

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

Complaint no.	57 of 2018
Date of filing complaint	11.12.2019
First date of hearing	12.04.2018
Date of decision	30.08.2022

Harinder Pal Singh <b>R/o:</b> H.No. 92, Sector 4, Urban Estate, Gurugram, Haryana-122001	<b>Complainant</b>
Versus	
M/s. Imperia Wishfield Pvt. Ltd. <b>Regd. office:</b> A-25, Mohan Co-operative Industrial Estate, Mathura Road, New Delhi- 110044	<b>Respondent</b>

<b>CORAM:</b>	
Dr. KK Khandelwal	<b>Chairman</b>
Shri Vijay Kumar Goyal	<b>Member</b>
<b>APPEARANCE:</b>	
Complainant in person	Complainant
None	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 29 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 allottee as per the agreement for sale executed inter se.

### A. Unit and project related details

2. The particulars of the project, the details of sale consideration, the amount paid by the complainants, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S.No.	Particulars	Details	
1.	Name of the project	"37th Avenue", Sector ,37C, Gurugram, Haryana (Originally known as Elvedor)	
2.	Project area	2.00 acres	
3.	Nature of the project	Commercial Colony	
4.	DTCP license no. and validity status	47 of 2012 dated 17.05.2012 valid up to 16.05.2018 51 of 2012 dated 28.05.2012 valid up to 16.05.2016	
5.	Name of licensee	Prime IT Solution Pvt. Ltd. and 1 other	
6.	RERA Registered/ not registered	Not registered	
7.	Allotment Letters	<b>Original Unit</b>	<b>Changed Unit</b>
		23.09.2013 (Page 15 of the complaint)	10.10.2013 (Page 16 of the complaint)
8.	Unit no.	12_A11, 12 <sup>th</sup> floor (Page 15 of the complaint)	8_S02, 8 <sup>th</sup> Floor, Tower B (Page 14 of the complaint)
9.	Unit area admeasuring (super area)	659 sq. ft. (Page 15 of the complaint)	659 sq. ft. (Page 16 of the complaint)



10.	Date of execution of space buyer's agreement	Neither executed nor on record
11.	Possession clause	Not on record
12.	Due date of possession	10.10.2016 (Calculated as 3 years from date of allotment letter in view of the Hon'ble Supreme Court judgment on the subject)
13.	Total sale consideration	Rs. 45,28,261/- (Page 16 of the complaint)
14.	Amount paid by the complainants	Rs. 8,92,004/- (As per CRA on pg. 29 of complaint)
15.	Occupation certificate /Completion certificate	Not obtained
16.	Offer of possession	Not offered

**B. Facts of the complaint:**

3. The Respondent launched a residential-cum commercial project originally known as " Elvedor", situated at Sector - 37C, Gurugram, Haryana, India (hereinafter referred to as the "Project") in and about the year 2012.
4. That the complainant was allured by the agents of the respondent based in Gurugram and was induced to book a fully furnished studio apartment in the project with promise to deliver the apartment by December 2015, for which payment of Rs.3,50,000/- was made vide cheque no. 106580 of Gurgaon Gramin Bank dated 08-08-2012 which was duly acknowledged and issued a receipt on 13-09-2012. Vide letter dated 17-11-2012, a further demand of Rs. 5,42,004/- was made by the respondent. Consequently, the complainant made the payment of Rs.5.42,004/- vide cheque No. 106586 of Gurgaon

Gramin Bank dated 30-11-2012 for which receipt was issued to him on 10-12-2012.

5. That vide allotment letter dated 08-03-2013, the complainant was allotted unit no. 8\_S02 measuring 659 sq. ft. at the basic sale price of Rs. 5,252 per sq. ft. However, the respondent unilaterally changed the unit allotted to the complainant which came to his notice only when he received allotment letter from it on 23-09-2013 in which a changed to a new unit bearing no. 12\_A11 which clearly shows the deceitful attitude of the respondent. The complainant, thereafter, approached the respondent and lodged a strong protest regarding unilateral change of unit after which it changed the unit back to the original one on 10.10.2013. However, to the utter shock of the complainant, again changed the unit no to 9\_S02 from original 8\_S02 vide demand letter dated 31.08.2017.
6. That further vide letter dated 23.09.2013 the complainant was informed by the respondent that the builder buyer agreement would be dispatched to him shortly for execution but the same has not been sent even after 6 years.
7. That when complainant received no further demand notice or any communication from the company, he decided to visit the site of the proposed project in first week of January 2015. He was shocked and dismayed to find that there was no activity of any type there till then.
8. Thereafter, the complainant decided to visit the office of the respondent and lodged strong protest for inaction on its part to proceed with the project but received no commitment for any timelines to start with construction and handing over possession. After repeated requests for refund and refusal by respondent to do, the complainant filed a case in consumer forum,

Gurugram. However, unfortunately the complainant had to withdraw the case due to change in jurisdiction.

9. That respondent (Builder) started construction in May 2017 which can be ascertained through his demand letter dated 30.08.2017 and asked for instalment against start of casting of basement slab which is after more than 5 years after taking first instalment. That building had reached up to casting of slab of first floor as against casting of slab for first floor as the builder sent a demand letter on 05.06.2018 for the concerned milestone.
10. That the respondent took booking amount from buyers much before acquiring necessary clearance/NOCs from various government authorities.
  - a) That respondent (builder) got building plan sanctioned on 14/05/2014 through memo no. ZP-821-/SD(BS)/2014/9897 while booking amount was taken in 2012.
  - b) That builder got clearance from State Environment Impact Assessment Authority, Haryana on 07/11/2014 vide no SEIAA/HR/2014/1349 more than two years after getting booking amount from complainant.
  - c) That builder got forest clearance & NOC for land use on 26/04/2013 vide letter no 389 while booking amount was taken in 2012.
  - d) That builder got NOC for height from Airport Authority of India on 02/05/2013 vide letter no. AAI/NOC/2013/164/1194 while booking amount was taken in 2012.
11. Thus, in view of the facts stated above, the complainant has approached this Authority for various reliefs.

**C. Relief sought by the complainant**

12. The complainant has sought following relief(s):

- i. Direct the respondent to refund the total amount paid to them amounting to Rs. 8,92,004/- along with interest as prescribed under Act.

**D. Written statement by the respondent:**

The respondents by way of written reply made following submissions:

13. At the outset, it was submitted that the complainant is an investor who had made investment in the esteemed commercial project namely "37th Avenue" erstwhile known as "Elvedor" located at Sector 37C, Gurgaon, Haryana. Accordingly, the complainant was allotted unit bearing no. 8.S02 in tower B admeasuring 659 sq. ft. The complainant had opted for construction linked payment plan and had paid an amount of Rs. 8,92,004/- against the unit.
14. The respondent also submitted that the construction at the project site is being done in phases and the first phase of the project has almost reached completion and the construction activity at the second phase has commenced. The company has constructed the building up to 15th floor and accordingly, raised the demands up to the casting of 15th floor slab in the first phase.
15. The company had obtained all necessary permissions and sanctions for the commercial project. The company was granted LOI for setting up a commercial colony on 24.05.2011 and subsequently the license no. 47 of 2012 and license no 51 of 2012 were granted on 12-05-2012 & 17-05-2012. Thereafter the company applied for environment clearance vide application dated 06-11-2012 and was granted the same for the said project. Further, the Directorate of Town and Country Planning (DTCP) sanctioned the building plans. Other necessary permissions and sanctions such as clearance

from the DTCP for forest clearance and NOC for height clearance from Airports Authority of India were obtained.

16. It was further submitted that the construction at the site is being done in phases and is in full swing and as per the terms and conditions of the agreement executed between the parties. The developer put in its best endeavours to complete the construction of the said project within 5 years else it would pay the penalty as per the terms and conditions of the BBA for delay in offer of possession. The company is to give the possession of the unit allotted to the complainant as per the terms of the agreement executed between the parties subject to payments by him which he had been deliberately ignoring on one count or the other.
17. The averments of shifting the floor on which the unit was allotted also holds no ground as the unit was allotted to him in the year 2013 as the allotment of unit is done by the developer at its sole discretion by default as the complainant failed to give an alternate preference for the Unit.
18. The allegation of the complainant that the bookings were taken before obtaining the sanction plans also is false and baseless. It is pertinent to mention here that the developer should have the license in place to sell the project and which already had in place while taking the bookings.
19. The complainant had taken a legal recourse by filing a consumer case complaint before the Hon'ble Consumer Disputes Redressal Forum, Gurgaon which was dismissed as withdrawn as the complaint filed by the complainant was false and bogus claims were made and held no solid grounds. Therefore, to keep away from inviting an unfavourable order, the complainant himself withdrew the case from the consumer forum after pursuing it for almost 3 years.

20. The complainant after exhausting all his remedies has approached the police station to put undue pressure on the developer to refund booking amount and other payments without the deduction of earnest money which the company has legitimate right to deduct.
21. It was submitted that the complainant has filed false and vexatious complaint against the company just to put pressure and the matter is of pure civil nature which revolves around the contractual liabilities of both the parties derived from the agreement executed by the parties.
22. 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.
23. File was received on transfer from Adjudicating Officer in view of the judgment dated 11.11.2021 passed by the Apex Court in the case bearing no. SLP(Civil) No(s). 3711-3715 OF 2021) titled as M/s Newtech Promoters and Developers Pvt Ltd Versus State of U.P. and Ors., and wherein it was held that as matters regarding refund and interest under section 18(1) are to be decided by the authority and matters regarding adjudging compensation to be decided by the Adjudicating officer.

**E. Jurisdiction of the authority:**

24. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. 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 allottee 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 respondents:**

**F.1 Objections regarding the complainants being investors:**

28. It is pleaded on behalf of respondent that complainant is an investor and not consumer. So, he is not entitled to any protection under the Act and the complaint filed by them under Section 31 of the Act, 2016 is not maintainable. It is pleaded that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The Authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that the preamble is an introduction of a statute and states the main aims and objects of enacting a statute but at the same time, the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if he contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the buyer's agreement, it is revealed that the complainant is buyer and paid considerable amount towards purchase of subject unit. At this stage, it is important to stress upon the definition of term allottee under the Act, and the same is reproduced below for ready reference:

*"Z(d) 'allottee' in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or*

*otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent."*

29. In view of above-mentioned definition of allottee it is crystal clear that the complainant is an allottee as the subject unit allotted to him by the respondent/promoter. The concept of investor is not defined or referred in the Act of 2016. As per definition under section 2 of the Act, there will be 'promoter' and 'allottee' and there cannot be a party having a status of 'investor'. The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal No.0006000000010557 titled as *M/s Srushti Sangam Developers Pvt Ltd. vs. Sarvapriya Leasing (P) Ltd. and anr.* has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.

**G. Entitlement of the complainant for refund:**

**G.I Direct the respondent to refund the total amount paid to them amounting to Rs. 8,92,004/- along with interest as prescribed under Act.**

30. The project detailed above was launched by the respondent as group housing complex and the complainant was allotted the subject unit against total sale consideration of Rs. 45,28,261/-. It is pertinent to mention at this juncture that no BBA was executed between the parties. The complainant has till now paid Rs. 8,92,004/- for the concerned unit. The respondent has till now not obtained the occupation certificate for the concerned building/tower and as such no possession has been offered to the complainant.

31. Due to lack of documents on record, the due date of possession has been calculated as per the judgment of the Hon'ble Supreme Court in the case of ***Fortune Infrastructure and Ors. vs. Trevor D'Lima and Ors. (12.03.2018 - SC); MANU/SC/0253/2018*** wherein it was observed, "a person cannot be made to wait indefinitely for the possession of the flats allotted to them and they are entitled to seek the refund of the amount paid by them, along with compensation. Although we are aware of the fact that when there was no delivery period stipulated in the agreement, a reasonable time has to be taken into consideration. In the facts and circumstances of this case, a time period of 3 years would have been reasonable for completion of the contract". The due date has thus been calculated from the date of allotment letter which comes out to be 10.10.2016. It is pertinent to note that when the complainant approached the Authority, the due date had already expired.
32. It is undisputed that the allottee-complainant wishes to withdraw from the project after the due date of possession and is demanding return of the amount paid to the promoter in respect of the unit with interest, on his failure 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. Keeping in view the facts stated above, it is concluded that the matter is covered under section 18(1) of the Act of 2016.
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. (2021-2022(1)RCR(Civil),357)** 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*

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 he 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 he 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. 8,92,004/- with interest at the rate of 10.00% (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 issue the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoters as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

- i) The respondent is directed to refund the amount i.e., **Rs. 8,92,004/-** received by it from the complainant along with interest at the rate of 10.00% p.a. 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 respondents 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 the registry.

*Vijay*  
(Vijay Kumar Goyal)

Member

*Dr. KK Khandelwal*  
(Dr. KK Khandelwal)

Chairman

Haryana Real Estate Regulatory Authority, Gurugram

**Dated: 30.08.2022**



**HARERA**  
**GURUGRAM**

