

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

Complaint no. : 1256 of 2018
Date of first hearing : 24.01.2019
Date of decision : 01.05.2019

Mr. Devinder Kumar
R/o. 91 A, Hari Nagar Ashram,
Mathura Road, New Delhi - 110014.

Complainant

Versus

M/s Imperia Wishfield Pvt. Ltd.
(Through its Directors)
Office at: A-25, Mohan Co-operative
Industrial Estate, Mathura Road, New Delhi

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Parikshit Kumar Advocate for the complainant
Shri Devender Kumar Complainant in person.
Shri Rajender Kumar Assistant Legal Manager of the
respondent Company
Shri Ishaan Dang Advocate for the respondent

ORDER

1. A complaint dated 18.10.2018 was filed under section 31 of the Real Estate (Regulation and Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 by the complainant Mr. Devinder

Kumar, against the promoter M/s Imperia Wishfield Pvt. Ltd., on account of violation of the clause 11(a) of builder buyer's agreement executed on 22.08.2014 in respect of apartment described as below in the project "Elvedor", located at sector 37 C, Gurugram by not refund the paid amount to the complainant which is an obligation of the promoter under section 18 of the Act *ibid*.

2. Since the builder buyer's agreement has been executed on 22.08.2014, i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, therefore, the penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non-compliance of contractual obligation on the part of the promoter/respondent in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016.

3. The particulars of the complaint are as under: -

- **Nature of the project - Commercial colony**
- **DTCP License no.- 47 of 2012 dated 12.05.2012**
- **License valid/renewed up to- 11.05.2016**
- **License holder- M/s Prime IT Solutions Pvt. Ltd.**

1.	Name and location of the project	"Elvedor", Sector 37-C, Gurugram, Haryana.
2.	Project area	2.0 acres
3.	Registered/ not registered	Not registered

4.	Unit no.	6_A16, 6 th floor, tower Evita
5.	Unit measuring	436 sq. ft.
6.	Date of buyer's agreement	22.08.2014 (Annx C/8)
7.	Total consideration as per buyer's agreement	Rs. 30,71,406/- (Pg.49)
8.	Total amount paid by the complainant	Rs.26,79,313/- (as per the receipts annexed)
9.	Payment plan	Construction linked plan
10.	Date of delivery of possession [Clause 11(a) – 60 months from date of execution of agreement i.e.22.08.2014]	22.08.2019
11.	Delay in handing over possession till the date of decision	The complaint is premature
12.	Penalty clause as per buyer's agreement dated 22.08.2014	Clause 14- Rs.20/- per sq. ft. per month of the super area of the said unit per month.

4. The details provided above have been checked on the basis of the record available in the case file which have been provided by the complainant and the respondent. A buyer's agreement dated 31.01.2014 is available on record for unit no. 6_A16,6th floor, block/tower 'Evita' admeasuring 436 sq. ft. in the project 'Elvedor' according to which the due date of possession comes out to be 22.08.2019. On this count the complaint is premature but the respondent has failed to refund the paid amount of the complainants on their request which is in violation of section 18 of the Act *ibid*.

5. Taking cognizance of the complaint, the authority issued notice to the respondents for filing reply and for appearance. The respondent through his counsel appeared on 24.01.2019. The case came up for hearing on 24.01.2019, 05.03.2019 and 01.05.2019. The reply has been filed by the respondent on 10.10.2018 which has been perused by the authority.

Facts of the complaint: -

6. Briefly put facts relevant for the disposal of the present complaint are that the respondent has launched a residential-cum-commercial project originally known as Esfera Elvedor, situated at sector-37C, Gurugram in the year 2012.
7. The complainants submitted that on the basis of representations made by the respondent, complainants jointly vide application form dated 21.01.2013 applied for allotment of one studio apartment on the 7th floor, corner park east facing in the said project having a super area of 500 sq. ft.
8. Pursuant to aforesaid booking of the complainants' respondent has issued a welcome letter dated 20.02.2013 wherein the respondent has acknowledged the complainant as a customer for a space in the project 'elvedor adus' and allotted a unit bearing no. 6_A16 admeasuring 436 sq. ft. in the project.

9. On 22.08.2014, studio buyer's agreement for allotted unit was executed between the parties. It is pertinent to note that the said agreement provided by the respondent consisted of several one-sided clauses including with respect to possession. The complainant submitted that in the agreement, it was represented that the said land was owned in part by one Mr. Devi Ram and in the other part by M/s Prime IT Solutions Private Limited. M/s Prime IT Solutions had entered into a collaboration agreement and general power of attorneys in favor of M/s Prime IT Solutions Private Limited. The said Prime IT Solutions subsequently applied for and purportedly obtained a license bearing no. 47 of 2012 dated 12.05.2012 in respect of the project land. Subsequently, Prime IT Solutions entered into collaboration with the respondent pursuant to which the project was being implemented. It was further represented that development plans had also been approved on 24.05.2011 and based on such approvals, the respondent is competent and entitled to execute the project.
10. The complainants submitted that in terms of the buyer's agreement, the total basic sale price was shown as Rs.23,02,080/-, with additional charges, the total sale price was reflected as Rs. 30,71,406/-.

11. The complainants submitted that as per demand letters, the respondent had purportedly undertaken construction up till 15th floor by July 2016 itself. Simultaneously, as evidenced by various receipts, the complainant had paid 90% of the total price.
12. The complainants submitted that when construction halted for a period of 2 years, complainants started making enquiries from the other allottees who were similarly situated and was shocked to learn that neither did the respondent have any right in and over the land at the time of booking, nor did the respondent have requisite sanctions or approvals from the concerned authorities. As such all the representations provided by the respondent in terms of the buyer's agreement were found to be deceptive and false. The complainants also became aware of the following facts:
 - (i) A license / letter of intent was issued in favor of Prime IT Solutions Private Limited (and not the respondent) on 24.05.2011. As per clause 25 of terms and conditions of the said letter of intent, the colonizer (i.e. Prime IT Solutions Private Limited) was required to provide an undertaking to the effect that land is not being sold to anyone after issuance of the letter of intent. As such, it is evident that a pre-condition

for issuance of letter of intent / license was that there is no collaboration agreement / agreement to sell which is in force on the project land. Therefore, neither did the respondent have any license in its favor nor was it, in any event, without a separate license issued in its favor, entitled to acquire the land or undertake construction on the same.

- (ii) Further a license bearing no. 47 of 2012 was issued in favor of the Prime IT Solutions on 12.05.2012. However, the DTCP Haryana website clearly shows that in fact such license has expired on 11.05.2016 itself.
- (iii) Further, the sanctioned plan as available on the DTCP website also shows that approval had been granted for construction only up till the 13th floor whereas the respondent was purportedly undertaking construction up till the 15th floor in violation of the sanctioned plans. This essential fact was also actively suppressed.
- (iv) The collaboration agreement dated 6.12.2012 which was the governing document granting the respondent right to undertake construction and development was in fact unregistered. Consequently, at the time of undertaking booking for the complainant, the respondent had no right in and over the said land.

- (v) The complainants further learnt that vide a general power of attorney purportedly registered, Prime IT solutions had agreed to sell, transfer and convey the project land in favor of the respondent. Even as on the date of execution of the buyer's agreement, no sale had taken place and neither was any registered development agreement executed.
- (vi) In fact, the respondent in order to enforce its purported rights against Prime IT Solutions filed a civil suit before the Ld. Civil Judge (Jr. Division) wherein a compromise was executed between the parties to the suit. Pursuant to such compromise dated 12.01.2016 and a compromise decree dated 21.01.2016, the respondent presumably has acquired rights in respect of the project land. However, as is evident, the respondent still does not have the requisite sanction from the concerned authorities to undertake construction over the lands since the approval/license was issued only in the name of Prime IT Solutions and not the respondent. As such the construction is completely not sanctioned and this fact has been actively concealed by the respondent for almost 6 years.
13. The complainants further submitted that even after expiry of 6 years from the date of booking, till date only a rudimentary structure of one out of the several buildings forming part of the

project has been erected on the project land which is incapable of possession. Additionally, there is no other development on the project land for last two years and the construction activities have been stopped since 2016.

14. Hence, the complainants were constrained to file the instant complaint.

15. **Issues raised by the complainants: -**

- i. Whether the respondent has misrepresented to the complainants that it has the necessary sanctions and approvals in place to undertake construction of the proposed project?
- ii. Whether the respondent has abandoned the project and consequently is liable to refund the amounts along with interest to the complainants?
- iii. Whether the respondent has failed to provide possession of the unit in question without any reasonable justification?
- iv. Whether the respondent has undertaken construction of the proposed project in accordance with any sanctioned plans which have been duly approved?

- v. Whether the respondent has any authority to undertake construction or sale of the project in question at the time of receiving booking amount or instalments from the complainants?

16. Reliefs sought by the complainants :-

- Pass appropriate directions to the respondent directing refund of the amount of Rs.26,79,313/- alongwith interest @ 18% p.a. from the date of deposits till the date of actual payment.

Respondent's reply:-

17. The respondent has denied each and every allegations and contentions raised by the complainant. They contended that the complaint is false, frivolous, malafide and an abuse of process of this authority. It was further contended by the respondent that the complainant has not approached this authority with clean hands.
18. The respondent has submitted that the construction has been delayed due to force majeure circumstances beyond the control of the respondents. It was further submitted by the respondent that M/s. Prime IT Solutions Pvt. Ltd. entered into a development agreement on 06.12.2011 and the same was duly registered. In furtherance of the development agreement,

an application for grant of license to develop a commercial colony over the aforesaid land had been submitted by M/s Prime IT Solutions Pvt. Ltd. before DTCP.

19. The respondent submitted that later, M/s Prime IT Solutions Pvt. Ltd. and developer had executed a term sheet which took the shape of the collaboration agreement. Further, a general power of attorney was also executed by M/s. Prime IT Solution Pvt. Ltd. in favour of developer which was also registered on 19.03.2012. It was further submitted by the respondent that they had obtained all necessary permissions and sanctions for the commercial project in question.
20. The respondent submitted that they got letter of intent on 24.05.2011 and subsequently license no. 47 of 2012 and license no. 51 of 2012 was granted on 12.05.2012 and 17.05.2012. Further the building plan was sanctioned on 25.06.2013.
21. The respondent has submitted that they had filed a suit titled Imperia Wishfield Private Limited versus Prime IT Solution Private Limited whereby the relief of declaration along with consequential relief of permanent injunction against the Prime IT Solution Private Limited and landowners. The hon'ble civil court has passed the order in the shape of compromise deed

and issued direction to prepare the decree sheet accordingly. The decree sheet judgement and sanctioning of mutation no. 2117 for transfer of the ownership of project land to Imperia Wishfield Private Limited was declared the owner of the property in question.

22. The respondent submitted that by virtue of acts in law, above permissions and court decree, the respondent have the absolute right to market, sell, allot plots, etc. and as such became competent to enter into agreements.
23. The respondent submitted that the construction at the site is being done in phase and in going on full swing. It was further submitted by the respondent that the complainants are bound by the terms of the application form and therefore the dispute if any falls within the ambit of civil dispute and all other allegations levelled by the complainants are false and baseless.

Determination of issues

After considering the facts submitted by the complainants, reply by the respondent and perusal of record on file, the authority decides seriatim the issues raised by the parties as under:

24. In respect of **first issue** raised by the complainants, complainants have failed to furnish any concrete proof in order to establish any misrepresentation on the part of the

respondent regarding necessary sanctions and approvals in order to carry out construction. Thus, this issue is decided in negative.

1. In respect of **second issue** raised by the complainants, the complainants have submitted in their complaint that the construction of the tower in question is completed up till 15th floor. However, regarding the fact that the construction on the site has been abandoned by the respondent, local commissioner has been appointed in a similar matter i.e. CR/1666/2018. The **report of local commissioner dated 30.01.2019** has been received. The operative part of said report is reproduced below –

“For project ‘ELVEDOR’ 2.00 acres of land being developed by M/s. Imperia Wishfield P. Ltd.

Since the estimated cost and expenditure incurred figures are available for the project ‘ELVEDOR’ the overall progress of the project has been assessed on the basis of expenditure incurred and actual work done at site on 24.01.2019. Keeping in view above facts and figures, it is reported that the work has been completed with respect to financially is 42.20% whereas the work has been completed physically is about 30% approximately.

For the project ‘37th AVENUE’ on 4.00 acres land being developed by M/s. Imperia Wishfield P. Ltd..

Since the estimate cost and expenditure incurred figures are available for the project is ‘37th AVENUE’ being developed by M/s. Imperia Wishfield P. ltd. The overall progress of the project has been assessed on the basis of expenditure incurred

and actual work done at site on 24.01.2019. Keeping in view above facts and figures, it is reported that the work has been completed with respect to financially is 15.70% whereas the work has been completed physically is about 5% approximately”

25. In respect of **third issue** raised by the complainants, as per clause 11(a) of the buyer’s agreement dated 22.08.2014, the due date for delivery of possession comes out to be 22.08.2019. Thus, the complaint is pre-mature. Hence, any delay on the part of respondent cannot be attributed at this stage. Thus, this issue is decided in negative.
26. In respect of **fourth and fifth issue** raised by the complainants, the complainants have not furnished any documentary proof in order to firmly ascertain whether the construction was carried out in accordance with the sanctioned plans and approvals or whether the respondent, in the first place, had any authority to undertake construction or sale of the project in question. However, it is clear from the records that DTCP license has already expired on 11.05.2016 and it is nowhere stated by the respondent in their reply that they have applied for renewal of said license.

Findings of the authority:-

27. The project “Elvedor” is located in Sector 37-C, Gurugram. As the project in question is situated in planning area of

Gurugram, therefore the authority has complete territorial jurisdiction vide notification no.1/92/2017-1TCP issued by Principal Secretary (Town and Country Planning) dated 14.12.2017 to entertain the present complaint.

28. The preliminary objections raised by the respondent regarding subject matter jurisdiction of the authority stands rejected. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as held in ***Simmi Sikka v/s M/s EMAAR MGF Land Ltd.*** leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.
29. Arguments heard. As per clause 11(a) of the buyer's agreement dated 22.08.2014 for unit no. 6_A16, 6th floor, tower Evita, in the project "Elvedor" located at Sector 37C, Gurugram, possession was to be handed over to the complainant within a period of 60 months from the date of execution of buyer's agreement which on calculation comes out to be 22.08.2019 and which has not yet come, so the complaint is pre mature on this count.
30. There is some confusion with respect to the location/situation of the allotted unit in the project as it has been alleged by the

complainant that unit is in tower Edes as all the demand letters issued by the respondent indicate that his flat/unit is in tower Edes. Since, the buyer's agreement dated 22.08.2014 signed inter-se the parties is for unit located in tower Evita, as such, the buyer is directed to clarify and certify for all intents and purposes.

Decision and directions of the authority:-

31. After taking into consideration all the material facts as adduced and produced by both the parties, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issues the following directions to the respondent:

- i. The respondent is directed to clarify the location of the allotted unit to the complainant for all intents and purposes. A compliance report in this regard be filed within a month.
- ii. The respondent is further directed that the complainant must be satisfied with respect to the location of the unit and the allotted unit should be as per the buyer's agreement in all respects failing which the promoter shall be liable for cheating and fraud.

iii. The project is registerable and has not been registered by the promoters. Thus, the authority has decided to take suo-moto cognizance for not getting the project registered and for that separate proceeding will be initiated against the respondent under section 59 of the Act *ibid*. A copy of this order be endorsed to the registration branch.

32. The order is pronounced.

33. Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 01.05.2019.

Judgement uploaded on 27.05.2019

HARERA
GURUGRAM