

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

Order Reserved on: 21.09.2023

Order pronounced on: 26.10.2023

NAME OF THE BUILDER		M/S IMPERIA WISHFIELD PRIVATE LIMITED	
PROJECT NAME		ELVEDOR	
S. No.	Case No.	Case title	Appearance
1	CR/7572/2022	Deepak Gupta and Vineet Goyal V/s Imperia Wishfield Private Limited	Shri Pardeep Singh Sherawat Advocate and Shri Rishi Kapoor Advocate
2	CR/7913/2022	Basant Lal Taneja V/s Imperia Wishfield Private Limited	Shri Pardeep Singh Sherawat Advocate and Shri Rishi Kapoor Advocate

CORAM:

Shri Vijay Kumar Goyal

Member**ORDER**

1. This order shall dispose of both the complaints titled above filed before this authority under section 31 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred as "the Act") read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter referred as "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 its obligations, responsibilities and functions to the allottees as per the agreement for sale executed inter se between parties.
2. The core issues emanating from them are similar in nature and the complainant(s) in the above referred matters are allottees of the project,



namely, Elvedor situated at Sector-37-C, Gurugram being developed by the same respondent/promoter i.e., M/s Imperia Wishfield Private Limited. The terms and conditions of the buyer's agreements fulcrum of the issue involved in all these cases pertains to failure on the part of the promoter to deliver timely possession of the units in question, seeking refund of the unit along with interest.

3. The details of the complaints, reply status, unit no., date of agreement, possession clause, due date of possession, total sale consideration, total paid amount, and relief sought are given in the table below:

Project Name and Location	"Elvedor" at sector 37C, Gurgaon, Haryana.
Project area	2 acres
DTCP License No.	47 of 2012 dated 12.05.2012 valid upto 11.05.2016
Name of Licensee	M/s Prime IT Solutions Pvt. Ltd.
RERA Registration	Not Registered
Possession Clause: 11(a). SCHEDULE FOR POSSESSION OF THE SAID UNIT	
<p><i>" 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."</i></p>	
Occupation Certificate: Not obtained	

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Sr. No	Complaint No., Case Title, and Date of filing of complaint	Date of apartment buyer agreement	Unit No.	Unit admeasuring	Due date of Possession	Total Sale Consideration / Total Amount paid by the complainant in Rs.
1.	CR/7572/2022 Deepak Gupta and Vineet Goyal V/s Imperia Wishfield Private Limited DOF: 26.12.2022 Reply Status: 19.05.2023	15.01.2014 (Page no. 38 of complaint) Allotment Letter: 01.10.2013 (Page no. 30 of complaint)	A12, 6 th Floor, Tower EVITA (Page no. 41 of complaint)	436 sq. ft. (Page no. 41 of complaint)	15.01.2019 (Calculated from the date of agreement)	TSC: - 30,12,955/- AP: - 25,02,464/- (As per statement of account on page no. 20 of reply)
2.	CR/7913/2022 Basant Lal Taneja V/s Imperia Wishfield Private Limited DOF: 26.12.2022 Reply Status: 19.05.2023	15.01.2014 (Page no. 32 of complaint) Allotment Letter: 23.08.2013 (Page no. 23 of complaint)	E-048, Ground Floor, Tower EVITA (Page no. 35 of complaint)	315 sq. ft. (Page no. 35 of complaint)	15.01.2019 (Calculated from the date of agreement)	TSC: - 34,12,884/- AP: - 26,78,391/- (As per statement of account on page no. 17 of reply)
Relief Sought by the complainant(s)						
i. Direct the respondent to refund the entire paid up amount along with interest from the date of deposit till the date of actual receipt at the prescribed rates.						
ii. Award a cost of Rs.10,00,00/- towards litigation expenses in favour of the complainant and against the opposite party.						
Note: In the table referred above certain abbreviations have been used. They are elaborated as follows:						
Abbreviation Full form						

4. The aforesaid complaints were filed by the complainants against the promoter on account of violation of the builder buyer's agreement executed between the parties in respect of said units for not handing over the possession by the due date, seeking refund of the total paid up amount.
5. It has been decided to treat the said complaints as an application for non-compliance of statutory obligations on the part of the promoter /respondent in terms of section 34(f) of the Act which mandates the authority to ensure compliance of the obligations cast upon the promoters, the allottee(s) and the real estate agents under the Act, the rules and the regulations made thereunder.
6. The facts of all the complaints filed by the complainant(s)/allottee(s) are similar. Out of the above-mentioned case, the particulars of lead case *CR/7572/2022 titled as Deepak Gupta and Vineet Goyal V/s Imperia Wishfield Private Limited* are being taken into consideration for determining the rights of the allottee(s).

A. Project and unit related details

7. 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:

*CR/7572/2022 titled as Deepak Gupta and Vineet Goyal V/s Imperia
Wishfield Private Limited*

S. No.	Heads	Details
1.	Project name and location	"Elvedor" 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.	47 of 2012 dated 12.05.2012
	Valid up to	11.05.2016
	Name of Licensee	M/s Prime IT Solutions Pvt. Ltd. and others
6.	Welcome Letter	20.02.2013 (Page no. 28 of complaint)
7.	Confirmation of unit allotment	23.03.2013 (Page no. 29 of complaint)
8.	Allotment letter dated	01.10.2013 (Page no. 30 of complaint)
9.	Date of execution of buyer agreement	15.01.2014 (Page no. 38 of complaint)
10.	Unit No.	A12, 6 th Floor, Tower EVITA (Page no. 41 of complaint)
11.	Unit area admeasuring	436 sq. ft. (Page no. 41 of complaint)
12.	Possession clause	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 <i>within a period of sixty</i>

		(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.
13.	Due date of delivery of possession	15.01.2019 (Calculated from the date of agreement)
14.	Total consideration	Rs.30,12,955/- (As per statement of account on page no. 17 of reply)
15.	Total amount paid by the complainant	Rs.25,02,464/- (As per statement of account on page no. 20 of reply)
16.	Occupation certificate	Not obtained
17.	Offer of possession	Not offered
18.	Delay in handing over the possession till date of filing complaint i.e., 26.12.2022	3 years 11 months and 11 days

B. Facts of the complaint

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

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- i. That in the year 2012 the respondent company during the course of its business launched a residential-cum-commercial project originally known as "Esfera Elvedor," situated at sector- 37C guru gram, Haryana, and by means of misleading advertisement, promotions and verbal commitments /discussions, the respondent company induced the complainant to apply for purchase of commercial shop in the said project.
- ii. That on 07.11.2012 the complainants applied for allotment of one office space in the above project namely **Esfera Elvedor Adus** one having a super area of 436 sq. ft. and paid an amount of Rs.1,00,000/- vide cheque bearing no. 919795 dated 04.11.2012 drawn on State Bank of India, Gurugram, Haryana and paid an amount of Rs.1,11,024/- vide cheque bearing no. 000016 dated 04.11.2012 drawn on Standard Chartered Bank, Gurugram, Haryana. The complainants Customer ID for this Booking was IWF-A-0013.
- iii. That on 22.11.2012 the respondent company issued an acknowledgment letter regarding acceptance of complainants booking of "ELVEDOR ADUS" measuring 436 sq. ft at the basic sale price of Rs.4840 per sq. ft. and also acknowledged the payment of Rs.2,11,024/-. Thereafter within 45 days of booking the respondent company raised a demand of Rs.3,32,838/- which were duly paid by the complainants.
- iv. That the respondent company issued a welcome letter to the complainants on 20.02.2013. Thereafter, on 23-03-2013 the respondent company issued a confirmation of unit allotment letter whereby they informed the complainants that with reference to their booking under IWF-A-0013 dated

07.11.2012 in their commercial project of a studio apartment measuring 436 sq. ft. at the basic sale price of 4840 per sq. ft. unit no. 7-A07 on 7th floor in tower B has been allotted to them.

- v. That on 01.10.2013 the respondent company issued an allotment letter to the complainants. It is pertinent to mention that in this allotment letter the unit no was unilaterally changed from unit no. 7-A07 on 7th floor to unit no. 6-A12.
- vi. That on 7.10.2013 the respondent company sent a letter to the complainants and informed them that Bhoomi Pujan Ceremony of Elvedor at Sec37C, Gurugram was conducted on 5th October and that now they are starting the construction of the project.
- vii. Thereafter on 11.10.2013 the respondent company issued a demand letter and raised a demand of Rs.2,18,849/- which was duly paid by the complainant vide cheque bearing no. 035951 drawn on State Bank of India, Gurugram for Rs.2,20,000/- and the respondent company duly issued a receipt of this payment dated 01.11.2013.
- viii. That on 27.11.2013 respondent company sent a letter to the complainant in which it was mentioned that they are sending two copies of builder buyer agreement for unit no. 6-A12 (tower- EVITA) in the said project along with stamp papers and annexure with this letter and that the complainant should sign on each page of this BBA and return this within 30 days. This BBA contain several one-sided clauses but the complainant being a trapped customer as he had already paid a huge amount of money was constrained

to execute this agreement with the respondent. It is pertinent to mention here that in this builder buyer agreement it has been mentioned that the respondent has got all the necessary sanctions and approvals to undertake the construction of this project. The complainant duly signed this BBA and sent it back to the respondent company.

- ix. That on 16.01.2014 the respondent company sent a letter to the complainants and also sent a duly signed "B" copy of builder buyer agreement dated 15.01.2014.
- x. That in the year 2014 to 2016, the respondent company issued various demands letter and all the demands was timely paid by the complainant. Till February 2016 the complainant has paid an amount of Rs.23,90,464/- out of total sale consideration of Rs.25,00,566/- as can be seen from the payment information provided by the respondent company.
- xi. That after this the complainant realized that no construction activities were undertaken on the site for a period of 2 years, then the complainant started making queries from other allottees that 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.
- xii. That a license/letter of intent was issued in favour of Prime IT Solutions Pvt Ltd on 24.05.2011 and not the respondent company and as such all the representations provided by the respondent in terms of the buyer's agreement were found to be deceptive and false.

- xiii. That in terms of the studios buyer's agreement, the project was being constructed on a land admeasuring 16 Kanals (2 acres) situated in the revenue estate of Garauli Khurd, Tehsil and district Gurgaon in section 37C, Gurgaon. It was further mentioned in this agreement that the said land was owned in part by one Mr. Devi Ram and in the other part by M/s Prime IT solution Pvt. Ltd. That M/s Prime IT solutions had entered into a collaboration agreement with Mr. Devi Ram and That Mr Devi Ram also executed a GPA in favour of M/s Prime IT Solutions Pvt Ltd. It was further mentioned in this BBA that M/s Prime IT Solutions Pvt Ltd. That the said Prime IT solutions subsequently applied for and purportedly obtained licence from DTCP, Haryana 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 company 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 respondents are competent and entitled to execute the project. That when the complainant makes further queries, he came to know that even the license no 47 of 2012 issued in Favour of the Prime IT solutions on 12.05.2012 has expired on 11.05.2016.
- xiv. That in terms of the buyer's agreement the total basic sale price was shown as Rs.21,10,240/- (at the rate of Rs.4840/- per sq. ft. for a total super area of 436 sq. ft.), PLC charges Rs.61,345/-, IFMS of Rs.43,600/- and other

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charges at Rs.6,56,664/-. Thus, the total sale price (inclusive of all charges) was reflected as Rs.28,71,849/-.

- xv. That even after receiving significant amount of money towards all charges i.e., towards PLC, car park and development charges, and the respondent did not undertake any construction on the project. The complainant repeatedly requested the respondent to provide status of construction as well as information on the expected date of delivery of the project. However, no response was forthcoming on the part of the respondent.
- xvi. That even after expiry of 10 years from the date of booking, till date only a rudimentary structure of one out of the several building forming parts of the project has been erected on the project land which is incapable of being handed over or being inhabitable possession. Additionally, there is no other development on the project land for last four years and the construction activities have been stopped since 2016.
- xvii. That the respondent has breached the fundamental term of the contract by inordinately delaying delivery of the possession. The respondent has committed various acts of omission and commissions by making incorrect and false statements in the advertisement materials as well as by committing other serious acts as mentioned in preceding paragraphs.
- xviii. That this authority has the jurisdiction to try the present complaint as it is now settled that under section 31 of the Act of 2016, any aggrieved person may file a complaint pertaining to any housing project, either registered or unregistered.

C. Relief sought by the complainant: -

9. The complainant has sought following relief(s):
- I. Direct the respondent to refund the entire paid up amount along with interest from the date of deposit till the date of actual receipt at the prescribed rates.
 - II. Award a cost of **Rs.10,00,00/-** towards litigation expenses in favour of the complainant and against the opposite party.
10. 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

11. The respondent contested the complaint on the following grounds: -
- i. 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' located in sector-37-C, Gurugram, Haryana. The respondent company provisionally allotted the unit bearing no. 6-A12 in favor of the complainant for a total consideration amount of Rs.30,12,955/- including applicable tax and additional miscellaneous charges vide booking dated 07.11.2012 and opted the construction-linked payment plan on the terms and conditions mutually agreed by them.
 - ii. That the said project is a commercial project which was being developed on 2 acres of land and comprises of retail and studio apartments. The foundation of the said project vests on the joint venture/collaboration between M/s Prime IT Solutions Private Limited, a company incorporated under the provisions of Companies Act, having its registered office at B-33, First Floor, Shivalik Colony (Near Malviya Nagar), New Delhi-110017 (as



- One Party) and M/s Imperia Structures Pvt. Ltd. (as Second Party), laying down the transaction structure for the said project and for creation of SPV (Special Purpose Vehicle) Company, named and titled as Imperia Wishfield Pvt. Ltd.', i.e. the respondent company.
- iii. That the role of M/s Prime IT Solutions Pvt. Ltd. was indicated to the allottees at the time of booking the said unit, and it was conveyed that M/s Prime IT Solutions Pvt. Ltd. was the owner of the said Land and has been granted License No. 47/2012 by the Director General, Town and Country Planning, Haryana in respect of Project Land and the respondent company being an associate/JV Company is undertaking implementation of the said project. The involvement of M/s Prime IT Solutions Pvt. Ltd. has been duly acknowledged by the complainant herein and the same is an undisputed fact.
- iv. That in lieu of above said understanding & promises, M/s 'Imperia Wishfield Pvt. Ltd.' was incorporated & formed with 4 Directors & 5 shareholders. Mr. Pradeep Sharma and Mr. Avinash Kumar Setia were from Ms Prime IT Solutions Pvt. Ltd. and Mr. Harpreet Singh Batra and Mr. Brajinder Singh Batra were from M/s Imperia Structures Pvt. Ltd.
- v. That 3 out of 5 shareholders of the respondent company, to the tune of 2500 shares each, amounting to Rs.15,00,000/- 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.
- vi. 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 registered under the name of M/s Prime IT Solutions Pvt. Ltd., which is also

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- the licensee or license holder of the said land. Thus, it is evident on bare perusal of the facts and of Section 2(k) of the Real Estate (Regulation and Development) Act, 2016, which defines a 'promoter', that the said project has two promoters, i.e., Ms Prime IT Solutions Pvt. Ltd. and M/s Imperia Wishfield Pvt. Ltd., i.e., respondent company.
- vii. That in pursuance to the above-mentioned venture, M/s Prime IT Solutions Pvt. Ltd., represented and confirmed to the respondent company that M/s Prime IT Solutions Pvt. Ltd. had already procured Letter of Intent ('LOI') from the Department of Town and Country Planning, Government of Haryana, on 24.05.2011, along with subsequent license from the Department of Town and Country Planning, Government of Haryana, as necessary for setting up a commercial project on the land admeasuring 2.00 acres in the revenue estate of Village Gadoli Khurd, Sector-37 C Gurugram, along with the Zoning Plan, however, the same was a planned approach to defraud the respondent company and later on it was found to be untrue and the M/s Prime IT Solutions Pvt. Ltd. has not complied with any of the abovementioned promises & covenants.
- viii. That the annual return of 2013-2014 shows the list of Directors at the time when the allotment letter was issued (mentioning that Avinash Setia and Pradeep Sharma were also Directors at that time).
- ix. That on the date of allotment, Mr. Pradeep Sharma and Mr. Avinash Kumar Setia were also directors as well as shareholders of the respondent company.
- x. 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'.

- xi. 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/complainant 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.
- xii. 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 allotment, 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.

- xiii. 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.
- xiv. That on perusal of all the records submitted herein and after referring to the endless precedents, it is evident that the M/s Prime IT Solutions Pvt. Ltd., Mr. Avinash Kumar Setia and Mr. Pradeep Sharma are equally responsible towards the complainant as the respondent company.
- xv. That several allottees have withheld the remaining payments, which is further severally affecting the financial health of the respondent company and further, due to the Force Majeure conditions and circumstances, which were beyond the control of the respondent company as mentioned herein below, the construction got delayed in the said project.
- xvi. That both the parties i.e., the complainant as well as the respondent company had contemplated at the very initial stage while signing the allotment letter that some delay might occur in future and that is why under the force majeure clause as mentioned in the allotment letter, it is duly agreed by the complainant that the respondent company shall not be liable to perform any or all of its obligations during the subsistence of any force majeure circumstances and the time period required for performance of its obligations shall inevitably stand extended. It was unequivocally agreed between the complainant and the respondent

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company that the respondent company is entitled to extension of time for delivery of the said flat on account of force majeure circumstances beyond the control of the respondent company. Firstly, owing to unprecedented air pollution levels in Delhi NCR, the Hon'ble Supreme Court ordered a ban on construction activities in the region from 04.11.2019 onwards, which was a blow to realty developers in the city. The air quality index (AQI) at the time was running above 900, which is considered severely unsafe for the city dwellers. Following the Central Pollution Control Board (CPCB) declaring the AQI levels as not severe, the SC lifted the ban conditionally on 09.11.2019 allowing construction activities to be carried out between 6 am and 6 pm, and the complete ban was lifted by the Hon'ble Supreme Court on 14.02.2020. Secondly, after the complete ban was lifted on 14.02.2020 by the Hon'ble Supreme Court, the Government of India imposed National Lockdown on 24.03.2020 on account of nation-wide pandemic COVID-19, and conditionally unlocked it on 03.05.2020, however, this has left a great impact on the procurement of material and labour. The 40-day lockdown effective since 24.03.2020, extendable up to 03.05.2020 and subsequently to 17.03.2020, led to a reverse migration with workers leaving cities to return back to their villages. It is estimated that around 6 lakh workers walked to their villages, and around 10 lakh workers were stuck in relief camps. The aftermath of lockdown left a great impact on the sector for resuming the fast pace construction for achieving the timely delivery as agreed under the agreement.

- xvii. 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

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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.

12. 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

13. 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

14. 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

15. 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

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(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.

16. 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.
17. 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. (Supra)*** and 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*** 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."

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

F. Finding on the objection raised by the respondent

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

19. 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 executed between the parties on 12.03.2015 i.e., after signing of collaboration 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.

F.II Objection regarding force majeure conditions:

20. The respondent-promoter has raised the contention that the construction of the tower in which the unit of the complainant is situated, has been delayed due to force majeure circumstances such as orders of the NGT, High Court and Supreme Court, demonetisation, govt. schemes and non-payment of instalment by different allottee of the project but all the pleas advanced in this regard are devoid of merit. First of all, the possession of the unit in question was to be offered by 15.01.2019. Hence, events alleged by the respondent do not have any impact on the project being developed by the respondent. Moreover, some of the events mentioned above are of routine in nature happening annually and the promoter is required to take the same into consideration while launching the project. Thus, the promoter respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

G. Findings on the relief sought by the complainant(s)

G.I Direct the respondent to refund the entire paid up amount along with interest from the date of deposit till the date of actual receipt at the prescribed rates.

21. In the present complaint, the complainants intend to withdraw from the project and are seeking return of the amount paid by them in respect of subject unit along with interest as per section 18(1) of the Act and the same is reproduced below for ready reference:

"Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building.-

(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case 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 that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

(Emphasis supplied)

22. Clause 11(a) of the buyer's agreement provides the time period of handing over possession and the same is reproduced below:

11(a).

Schedule for possession of the said unit

"The company based on its present plans and estimates and subject to all 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 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(s) to abide by all or any of the terms and conditions of this Agreement."

23. At the outset, it is relevant to comment on the present possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the complainants not being in default under any provisions of these agreements and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of

allottees and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

24. **Admissibility of refund along with prescribed rate of interest:** The complainants are seeking refund the amount paid by them along with interest prescribed rate of interest. However, the allottee 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.

25. 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.
26. 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., 26.10.2023

is **8.75%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.75%**.

27. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation. —For the purpose of this clause—

- (i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default; the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

28. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 11(a) of the agreement executed between the parties on 15.01.2014, the possession of the subject apartment was to be delivered within a period of 60 months from the date of execution of buyer's agreement. Therefore, the due date of handing over possession is 15.01.2019. It is pertinent to mention over here that even after a passage of more than 9.9 years (i.e., from the date of BBA till date) neither the construction is complete nor the offer of possession of the allotted unit has been made to the allottees by the respondent/promoter. The authority is of the view that the allottee cannot be expected to wait endlessly for taking

possession of the unit which is allotted to him and for which he has paid a considerable amount of money towards the sale consideration. It is also to mention that complainant has paid almost 83% of total consideration till June 2016. Further, the authority observes that there is no document placed on record from which it can be ascertained that whether the respondent has applied for occupation certificate/part occupation certificate or what is the status of construction of the project. In view of the above-mentioned facts, the allottee intends to withdraw from the project and are well within the right to do the same in view of section 18(1) of the Act, 2016.

29. Moreover, 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 allottees 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....."

30. Further, 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. 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."

31. 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 allottees 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.
32. 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 respondent is established. As such, the complainants are entitled to refund of the entire amount paid by them at the prescribed rate of interest i.e., @ 10.75% p.a. (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*.

G.II Award a cost of Rs.10,00,00/- towards litigation expenses in favour of the complainant and against the opposite party.

33. The complainants are seeking above mentioned 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. (supra)*, has held that an allottee is entitled to claim compensation & litigation charges 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 & litigation expense 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 & legal expenses.

H. Directions of the authority

34. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):
- i. The respondent/promoter is directed to refund the amount received by it from each of the complainant(s) 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 the deposited amount.
 - ii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.
 - iii. 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

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transfer is initiated with respect to subject unit, the receivable shall be first utilized for clearing dues of allottee/complainant.

35. This decision shall mutatis mutandis apply to cases mentioned in para 3 of this order.
36. The complaints stand disposed of. True certified copy of this order shall be placed in the case file of each matter.
37. Files be consigned to registry.

Dated: 26.10.2023

V.I - 
(Vijay Kumar Goyal)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram

