

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

Complaint no. : 4604 of 2023
Date of complaint : 29.09.2023
Date of order : 07.08.2024

Navdeep Punia, S/o Haricharan Singh Punia,
R/o: - H. No. 1282, Urban Estate-II, Hisar.

Complainant

Versus

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

Respondent

CORAM:
Ashok Sangwan

Member

APPEARANCE:
Pushkar Rai Garg (Advocate)
Rishi Kapoor (Advocate)

**Complainant
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 provisions of the Act or the Rules and regulations made there under 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. N.	Particulars	Details
1.	Name and location of the project	"The Esfera" 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.	002, Ground Floor, Tower- D (page no. 32 of complaint)
8.	Unit area admeasuring	1435 sq. ft. (super area) (page no. 32 of complaint)
9.	Date of builder buyer agreement	24.12.2012 [page no. 46 of complaint]
10.	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)
11.	Due date of possession	24.06.2016 [calculated as per possession clause]
12.	Total sale consideration	Rs. 75,81,390/- (excluding taxes) [as per BBA on page no. 52 of complaint]
13.	Amount paid by the complainant	Rs.71,38,911/- [as per the demand letter dated 12.04.2018 on page no. 93 of complaint]
14.	Occupation certificate	Not received
15.	Letter of intimation regarding possession	23.12.2022 (page 94 of complaint)

B. Facts of the complaint

3. The complainant has made the following submissions: -

- I. That the complainant was allotted an apartment bearing no. D-004, measuring 1435 sq.ft., Ground Floor in the project of the respondent named “The Esfera”, Sector 37C, Gurugram vide apartment buyer’s agreement dated 24.12.2012 for a total sale consideration of Rs.75,81,390/- (excluding taxes).
- II. That vide letter dated 21.09.2013, the respondent had changed the flat no. from ‘D-004’ to ‘D-002’ on the Ground Floor, Tower D in the said project mentioning that the location of the unit and other terms remain unchanged.
- III. That as per clause 10.1 of the agreement, the completion period of the flat was fixed for three and half years of commencement of construction. It is pertinent to mention here that the respondent failed to discharge their obligations as per the flat buyer agreement



and did not hand over the possession of the flat in due time to the complainant.

- IV. That the respondent issued a letter dated 23.12.2022, regarding intimation of possession of flat in question without even obtaining occupation certificate from the competent authority. The respondent with malafide intention illegally/fraudulently demanded money from the complainant without discharging their obligations to complete the construction of the flat in due time and further continued to impose the interest amount on the pending dues. It is submitted here that in the month of June 2023, the complainant had visited the site in question but the flat in question was not ready for possession. As such, by issuing the letter dated 23.12.2022 the respondent has misguided the complainant.
- V. That vide letter dated 23.12.2022, the respondent company had demanded average escalation cost of Rs.4,88,486/- for the period between 2014-2017. That these escalation charged are illegal and arbitrary in nature because as per the clause 10.1 of agreement dated 24.12.2012, the respondent was liable to complete the said project before June 2015, but the respondent had failed to discharge its obligation and the charges beyond that period can't be demanded from the petitioner as the delay in completion of the project is solely due to the fault, negligent and procrastinate behaviour of the respondent.
- VI. That the as per the agreement, the respondent had promised to the complainant for providing him a private lawn for his personal use, and in lieu of that the respondent had received a payment of Rs.16,85,400/-, but the construction of the apartment prima-facie tells that neither any private ground lawn has been constructed till



date, nor the respondent company has left the scope for construction of private lawn in future. The respondent has frauded the petitioner by misrepresenting the facts and illegally charging for the private lawn which is neither constructive nor is in the construction plan of the building. The petitioner reserves the right to prosecute the respondent for fraudulent activities in the appropriate court of law.

- VII. That the respondent has illegally charged CGST & SGST on an interest amount which they cannot charge the same. Further, the respondent has charged the club charges from the complainant but till date no club has been constructed by it.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s).
- Direct the respondent to handover physical possession of the unit along with delay possession charges alongwith prescribed rate of interest.
 - Direct the respondent to handover the private lawn to the complainant or to refund the lawn amount alongwith interest.
5. On the date of hearing, the authority explained to the respondent/promoter about the contraventions as alleged to have been committed in relation to section 11(4)(a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent.

6. The respondent was proceeded ex-parte vide order dated 07.02.2024. Thereafter, on proceedings dated 03.04.2024, the counsel for the respondent appeared and stated that the respondent was under CIRP from 31.08.2023 to 01.02.2024, due to which appearance in the matter could not be made and sought leave to file reply in the matter. In the interest of justice, the counsel for the respondent was directed to file



reply to the complaint within ten days after supplying a copy to the counsel for the complainant failing which the defence of the respondent shall be struck off. Accordingly, on 04.04.2024, the respondent has filed reply in the registry of the Authority and the same is being taken on record.

7. The respondent has contested the complaint on the following grounds:
- i. That the complainant, after making independent enquiries and only after being fully satisfied about the project, had approached the respondent for booking of a residential unit in respondent's project 'The Esfera' located in Sector-37-C, Gurugram, Haryana. The respondent company provisionally allotted the unit bearing no. D 002 in favor of the complainant for a total consideration amount of Rs.80,06,007/- including applicable tax and additional miscellaneous charges vide booking dated 30.08.2011 and opted the construction linked payment plan on the terms and conditions mutually agreed by the parties.
 - ii. That the construction of the said unit has completed in 2020 and the occupation certificate has already been applied for. It is pertinent to mention that the respondent has successfully completed the construction of the said project, way before the agreed timeline, and has applied to the competent authority for issuance of occupancy certificate on 15.04.2021 itself, after complying with all the requisite formalities, and the same is awaited to be procured anytime now by the end of month of May. It is further stated that the respondent is not at fault for the further delay in the delivery of physical possession to the complainant.
 - iii. That consequently, the respondent entered into a builder-buyer agreement dated 24.12.2012 with the complainant in interest of the



booked unit. It is pertinent to mention that the BBA duly covers all the liabilities and rights pertaining to both the parties involved.

- iv. That the complainant has not paid the outstanding instalments in time, and it must be noted that till this day a large sum of amount is pending to be paid by the complainant, despite numerous reminders which were issued to the complainant by the respondent.
- v. That the terms of the BBA were agreed to and signed by the complainant and, as such, the parties are bound by the terms and conditions mentioned in the said agreement. As per clause 8 of the BBA, time was agreed to be a matter of essence and the allottees were bound to make timely payments of the instalments due as per the payment plan opted by the complainant.
- vi. That despite numerous reminders, the complainant failed to comply by the obligations laid down by the BBA. It is pertinent to mention that an exorbitant sum of Rs.4,78,035/- is still due to be paid by the complainant.
- vii. That delay was caused in the completion of construction of the said project due to certain unforeseeable circumstances such as ban on construction activities in Delhi NCR region by the orders of Hon'ble Supreme Court due to unprecedented air pollution levels, Covid-19 pandemic, shortage of labour and raw material, non-payment of outstanding dues by numerous allottees, including complainant etc.
8. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority

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

E.I Territorial jurisdiction

10. 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

11. 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.

12. 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.



F. Findings on the objections raised by the respondent.

F.I Objection regarding the circumstances being 'force majeure'.

13. The respondent has contended that the project was delayed because of the 'force majeure' situations like ban on construction activities in Delhi NCR region by the orders of Hon'ble Supreme Court due to unprecedented air pollution levels, Covid-19 pandemic, shortage of labour and raw material, non-payment of outstanding dues by numerous allottees, including complainant etc. which were beyond the control of respondent. However, all the pleas advanced in this regard are devoid of merits. First of all, the possession of the unit in question was to be offered by 24.06.2016. Hence, events alleged by the respondent do not have any impact on the project being developed by the respondent. Moreover, some of the events mentioned above are of routine in nature happening annually and the promoter is required to take the same into consideration while launching the project. Thus, the promoter-respondent cannot be given any leniency on based of aforesaid reasons and it is a well settled principle that a person cannot take benefit of his own wrong and the objection of the respondent that the project was delayed due to circumstances being force majeure stands rejected.

G. Findings on the relief sought by the complainant.

G.I Direct the respondent to handover physical possession of the unit along with delay possession charges at prescribed rate of interest.

14. In the present complaint, the complainant intends to continue with the project and is 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."

15. 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 OF THE SAID APARTMENT

*"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.*"*

16. As per the above possession clause, the respondent was obligated to complete the construction of the project within a period of 3 years and 6 months from the date of execution of buyer's agreement. The apartment buyer's agreement was executed between the parties on 24.12.2012. Therefore, the due date for handing over of possession comes out to be 24.06.2016. Further occupation certificate w.r.t the Tower in question i.e., Tower-D has not obtained by the respondent from the competent authorities till date. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. Moreover, the respondent arbitrarily prior to obtaining of occupation certificate from the competent Authority, vide 'letter of intimation regarding possession' dated 23.12.2022 intimated the



complainant regarding handing over of possession of the units in Tower-D of the project, subject to payment of amount demanded by it under various heads without giving any justification/clarification regarding it in the said letter, which cannot be held valid in the eyes of law.

17. **Admissibility of delay possession charges at prescribed rate of interest:** 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.

18. 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.
19. 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., 07.08.2024 is **9%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **11%**.
20. The definition of term 'interest' as defined under section 2(z) 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;"*

21. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., **11%** by the respondent/promoter which is the same as is being granted to him in case of delayed possession charges.
22. On consideration of the documents available on record as well as submissions made by the parties, the Authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 10.1 of the apartment buyer's agreement executed between the parties on 24.12.2012, the possession of the subject flat/apartment was to be delivered within a period of 42 months from the date of execution of the agreement. Therefore, the due date of handing over possession comes out to be 24.06.2016. The respondent has failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. The authority is of the considered view that there is delay on the part of the respondent to offer of possession of the allotted unit to the complainant as per the terms and conditions



of the agreement to sell dated 24.12.2012 executed between the parties. Further occupation certificate w.r.t the Tower in question i.e., Tower-D has not been granted by the competent authorities till date. Hence, this project is to be treated as on-going project and the provisions of the Act shall be applicable equally to the builder as well as allottees.

23. 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 complainant is entitled to delay possession charges at rate of the prescribed interest @11% p.a. w.e.f. 24.06.2016 till actual handing over of possession or valid offer of possession plus two months after obtaining occupation certificate from the competent authority, whichever is earlier, as per section 18(1) of the Act of 2016 read with rule 15 of the rules.

G.II. Direct the respondent to handover the private lawn to the complainant or to refund the lawn amount alongwith interest.

24. The complainant has submitted that as per the agreement, the respondent had promised to the complainant for providing him a private lawn for his personal use, and in lieu of that the respondent had received a payment of Rs.16,85,400/- (including taxes), but the construction of the apartment prima-facie tells that neither any private ground lawn has been constructed till date, nor the respondent company has left the scope for construction of private lawn in future. The respondent has frauded the petitioner by misrepresenting the facts and illegally charging for the private lawn which is neither constructive nor is in the construction plan of the building. After considering the documents available on record as well as submissions made by the parties, it is determined that vide apartment buyer's agreement dated 24.12.2012, the complainant was allotted a ground floor unit with



private lawn and PLC amounting to Rs.16,85,400/- (including taxes) against the same has been paid by him to the respondent as evident from the demand letter dated 12.08.2018. Further, vide clause 1.5 of the said agreement, it was further agreed that if due to change in layout plan/building plan, the said apartment ceases to be in a preferential location, the respondent shall be liable to refund the same. Therefore, in view of the above, the respondent is directed to handover the subject unit with private lawn to the complainant after obtaining occupation certificate from the competent authority failing which the PLC amount so collected i.e., Rs.16,85,400/- shall be refunded to the complainant alongwith prescribed rate of interest from the date of payment till its realization.

H. Directions of the authority

25. 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 to the complainant against the paid-up amount at the prescribed rate of 11% p.a. for every month of delay from the due date of possession i.e., 24.06.2016 till actual handing over of possession or valid offer of possession plus two months after obtaining occupation certificate from the competent authority, whichever is earlier, as per section 18(1) of the Act of 2016 read with rule 15 of the rules.
 - ii. The arrears of such interest accrued from due date of possession i.e., 24.06.2016 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 10th of the subsequent month as per rule 16(2) of the rules.

- iii. The respondents/promoter shall handover the physical possession of the flat/unit alongwith private lawn to the complainant in terms of apartment buyer's agreement dated 24.12.2012 and section 17(1) of the Act of 2016. In case, the respondent is unable to provide the said private lawn with allotted unit to the complainant due to change in the layout plan/building plan, the PLC amount so collected i.e., Rs.16,85,400/- shall be refunded to the complainant alongwith prescribed rate of interest from the date of payment till its realization.
 - iv. The respondent shall not charge anything from the complainant which is not the part of the apartment buyer's agreement.
 - v. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
 - vi. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 11% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.
26. Complaint stands disposed off.
27. File be consigned to registry.

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 07.08.2024