCE:
Complainant in person with Shri Sunil Kumar — Advocate for the complainants
Sh. Geetansh Nagpal — Advocate for the respondent

ORDER

1. The present complaint has been filed by the complainants/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. 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.	504, 5th Floor, Tower C (pg. 29 of complaint)
8.	Unit area admeasuring	1435 sq. ft. (pg. 29 of complaint)
9.	Date of booking	20.09.2011 (pg. 29 of complaint)
10.	Date of builder buyer agreement	17.04.2013 (pg. 33 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	17.10.2016 [calculated as per possession clause]
13.	Total sale consideration	₹ 62,88,030/- [as per the agreement at pg. 39 of complaint]
14.	Amount paid by the complainants	₹ 61,82,682/- [as per applicant file dated 22.01.2018 at pg. 86 of complaint]
15.	Offer of possession for fit outs	16.07.2021 (pg. 25 of reply)
16.	In principle Occupation certificate	13.03.2024 [pg. 5 of application filed by respondent on 17.07.2024]
17.	Offer of possession for fit outs	15.03.2024 [pg. 7 of application filed by respondent on 17.07.2024]

B. Facts of the complaint

3. The complainants have made the following submissions in the complaint:

   a. That the complainants were approached by the representatives of the respondent. The sale representatives claimed and boasted of the

project 'The Esfera' as the world class project. The complainants were invited to the sales office and was lavishly entertained, and huge promises were made to him. The complainants were impressed by their statements and representations and ultimately lured to pay Rs.8,16,419/- as booking amount of the said apartment on 08.09.2011 to 19.10.2011 vide account statement issued by the respondent dated 13th August, 2021.

b. The complainants paid a total amount of Rs. 9,28,214/- till 04.11.2011. But the apartment buyer agreement was executed between the respondent and complaints on 17.04.2013. The respondent violated Section 13 of the Act, 2016 by taking more than ten per cent (10%) cost of the flat before the execution of the flat buyer's agreement. The BSP was Rs. 45,24,555/- and total cost of the flat is Rs. 62,88,030/- including other charges includes -DC, reserved covered parking, IFMS (Interest Free Maintenance security, club membership charges, FFC, PBIC & EEC, PLC including corner and park facing, while the respondent had collected a total sum of Rs.9,28,214/-, more than 20% of the cost of BSP the apartment till 04.11.2011 before execution of apartment buyer agreement.

c. The buyer's agreement for the apartment no 504, Tower C, measuring 1435 sq. ft. was executed on 17.04.2013 between the parties. The date of possession as per the agreement was 16.10.2016 (36 Months), from the date of execution of the agreement.

d. That the complainants further paid all instalments of payments as and when demanded by the respondent and ultimately paid a sum out of the total consideration of Rs.61,82,682/- which is more than 98% payable amount of the apartment.

e. That it was unfair, illegal, unlawful, unethical for the respondent when he had demanded on dated 16.07.2021, the amount from the complainants without the particular stage of construction being achieved as the completion of the apartment has been delayed by five (5) years approximately, which has ultimately resulted in the difficulties for the complainants and many such buyers. Further, instead of making reparations for the delay caused due to failure of the respondent, the builder/developer/company charged from the complainants.

f. The complainants have approached the respondent and pleaded for delivery of possession of his apartment as per the buyer's agreement on various occasions. The respondent did not reply to his letters, emails, personal visits, telephone calls, seeking information about the status of the project and delivery of possession of his apartment, thereby the respondent violated Section 19 of the Act, 2016.

g. That the respondent has in an unfair manner siphoned of funds meant for project and utilised same for his own benefit for no cost. That the respondent being builder and developer, whenever in need of funds from bankers or investors ordinarily has to pay a heavy interest per annum. However, in the present scenario, the respondent utilised funds collected from the complainants and other buyers for his own good in other projects, being developed by the respondent. That is why, the project has not yet been completed even after a delay period of Five (5) Years approximately.

h. That the complainants have come to know about the poor quality of the construction of their apartment and the apartments of other buyers. The respondent is not constructing the construction of their

apartment and other apartments as per the quality committed at the time of application/allotment/buyer's agreement.

i. That the complainants have lost confidence and in fact has got no trust left in the respondent, as the respondent has deliberately and wilfully indulged in undue enrichment, by cheating the complainants beside being guilty of indulging in unfair trade practices and deficiency in services in not delivering the possession of the apartment and then remaining non-responsive to the requisitions of the complainants.

j. That the respondent/seller/builder/promoter/owner is habitual of making false promises and have a deceptive behaviour. The respondent has earned enough monies by duping the innocent complainants and other buyers through his unfair trade practices and deficiencies in services and has caused the complainants enough pain, mental torture, agony, harassment, stress, anxiety, financial loss and injury.

k. The complainants hereby seeks to redress the various forms of legal omissions and illegal commissions perpetuated by the respondent/ seller/builder/promoter/owner, which amount to unfair trade practices, breach of contract and are actionable under the Act, 2016. In the present circumstances, the complainants have been left with no other options but approach and seek justice at the Haryana Real Estate Regulatory Authority at Gurugram, Haryana.

l. That the respondent despite promising the complainant that the project would be delivered by October 2016 as per the buyer's agreement has neither offered possession nor has paid interest on the paid amount for the delay caused by the respondent, thus

constitutes unfair trade practices & deficiencies in service and cheating.

m. By delaying possession, the respondent has unjustly enriched themself by taking more than BSP payable amount and additional charges from the complainants and thereafter utilizing this huge money on other projects and left the complainants and other buyers high and dry at their own fate. This conduct and behaviour of the respondent are deplorable and constitute unfair trade practices & deficiency in services and it is a clear case of cheating.

n. That the respondent in a clandestine manner has fraudulently and illegally charged violates the basic nature of agreement between the parties.

o. That the respondent has cheated the complainants knowingly and have taken monies by deception, made fraudulent representations, deliberate false written promises to deliver possession in time. The fraudulent behaviour of the respondent also attracts criminal liability under the Indian Criminal dispensation system. The conducts of the respondent are suspect, wilfully unfair and arbitrary, deficient in every manner and scandalous. That the complainants have lost faith, confidence and trust in the respondent as the respondent is continuously deceptive and non-responsive.

p. That equity demands that such unscrupulous developers/sellers /builders, who after taking all cost of the apartment do not perform their parts of obligations, should not be spared. A strong message is required to be sent to such type of the respondent that the Haryana Real Estate Regulatory Authority is not helpless in such type of matter. Therefore, it is a fit case where punitive damage should be imposed upon the respondent.

q. The cause of action is recurring in nature and subsisting and has accrued finally when the respondent has not submitted any justified response to the complainants. Thus, the complaint has been filed within time with effect from accrual of the cause of action.

C. Relief sought by the complainants:

4. The complainants have sought following relief(s).

(i) Direct the respondent to handover the actual, physical and vacant possession of the apartment along with delay possession charges.

(ii) Direct the respondent to execute the conveyance deed as per terms of Rera act in favour of complainant.

(iii) Direct the respondent to reverse back unethical and wrong demand raised by the respondent on dated 16th July, 2021.

(iv) Direct the respondent to pay legal expenses of Rs.80,000/-.

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 has contested the complaint on the following grounds.

I. That the complainants have not approached the authority with clean hands and thus supressed misconceived the material facts with an intention to mislead the authority by making incorrect and false averments and stating untrue and incomplete facts and as such is guilty of suppression very suggestion falsie.

II. That after making independent enquiries and only after being fully satisfied about the project, the complainants approached the respondent company for booking of a residential unit in its project "The ESFERA", phase II, located in sector-37-C, Gurugram,

Haryana. The respondent company provisionally allotted the unit bearing no. tower C, 504 admeasuring with of 1435 sq. ft. to complainants for a total consideration of Rs.65,88,505/- (including applicable tax) plus other charges vide booking dated 20.09.2011 and opted the construction linked plan on the terms and conditions mutually agreed by them.

III. That the complainants have failed to make out a case under section 18 of Act, as the respondent has already completed the construction and development of the towers and applied to the competent authority for grant of occupancy certificate on 15.04.2021 after complying with all the requisite formalities and is expecting to receive the same by end of March 2023. The respondent is expecting to issue offer of possession along with all required certificates by the end of March 2023.

IV. That, the respondent company is in extreme liquidity crunch at this critical juncture and has also been saddled with orders of refund in relation to around 20-25 apartments in the project, on account of orders passed by various other courts. The total amount payable in terms of those decrees exceeds an amount of Rs.20 crores.

V. That, on account of many allottees exiting the project and many other allottees not paying their installment amounts, 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, are net-worth positive and require last mile funding to complete construction. The company was granted sanction on 23.09.2020 after examination of its status and its subject project "Esfera" for the amount of Rs.99 crores. The first transaction of installment has already been received by the respondent company from the said fund as loan.

VI. That the respondent company is extremely committed to complete the phase 2 of the project Esfera. In fact, the super structure of all towers in phase 2 (incl. Tower B) has already been completed. The internal finishing work and MEP works is going in a full swing with almost 450 construction labourers are working hard to achieve the intent of the appellant to complete the entire project.

VII. That the respondent company fulfilled its promise and had constructed the said unit of the complainants and with due procedure of law, applied for occupation certificate.

VIII. As per the additional documents submitted by the respondent on 17.07.2024 the occupation certificate was received on 13.03.2024 and offer of possession was made on 15.03.2024 to the complainants. That on account of wilful breach of terms of buyers agreement by failing to clear the outstanding dues despite reputed requests. It is submitted that the complainants have till date made a payment of Rs. 61,82,682/- as raised by the respondent in accordance with the payment plan and the terms of the buyers agreement.

7. Copies of all the relevant documents have been filed and placed on 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 authority has complete territorial and 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, Haryana the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. 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.

F. Entitlement of the Complainants:

F.I Direct the respondent to handover the actual, physical and vacant possession of the apartment along with delay possession charges.

12. In the present complaint, the complainants intend to continue with the project and are seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

> *"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, —*
>
> .....
>
> *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."*

13. 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."*

14. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges, proviso to section 18 provides 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 possession, at such rate as may be prescribed and it has been prescribed 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.*

15. 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.

16. 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., 03.01.2025 is 9.10%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 11.10% per annum.

17. The definition of term 'interest' as defined under section 2(za) 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;"

18. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 11.10% p.a. by the respondent/promoter which is the same as is being granted to the complainants in case of delay possession charges.

19. On consideration of the circumstances, the evidence and other record and submissions made by the parties, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. It is a matter of fact that buyer's agreement executed between the parties on 17.04.2013, the possession of the booked unit was to be delivered within a period of three and half years from the date of execution of this agreement which comes out to be 17.10.2016. Occupation certificate was granted by the concerned authority on 13.03.2024 and thereafter, the possession of the subject unit was offered to the complainants on 15.03.2024. Copies of the same have been placed on record. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the subject unit and it is failure on part of the promoter to fulfil its obligations and responsibilities as per the buyer's agreement dated 17.04.2013 to hand over the possession within the stipulated period.

20. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was

granted by the competent authority on 13.03.2024. The respondent offered the possession of the unit in question to the complainants only on 15.03.2024 so it can be said that the complainants came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainants should be given 2 months' time from the date of offer of possession. These 2 months' of reasonable time is being given to the complainants keeping in mind that even after intimation of possession practically they have to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 17.10.2016 till the expiry of 2 months from the date of offer of possession (15.03.2024) which comes out to be 15.05.2024. Interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 11.10% by the respondent/promoter which is the same as is being granted to the complainants in case of delayed possession charges as per section 2(za) of the Act.

21. 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 delayed possession at prescribed rate of interest i.e. 11.10% p.a. w.e.f. 17.10.2016 till expiry of 2 months from the date of offer of possession (15.03.2024) which comes out to be 15.05.2024 as per provisions of section 18(1) of the Act read with rule 15 of the rules.

F.II. Direct the respondent to execute the conveyance deed as per terms of Rera act in favour of complainants.

22. As per section 11(4)(f) and section 17(1) of the Act of 2016, the promoter is under obligation to get the conveyance deed executed in favour of the complainants. Whereas as per section 19(11) the Act of 2016, the allottee is also obligated to participate towards registration of the conveyance deed of the unit in question.

A reference to the provisions of sec. 17 (1) and proviso is also must and which provides as under:

> *"**Section 17: - Transfer of title***
> *17(1). The promoter shall execute a registered conveyance deed in favour of the allottee along with the undivided proportionate title in the common areas to the association of the allottees or the competent authority, as the case may be, and hand over the physical possession of the plot, apartment of building, as the case may be, to the allottees and the common areas to the association of the allottees or the competent authority, as the case may be, in a real estate project, and the other title documents pertaining thereto within specified period as per sanctioned plans as provided under the local laws: Provided that, in the absence of any local law, conveyance deed in favour of the allottee or the association of the allottees or the competent authority, as the case may be, under this section shall be carried out by the promoter within three months from date of issue of occupancy certificate.*

23. The respondent is under an obligation as per section 17 of Act to get the conveyance deed executed in favour of the complainants. The respondent is directed to get the conveyance deed executed within 3 months from the date of this order on payment of stamp duty and registration charges if not paid.

F.III. Direct the respondent to withdraw the demand letters dated 16.07.2021 sent by it containing illegal charges which are not payable by the complainants.

24. The complainants have contended about various illegal charges raised by the respondent-promoter detailed as under:

S. No.	Particulars	Amount (Rs.)
1	Demand towards Balance Sale Consideration	3,74,808/-
2	Increased Area Charges (i.e., Increase in Area x Booking/ Allotment Rate)	5,91,734/-
3	Average Escalation Cost, as per indexed construction Escalation between 2014-2017	5,08,476 /-
4(A)	Net Sales Value (Aggregate of above)	14,75,018/-
5(B)	Total Service Tax/ GST	3,96,321/-
6(C)	Service Tax/GST (Received)	2,69,460/-
8(E)	Delay Possession Penalty @ Rs. 5/- sq. ft.	4,43,944 /-
9(F)	Total Outstanding Dues [i.e., (A+D-E) =F	11,57,935/-

25. It is pleaded that out of the above-mentioned charges detailed, there is no basis to demand charges **against increase in area**, average escalation cost and balance service tax/GST. Though demand under the heading increased area charges (i.e., increase in area x booking/ allotment rate) has been mentioned as Rs. 5,91,734/-but without giving any basis. A buyer's agreement w.r.t allotted unit was executed between the parties on 17.04.2013 and clause 9.2 provides with regard to major alteration/modification resulting in excess of +/- 10% change in the super area of the apartment or material/ substantial change in the sole opinion of and as determined by the developer/company. A reference to clause 9.2 of the agreement must detail as under:

> 9.2 Major alteration/modification
>
> In case of any major alteration/modification resulting in excess of +10% change in the super area of the aid apartment or material/substantial change, in the sole opinion of and as determined by the Developer/company, in the specifications of the materials to be used in the said building/said apartment

any time prior to and upon the, grant of occupation certificate, the develop/company shall intimate the intending allotee(s) in writing the changes thereof and the resultant change, if any, in the price of the said apartment to be paid by him/her and the intending allottee agrees or deliver to the Developer/Company his/her written consent or objections to the changes within thirty days from the date of dispatch by the Developer/Company of such notice failing which the intending allottee shall be deemed to have given his/her full and unconditional consent to all such alterations/modifications and for payment, if any to be paid in consequence thereof.....

26. It is not disputed that the due date for completion of the project has already expired on 17.10.2016 and occupation certificate has received on 13.03.2024. The impugned demand against the above-mentioned head was raised vide letters dated 16.07.2021 and the same is as per the above-mentioned provision of the buyer agreement. If the complainants have any objection against the purposed change/increase, then they has a right to challenge the same within the period stipulated as per buyers' agreement. However, the respondent-builder is also duty bound to explain that increase in the super area of the unit vis a vis the project before raising such demand.

27. That in ***NCDRC consumer case no. 285 of 2018 titled as Pawan Gupta Vs Experion Developers Private Limited***, it was held that the respondent is not entitled to change any amount on account of increase in area. The relevant part of the order has been reproduced hereunder:

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The complaints have been filed mainly for two reasons. The first is that the opposite party has demanded extra money for excess area and second is the delay in handing over the possession. In respect of excess area, the complainants have made a point that without any basis the opposite party sent the demand for excess area and the certificate of the architect was sent to the complainant, which of a later date. The justification given by the party that on the basis of the internal report of the architect the demand was made for

excess area is not acceptable because no such report or any other document has been filed by the opposite party to prove the excess area. Once the original plan is approved by the competent authority, the areas of residential unit as well as of the common spaces and common buildings are specified and super area cannot change until there is change in either the area of the flat or in the area of any of the common buildings or the total area of the project (plot area) is changed. The real test for excess area would be that the opposite party should provide a comparison of the areas of the original approved common spaces and the flats with finally approved common spaces/buildings and the flats. This has not been done. In fact, this is a common practice adopted by majority of builders/developers which is basically an unfair trade practice. This has become a means to extract extra money from the allottees at the time when allottee cannot leave the project as his substantial amount is locked in the project and he is about to take possession. There is no prevailing system when the competent authority which approves the plan issues some kind of certificate in respect of the extra super area at the final stage. There is no harm in communicating and charging for the extra area at the final stage but for the sake of transparency the must share the actual reason for increase in the super area based on the comparison of the originally approved buildings and finally approved buildings. Basically, the idea is that the opposite party allottee must know the change in the finally approved lay-out and areas of common spaces and the originally approved lay-out and areas. In my view, until this is done, the opposite party is not entitled to payment of any excess area. Though the Real Estate Regulation Act (RERA) 2016 has made it compulsory for the builders/developers to indicate the carpet area of the flat, however the, problem of super area is not yet fully solved and further reforms are required.

28. Considering the above-mentioned facts, the authority observes that the respondent has increased the super area of the flat from 1435 sq. ft. to 1578 sq. ft. vide offer of possession for fit outs dated 16.07.2021 with increase in area of 143 sq. ft. i.e. 9.96%. In view of the above, the Authority has clear observation that as per BBA if there is any increase in super area, the company shall intimate the intending allottee in writing. But in the present case, there was an increase in super area, which was intimated to the complainants at the time of offer of

possession for fit outs and not before. Further, no justification and intimation were made to the complainants in respect of increase in area. So, the respondent cannot charge any amount from the complainants merely on account of increase in the super area without providing proper justification and specific details regarding the increase in the super area/carpet area.

- **Escalation charges**

29. The complainants took a plea that the respondent-builder has arbitrarily imposed escalation cost at the time of offer of possession. The respondent-builder submits that cost of escalation was duly agreed by the complainants at the time of booking/agreement and the same was incorporated in the buyer agreement. The undertaking to pay the above-mentioned charge was comprehensively set out in the buyer agreement.

The said clause of the agreement is reproduced hereunder: -

Clause 1.2

It is mutually agreed and binding between the Allottee(s) and the Company that 50% of the Total Price of the Said Apartment, shall be treated as construction cost for the purpose of computation of Escalation Charges. It is further mutually agreed that within the above stated construction cost, the components of steel, cement, other construction materials, fuel and power and labour shall be 15%. 10%, 40%, 5% and 30% respectively of the construction cost. Escalation charges shall be computed at the expiry of 42 months i.e. in April, 2016. The RBI indexes for the month of September. 2012 and for the month March, 2016 shall be taken as the opening and closing indexes respectively to compute the Escalation Charges. The Company shall appoint a reputed firm of Chartered Accountants to independently audit and verify the computation of escalation charges done by the Company from time to time. Such audited and verified Escalation Charges shall be paid/refunded (or adjusted), as the case may be. by/to the Allottee(s) before the offer of possession of the Said Apartment to the Allotlee(s). Escalation Charges, as intimated to the Allottee(s) shall be final and binding on the Allottee(s). The Allottee(s) agrees and understands that any default in payment of the Escalation Charges shall be deemed to be a breach under the terms

and conditions of the Agreement. No possession shall be handed over to the Allottee(s) unless Escalation Charges are paid in full along with delayed interest, if any.

30. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines. The delay was a result of the respondent failure to hand over the possession of the unit, leading to an increase in escalation cost. Therefore, it would be unjust to attribute the delay to the complainants. Hence, the imposition of escalation charges is not justified, and the same cannot be charged from the complainants.

- **GST charges:**

31. It is contended on behalf of the complainants that vide letter dated 16.07.2021 the respondent raised a demand for a sum of Rs.3,96,321/ on account of balance service tax/GST. That demand is illegal as the incidence of GST came into effect from 01.07.2017 and the due date for completion of the project and offer of possession of the allotted unit was fixed as 17.10.2016. No doubt the incidence of GST came into effect with effect from July 2017 but upto 12.12.2016, the developer can raise demand against applicable tax only and the same upto that date is chargeable from the allottee by the builder.

F. IV Direct the respondent to pay Rs. 80,000/- as litigation charges.

32. The complainants are also seeking relief w.r.t litigation expenses. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 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 & litigation charges 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 & litigation expense 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 & legal expenses. Therefore, the complainants are advised to approach the adjudicating officer for seeking the relief of litigation expenses.

G. Directions of the authority

33. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

I. The respondent is directed to pay the interest at the prescribed rate i.e. 11.10% per annum for every month of delay on the amount paid by the complainants from due date of possession i.e. 17.10.2016 till 15.05.2024 i.e. expiry of 2 months from the date of offer of possession (15.03.2024).

II. The respondent is directed to pay arrears of interest accrued within 90 days from the date of this order as per rule 16(2) of the rules.

III. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 11.10% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

IV. The respondent is directed to issue a revised statement of account after adjustment of delayed possession charges, and other reliefs as per above within a period of 30 days from the date of this order. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.

V. The respondent shall not charge anything from the complainants which is not the part of the buyer's agreement. The respondent is also not entitled to claim holding charges from the complainants/allottee at any point of time even after being part of the buyer's agreement as per law settled by hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 decided on 14.12.2020.

34. Complaint as well as applications, if any, stands disposed off accordingly.

35. File be consigned to registry.

(Arun Kumar)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 03.01.2025