



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

Complaint no. :	2307 of 2022
Date of filing complaint:	08.06.2022
Order Reserve On:	23.05.2023
Order Pronounced On:	29.08.2023

Shri Krishan Gupta Address: C-2/310, Milan Vihar, I.P Extension, Patparganj, Delhi-110092	Complainant
Versus	
M/s Imperia Wish field Pvt. Ltd. Regd. office: A-25, Mohan Cooperative Industrial Estate, New Delhi-110044	Respondent

CORAM:	
Shri Vijay Kumar Goyal	Member
Shri Sanjeev Kumar Arora	Member
APPEARANCE:	
Sh. Pradeep Singh Sherawat	Complainant
Sh. Rishi Kapoor	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottee under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 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

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and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

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

S. N.	Particulars	Details
1.	Name and location of the project	"Elvedor" at Sector 37 C, Gurugram
2.	Nature of the project	Commercial Project
3.	Project area	2 acres
4.	DTCP license no.	47 of 2012 dated 12.05.2012 valid upto 11.05.2016
5.	Name of licensee	M/s Prime IT Solutions Pvt. Ltd
6.	RERA Registered/ not registered	Not registered
7.	Unit no.	14_A07, 14th Floor, Tower Evita (page no. 42 of complaint)
8.	Unit area admeasuring (super area)	900 sq. ft. (page no. 42 of complaint)
9.	Date of allotment	03.08.2016 (page no. 29 of complaint)

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10.	Date of builder buyer agreement	16.08.2016 (page no. 32 of complaint)
11.	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 endeavours 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.
12.	Due date of possession	16.08.2021 (due date is calculated from the date of agreement i.e., 16.08.2016)
13.	Total sale consideration	Rs. 58,73,295/- (as per statement of account dated 27.01.2023 annexed on page no. 16 of reply)

12



14.	Amount paid by the complainant	Rs. 28,08,695/- (as per statement of account dated 27.01.2023 annexed on page no. 16 of reply)
15.	Occupation certificate	Not obtained
16.	Offer of possession	Not offered

B. Facts of the complaint:

3. That on 02.04.2012 the complainant booked a studio apartment and paid an amount of Rs. 4,00,000/- as booking amount which was duly acknowledged by the respondent. Further on 22.05.2012 the respondent issued a demand letter for a further amount of Rs. 6,84,378/- .
4. That after this the respondent issued a welcome letter to the complainant and declares him as owner of a studio apartment in the said project. However, vide the said letter the super area was increased from 825 sq. ft to 900 sq. ft. The same day the respondent issued a demand letter for Rs.98,580/-.
5. That on 01.08.2012 respondent acknowledged the receipt of total Rs.10,84,378/- from the complainant. On 16.02.2015 the complainant again issued a payment receipt for a total amount of Rs.11,82,958/-.
6. That on 03.08.2016 i.e., after more than four years from the date of booking the respondent issued an allotment letter to the complainant. That vide this allotment letter the respondent unilaterally changed the

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studio apartment booked by the complainant in Tower Rubix to Tower Evita and also issued a demand letter of Rs16,14,532/-.

7. That the complainant being a simple person made the said payment of Rs 16,14,532/- to the respondent through NEFT.
8. That after numerous follow ups and requests by the complainant for a builder buyers' agreement respondent finally executed agreement on 16.08.2016 after a prolonged delay of 4 years from the date of booking.
9. That till 25.08.2016 the complainant had already paid an amount of Rs. 27,97,490/- to the respondent. The aforesaid builder buyer's agreement being one sided with clauses loaded in favour of the respondent, the complainant raised his concerns vide his letter dated 01.09.2016.
10. That on 17.09.2016 the complainant again wrote to the respondent and demand refund of Rs.11, 205/- on account of TDS made on the RTGS transaction. He further enquired about executing a fresh agreement vide the said letter.
11. That even after receiving huge amount from the complainant the respondent did not undertake any construction on the project site. When the complainant visited the site he was shocked to learn that in fact no development had taken place in the project. Whilst one of the four towers in the project was constructed the other towers were not even in existence. The complainant was also shocked to see that no construction was undertaken at the site.
12. That since there was no progress in construction and there was no hope of delivery of possession, the complainant made inquiries from other allottees who were similarly situated and was shocked to learn that



neither did the respondent have any right in or over the land at the time of booking or transfer, nor did the respondent have requisite sanction or approvals from the concerned authority. As such all representations provided by the respondents in terms of the builder buyer agreement were found to be deceptive and false.

13. That since the respondent not only failed to hand over the possession of the apartment but also failed to refund the amount demanded by him, therefore, the complainant was constrained to file a complaint against the present respondent before this Hon'ble Authority.

C. Relief sought by the complainant:

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

(i) Direct the respondent to refund the amount of Rs. 28,08,695/- along with interest.

D. Reply by respondent:

The respondent by way of written reply made following submissions:

15. That that the complainant lured in the said agreement, and it is submitted 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 Adus' located in sector-37-C, Gurugram, Haryana. The respondent provisionally allotted the unit bearing no. 14_A07 in favour of the complainant for a total consideration amount of Rs. 58,73,295/-, including applicable tax and additional miscellaneous charges vide booking dated 04.02.2012 and opted the possession-linked payment plan on the terms and conditions mutually agreed by the complainant and the respondent company.



16. 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, (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.
17. That the role of M/s Prime IT Solutions Pvt. Ltd. was indicated to the allottees/complainant vide builder-buyer agreement dated 21.11.2014, and it was conveyed that M/s Prime IT Solutions Pvt. Ltd. was the owner of the said Land and has been granted Licence 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.
18. 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.
19. 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.

20. 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.
21. That on the date of Booking, i.e., on 04.02.2012, Mr. Pradeep Sharma and Mr. Avinash Kumar Setia were also directors as well as shareholders of the Respondent Company.
22. 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

12



dedicated project account, which would be in the name of 'M/s Imperia Wishfield Limited Elvedor Account'.

23. 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.
24. 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.

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25. 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.
26. 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.
27. 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:

28. The authority has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

29. 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

30. 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.

31. 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 respondent

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

32. 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

12



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 provision contained in Order 1 Rules 4 (b) and 9 of Code of Civil Procedure, 1908.

G. Entitlement of the complainant:

G. I Direct the respondent to refund the amount of Rs. 28,08,695/- along with interest.

33. In the present complaint, the complainant intends to withdraw from the project and is 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)

34. 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 endeavours 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."

35. The complainant had booked the unit in the project of the respondent company situated at sector 37-C for a total sale consideration of Rs. 58,73,295/-. The buyer's agreement was executed between the parties on 16.08.2016. As per possession clause 11(a) of the buyer's agreement, the possession of the unit was to be handed over by within

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60 months from the date of agreement. The due date for handing over of possession comes out to be 16.08.2021.

36. 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....."

37. Further in the judgement of the Hon'ble Supreme Court of India in the cases of **Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2021-2022(1) RCR (c), 357** reiterated in case of M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022, it was observed 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."

38. 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) of the Act. 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.
39. 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.
40. **Admissibility of refund along with prescribed rate of interest:** The section 18 of the Act read with rule 15 of the rules provide that in case the allottee intends to withdraw from the project, the respondent shall refund of the amount paid by the allottee 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]

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%.

12



41. 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.”
42. 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.
43. 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., 29.08.2023 is 8.75%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.75%.
44. The authority hereby directs the promoter to return the amount received by him i.e., Rs. 28,08,695/- 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 Rules *ibid*.

H. Directions of the Authority:

45. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoters as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

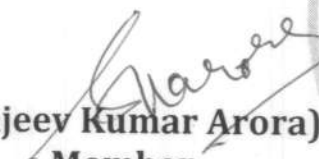
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- i) The respondent/promoter is directed to refund the entire amount of Rs. 28,08,695/- paid by the complainant along with prescribed rate of interest @ 10.75% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation & Development) Rules, 2017 from the date of each payment till the 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.


46. Complaint stands disposed of.

47. File be consigned to the registry.


(Sanjeev Kumar Arora)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 29.08.2023


(Vijay Kumar Goyal)
Member

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