

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

**Complaint No. : 1239 of
2018**
First date of hearing: 30.01.2019
Date of Decision : 06.02.2019

Mr. Varinder Singh and Mr. Bhupinder S Mittal,
R/o. J-1201, Green Arch, Tech Zone-IV, Greater
Noida (West)-201306

Complainants

Versus

M/s Imperia Wishfield Pvt. Ltd.
Regd. Office: A-25, Mohan Cooperative Estate,
Mathura Road, New Delhi

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

**Member
Member**

APPEARANCE:

Shri Parikshit Kumar Advocate for the complainants
Shri Rohit Sharma, authorized Advocate for the respondent
representative on behalf of the
respondent company with Shri
J.K. Dang and Ishaan Dang

ORDER

1. A complaint dated 16.10.2018 was filed under section 31 of the Real Estate (Regulation and Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 by the complainants Mr. Varinder Singh and Mr. Bhupinder S Mittal against the promoter M/s



Imperia Wishfield Pvt. Ltd in respect of studio apartment described below in the project 'Esfera Elvedor', Sector-37C, Gurugram on account of violation of the section 11(4)(a) of the Act ibid for not developing the project within stipulated period.

2. Since the allotment has been executed on 25.09.2013 i.e prior to the, therefore, the penal proceedings cannot be initiated retrospectively, hence, the authority has decided to treat the present complaint as an application for non-compliance of contractual obligation on the part of the promoter/respondent in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016.
3. The particulars of the complaint case are as under: -

| | | |
|----|----------------------------------|--|
| 1. | Name and location of the project | "Esfera Elvedor", Sector-37C, Gurugram |
| 2. | Nature of the real estate | Commercial Colony |
| 3. | Project area | 2 acres |
| 4. | DTCP No. | 47 of 2012 dated 1205.2012 |
| 5. | RERA registered/ not registered. | ESFERA, PHASE-II registered vide registration no. 352 of 2017 |
| 6. | Revised date of delivery | 31.12.2020 |
| 7. | Apartment/unit no. | 8__S09 The unit no. was changed from 8__S16 to S__S09 |
| 8. | Apartment area admeasuring | 629 sq.ft. The apartment area was changed from 625 |



| | | |
|-----|---|---|
| | | sq.ft to 659 sq.ft, Annexure C-14 |
| 9. | Date of allotment letter | 25.09.2013 |
| 10. | Date of builder buyer agreement | Not executed |
| 11. | Total sales consideration as per Annexure c-17 | Rs. 44,25,088 |
| 12. | Total amount paid by the complainant till date | Rs. 8,69,000/- |
| 13. | Date of delivery of possession | 24.09.2018 Note: As per the allotment letter, where the possession was to be handed over to the complainant within a period of 60 months. |
| 14. | Delay in handing over possession | 4 months 13 days |
| 15. | Penalty clause as per the builder buyer agreement | Since the BBA is not executed the penalty cannot be ascertained |

4. The details provided above have been checked on the basis of record available in the case file which have been provided by the complainant and the respondent. A builder buyer agreement is not executed. Therefore, the promoter has not fulfilled his committed liability as on date.
5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and appearance. The case came up for hearing on 30.01.2019 and 06.02.2019. The reply was filed by the respondent on 19.11.2018 which has been perused by the authority.



Facts of the complaint

6. Briefly stated, the facts of the case of the complaint, that during the course of its business, the respondent launched a residential-cum-commercial project originally known as Esfera Elvedora, situated at sector – 37C, Gurugram, Haryana. in and about the year 2012.
7. At the time of applying for the studio apartment, the complainants were informed that the respondent had the complete right, title and authorization on the project land and also had the requisite sanctions and approvals from the relevant authorities to undertake such construction. It was further informed that the project will be completed within a period of 60 months from the date of booking .
8. On receipt of the amounts as above, the respondent issued an acknowledgement letter dated 16.05.2012 wherein the respondent acknowledged the complainants as a customer for a studio apartment admeasuring 625 sq. ft and the respondent also acknowledged an amount of Rs. 3,40,000/- jointly deposited by the complainants towards booking amount for this unit.
9. The respondent did not issue any allotment letter nor provided any buyers agreement, however, the respondent



issued a demand letter dated 31.07.2012 calling upon the complainant to pay a further amount of Rs. 36,188/- in terms of the payment plan.

10. The respondent vide the acknowledgement letter dated 01.08.2012 unilaterally changed the area of allotment of the commercial unit from 625 sq. ft to 659 sq. ft without obtaining the consent of the complainants. The complainants protested against such unilateral changes and the fact the construction had not even commenced, however, the respondent assured that no further changes will be effected and that the project will proceed smoothly going forward.

11. However, even after receiving the total basic price of Rs. 8,69,000/- the respondent did not intimate any timeline within which the allotment letter and buyers agreement would be executed. The respondent did not undertake any construction on the project. The complainants 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.

12. Finally, after 11 months from the date of booking, the respondent provided a letter dated 22.04.2013 pursuant to



which the respondent confirmed having allotted a studio apartment bearing unit No. 8_S16 on the 8th floor in tower B in the commercial project 659 sq.ft. at the basic sale price of Rs. 5,100/- per sq. ft., to the complainants.

13. At this juncture, due to the lackadaisical attitude of the respondent and the fact that construction had not yet begun the complainants addressed an e- mail dated 23.07.2014 asking the respondent about the formalities required to surrender the unit back to the respondent. To this mail of the complainants, the respondent replied by stating that deduction of 15% would be applicable and that the complainants will have to adhere to the cancellation format in order to be able to successfully process their request of cancellation. However, since the exact amount of deduction was not disclosed to the complainants, the complainants addressed another mail dated 28.07.2014 asking the respondent to provide details of exact deduction.

14. Since no reply was received , the complainants again addressed an e-mail dated 01.02.2016 apprising the respondent that since the respondent had accepted their cancellation of documents as per the telephonic conversation dated 22.01.2016, they were not bound to make any further payments against the new demands raised by the respondent.



15. To the utter shock and dismay of the complainants instead of addressing the query of the complainants the respondent chose to remain silent over a period of another eight months. Finally, the complainants again received a letter dated 06.10.2016 called a provisional unit allotment and the complainants were asked to pay a certain amount of additional as well as preferential location charges. Moreover, the respondent unilaterally changed the unit no. of the complainants from 8_S16 to 8_S09 without giving any prior notice and further changed the project from Elvedor Studio as originally booked to project 37th Avenue.
16. Even after expiry of 6 years from the date of booking, till date only a rudimentary structure of one out of the several building forming part of the project has been erected on the project land which is incapable of possession. Additionally, there is no other development on the project land for last two years and the intermittent construction activities have also been stopped since 2016. On 12.11.2014, the complainant visited the office of the respondent and paid Rs. 1,12,79,700/- for total consideration for one unit of 302 sq. yards.
17. On 20.07.2018, when the complainant finally visited the office of the complainant and requested them on return the



amount or give the possession of the plot but the official of the respondent refused the same.

18. Issues raised by the complainants are as follow:

- i. Whether the respondent has misrepresented to the complainants that it has the necessary sanctions and approvals in place to undertake construction of the proposed project?
- ii. Whether the respondent was entitled to unilaterally change the location, unit number and project in which the complainants had initially booked without the consent of the complainants and whether such change was illegal and contrary to RERA Act and rules issued thereunder?
- iii. Whether the respondent was liable to refund the amount to the complainants after having agreed to do the same and having received all cancellation related documents from the complainants?
- iv. Whether by virtue of expiry of the license granted to prime time solutions, the respondent is liable to refund



the entire amount paid by the complainants together with interest?

- v. Whether the respondent has undertaken construction of the proposed project in accordance with any sanctioned plans which have been duly approved?
- vi. Whether the respondent has any authority to undertake construction or sale of the project in question at the time of receiving booking amount or instalments from the complainants?

19. Relief sought:

The complainants are seeking the following relief:

- i. Direct the respondent directing a refund of the amount of Rs. 8,69,000/-.
- ii. Direct the respondent to pay interest at the rate of 18% p.a. or at such rates as may be prescribed on the amount of Rs. 8,69,000/-.



Respondent's reply

20. The respondent has denied each and every allegations and contentions raised by the complainant. They contended that the complaint is false, frivolous, malafide and an abuse of process of this authority. It was further contended by the

respondent that the complainant has not approached this authority with clean hands.

21. The respondent has submitted that the construction has been delayed due to force majeure circumstances beyond the control of the respondent. It was further submitted by the respondent that M/s. Prime IT Solutions P. Ltd. entered into a development agreement on 06.12.2011 and the same was duly registered. In furtherance of the development agreement, an application for grant of license by DTCP was submitted by M/s. Prime IT Solutions P. Ltd. and developer had executed a term sheet which took the shape of the collaboration agreement.

22. The respondent submitted that a general power of attorney was also executed by M/s. Prime IT Solution in favour of developer which was also registered on 19.03.2013. It was further submitted by the respondent that they had obtained all necessary permissions and sanctions for the commercial project in question.

23. The respondent submitted that they got letter of intent on 24.05.2011 and subsequently license no. 47 of 2012 and license no. 51 of 2012 was granted on 12.05.2012 and 17.05.2012. Further the building plan was also sanctioned.



24. The respondent has submitted that they had filed a suit titled Imperia Wishfield P. Ltd. versus Prime IT Solution P. Ltd. whereby the relief of declaration along with consequential relief of permanent injunction against the Prime IT Solution P. Ltd. and landowners. The Hon'ble Civil Court has passed the order in the shape of compromise deed in and issued direction to prepare the decree sheet accordingly. The decree sheet judgement and sanctioning of mutation no. 2117 for transfer of the ownership of project land to Imperia Wishfield P. Ltd. was declared the owner of the property in question.
25. The respondent by virtue of acts in law, above permissions and court decree have become the absolute right to market, sell, allot plots, etc. and as such became competent to enter into agreements.
26. The respondent submitted that the construction at the site is being done in phase and in going on full swing. It was further submitted by the respondent that the complainant is bound by the terms of the application form and therefore the dispute if any falls within the ambit of civil dispute and all other allegations levelled by the complainant are false and baseless.



27. The respondent filed a suit bearing no. 149SK titled as Imperia Wishfield private limited versus prime IT solutions private limited and others, whereby seeking the relief of declaration along with consequential relief of permanent injunction against the prime IT solutions pvt. Ltd and others bhumidar of land in question namely, Sh. Rattan Singh and Mahipal both sons of Sohan Lal, Hari Kishan son of Ganesh, Rajpal and Shiv Charan both son of Mangtu and Smt. Nirmala Devi wife of Kawan Singh.
28. The respondent submitted that in terms of the decree sheet judgment and sanctioning of mutation no. 2117 for transfer of the ownership of project land to Imperia Wishfield Pvt. Ltd., Imperia Wishfield Pvt. Ltd. was declared the owner of the property in question.
29. The respondent further submitted that the complainants and the respondent are bound by the terms and conditions of the application form and therefore the dispute if any falls within the ambit of a civil dispute and all other allegations levelled by the complainant are false and baseless.
30. It is submitted that the respondent has already invested the entire sum of money received by the respondent towards the



said unit in the construction of the said project. Therefore, is not in position to refund the same to the complainants.

Determination of issues:

After considering the facts submitted by the complainant, reply by the respondent and perusal of record on file, the issues wise findings of the authority are as under:

31. With respect to **first, fifth and sixth issue** raised by the complainants, the complainants have failed to produce any iota of evidence in support of their allegation that the respondent was not having valid sanctions and approvals to undertake construction of the proposed project.

However, it is also clear from the records that DTCP license has been granted to the respondent vide no. 47 of 2012 dated 12.05.2012 and environment clearance is also received by the respondent.

32. With respect to the **third and fourth issue** keeping in view the current status of the project, the authority cannot allow the refund in the interest of the project and other allottees.

33. The complainants made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above.

34 (f) Function of Authority –



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.

The complainants requested that necessary directions be issued by the authority under section 37 of the Act ibid to the promoter to comply with the provisions and fulfil obligation which is reproduced below:

37. Powers of Authority to issue directions

The Authority may, for the purpose of discharging its functions under the provisions of this Act or rules or regulations made thereunder, issue such directions from time to time, to the promoters or allottees or real estate agents, as the case may be, as it may consider necessary and such directions shall be binding on all concerned.

Findings of the authority

34. The respondent admitted the fact that the project Esfera Elvedor is situated in sector-37C, Gurugram, therefore, the hon'ble authority has territorial jurisdiction to try the present complaint. As the project in question is situated in planning area of Gurugram, therefore the authority has complete territorial jurisdiction vide notification no.1/92/2017-1TCP issued by Arun Kumar Gupta, Principal Secretary (Town and Country Planning) dated 14.12.2017 to entertain the present complaint. As the nature of the real



estate project is commercial in nature so the authority has subject matter jurisdiction along with territorial jurisdiction

35. The objections raised by the respondent regarding jurisdiction of the authority stands rejected. The authority has complete jurisdiction to decide the complaint in regard to non-compliance of obligations by the promoter held in ***Simmi Sikka V/s M/s EMAAR MGF Land Ltd.*** leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

36. The report of the local commissioner dated 30.01.2019 has been received and the same has been placed on record. The counsel for the respondent has raised certain controversial issues w.r.t ownership of the land which is the name of Devi Ram who had entered into an agreement with Prime IT Solutions Pvt. Ltd. and thereafter Prime IT Solutions has entered into an agreement to develop the project with M/s Imperia Wishfield Pvt. Ltd.

37. However, vide judgement dated 21.01,2016 passed in Civil suit no. 140 SK by Shri Sanjeev Kajla, Civil Judge, Gurgaon, the matter has been settled inter-se all the three parties and as a matter of fact entries w.r.t land dispute have been correctly entered in the mutation and jamabandi record, as such there is no dispute w.r.t ownership of land.



38. By virtue of allotment letter dated 25.09.2013, the possession was to be handed over to the complainant within a period of 60 months i.e 24.09.2018. As such, the complainants are entitled to get interest for the delayed possession w.e.f from 24.09.2018 as per the provisions of section 18(1) of the Act till the offer of possession. As per the registration application, the revised date of delivery of possession is March 2020.

Decision and directions of the authority

39. After taking into consideration all the material facts as adduced and produced by both the parties, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issues the following directions to the respondent in the interest of justice and fair play:

- (i) The respondent is directed to pay the complainants delayed possession charges @10.75% per annum w.e.f 24.09.2018 till the offer of possession.
- (ii) The arrears of interest so far shall be paid to the complainant within 90 days from the due date of the order and thereafter monthly payment of interest till offer of possession shall be paid before 10th of subsequent month.



(iii) The respondent is directed to adjust the payment of delayed possession charges towards dues from the complainant, if any.

40. The order is pronounced.

41. Case file be consigned to the registry.

42. Copy of this order be endorsed to registration branch

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated:06.02.2019

Judgement Uploaded on 26.03.2019

HARERA
GURUGRAM

