

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

Complaint no. : 329 of 2023
Date of filing of
complaint: 27.01.2023
Date of decision : 03.10.2023

Chandrawati and Sita Ram Sharma
R/o: B-256, First Floor, Palam Extension, Sector-7,
Dwarka, New Delhi-110075.

Complainants

Versus

M/s Imperia Wishfield Private Limited
Office: A25, Mohan Co-operative, Industrial Estate
Mathura Road, New Delhi-110044.

Respondent

CORAM:

Shri Vijay Kumar Goyal
Shri Sanjeev Kumar Arora

**Member
Member**

ORDER

1. The present complaint dated 27.01.2023 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 allottee as per the agreement for sale executed *inter se*.

A. Project and unit related details



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

No.	Heads	Details
1.	Project name and location	"Elvedor Retail" at sector 37C, Gurgaon, Haryana
2.	Project area	2 acres
3.	Nature of project	Commercial Project
4.	RERA registered/not registered	Not registered
5.	DTPC license no. & validity status	47 of 2012 dated 12.05.2012 Valid/renewed up to- 11.05.2016 Licensee- M/s Prime IT Solutions Pvt. Ltd.
6.	Allotment letter dated	07.12.2013 (page no. 53 of complaint)
7.	Date of execution of buyer agreement	08.10.2014 (page no. 58 of complaint)
8.	Unit No.	E.002, Ground Floor, Tower Evita (page no. 68 of complaint)
9.	Unit area admeasuring	521 sq. ft. (page no. 68 of complaint)
10.	Possession clause	<p>11(a) Schedule for possession of the said unit</p> <p>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</p>



		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.
11.	Due date of delivery of possession as per clause 11(a)	08.10.2019 (due date is calculated from the date of agreement i.e., 08.10.2014)
12.	Total consideration	Rs. 62,97,528/- (As per page no. 68 of complaint)
13.	Total amount paid by the complainant	Rs. 59,92,002/- (as alleged by the complainant)
14.	Occupation certificate	Not obtained
15.	Date of offer of possession to the complainant	Not offered

B. Facts of the complaint

The complainant has made the following submissions in the complaint: -

- That the complainant vide allotment letter dated 07.12.2013 was allotted the unit bearing no. E. 002, ground floor, one car parking: tower evita: 521 square feet/ 48.40 square metres confirming the sale in the project "ELVEDOR RETAIL" to the complainants for a sale consideration amount Rs.62,97,528/-.
- The buyer's agreement signed between complainant and M/s Imperia Wishfield Pvt. Ltd. on dated 08.10.2014 showing the total sale consideration of Rs. 62,97,528/-. The said agreement was received by the complainants with the covering letter dated 10.10.2014, which contained the construction linked payment plan, site plan, unit plan, construction schedule, etc.

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5. That the promoters of the respondent company in terms of the clause no.11 of the builder buyer agreement dated 08.10.2014 had assured to hand-over the possession of the commercial unit along with one car parking in issue to the complainants within a period of sixty months starting from the said date of the builder buyer agreement on 08.10.2019.
6. That the complainants have paid an amount of Rs.59,92,002/- against the entire sale consideration amount of Rs.62,97,528/-.
7. The complainants for the reason of being left with no other alternate efficacious remedy on account of the delay in the establishment of the project in question to the extent of more than three years are substantially covered under the category of an aggrieved buyer for the purpose of seeking relief of refund of the sale consideration amount already paid along with interest against the delinquent respondent builder company under the Real Estate (Regulation and Development) Act, 2016 read with the Haryana Real Estate (Regulation and Development) Rules, 2017.
8. That in view of the above said facts and circumstances of the case the complainant is seeking refund of his paid amount that happens to be Rs. 59,92,002/-, with interest till the actual payment from the respondent.

C. Relief sought by the complainant: -

1. The complainant has sought following relief(s):
 - I. Direct the respondent to refund the entire amount paid by the complainant along with prescribed rate of interest.
 - II. Direct the respondent to pay the litigation cost of Rs. 1,00,000/-
2. 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.

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D. Reply by the respondent

The respondent has contested the complaint on the following grounds.

3. That the complainant, after making independent enquiries and only after being fully satisfied about the project, had approached the respondent company for booking of a residential unit in respondent's project 'Elvedor Retail' located in sector-37-C, Gurugram, Haryana. The respondent company provisionally allotted the unit bearing no. E.1002 in favor of the complainant for a total consideration amount of Rs. 62,97,528/-.
4. That in lieu of above said understanding & promises. M/s. 'Imperia Wishfield Pvt. Ltd.' was incorporated & formed with 4 Directors & 5 shareholders. It is pertinent to mention herein that **Mr. Pradeep Sharma and Mr. Avinash Kumar Setia were from M/s Prime IT Solutions Pvt. Ltd. and Mr. Harpreet Singh Batra and Mr. Brajinder Singh Batra were from M/s Imperia Structures Pvt Ltd.**
5. That 3 out of 5 shareholders of the respondent company, to the tune of 2500 shares each, amounting to Rs. 15,00,000/- (rupees fifteen lacks only) each were from M/s Prime IT Solutions Pvt. Ltd. and remaining 2 shareholders of the respondent company, to the tune of 3750 shares each were from M/s Imperia Structures Pvt. Ltd.
6. That the respondent company undertook the construction and development of the said project, without any obstruction and interference from any other party. The land for execution of the said project was/is registered under the name of M/s Prime IT Solutions Pvt. Ltd., which is also the licensee or license holder of the said land. Thus, it is evident on bare perusal of the facts and of Section 2(zk) of the Real Estate (Regulation and Development) Act, 2016, which defines a 'promoter', that the said Project

has two promoters, i.e., M/s Prime IT Solutions Pvt. Ltd. and M/s Imperia Wishfield Pvt. Ltd., i.e., respondent company.

7. That M/s Prime IT Solutions Private Limited is the owner of the land on which the subject project was based and is constructed.
8. That the land license of the said project is in the name of M/s Prime IT Solutions Private Limited.
9. That the annual return of 2014-2015 shows the list of directors at the time when the builder-buyer agreement was executed (mentioning that Avinash Setia and Pradeep Sharma were also Directors at that time).
10. That M/s Prime IT Solutions Private Limited share majority directors, i.e., 2 out of 4 and majority shareholders, which gives M/s Prime IT Solutions Private Limited 'control' over the actions of the respondent company, and thus, must be held vicariously liable.
11. That one of the directors of M/s Prime IT Solutions Private Limited, Mr. Avinash Setia, was a signatory for authorizing Mr. Anthony Malik to sign and approve builder-buyer agreements and to approve the documents required by the allottees for procurement of loan from their respective banks.
12. That M/s Prime IT Solutions Private Limited, Mr. Avinash Kumar Setia and Mr. Pradeep Sharma are necessary party in the instant complaint case, as M/s Prime IT Solutions Private Limited promotor of the said project and Mr. Avinash Kumar Setia & Mr. Pradeep Sharma are liable under Section 63 of the Real Estate (Regulation and Development) Act, 2016. M/s Prime IT Solutions Private Limited, Mr. Avinash Kumar Setia & Mr. Pradeep Sharma and the respondent company/applicant share equal responsibility and if there accrues any liability towards the allottees of the said project, both the parties must be held answerable towards the same and bear the burden, jointly and severally.

13. That in pursuance of a compromise deed dated 12.01.2016, between M/s Prime IT Solutions Pvt. Ltd. and the respondent company, a decree sheet was prepared on 21.01.2016, in a suit titled 'M/s Prime IT Solutions Pvt. Ltd. v. Devi Ram and Imperia Wishfield Pvt. Ltd.', vide which both M/s Prime IT Solutions Pvt. Ltd. and the respondent company resolved to take collective decisions for implementation of the said project and that all the expenses incurred in the process, from the dedicated project account, which would be in the name of 'M/s Imperia Wishfield Limited Elvedor Account'.
14. That the plaintiff in the above-quoted compromise deed is M/s Prime IT Solutions Pvt. Ltd. and this confirms the active involvement/participation of M/s Prime IT Solutions Pvt. Ltd. in the said project. These clauses bring to light the fact that M/s Prime IT Solutions Pvt. Ltd. was equally responsible for the funds collected for the execution of the said project and the money taken from allottees/complainants was under the access/usage/management/dispense/supervision of M/s Prime IT Solutions Pvt. Ltd. It is also germane to mention herein that behind the garb of nomenclature of the said bank account, M/s Prime IT Solutions Pvt. Ltd. was also recipient of money deposited by the allottees.
15. That in lieu of the above said, M/s Prime IT Solutions Pvt. Ltd. issued a letter dated 23.12.2021 to the Directorate of Town Country Planning, Haryana (hereinafter referred to as 'DTCP'), requesting for grant of permission to change of developer from M/s Prime IT Solutions Pvt. Ltd. to the respondent company, for setting up the said Project, in response to which DTCP issued a letter bearing Memo No. LC-2571/JE(S)/2022/16293 dated 09.06.2022, acknowledging the request of M/s Prime IT Solutions Pvt. Ltd. and directing terms and conditions for the same. This also clearly depicts that M/s Prime IT Solutions Pvt. Ltd. was/is developer for the said project at the time of

booking dated 07.11.2012, thus, concretizing the involvement and liability of M/s Prime IT Solutions Pvt. Ltd. with respect to the said project. This letter was replied to by M/s Prime IT Solutions Pvt. Ltd. vide Letter dated 13.07.2022.

16. That the said project suffered a huge setback by the act of non-cooperation of M/s Prime IT Solutions Pvt. Ltd., which proved to be detrimental to the progress of the said Project as majority of the fund deposited with the above-mentioned project account by the allottees was under the charge of M/s Prime IT Solutions Pvt. Ltd. and the said fund was later diverted by the M/s Prime IT Solutions Pvt. Ltd., leaving the respondent company with nearly no funds to proceed along with the said project.
17. That on account of above-mentioned circumstances, in addition to certain force majeure developments, the respondent company was not able to complete the said project.
18. All other averments made in the complaint were denied in toto.
19. Copies of all the relevant documents have been filed and placed on the 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 the authority

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

E.1 Territorial jurisdiction

21. 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

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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

22. 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) The promoter shall-

(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.

23. 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.

24. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in *Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors.*" 2021-2022(1)RCR(C), 357 and

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followed 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* wherein it has been laid down as under:

"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. If the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."

25. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the case mentioned above, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

F. Findings on the objection raised by respondent

F.1 Objection regarding non joinder of M/s Prime IT Solutions Pvt. Ltd. as a party.

26. While filing written reply, a specific plea was taken by the respondent with regard to non-joining of M/s Prime IT Solutions Pvt. Ltd. as a party in the complaint. It is pleaded by the respondent that there was joint venture agreement executed between it and M/s Prime IT Solutions Pvt. Ltd., leading to collaboration agreement dated 06.12.2012 between them. On the basis of

that agreement, the respondent undertook to proceed with the construction and development of the project at its own cost. Moreover, even on the date of collaboration agreement the directors of both the companies were common. So, in view of these facts, the presence of M/s Prime IT Solutions Pvt. Ltd. as a respondent before the authority is must and be added as such. However, the pleas advanced in this regard are devoid of merit. No doubt there is mention to that collaboration agreement in the buyer's agreement but the complainant allottee was not a party to that document executed on 06.12.2012. If the Prime IT Solutions would have been a necessary party, then it would have been a signatory to the buyer's agreement. The factum of merely mentioning with regard to collaboration agreement in the buyer's agreement does not ipso facto shows that M/S Prime IT Solutions Pvt. Ltd. should have been added as a respondent. Moreover, the payments against the allotted units were received by the respondent/builder. So, taking into consideration all these facts it cannot be said that joining of M/s Prime IT Solutions Pvt. Ltd. as a respondent was must and the authority can proceed in its absence in view of the provisions of law.

G. Findings on the relief sought by the complainant

1. Direct the respondent to refund the entire amount paid by the complainant along with prescribed rate of interest.

27. The complainants booked a unit in the project of the respondent named as "Elvedor Retail" situated at sector 37-C, Gurgaon, Haryana for a total sale consideration of Rs. 62,97,528/- on 19.10.2013. They paid an amount of Rs. 59,92,002/- out of the total sale consideration. A buyer agreement interse the parties were executed on 08.10.2014. As per clause 11(a) of the buyer agreement, the respondent had to handover the possession of

the allotted unit within a period of 60 months from the date of execution of agreement. Therefore, the due date for handing over of possession comes out to be 08.10.2019.

28. Keeping in view the fact that the allottee complainant wishes to withdraw from the project and 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.
29. The due date of possession as per agreement for sale as mentioned in the table above is 08.10.2019 and there is delay of 3 years 3 months 19 days on the date of filing of the complaint.
30. 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.....”

31. 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. 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

32. 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.

33. The authority hereby directs the promoter to return the amount received by him i.e., Rs. 59,92,002/- with interest at the rate of 10.75% (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*.

34. **Admissibility of refund at prescribed rate of interest:** The complainants are seeking refund the amount paid by them at the rate of 18% p.a. However, allottees intend to withdraw from the project and are seeking refund of the amount paid by them in respect of the subject unit with interest at prescribed rate as provided under rule 15 of the rules. Rule 15 has been reproduced as under:

Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

- (1) *For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.*

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

35. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

36. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 03.10.2023 is 8.75%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.75%.

37. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondents is established. As such, the complainants are entitled to refund the entire

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amount paid by him at the prescribed rate of interest i.e., @ 10.75% p.a. from the date of payment of each sum till its actual realization as per provisions of section 18(1) of the Act read with rule 15 of the rules, 2017.

G.II Litigation Cost:

38. The complainant in the aforesaid relief is seeking relief w.r.t compensation. Hon'ble Supreme Court of India in civil appeal titled as M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors. (Civil appeal nos. 6745-6749 of 2021, 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.

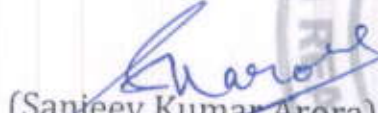
H. Directions of the authority

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 the amount received from the complainant i.e., Rs. 59,92,002/- along with interest at the rate of 10.75% 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 amount.


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- 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. The respondent is further directed not to create any third-party rights against the subject unit before full realization of the paid-up amount along with interest thereon to the complainants, and even if, any transfer is initiated with respect to subject unit, the receivable shall be first utilized for clearing dues of allottee/ complainants.
40. The complaints stand disposed of.
41. Files be consigned to registry.


(Sanjeev Kumar Arora)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 03.10.2023


(Vijay Kumar Goyal)
Member