

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

Complaint no. : 4041 of 2021
First date of hearing: 21.12.2021
Date of decision : 04.07.2022

1. Mrs. Chandra Vaswani
2. Mrs. Santosh Mukerji
Address: Flat no. B-1/54, Sai Ashray,
Sector-K, Aliganj, U.P-226024

Complainants

Versus

1. M/s Imperia Wishfield Pvt. Ltd.
Regd. Office at: - A-25, Mohan Cooperative
Industrial Estate, Mathura Road, New Delhi,
110044
2. Prime IT Solution Pvt. Ltd.
Address: B-2/3, S/F KH no. 8/8, Chatterpur
Extn. Nanda Hospital, New Delhi-110074

Respondents

CORAM:

Shri KK Khandelwal
Shri Vijay Kumar Goyal

Chairman
Member

APPEARANCE:

Shri Sukhbir Yadav
Shri Himanshu Singh

Advocate for the complainants
Advocate for the respondents

ORDER

1. The present complaint dated 29.10.2021 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 provision 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. No.	Heads	Information
1.	Name and location of the project	"Elvedor" at sector 37C, Gurgaon, Haryana
2.	Nature of the project	Commercial Project
3.	Project area	02 acres
4.	DTCP license no.	47 of 2012 dated 12/05/2012 valid upto 11.05.2016
5.	Name of license holder	M/s Prime IT Solutions Pvt. Ltd.
6.	RERA Registered/ not registered	Not Registered
7.	Apartment no.	15-A05, 15th floor, Tower EVITA (annexure P-3 on page no. 50 of complaint)
8.	Unit measuring	436 sq. ft. (annexure P-3 on page no. 50 of complaint)
9.	Date of builder buyer agreement	04.07.2014



		(annexure P-3 on page no. 41 of complaint)
10.	Addendum Agreement	April 2017 effective from 01.02.2017 (annexure P-5 on page no. 82 of complaint)
11.	Possession clause	11(a) Schedule for possession of the said unit The company based on its present plans and estimates and subject to all just exceptions endeavors to complete construction of the said building/said unit within a period of sixty(60) months from the date of this agreement unless there shall be delay or failure due to department delay or due to any circumstances beyond the power and control of the company or Force Majeure conditions including but not limited to reasons mentioned in clause 11(b) and 11(c) or due to failure of the allottee(s) to pay in time the Total price and other charges and dues/payments mentioned in this agreement or any failure on the part of the allottee to abide by all or any of the terms and conditions of this agreement.
12.	Due date of possession	04.07.2019 (calculated as per possession clause)
13.	Total consideration	Rs. 31,70,204/- [annexure P-3 on page no. 50 of complaint]



14.	Total amount paid by the complainants	Rs. 27,67,566/- [as alleged by both parties]
15.	Amount received by complainants as assured returns	Rs. 12,00,009/- [as alleged by complainants on page no. 10 of CRA for refund]
16.	Occupation certificate	Not received
17.	Offer of possession	Not offered

B. Facts of the complaint

3. That a commercial project by the name of Elvedor situated at sector 37 C, Gurgaon was being developed by M/s Imperia Wishfield Pvt. Ltd. i.e., respondent no. 1 along with respondent no. 2 being a licensee/promoter/ landowner. That both respondents entered into a collaboration agreement on 06.12.2012 for developing the above-mentioned project.
4. That in February 2013 the complainants received a marketing call on behalf of respondent no. 1 for the above-mentioned project. After going through the brochure (annexure P1) and the representations made, the complainants booked a unit in the above-mentioned project and were allotted one studio bearing No. 15_A05 on 15th floor of tower Evita for tentative size admeasuring 436 sq. ft. on 04.02.2013 and made a payment of Rs. 2,75,000/- under the construction linked payment plan for a sale consideration of Rs. 31,70,204/-.
5. That 04.07.2014 builder buyer agreement with regard to the allotted unit was executed between the allottees and



respondent no. 1 setting out term and condition of allotment, the price of the allotted unit, its dimensions and area, the due date of completion of the project and the payment plan etc.

6. It is the case of complainants that after execution of buyer's agreement, they started making payments against the allotted unit and paid a sum of Rs. 27,67,566/- i.e., 87% of the total sale consideration up to 25.05.2016(annexure P4).
7. That the due date for handing over of possession and completion of the project was agreed upon to be 42 months from the date of booking but was counted from the date of agreement for sale and which comes out to be 04.7.2019.
8. That in February 2017 the complainants asked the respondent about the status of the project and handing over possession of the allotted unit to them, but they were shocked to see the construction activities being stopped at the site. When the complainants pressed the respondent for interest, then they executed an addendum agreement (annexure P5) in April 2017 and vide which respondent no. 1 agreed to pay assured returns calculated at the rate of 1% per month on the total consideration paid by them with effect from the date of signing of the agreement till the unit is sold or transferred to the prospective buyer by the developer.
9. That the amount of assured return to be paid to the complainants by the respondent no. 1 from June 2017 to Aug 2021 was Rs. 14,90,451/- but it has only paid Rs. 12,00,009/- till 23.07.2021 and did not pay the remaining amount.



10. That since the year 2019, the complainants have been visiting the respondents and making efforts seeking refund of the paid-up amount but with no positive results. There is apprehension in their minds that the respondents are playing fraud with them and might have embezzled their hard-earned money. So, they withdrew from the project and are seeking refund (annexure P8) by filing this complaint.

C. Relief sought by the complainants:

11. The complainants have sought the following relief:

- Direct the respondents to refund an amount of Rs. 27,67,566/- along with interest.

12. On the date of hearing, the authority explained to the respondents/promoters 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.

13. No written reply on behalf of respondent no. 2 was received despite due service. So, the authority was left with no alternative but to proceed as per the pleadings of the parties present before it.

D. Reply by the respondent no.1.

14. That the present complaint has been filed by the complainants against the respondent no.1 with respect to the tower- "Evita" being developed by the respondent no.1 in its commercial project titled as "Elvedor Adus" situated at sector-37C, Gurgaon, Haryana.



15. That unit no. 15_A05 admeasuring with of 436 sq. ft, in tower-Evita situated in the said commercial project, which had been allotted to the complainants by the respondent no.1 for a total consideration amount of Rs. 33,74,810/- and opted construction link plan.
16. That the said project is a commercial project being developed on two acres of land situated at sector 37-C, Gurugram, Haryana and comprises of retail and studio apartments. The foundation of the said project vest upon the joint venture agreement executed between M/s Prime IT Solutions Pvt. Ltd. and Imperia Structure Pvt. Ltd. lying down the transaction structure for this project and for creation of SPV company, named and styled as "Imperia Wishfield Pvt. Ltd.". Later, collaboration agreement dated 06.12.2012 as executed between M/s Prime IT Solutions Private Limited (on One Part) and M/s Imperia Wishfield Pvt. Ltd. (on the Second Part). In terms of the said collaboration agreement, the second party i.e. Imperia Wishfield Pvt. Ltd is legally entitled to undertake construction and development of the project at its own costs, expenses and resources in the manner it deems fit and proper without any obstruction and interference from any other party.
17. That M/s Prime IT Solutions Private Limited represented and confirmed to the Imperia Wishfield Pvt. Ltd. that it has already obtained Letter of Intent ("LOI") from the department of town and country planning, Government of Haryana on 24.05.2011 and subsequent license from the department of town and



country planning as necessary for setting up a commercial project on the land admeasuring 2.00 Acres in the revenue estate of Village Gadoli Khurd, sector 37 C, Gurugram on 12.05.2012 along with the zoning plan. The building plans of the said project being developed under above mentioned license no. 47 of 2012 was approved on 25.06.2013.

18. That it is also agreed between both M/s Imperia Wishfield Pvt. Ltd. and M/s Prime IT Solutions Pvt. Ltd. that regardless of execution of collaboration agreement dated 06.12.2012, M/s Prime IT Solutions Pvt. Ltd. shall remain actively involved in the implementation of project. The respondent no.1 has filed an execution petition against the said M/s Prime IT Solutions for compliance of their part and responsibility in regard to said project Elvedor, which is pending adjudication before the civil court at Gurugram and last listed for hearing on 13.01.2022 and same is still sub-judice. Pertinent to mention that, in the said execution, the answering respondent no.1 has prayed for recovery of Rs. 24.27 crores towards balance construction cost of the project.
19. That the respondent no.1 had intended to complete the construction of the allotted unit on time. They had successfully completed the civil work of the said tower/project, and the finishing work, MEP work is remaining of these towers, however the delay in handing over the project has occurred due to certain force majeure circumstance, inter alia includes the Covid-19.

20. That several allottees have withhold the remaining payments, which is severally affecting the financial health of the respondent. 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.
- i. That the respondent company started construction over the said project land after obtaining all necessary approvals and sanctions from different state/ central agencies/ authorities and after getting building plan approved from the authority and named the project as "Elvedor Adus". The respondent company had received applications for booking of apartments in the said project by various customers and on their requests, it allotted the under-construction apartments/ units to them.
 - ii. 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. 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 Gurgaon District, it was becoming difficult to timely schedule the construction activities.



- iii. 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 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 14th February, 2020.
- iv. That, when the complete ban was lifted on 14th February 2020 by the Hon'ble Supreme Court, the Government of India imposed National Lockdown on 24th of March 2020 due to pandemic COVID-19, and conditionally unlocked it in 3rd May, 2020, However, that has left a big 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 to their villages. It is estimated that around 6 lakh workers walked to their villages, and around 10 lakh workers were stuck in relief camps. The aftermath of lockdown or post lockdown periods have 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.
- v. 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 sit 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.

- v. 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.
- vi. The real estate sector so far has remained 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 has 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.

21. That the terms of agreement were entered between the parties and, as such, the parties are bound by the terms and conditions mentioned in the said agreement. The said agreement was duly acknowledged by the complainants after properly understanding each and every clause contained in the agreement. The complainants were neither forced nor influenced by the respondent no.1 to sign the said agreement. As per the clause of agreement the time was the essence of the agreement and the allottees were bound to make timely payment of instalments due as per the payment plan.
22. That the complainants have approached the authority with unclean hands and has suppressed and concealed material and vital facts which have a direct bearing on the very maintainability of the purported complaint and if there had been disclosure of these material facts, the question of entertaining the purported complaint would not have arisen.



23. 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 authority

24. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

25. 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

26. 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;

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.

27. 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. Findings on the objections raised by the respondent:

F.I Objection regarding force majeure conditions:

28. The respondent-promoter raised the contention that the construction of the project was delayed due to force majeure conditions such as national lockdown, shortage of labour due to covid 19 pandemic, stoppage of construction due to various orders and directions passed by hon'ble NGT, New Delhi, Environment Pollution (Control and Prevention) Authority, National Capital Region, Delhi, Haryana State Pollution Control Board, Panchkula and various other authorities from time to time. But all the pleas advanced in this regard are devoid of merit. As per the possession clause 11 of the builder buyer agreement, the possession of the said unit was to be delivered within a period of 60 months from the date of this agreement. The builder buyer agreement between the parties was executed on 04.07.2014. So, the due date for completion of the project and offer of possession of the allotted



unit comes out to be 04.07.2019. The authority is of the view that the events taking place after the due date do not have any impact on the project being developed by the respondent/promoter. Thus, the promoter/ respondent cannot be given any leniency based on aforesaid reasons. It is well settled principle that a person cannot take benefit of his own wrongs.

G. Findings on the relief sought by the complainants.

G.I Direct the respondent to refund an amount of Rs. 27,67,566/- along with interest.

29. That the complainants booked a commercial unit in the project of the respondent named as "Elvedor" situated at sector 37-C, Gurgaon, Haryana for a total sale consideration of Rs. 31,70,204/- on 11.02.2013. They paid an amount of Rs. 27,67,566/- out of the total sale consideration. A builder buyer agreement interse between the parties was executed on 04.07.2014. As per clause 11(a) of the builder buyer agreement the respondent has to handover the possession of the allotted unit within a period of 60 months from the date of execution of agreement. Therefore, the due date for handing over of possession comes out to be 04.07.2019.
30. Meanwhile in February 2017, complainants approached the respondent and asked regarding the due date of possession. Due to the status of construction at site the complainants demand refund of a paid amount along with interest. The respondent in this regard assured them to pay compensation



in form of assured returns @ 12% p.a. till he gets the prospective buyer of the unit. An addendum agreement in this regard was executed between the parties in April 2017 to be effective from 01.02.2017(annexed as annexure P-5 on page no. 70 of complaint). That the complainants in his facts has stated that the assured return should be paid from June 2017 to August 2021, and he has received an assured return of Rs. 12,00,009/- till 23.07.2021

31. Keeping in view the fact that the allottee complainants wishes to withdraw from the project and are demanding return of the amount received by the promoter in respect of the unit with interest on failure of the promoter to complete or inability to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. The matter is covered under section 18(1) of the Act of 2016.
32. The due date of possession as per agreement for sale as mentioned in the table above is 04.07.2019 and there is delay of 2 years 3 months 25 days on the date of filing of the complaint.
33. The occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondent-promoter. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the allotted unit and for which he has paid a considerable amount towards the sale consideration and as observed by Hon'ble Supreme Court of India in Ireo Grace



Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors., civil appeal no. 5785 of 2019, decided on 11.01.2021

“... The occupation certificate is not available even as on date, which clearly amounts to deficiency of service. The allottees cannot be made to wait indefinitely for possession of the apartments allotted to them, nor can they be bound to take the apartments in Phase 1 of the project.....”

34. Further in the judgement of the Hon'ble Supreme Court of India in the cases of Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra) reiterated in case of M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022 wherein it was observed as under:

25. The unqualified right of the allottee to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed.

35. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to



the allottee as per agreement for sale under section 11(4)(a). The promoter has failed to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottee, as the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of the unit with interest at such rate as may be prescribed.

36. This is without prejudice to any other remedy available to the allottee including compensation for which allottee may file an application for adjudging compensation with the adjudicating officer under sections 71 & 72 read with section 31(1) of the Act of 2016.
37. The authority hereby directs the promoter to return the amount received by him i.e., Rs. 27,67,566/- after deducting the amount received by the complainants i.e., 12,00,009/- as assured return with interest at the rate of 9.50% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

H. Directions of the authority

38. 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/promoter is directed to refund the amount i.e., Rs 27,67,566/- received by him after deducting the amount received by the complainants i.e., 12,00,009/- as assured return with interest at the rate of 9.50% as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount.
- ii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

39. Complaint stands disposed of.

40. File be consigned to registry.


(Vijay Kumar Goyal)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 04.07.2022