

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

Complaint no. : 518 of 2019
First date of hearing: 23.04.2019
Date of decision : 04.07.2022

Eckta D/o Late Sh. H.K. Lamba
R/o: 1160A, 2nd Floor, Housing Board, Sector-
52, Near Ardee City Gate no. 2, Gurgaon

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:

None

Shri Himanshu Singh

Advocate for the complainant
Advocate for the respondent

ORDER

1. The present complaint dated 20.02.2019 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 allottee 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 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.	Apartment no.	6 S18, 6th floor, Block B (page no. 28 of complaint)
8.	Unit measuring	659 sq. ft. (page no. 28 of complaint)
9.	Date of booking	30.03.2012



		(page no. 19 of complaint)
10.	Agreement to sell	09.03.2013 (page no. 23 of complaint)
11.	Subsequent transfer	23.03.2013 (page no. 28 of complaint)
12.	Date of Allotment	Not mentioned
13.	Date of builder buyer agreement	Not Executed
14.	Due date of possession	30.03.2017 (Calculated on the basis of the date of booking application i.e., 30.03.2012 in the absence of buyer's agreement)
15.	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.
16.	Total consideration	Rs. 32,75,230/- [as alleged by complainant]
17.	Total amount paid by the complainant	Rs. 8,45,000/- [page no. 25 of complaint]
18.	Occupation certificate	Not received
19.	Offer of possession	Not offered

B. Facts of the complaint

3. That vide application dated 30.03.2012 Mr. Aman Goel and Mrs. Richa Goel booked a studio apartment in the project "Elvedor" being developed by the respondent in sector 37C, Gurugram, Haryana.
4. They also handed over the advance payment of sum of Rs. 3,00,000/- through cheque and the respondent issued letters of acknowledgement as well as welcome of apartment admeasuring 625 sq.ft. to them. The basic sale price of the allotted unit was fixed as Rs. 4970 per sq. ft. in a construction linked payment plan.
5. That on 09.03.2013, the previous allottees entered into sale agreement of the studio apartment with the complainant having an admeasuring area 659 sq. ft. allotted for a total sale

consideration of Rs. 32,75,230/- and out of which they have already paid a sum of Rs. 8,45,000/- the respondent and agreed to pay that amount to the previous allottees.

6. That on the basis of agreement to sell and request made by the previous allottees, the respondent accepted that assignment and transferred the allotted unit in favour of the complainant vide letter dated 04.05.2013.
7. That no builder buyer agreement was signed between the parties with regard to the allotted unit. However when the respondent send a memorandum of understanding instead of builder buyer agreement on 26.06.2013, the later raised some issues with regard to certain clauses of that document and the same led to exchange of correspondence between them vide emails dated 03.07.2013, 08.07.2013, 16.07.2013, 18.07.2013, 11.10.2013, 12.10.2013, 14.10.2013, 18.10.2013, 28.01.2014, 26.04.2014, 22.05.2014, 24.05.2014, 10.11.2014 respectively but with no positive results.
8. It further the case of the complainant that instead of executing sales agreement with regard to the allotted unit the respondent started raising demands vide letters dated 05.01.2016, 06.10.2016 and which were objected by writing a number of emails. The respondent changed the allotment of the unit many times as per its convenience and every time allotting a unit of lesser value.

9. So in view of these facts the complainant lost faith in the credibility of the respondent who failed to complete the project and offer possession of the allotted unit within a period of reasonable period from the date of allotment of unit. So, she withdrew from the project after that date and sought refund of the amount deposited against the allotted unit besides interest and compensation from the respondent.

C. Relief sought by the complainant:

10. The complainant has sought the following relief:

- Direct the respondent to refund the amount of Rs. 8,45,000/- to the complainant.
- Direct the respondent to pay interest on that amount @ 24% interest per annum from the date of each payment till the order of this authority.
- Direct the respondent to pay a sum of Rs. 50,000/- to the complainant towards cost of litigation.

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 complainant is an investor who has made investment in the project namely "Elvedor" located at sector 37C Gurgaon

Haryana. Accordingly, the complainant was allotted a studio apartment admeasuring 625 sq. ft. on the 6th floor of the project "Elvedor". The complainant had opted for construction linked payment plan and had till date paid an amount only of Rs.8,51,700/-against the said studio apartment.

13. That Prime IT Solutions Private Limited had entered into development agreement dated 6th December 2011 bearing vasika number 25315 with Mr Ratan Singh etc. (landowners) for development of a commercial colony over the aforesaid land holding. In furtherance of development agreement dated 6th of December 2011 bearing vasika number 25315, application for grant of license for development of a commercial or a commercial colony over the land subject matter of said contract had been submitted by Prime Solutions Private Limited with Directorate of Town & Country Planning, Haryana, Chandigarh.
14. That in furtherance of the aforesaid application, license bearing number 47 of 2012 on 17th of May 2012 by Directorate of Town & Country Planning, Haryana, Chandigarh.
15. That a collaboration agreement had been executed between the respondent and Prime IT Solutions Private Limited in terms of which the respondent was/is entitled to undertake the implementation of the commercial colony over the land subject matter of aforesaid contract. A General Power of

Attorney dated 19th of March 2013 bearing vasika number 1374 had also been executed and registered by Prime IT Solutions Private Limited in favour of the respondent.

16. That the concerned statutory authority had also granted environmental clearance for the project on 6th of November 2012. The building plans for the project had also been sanctioned by the concerned statutory authority. Other requisite permissions/clearances were also granted for the project.
17. That in the meantime, differences arose between Prime IT Solutions Private Limited, respondent and the landowners. The same culminated in institution of suit for declaration with consequential relief of permanent injunction titled "Imperia Wishfield Private Limited versus Prime IT Solutions Private Limited and others".
18. That judgment dated 21.01.2016 had been passed by Mr. Sanjeev Kajla the then Civil Judge, Gurgaon whereby the respondent had been declared to be absolute owner in exclusive possession of project land.
19. That the Imperia Wishfield Pvt. Ltd. have the absolute right to market, sell, allot plots, receive monies, give receipts, execute conveyance, other documents etc.
20. That the respondent cannot be held liable for any cost or obtaining regulatory damages/interest due to delay in

compliances from various authorities and for any default on the part of the complainant herself.

21. That the respondent has already invested the entire sum of money received by it towards the said unit in the construction of the said project. Therefore, is not in the position to refund the same to the complainant.
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.

E. Jurisdiction of authority

23. 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

24. 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

25. 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.

26. 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.

F. Findings on the objections raised by the respondent:

F.1 Objection regarding force majeure conditions:

27. 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 the 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., 30.03.2012 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 30.03.2017. 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 complainant.

- Direct the respondent to refund the amount of Rs. 8,45,000/- to the complainant.

- Direct the respondent to pay interest on that amount @ 24% interest per annum from the date of each payment till the order of this authority.
28. 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., 30.03.2012 in the absence of buyer's agreement which comes out to be 30.03.2017.
29. 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.
30. The due date of possession as per agreement for sale as mentioned in the table above is 30.03.2017 and there is delay of 1 year 10 months 19 days on the date of filing of the complaint.
31. 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 she 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.....”

32. 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

33. 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.
34. 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.
35. The authority hereby directs the promoter to return the amount received by him i.e., Rs. 8,45,000/- 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*.

36. 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.
37. 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 a sum of Rs. 50,000/- to the complainant towards cost of litigation.**
38. 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.

H. Directions of the authority

39. 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):

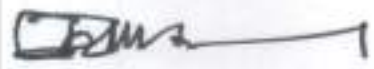
- i. The respondent/promoter is directed to refund to the complainant the amount received by him i.e., Rs. 8,45,000/- with interest at the rate of 9.50% as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of 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.

40. Complaint stands disposed of.

41. File be consigned to registry.


(Vijay Kumar Goyal)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 04.07.2022


HARERA
GURUGRAM