

BEFORE THE HARYANA REAL ESTATE REGULATORY

AUTHORITY, GURUGRAM

Complaint no. : 6710 of 2022
Date of complaint : 14.10.2022
Date of order : 20.09.2023

1. Vinod Kumar,
2. Tripta Behl,
Both R/o: - House no. 78, Gali no. 9,
Pawan Nagar, Kangra Colony,
Amritsar, Punjab-143001.

Complainants

Versus

Imperia Wishfield Private Limited.
Through its Authorised Signatory,
Regd. Office at: A-25,
Mohan Co-operative Industrial Estate,
Mathura Road, New Delhi-110044.

Respondent

CORAM:
Ashok Sangwan

Member

APPEARANCE:
Satyawan Kundalwal (Advocate)
Nadeem Arman (Advocate)

Complainants
Respondent

ORDER

1. The present complaint has been filed by the complainant/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 thereunder or to the allottees as per the agreement for sale executed *inter se*.

A. Unit and project related details

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

S. N.	Particulars	Details
1.	Name and location of the project	"Elvedor Studio" at sector 37-C, Gurgaon, Haryana
2.	Nature of the project	Commercial colony
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. and 1 other
6.	RERA Registered/ not registered	Not Registered
7.	Apartment no.	8_A05, 8 th floor (page no. 29 of complaint)
8.	Unit area admeasuring	659 sq. ft. (page no. 29 of complaint)
9.	Allotment letter	23.09.2013 (page 27 of complaint)
10.	Date of builder buyer agreement	Not executed
11.	Possession clause	11.A. SCHEDULE FOR POSSESSION "The company based on its present plans and estimates and subject to all just exceptions, contemplates to complete the construction of the said building/said apartment within a period of sixty months from the date of execution of this agreement...."



		(emphasis supplied)
12.	Due date of possession	23.09.2018 [calculated from the date of allotment]
13.	Total sale consideration	Rs.46,46,504/- [as per applicant ledger dated 08.08.2023 on page no. 17 of reply]
14.	Amount paid by the complainants	Rs.38,93,104/- [as per applicant ledger dated 08.08.2023 on page no. 20 of reply]
15.	Occupation certificate	Not received
16.	Offer of possession	Not offered

B. Facts of the complaint:

3. The complainants have made the following submissions: -

- I. That the complainants were provisionally allotted a unit bearing no. 8_A05, admeasuring 659 sq.ft. on 8th floor in the project of respondent named "Elvedor" at Sector 37-C, Gurugram vide allotment letter dated 23.09.2013 for a total sale consideration of Rs.44,49,504/- and they have paid a total sum of Rs.38,93,104/- against the same.
- II. That however, subsequent to receipt of more than 85% of the total price, the respondent did not undertake any construction on the project. The complainants repeatedly requested it 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.
- III. That subsequently, the complainant become aware of the fact that the collaboration agreement dated 06.12.2012 which was the governing document granting the respondent right to undertake construction and development was in fact unregistered. Consequently, at the time of undertaking booking for the complainant, the respondent had no



right in and over the project land. He further learnt that vide a general power of attorney purportedly registered, Prime IT Solutions had agreed to sell, transfer and convey the project land in favour of the respondent. Even as on the date of execution of the buyer's agreement, no sale had taken place and neither was any registered development agreement executed.

- IV. That the respondent, in order to enforce its purported rights against Prime IT Solutions, filed a civil suit before the Ld. Civil Judge (Jr. Division) wherein a compromise was executed between the parties to the suit. Pursuant to such compromise dated 12.01.2016 and a compromise decree dated 21.01.2016, the respondent presumably has acquired rights in respect of the project land. However, the respondent still does not have the requisite sanction from the concerned authorities to undertake construction over the lands since the approval/license was issued only in the name of Prime IT Solutions and not the respondent. As such the construction is completely not sanctioned and this fact has been actively concealed by the respondent for almost 6 years.
- V. That the respondent after 6 years chose to forward the builder buyer agreement dated 07.09.2018 alongwith statement titled as applicant file which shows that Rs.38,93,104/- has been paid by them and since June 2016 no further demand has been raised and no further activity has been carried out. Further as per clause 11 of the agreement, the respondent is claiming that the project will be executed within 60 months from the date of agreement i.e., after another 5 years with no



justification for unreasonable delay. Therefore, the complainants refused to sign and send the same to the respondent.

- VI. That after expiry of 9 months from the date of booking, till date only a rudimentary structure of one out of several building forming part of the project has been erected on the project land which is incapable of possession. Additionally, there has been no other development on the project land for the last two years and the construction activities have been stopped since 2016.
- VII. That earlier the complainants have filed a complaint bearing no. 1302/2018 before this Authority wherein the delayed possession charges at prescribed rate of interest on the paid-up amount was allowed in their favour from the due date of possession till offer of possession vide order dated 06.02.2019. However, the respondent has neither paid any delayed possession charges nor has it handed over the possession of the allotted unit till date.
- VIII. That the factum of abandonment of the project is further evident from the report of the local commissioner called by this Authority in various other complaints filed against the respondent by some buyers and as per this local commission report, the respondent had only undertaken 5% of the construction in the area 37th Avenue. The complainant's unit was proposed to be situated in the adjoining land where one Tower Evitais is partially constructed and only 30% of the project has been constructed which has been recorded in the LC report dated 30.01.2019 appointed by the Authority. Hence, this complaint.

C. Relief sought by the complainants:

4. The complainants have sought following relief(s):

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- I. To refund the entire paid-up amount along with prescribed rate of interest.
5. 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.**
6. The respondent vide reply dated 09.08.2023 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. 8_A05 in favour of the complainant for a total consideration amount of Rs.46,46,824/- including applicable tax and additional miscellaneous charges vide booking dated 15.11.2012 and opted the possession-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 and M/s Imperia Structures Pvt. Ltd., 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 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. 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 and 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 the licensee or license holder of the said land. Thus,

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- 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., 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 Ms 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 and 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 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

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- 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 Ms 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

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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 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

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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 allotment letter.

- 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 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.
7. 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. Maintainability of the complaint.

8. The complainants bring to the notice of this Authority that earlier have filed a complaint bearing CR.No. 1302/2018 before this Authority wherein the delayed possession charges at prescribed rate of interest on the paid-up amount was allowed in their favour from the due date of possession till offer of possession vide order dated 06.02.2019. However, the respondent has neither paid any delayed possession charges nor has it handed over the possession of the allotted unit till



date. Therefore, they have filed the present complaint seeking a refund of the paid-up amount along with interest on failure of the respondent to handover the possession of the unit 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)

9. However, in the instant case no liberty was granted to the complainants to approach this Authority in case the respondent fails to hand over the possession in due time. Further, this Authority cannot re-write its own orders and lacks the jurisdiction to review its own order as the matter in issue between the same parties has been heard and finally decided by this Authority in the former complaint bearing CR.No. 1302/2018. No doubt, one of the purposes behind the enactment of the Act was to protect the interest of consumers. However, this cannot be ^{stretch} fetched to an extent that basic principles of jurisprudence are to be ignored. Therefore, subsequent complaint on same cause of action is barred by the principle of res-judicata as provided under Section 11 of the Code of



Civil Procedure, 1908 (CPC). Section 11 CPC is reproduced as under for ready reference:

"11. Res judicata.—No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I.—*The expression "former suit" shall denote a suit which has been decided prior to a suit in question whether or not it was instituted prior thereto.*

Explanation II.—*For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.*

Explanation III.—*The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.*

Explanation IV.—*Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.*

Explanation V.—*Any relief claimed in the plaint, which is not expressly granted by the decree, shall for the purposes of this section, be deemed to have been refused.*

Explanation VI.—*Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating .*

1[Explanation VII.—*The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.*

Explanation VIII. —*An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res*



judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.]”

10. The authority is of view that though the provisions of the Code of Civil Procedure, 1908 (CPC) is, as such, not applicable to the proceedings under the Act, save and except certain provisions of the CPC, which have been specifically incorporated in the Act, yet the principles provided therein are the important guiding factors and the authority being bound by the principles of natural justice, equity and good conscience has to consider and adopt such established principles of CPC as may be necessary for it to do complete justice. Moreover, there is no bar in applying provisions of CPC to the proceedings under the act if such provision is based upon justice, equity and good conscience. Thus, in view of the factual as well as legal provisions, the present complaint stands dismissed being not maintainable. File be consigned to the registry.

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 20.09.2023