

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

Date of decision: 03.01.2024

NAME OF THE BUILDER		M/S IMPERIA WISHFIELD PRIVATE LIMITED	
PROJECT NAME		ELVEDOR	
S. No.	Case No.	Case title	Appearance
1	CR/7697/2022	Raheel Mohan V/s Imperia Wishfield Private Limited	Gaurav Rawat (Complainant) Rishi Kapoor (Respondent)
2	CR/7716/2022	Aditya Mohan Chugh V/s Imperia Wishfield Private Limited	Gaurav Rawat (Complainant) Rishi Kapoor (Respondent)

CORAM:

Ashok Sangwan

Member

ORDER

1. This order shall dispose of the 2 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 Retail 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 DTCP License No. Name of Licensee	2 acres 47 of 2012 dated 12.05.2012 valid upto 11.05.2016 M/s Prime IT Solutions Pvt. Ltd.
RERA Registration	Not Registered
Possession Clause: 11(a). SCHEDULE FOR POSSESSION OF THE SAID UNIT <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> (Possession clause taken from case file of same project)	
Occupation Certificate: Not obtained	



Sr. No	Complaint No., Case Title, and Date of filing of complaint	Date of apartment buyer agreement	Unit No.	Unit area sq. ft.	Due date of Possession	Total Sale Consideration / Total Amount paid by the complainant	Relief Sought
1.	CR/7697/2022 Raheel Mohan V/s Imperia Wishfield Private Limited DOF: 06.01.2023 Reply Status: 23.05.2023	Not executed	F44, 1 st Floor, Tower-37 th Avenue	156 sq. ft.	10.09.2017 (calculated 60 months from the date of booking)	Total Sale Consideration: Rs. 18,81,516/- Amount Paid: - Rs. 4,53,960/-	Refund
2.	CR/7716/2022 Aditya Mohan Chugh V/s Imperia Wishfield Private Limited DOF: 06.01.2023 Reply Status: 23.05.2023	Not executed	F-36, 1 st floor, Tower-37 th Avenue	156 sq. ft.	07.09.2017 (calculated 60 months from the date of booking)	Total Sale Consideration: Rs. 18,81,516/- Amount Paid: - Rs. 4,53,960/-	Refund



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/7697/2022 Raheel Mohan 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, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

CR/7697/2022 Raheel Mohan V/s Imperia Wishfield Private Limited

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/renewed up to- 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.	Date of booking	10.09.2012 (Page no. 25 of complaint)
8.	Apartment no.	F44, 1 st Floor, 37 th Avenue (page no. 10 of reply)
9.	Unit area admeasuring	156 sq. ft. (page no. 10 of reply)
10.	Date of builder buyer agreement	Not executed
11.	Possession clause taken from case file of same project.	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	10.09.2017 (calculated from the date of booking)
13.	Total sale consideration	Rs. 18,81,516/- [as per page no. 10 of reply]
14.	Amount paid by the complainant	Rs. 4,53,960/- [as per page no. 12 of reply]
15.	Occupation certificate	Not received
16.	Offer of possession	Not offered

B. Facts of the complaint

8. The complainant has made the following submissions in the complaint: -
- I. That the complainant vide demand letters dated 05.06.2018 and 31.08.2017 was allotted a commercial unit no. Shop F44 admeasuring 156 sq. ft., in Tower 37th Avenue in the project of respondent named “Elvedor Retail” at Sector 37C, Gurugram. But prior to that vide demand letter dated



- 05.01.2016, the complainant was allotted a commercial unit bearing no. R-1050 at tower "RUBIX" in the same project.
- II. That the respondent has not even offered a buyer's agreement which was supposed to be signed between the parties till date.
 - III. That the total cost of the said unit is inclusive of BSP, EDC, IDC, PLC, IFMS, electricity and other charges. Out of this, a sum of Rs 4,53,960/- was unilaterally, arbitrarily and illegally demanded by the respondent and was paid by the complainant even before signing of BBA.
 - IV. That after the said amount from the complainant, the respondent has not bothered to initiate any development of the project till today. Accordingly, after paying more than 30% amount till 2015, the complainant stopped releasing any amount as the project is abandoned from last 6 years.
 - V. That respondent was presumed to have handed over the possession of a developed commercial unit within 3 years from the date of booking of the unit, but the builder has failed to deliver the possession within that span.
 - VI. That the complainant has visited the project site many times and found that the respondent-builder had not carried out any development work at the project site. Therefore, the complainant approached the builder to know the reason for inordinate delay, but it didn't reply. Moreover, the builder never proposed any tentative date of completion of the project nor could assure the same to the complainant so far.
 - VII. That such an inordinate delay (approx. 10 years) in the delivery of possession to the allottee is an outright violation of the rights of the allottees under the provisions of RERA act and thus, in view of the above said facts and circumstances of the case the complainant is seeking refund of his paid amount with interest till the actual payment from the respondent.

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 prescribed rate of interest.

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 has 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 Retail' located in sector-37-C, Gurugram, Haryana. The respondent company provisionally allotted the unit bearing no. Shop F44 in favour of the complainant for a total consideration amount of Rs.18,81,516/- including applicable tax and additional miscellaneous charges vide booking dated 10.09.2012 and opted the possession-linked payment plan on the terms and conditions mutually agreed by them.
- ii. That 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 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.
- iv. 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.
- v. 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. Further, a case was filed with the title 'M/s Prime IT Solutions Pvt. Ltd. v. Devi Ram and Imperia Wishfield Pvt. Ltd.', pursuant to which a Compromise Deed dated 12.01.2016 was signed between the respondent company and M/s Prime IT Solutions Pvt. Ltd. whereby, the respondent company was left with the sole responsibility to implement the said project.
- vi. That both the parties i.e., the complainant as well as the respondent company had contemplated at the very initial stage of booking 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 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.

- vii. That furthermore, the delay is caused due to lack of funds, as the complainant has paid only Rs.4,53,960/- to the respondent company and a huge sum of Rs.14,27,556/- is still pending to be paid by him
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

.....

(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 complainant at a later stage.

F. Findings on the objections raised by the respondent.

F.I Objection regarding force majeure conditions.

17. 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, 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 10.09.2017. 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

- I. Direct the respondent to refund the entire paid-up amount along with prescribed rate of interest.
18. In the present complaint, the complainant intends to withdraw from the project and is seeking return of the amount paid by him 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)

19. Clause 11(a) of the buyer's agreement (taken from the case file of same project) 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."

20. The complainant had booked the unit in the project of the respondent company situated at sector 37-C and thereafter a commercial unit bearing no. Shop F44 admeasuring 156 sq. ft., in Tower-37th Avenue was allotted in his favour vide demand letters dated 05.06.2018 and 31.08.2017 for a total sale consideration of Rs.18,81,516/-. However, despite receipt of 24.12% amount against the said consideration, no efforts have been taken by the respondent to execute a builder buyer's agreement between the parties as well as there is no document available on record vide which the due date of possession can be ascertained. Therefore, in order to calculate the due date of possession of the unit, possession clause i.e., clause 11(a) has been taken from the case file of the same project of the respondent. As per clause 11(a) of the buyer's agreement, the possession of the unit was to be handed over within 60 months from the date of agreement. In the present case, the buyer's agreement has not been executed between the parties. Thus, the due date is calculated from the date of booking i.e., 12.09.2012. Therefore, the due date for handing over of possession comes out to be 12.09.2017.
21. 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....."

22. 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."

23. 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 is 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.

24. 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 and 72 read with section 31(1) of the Act of 2016.
25. **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]***
- (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."*
26. 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.
27. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on


date i.e., 03.01.2024 is 8.85%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.85%.

28. The authority hereby directs the promoter to return the entire amount received by it i.e., Rs.4,53,960/- with interest at the rate of 10.85% (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

29. 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 entire amount paid by the complainants in all the above-mentioned cases along with prescribed rate of interest @10.85% 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.
30. This decision shall *mutatis mutandis* apply to cases mentioned in para 3 of this order.

31. The complaints stand disposed of.
32. Files be consigned to the registry.


(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 03.01.2024



HARERA
GURUGRAM