

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

**Complaint no. :** 119 of 2020  
**Date of filing** 21.01.2020  
**complaint :**  
**First date of hearing :** 11.02.2020  
**Date of decision :** 06.10.2021

1. Shri Hemant Kumar Dwivedi <b>R/O:</b> - House No.- 227, East West Society, Plot No.99, Sector -54 Gurugram-122002	<b>Complainant</b>
Versus	
1. M/s Imperia Structures Ltd. <b>Regd. Office at:</b> - A-25, Mohan Cooperative, Industrial Estate, Mathura Road, New Delhi- 110044	<b>Respondent</b>

**CORAM:**

Shri. Samir Kumar	<b>Member</b>
Shri Vijay Kumar Goyal	<b>Member</b>

**APPEARANCE:**

Col. M. S. Sehrawat (Advocate)	Complainant
Ms. Tanya Swarup (Advocate)	Respondent

**ORDER**

1. The present complaint has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real



Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made thereunder or to the allottee 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 complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S. No.	Heads	Information
1.	Project name and location	"Esfera, Phase-II", Sector-37c, village gharoli khurd and basai, Gurugram
2.	Licensed area	17 acres
3.	Nature of the project	Group housing residential colony
4.	DTCP license no.	64 of 2011 dated 16.07.2011
	License valid up to	15.07.2017
	Licensee	M/s Prime Infoways Pvt. Ltd., M/s Prime IT Solutions Pvt. Ltd., M/s Phoenix Datatech Services Pvt. Ltd.
5.	RERA registered/not registered	Registered <b>vide 352 of 2017</b> dated 17.11.2017



	Validity	Valid upto 31.12.2020
6.	Date of approval of building plan	18.12.2012
7.	Unit no.	402, 4 <sup>th</sup> floor, block -E (annexure C-6 on page no. 37 of the complaint)
8.	Unit measuring	1435 sq. ft. (annexure C-6 on page no. 33 of the complaint)
9.	Subsequent allottee	16.07.2012 (annexure C-5 on page no. 26 of the complaint)
10.	Date of execution of flat buyer's agreement	19.01.2013 (annexure C-6 on page no. 31 of the complaint)
11.	Payment plan	Construction linked payment plan (annexure C-6 on page no. 72 of the complaint)
12.	Total consideration	Rs. 62,26,325/- (annexure C-6 on page no. 37 of the complaint)
13.	Total amount paid by the complainant	Rs.56,25,450/- (annexure C-11 on page no. 93 of the complaint)
14.	Due date of delivery of possession (as per clause 10.1, possession be handed over within a period of three and half years from the date of execution of the agreement)	19.07.2016 <b>Calculated from the date of execution of agreement</b>
15.	Offer of possession	Not Offered
16.	Occupation certificate	Not obtained
17.	Delay in handing over possession till the date of this order i.e., 06.10.2021	5 years 2 months 17 days.

**B. Facts of the complaint**

The complainant has submitted as under:

3. That the complainant was looking for a flat and came across the upcoming group housing project named 'The Esfera' being developed in sector 37-C by the respondent.
4. That on 17.07.2012, the complainant was transferred the rights of the subject unit in the said project which was booked on 05.09.2011 and allotment was confirmed on 10.03.2012, vide Ref -IMP-E-0117 dated 10.03.2012.
5. That, the FBA was signed between the complainant and the respondent on 19.01.2013 and the booking was done on 05.09.2011 and the FBA was signed after a delay of 1 year and 4 months and the respondent by then had received a total sum of Rs 19,78,385/-, which included interest of Rs 59,991/-
6. That the FBA was signed after a delay of 16 months of the booking and after taking Rs 1978385/, left no choice for the complainant but to sign along the dotted lines, on a document drafted and printed by the respondent. Hon`ble NCDRC and The Hon`ble Supreme Court have declared such FBA as untenable and illegal.
7. That, the complainant took a housing loan of Rs 43,00,000/ from SBI vide RACPC/HL/1786 dated 13-08-2013 and housing loan account No 33245508089.
8. That the respondent withdrew most of the loan amount from SBI, during 2013-2015 in connivance with the bankers, though the payment plan was construction linked plan. That the complainant is



paying Rs 43,271/ EMI since, 01 .09.2015 onwards and also paying Rs 24,000/- as a lease rental for hired accommodation.

9. That the complainant should have been handed over the possession of E-402 in the subject project by January 2016, (as per the FBA,) and on 09.06.2015, as per date of allotment which is 10.03.1012.
10. That more than 90% payments have been taken by the respondent till 27.02.2017 and the project is nowhere near completion. There is no construction activity on the site and the subject project is only 65 to 75 % complete.
11. That the respondent inter-alia consciously and deliberately have been cheating and kept taking money till as late as March 2017, and whereas the project had come to a still stand during mid-2016 itself and the respondent had abandoned it long ago.

**C. Relief sought by the complainant:**

The complainant has sought following relief(s):

- (i) Direct the respondent to pay interest for every month of delay @18% p.a. to the complainant.

**D. Reply by the respondent**

12. That it was submitted that the present complaint has been filed by the complainant against the respondent company in respect of the tower- "E" being developed by the respondent company in its group housing project titled as "Esfera Phase II" situated at sector-37C, Gurugram, Haryana.

13. That it was submitted that the unit no. E-402, in tower-E situated in the said project, had been allotted to the complainant by the respondent company vide allotment letter dated 19.01.2013 on the terms and condition mutually agreed by the allottee/complainant and the respondent company.
14. That in view of the above said, the respondent company had intended to complete the construction of the said unit on time. It is pertinent to mention that the respondent company had successfully completed the construction of the said tower and procured the occupancy certificates for three towers out of 9 towers in the said project. However, the construction of all the towers is completed and in habitable stage, in fact the respondent company had already applied for grant of occupation certificate for rest of the towers of project including the tower-"E", where the allotted unit situates. Further, it is pertinent to mention here that respondent company already intimated the complainant about the factum of its OC application though due to certain force majeure circumstance, majorly the outbreak of second COVID wave in April 2021 and subsequent lockdown in Haryana State, the DGTCP, Haryana could not issue the OC well in time enabling the respondent to offer the physical possession of the allotted unit to the complainant.
15. That it is reiterated that allotted unit is ready for fit out possession, and communication with regard to this aspect have already been sent to all eligible allottees including the complainant herein. It is important mention here that the project "Esfera" comprises of 2



phases whereas OC of the phase I of the project is duly issued by "Town and Country Planning Development Haryana" on 07.02.2018 and more than 100 happy allottee(s) are residing in that phase. The physical possession of the unit will be tentatively delivered to its respective allottee(s) soon with respective OC on the said project.

16. That the respondent company is in extreme liquidity crunch at this critical juncture, the company has also been saddled with orders of refund in relation to 15 apartments in the project, an account of orders passed by various other courts. The total amount payable in terms of these decrees exceeds an amount of Rs.10 crores. The said project involving hundreds of allottees, who are eagerly awaiting the possession of their apartments, will be prejudiced beyond repair in case any mandatory order be passed when the project is almost completed.
17. That on account of many allottees exiting the project and many other allottees not paying their instalment amounts, the company, with great difficulty, in these turbulent times have managed to secure a last mile funding of Rs.99 crores from SWAMBIH Investment Fund - 1. The said alternate investment fund (AIF) was established under the special window declared on 6.11.2019 by the Hon'ble Finance Minister 1 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 a sanction on 23.09.2020 after examination of



the status of the company and its subject project "Esfera" for the amount of Rs.99 crores. However, the funding is still to be received, and the company is hoping for the same to be released shortly.

18. That it is humbly submitted that this authority may be pleased to consider the bona fide of the respondent company and distinguish the respondent company from the bad repute being imparted to real-estate builders. It is pertinent to mention here that the respondent company is extremely committed to complete the phase-2 of project "Esfera", in fact the super structure of all towers in phase-2 (incl. tower) has already been completed, the internal finishing work and MEP works is going in a full swing with almost 300 construction labourers are working hard to achieve the intent of the respondent to complete the entire project despite all prevailing adversaries.
19. That it is relevant to mention herein that several allottees have withhold the remaining payments, which is further severally affecting the financial health of the respondent company and further due to the force majeure conditions and circumstances/reasons, which were beyond the control of the respondent company as mentioned herein below, the construction works got delayed at the said project. Both the parties i.e., the complainant as well as the respondent company had contemplated at the very initial stage while signing the allotment letter/agreement that some delay might have occurred in future and that is why under the force majeure clause as mentioned in the allotment letter, it is duly agreed by the complainant that the respondent company shall not be liable to perform any or all of its





obligations during the subsistence of any force majeure circumstances and the time period required for performance of its obligations shall inevitably stand extended. It is unequivocally agreed between the complainant and the respondent company that the respondent company is entitled to extension of time for delivery of the said flat on account of force majeure circumstances beyond the control of the respondent company and inter alia, some of them are mentioned herein below:

- a) That the respondent company started construction over the said project land after obtaining all necessary sanctions/approvals clearances from different state/central agencies/authorities and after getting building plan approved from the authority and named the project as "Esfera II". The respondent company had received applications for booking of apartments in the said project by various customers and on their requests, the respondent company allotted the under-construction apartments/ units to them.
- b) That owing to unprecedented air pollution levels in Delhi NCR, the Hon'ble Supreme Court ordered a ban on construction activities in the region from November 4, 2019, onwards, which was a blow to realty developers in the city. The air quality index (AQI) at the time was running above 900, which is considered severely unsafe

for the city dwellers. Following the Central Pollution Control Board (CPCB) declaring the AQI levels as not severe, the SC lifted the ban conditionally on December 9, 2019, allowing construction activities to be carried out between 6 am and 6 pm, and the complete ban was lifted by the Hon'ble Supreme Court on 14.02.2020.

- c) That when the complete ban was lifted on 14 February 2020 by the Hon'ble Supreme Court, the Government of India imposed National Lockdown on 24 of March 2020 due to pandemic COVID-19, and conditionally unlocked it on 03.05.2020. However, this has left the great impact on the procurement of material and Labour. The 40-day lockdown in effect since March 24, which was further extended up to May 3 and subsequently to May 17, led to a reverse migration with workers leaving cities to return back to their villages. It is estimated that around 6 lakh workers walked to their villages, and around 10 lakh workers are stuck in relief camps. The aftermath of lockdown or post lockdown periods has left great impact and scars on the sector for resuming the fast-paced construction for achieving the timely delivery as agreed under the "allotment letter".
- d) That initially, after obtaining the requisite sanctions and approvals from the concerned authorities, the respondent company had commenced construction work

and arranged for the necessary infrastructure including labour, plants and machinery, etc. However, since the construction work was halted and could not be carried on in the planned manner due to the force majeure circumstances detailed above, the said infrastructure could not be utilized and the labour was also left to idle resulting in mounting expenses, without there being any progress in the construction work. Further, most of the construction material, which was purchased in advance, got wasted/deteriorated causing huge monetary losses. Even the plants and machineries, which were arranged for the timely completion of the construction work, got degenerated, resulting into losses to the respondent company running into crores of rupees.

- e) That, it is also pertinent to mention here that every year the construction work was stopped/ banned/stayed due to serious air pollution during winter session by the Hon'ble National Green Tribunal (NGT), and after banned / stayed the material, manpower and flow of the work has been disturbed/distressed. Every year the respondent company had to manage and rearrange for the same and it almost multiplied the time of banned/stayed period to achieve the previous workflow. The orders already placed on record before this authority.

- f) That the real estate sector so far has remain the worst hit by the demonetization as most of the transactions that take place happen via cash. The sudden ban on Rs. 500 and Rs. 1000 currency notes have resulted in a situation of limited or no cash in the market to be parked in real estate assets. This has subsequently translated into an abrupt fall in housing demand across all budget categories. Owing to its uniqueness as an economic event, demonetisation brought a lot of confusion, uncertainty and, most of all, especially when it came to the realty sector. No doubt, everyone was affected by this radical measure, and initially all possible economic activities slowed down to a large extent, which also affected the respondent company to a great extent, be it daily wage disbursement to procuring funds for daily construction, and day-to-day activities, since construction involves a lot of cash payment/transactions at site for several activities.
- g) That it is a well-known fact that there is extreme shortage of water in State of Haryana and the construction was directly affected by the shortage of water. Further, the Hon'ble Punjab and Haryana High Court vide an order dated 16.07.2012 in CWP No. 20032 of 2009 directed to use only treated water from available sewerage treatment plants (hereinafter referred to as "STP"). As the availability of STP, basic infrastructure and

availability of water from STP was very limited in comparison to the requirement of water in the ongoing constructions activities in Gurugram District, it was becoming difficult to timely schedule the construction activities. The availability of treated water to be used at construction site was thus very limited and against the total requirement of water, only 10-15% of required quantity was available at construction sites.

20. That owing to the above said force majeure circumstances and reasons beyond the control of the respondent company, it was extremely necessary to extend the intended date of offer of possession mentioned in the allotment letter.
21. That for the purpose of ensuring the delivery of the possession, despite the lockdown, the respondent company was seeking permission to resumes construction of the said project. The respondent company got the permission certificate on 01.05.2020 by the municipal corporation of Gurugram, Haryana subject to certain safety restriction and conditions. Therefore, it is humbly submitted that this authority may be pleased to consider the bona fide of the respondent company and distinguish the respondent company from the bad repute being imparted to real-estate builders. It is pertinent to mention here that the respondent company is extremely committed to complete the phase 2 of the said project in fact super structure/ civil works in all the towers in phase-2 (incl. tower) has

already been completed despite all prevailing adversaries, only final finishing work is remaining now.

22. The respondent company craves leave of this authority to add, amend or alter this reply, if found necessary, at any stage of the proceedings. The respondent company shall submit any documents or details as may be required by this authority. The respondent company also craves leave of this authority to make further submissions at the appropriate stage, if so advised.

**E. Jurisdiction of the authority**

The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below:

**E. I Territorial jurisdiction**

23. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District, therefore this authority has complete territorial jurisdiction to deal with the present complaint.

**E. II Subject matter jurisdiction**

Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottees as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

**Section 11(4)(a)**

*Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*

*The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA dated..... Accordingly, the promoter is responsible for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.*

**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.*

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 complainant at a later stage.

**F. Findings on the relief sought by the complainant.**

**Delay possession charges:** Direct the respondent to pay interest for every month of delay @18% p.a. to the complainant.

24. In the present complaint, the complainant intends 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."*

25. Clause 10.1 of the apartment buyer's agreement provides the time period of handing over possession and the same is reproduced below:

*"Clause 10.1- The Developer/Company based on its present plans and estimates and subject to all just exceptions, contemplates to complete 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 Clauses 11.1, 11.2, 11.3 and Clause 41 or due to failure of Intending Allottee(s) to pay in time the price of the said Apartment along with other charges and dues in accordance with the schedule of payments given in Annexure F or as per the demands raised by the Developer/Company from time to time or any failure on the part of the Intending Allottee(s) to abide by all or any of the terms or conditions of this Agreement."*

26. The apartment buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builders /promoters and buyers/allottee are protected candidly. The apartment buyer's agreement lays down the terms that govern the sale of different kinds of properties like residentials, commercials etc.





between the buyer and builder. It is in the interest of both the parties to have a well-drafted apartment buyer's agreement which would thereby protect the rights of both the builder and buyer in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision with regard to stipulated time of delivery of possession of the apartment, plot or building, as the case may be and the right of the buyer/allottee in case of delay in possession of the unit. In pre-RERA period, it was a general practice among the promoters/developers to invariably draft the terms of the apartment buyer's agreement in a manner that benefited only the promoters/developers. It had arbitrary, unilateral, and unclear clauses that either blatantly favoured the promoters/developers or gave them the benefit of doubt because of the total absence of clarity over the matter.

27. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is 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.

28. 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.
29. 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., 06.10.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
30. 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;"*

31. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same as is being granted to the complainant in case of delayed possession charges.
32. Section 19(10) of the Act obligates the allottees to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. These 2 months' of reasonable time is being given to the complainant keeping in mind that even after intimation of possession practically he has 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., 19.07.2016 till the offer of possession of the subject flat after obtaining occupation certificate from the competent authority plus two months or handing over of possession whichever is earlier as per the provisions of section 18(1) of the Act read with rule 15 of the rules and section 19 (10) of the Act.

33. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, 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. By virtue of clause 10.1 of the apartment buyer's agreement executed between the parties on 19.01.2013, the possession of the subject apartment was to be handed over within a period of 3 and half years from the date of execution of apartment buyer's agreement i.e., 19.01.2013 which comes out to be 19.07.2016. The respondent has failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondent to fulfil its obligations and responsibilities as per the apartment buyer's agreement executed inter-se between the parties within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such the allottee shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 19.07.2016 till the offer of possession of the subject flat after obtaining occupation certificate from the competent authority plus two months or handing over of possession whichever is earlier as per the provisions of section 18(1) of the Act read with rule 15 of the rules and section 19 (10) of the Act.

**G. Directions of the authority**



34. 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 interest at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e., 19.07.2016 till the offer of possession of the subject flat after obtaining occupation certificate from the competent authority plus two months or handing over of possession whichever is earlier as per section 19 (10) of the Act.
- ii. The arrears of such interest accrued from 19.07.2016 till the date of order by the authority shall be paid by the promoter to the allottee within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoter to the allottee before 10<sup>th</sup> of the subsequent month as per rule 16(2) of the Rules.
- iii. The respondent is directed to handover the physical possession of the subject unit after obtaining OC from the competent authority.
- iv. The complainant is also directed to pay the outstanding dues, if any. Interest on the due payments from the complainant and interest on account of delayed possession charges to be paid by the respondent shall be equitable i.e., at the prescribed rate of interest i.e., 9.30% per annum.



**HARERA**  
**GURUGRAM**

Complaint No. 119 of 2020

- v. The respondent shall not charge anything from the complainant which is not part of the builder buyer agreement.
- vi. The cost imposed during the proceedings on either of the party to be part of the decree sheet.
35. Complaint stands disposed of.
36. File be consigned to registry.

  
**(Samir Kumar)**  
Member

  
**(Vijay Kumar Goyal)**  
Member

Haryana Real Estate Regulatory Authority, Gurugram

**Dated: 06.10.2021**

JUDGEMENT UPLOADED ON 26.12.2021

**HARERA**  
**GURUGRAM**