

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

Complaint no. : 6691 of 2019
First date of hearing: 27.01.2020
Date of decision : 04.07.2022

1. Renu Saroha
2. Satyavir Singh Saroha
Both R/o: H.no. E-53A, Ground Floor,
Sushant Lok II, Sector-56, Gurugram,
Haryana

Complainants

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:
Ms. Sangeeta Yadav
Shri Himanshu Singh

Advocate for the complainants
Advocate for the respondent

ORDER

1. The present complaint dated 23.12.2019 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.	11_S05, 2BHK, 11th floor (page no. 18 of complaint)
8.	Unit measuring	900 sq. ft. (page no. 18 of complaint)
9.	Date of booking	28.12.2012



		(page no. 18 of complaint)
10.	Date of Allotment	Not mentioned
11.	Date of builder buyer agreement	Not Executed
12.	Due date of possession	28.12.2017 (Calculated on the basis of the date of booking application i.e., 28.12.2012 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. 30,37,680/- [page no. 23 of complaint]
15.	Total amount paid by the complainants	Rs. 13,63,881/-



		[page no. 23 of complaint]
16.	Occupation certificate	Not received
17.	Offer of possession	Not offered

B. Facts of the complaint

3. That complainants booked a commercial unit in the project floated by the respondent namely "Elvedor Studio" situated at Sector-37C, Gurgaon, Haryana at agreed total sale consideration of Rs.30,37,680/-.
4. That the complainants paid Rs. 5,29,200/- as booking amount on 20.12.2012. After receipt of booking amount the respondent sent a welcome letter of the said project.
5. That the complainants have paid Rs.8,3,468/- on 11.02.2013. The respondent after receipt of first installment allotted a unit No.11 S05, 37th Avenue, at sector-37 C, Gurugram. But the respondent had neither issued any allotment letter nor executed buyer's agreement till date regarding the property in question.
6. That the total sale consideration of the flat is Rs.30,37,680/- for which the complainants have paid Rs.13,63,881/- till date, but the respondent after receipt of the payment neither issued allotment letter nor executed any buyer agreement in respect of the flat.
7. That the respondent has not even started the construction work at the site and failed to provide the flat/apartment to the complainants as per the commitment. The respondent is not in

a situation to hand over the possession of the flat/unit as per the commitment within the aforesaid maximum period.

8. That at the site, there is no development as per assurance. The project is far from starting and the complainants are suffering because of undue delay on the part of the respondent in handing over of the physical possession of the flat/unit.
9. That the respondent has failed to abide by the contractual terms. The cause of action to file the complaint is continuing as the respondent has failed to deliver possession of developed flat/unit within the agreed prescribed period.

C. Relief sought by the complainants:

10. The complainants have sought the following relief:
 - Direct the respondent to refund an amount of Rs. 13,63,881/- along with interest @ 18 % per annum towards the delay in taking over possession of the said flat.
11. 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.

12. That the present complaint has been filed by the complainants against the respondent company in with respect to the tower- "37th Avenue" being developed by it in its commercial project



titled as "Elvedor Studio" situated at sector-37C, Gurgaon, Haryana.

13. That unit no. 11_S05 admeasuring with of 900 sq. ft, in Tower-37th Avenue situated in the said commercial project, was allotted to them by the respondent for a total consideration of Rs. 71,60,585/-, vide booking date dated 28.12.2012 and opted construction link plan on the terms and conditions mutually agreed by the parties.
14. That the complainants have approached this authority with unclean hands and have tried to mislead by making incorrect and false averments and stating untrue and/or incomplete facts and, as such, are guilty of suppressing of facts.
15. 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 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. 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.



16. That every year, the construction work was stopped/ banned 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 had to manage and rearrange for the same and it almost multiplied the time of banned / stayed period to achieve the previous workflow.
17. That 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, the demonetization 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 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.
18. 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, 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 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.

19. 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 on 3rd May 2020, However, this has left the great impact on the procurement of material and labour. The 40-day lockdown in effect since March 24, extended up to May 3 and subsequently to May 17, led to a reverse migration with workers leaving cities returning back 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 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."
20. That several allottees have withhold the remaining payments, severally affecting the financial health of the respondent.

Further due to the force majeure conditions and circumstances were beyond the control of the respondent company.

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 to sign the said agreement.
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. 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, 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 was not executed between the parties. So, the due date is calculated on the basis of the date of booking application i.e., 28.12.2012 in the absence of buyer's agreement. As per the possession clause taken from the BBA annexed in complaint no. 4038 of 2021 of the same project being developed by the same promoter. Hence, the due date comes out to be 28.12.2017. 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.

- Direct the respondent to refund an amount of Rs. 13,63,881/- along with interest @ 18 % per annum towards the delay in taking over possession of the said flat.
29. That the complainants 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. 30,37,680/-. The complainants paid an amount of Rs. 5,29,200/- as booking amount on 20.12.2012 and Rs. 8,34,681/- on 11.02.2013, means total payment of Rs. 13,63,881/-. The respondent after receipt of installment allotted a unit detailed above. But the respondent neither issued any allotment letter nor executed buyers' agreement till date regarding the unit.
30. On consideration of record and submissions 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., 28.12.2012 in the absence of buyer's agreement which comes out to be 28.12.2017.

31. Keeping in view the fact that the allottee complainants wish 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 28.12.2017 and there is delay of 1 year 11 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 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 allottees wish 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 allottees 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. 13,63,881/- 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*.
38. 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.

39. 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.

H. Directions of the authority

40. 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. 13,63,881/- 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 39 of the order.

41. Complaint stands disposed of.

42. File be consigned to registry.

V.K. - 3

(Vijay Kumar Goyal)
Member

[Signature]

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 04.07.2022

HARERA
GURUGRAM