

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

Complaint no. : 4952 of 2020
First date of hearing: 26.02.2021
Date of decision : 04.07.2022

Shital Dahiya
R/o: H.no. 2646, Near Palm Tree Hotel,
Ashok Vihar, Phase-3, Gurugram,
Haryana-122001

Complainant

Versus

M/s Imperia Wishfield Pvt. Ltd.
Regd. Office at: - A-25, Mohan Cooperative
Industrial Estate, Mathura Road, New Delhi,
110044

Respondent

CORAM:
Shri KK Khandelwal
Shri Vijay Kumar Goyal

**Chairman
Member**

APPEARANCE:

Shri Abhay Jain
Shri Himanshu Singh

Advocate for the complainant
Advocate for the respondent

ORDER

1. The present complaint dated 12.01.2021 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 there under or to the allottees as per the agreement for sale executed inter se.

2. As per the records available, the registry has sent notice to both the parties which was properly delivered as per tracking report available in file. Further vide order dated 26.02.2021, the complaint was ordered to be dismissed for want of prosecution as none has appeared on behalf of the complainant. Thereafter, the complainant filed an application for restoration of complaint on 16.04.2021 and the same was allowed.
3. Thereafter, the registry sent a notice through email to appear before the adjudicating officer. But none from the side of respondent appeared. So, the defence of the respondent was struck off and the authority is proceeding as per the pleadings and documents on the record.

A. Unit and project related details

4. 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. | 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. | Unit no. | E.023 (as alleged by complainant) |
| 8. | Unit measuring | 315 sq. ft. (as alleged by complainant) |
| 9. | Date of booking | 01.09.2012 (as alleged by complainant) |
| 10. | Date of Allotment | August 2013 (as alleged by complainant) |
| 11. | Date of builder buyer agreement | Not Executed |
| 12. | Due date of possession | 01.09.2017 (Calculated on the basis of the date of booking application i.e., 01.09.2012 in the absence of buyer's agreement) |
| 13. | Possession clause [Possession clause taken from the BBA annexed in complaint no. 4038 of 2021 of the same project being developed by the same promoter] | 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. |
| 14. | Total consideration | Rs. 27,43,120/- [as alleged by complainant] |
| 15. | Total amount paid by the complainant | Rs. 16,63,188/- [as alleged by complainant] |
| 16. | Occupation certificate | Not received |
| 17. | Offer of possession | Not offered |

B. Facts of the complaint

5. That the complainant booked commercial unit in the project floated by the respondent namely "Elvedor" situated at Sector-37C, Gurgaon, Haryana and paid a booking amount of Rs. 2,59,717/-.



6. That the complainant further paid a Rs. 4,09,640/- towards second instalment which was duly acknowledged by the respondent.
7. The respondent issued an allotment letter in August 2013 wherein the original allotment was changed to unit no. E.023 measuring 315 sq. ft. of super area.
8. That the respondent through demand letter raised a demand of Rs. 2,69,348/- which was duly paid by the complainant. Therefore, the complainant till 26th May 2016 paid an amount of Rs. 16,63,188/- to the respondent.
9. That the respondent kept the complainant in dark about the actual and true status of the construction of her commercial unit. The respondent kept telling the complainant that her commercial unit would be ready as per the commitments and the promises made to her. The complainant had reposed faith in the representations made by the respondent, about the development of the project. The respondent kept raising demands, but the construction activities were not visible at the project site.
10. That the complainant has lost confidence and in fact has got no trust left in the respondent as it deliberately and wilfully indulged in undue enrichment, by cheating her besides being guilty of indulging in unfair trade practices. Therefore, the complainant intends to withdraw from the project and seeks the complete refund of her deposited amount along with

interest at the prescribed rate for inordinate delay caused due to complete failure of the respondent.

C. Relief sought by the complainant:

11. The complainant has sought the following relief:

- Direct the respondent to refund an amount paid by the complainant of Rs. 16,63,188/- along with interest.
- Direct the respondent to pay legal expenses of Rs. 1,00,000/- incurred by complainant.

D. Jurisdiction of authority

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

D. I Territorial jurisdiction

13. 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.

D. II Subject matter jurisdiction

14. 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.

15. 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.

E. Findings on the relief sought by the complainant.

- Direct the respondent to refund an amount paid by the complainant of Rs. 16,63,188/- along with interest.
16. The complainant booked a commercial unit in the project of the respondent named as "Elvedor Studio" situated at sector 37-C, Gurgaon, Haryana for a total sale consideration of Rs. 27,43,120/-. The complainant paid an amount of Rs.

16,63,188/- till 26.05.2016. The booking of the said unit was made on 01.09.2012 and thereafter allotment of the unit was made in august 2013. But the respondent neither issued any allotment letter nor executed buyers' agreement till date regarding the unit.

17. On consideration of record and submission, the authority is of the view that no builder buyer agreement has been executed between the parties till date. So, the possession clause for calculating the due date is taken from the compliant no. 4038 of 2021 of the same project being developed by the same promoter. Hence, due date is calculated on the basis of the date of booking application i.e., 01.09.2012 in the absence of buyer's agreement which comes out to be 01.09.2017.
18. Keeping in view the fact that the allottee complainant wishes to withdraw from the project and is 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.
19. The due date of possession as per agreement for sale as mentioned in the table above is 01.09.2017 and there is delay of 3 years 4 months 11 days on the date of filing of the complaint.

20. 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....."

21. 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. it was observed

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

22. 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.
23. 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.
24. The authority hereby directs the promoter to return the amount received by him i.e., Rs. 16,63,188/- 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*.

25. During the course of arguments, it was submitted by the respondent that license for the project was issued in the name of M/s Prime IT Solutions Pvt. Ltd. and that person had not been added as a party in the complaint. It is not disputed that all the payments against the allotted units were made to the respondent. No buyer's agreement was executed between the parties with regard to the allotted unit so as per the explanation attached with section 2(zk) of the Act of 2016, both i.e., the respondent as well as M/s Prime IT Solutions Pvt. Ltd. are to be treated as promoters and are jointly liable as such for functions and responsibilities specified under the Act of 2016 or the rules and regulations made thereunder.
26. The project was not got registered with the authority by the respondent. So, the authority directs the planning branch to intimate the status of penal proceedings pending against the promoters for not registering the project with the authority. A copy of this order be sent to the planning branch of the authority for doing the needful.
 - **Direct the respondent to pay legal expenses of Rs. 1,00,000/- incurred by complainant.**

27. The complainant in the aforesaid relief is seeking relief w.r.t compensation. 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.** (Decided on 11.11.2021), has held that an allottee is entitled to claim compensation 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 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. Therefore, the complainant is advised to approach the adjudicating officer for seeking the relief of compensation.

F. Directions of the authority

28. 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 received by him i.e., Rs. 16,63,188/- 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.
- iii. A copy of this order be sent to the planning branch of the authority for doing the needful in view of observations made in para 26 of the order.

29. Complaint stands disposed of.

30. File be consigned to registry.

V. / - 
(Vijay Kumar Goyal)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 04.07.2022