

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

Date of **21.04.2023**
pronouncement:

NAME OF THE BUILDER		ADTV COMMUNICATION PVT. LTD.
PROJECT NAME		AEZ ALOHA
S. No.	Case No.	Case title
1.	CR/3477/2021	O.P Kukreja V/s ADTV Communications Pvt. Ltd. & Ors.
2.	CR/3478/2021	Pushpa Rani V/s ADTV Communications Pvt. Ltd. & Ors.

CORAM:

Shri Sanjeev Kumar Arora

Member

APPEARANCE:

Mr. Umesh Gulati (Advocate)

Complainants

None

Respondent

EX- PARTE ORDER

1. This order shall dispose of both the complaints titled as above filed before this authority in form CRA 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, "AEZ ALOHA" (Group Housing Colony) being developed by the same respondent/promoter i.e., **M/s ADTV Communications Pvt. Ltd.**
3. The details of the complaints, reply to 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	"AEZ ALOHA" Sector-57, Gurugram.	
COMMON DETAILS		
S. N.	Particulars	Details
a.	Due date of Possession	Calculated from date of execution of buyer agreement as date of start of construction is not available in the files
b.	Occupation certificate	Not obtained
c.	DTCP license details	34 of 1996 in favour of SM Towers Pvt. Ltd. dated 21.03.1996 valid up to 20.03.2015
d.	RERA registration	Not registered

4. The unit related details of each complaint are as under:

Particulars	CR/3477/2021 dated 13.09.2021	CR/3478/2021 dated 13.09.2021
Unit no. and area measuring	D-5/802 admeasuring 2244 sq. ft.	D-5/803 admeasuring 2244 sq. ft.

Date of execution of agreement	01.04.2009	01.04.2009
Due date of possession	01.04.2012	01.04.2012
Basic sale Price (BSP)/ Amount paid by the complainants. (AP)	BSP- ₹ 78,00,000/- AP- ₹ 75,00,000/-	BSP- ₹ 78,00,000/- AP- ₹ 75,00,000/-

5. The aforesaid complaints were filed by the complainants against the promoter on account of violation of the buyer's agreement executed between the parties in respect of said units.
6. 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.
7. The facts of all the complaints filed by the complainant(s)/allottee(s) are also similar. Out of the above-mentioned case, the particulars of lead case **CR/3477/2021 O.P Kukreja V/s ADTV Communications Pvt. Ltd.** are being taken into consideration for determining the rights of the allottee(s).

A. Facts of the complaint

8. The complainant has made the following submissions in the complaint: -
 - a. That erstwhile S.M Towers Private Limited was the legal owner of land admeasuring 20 Acres situated in the revenue estate of village Tigra, District Gurgaon (Haryana) and subsequently the said erstwhile S.M. Towers Private Limited stood merged with M/s AEZ Infratech Private Limited vide order dated 04.02.2008 passed by the Hon'ble Delhi High

Court in company petition no. 73 of 2007 under the scheme of amalgamation and demerger.

- b. That in view of the aforesaid order dated 04.02.2008, M/s AEZ Infratech Private Limited has become legal owner and in possession of the aforesaid land. M/s AEZ Infratech Private Limited was in the process of developing the said plot of land as a group housing project and has given the name of the said project as “**AEZ ALOHA**”.
- c. That a number of advertisements were given in various leading newspapers, brochures, pamphlets regarding developing of the said plot as a group housing society and public at large was invited to buy houses/flats in the said project.
- d. That the respondent advertised itself as a very ethical business group that lives onto its commitments in delivering its housing projects as per promised quality standards and agreed timelines.
- e. That the respondents were very well aware of the fact that in today's scenario looking at the status of the construction of housing projects in India, especially in NCR, the key factor to sell any dwelling apartment is the delivery of completed house within the agreed timeline and that is the prime factor which a consumer would see while purchasing his dream home. Respondent, therefore used this tool, which is directly connected to emotions of gullible consumers, in its marketing plan and always represented and warranted to the consumers that their dream home will be delivered within the agreed timelines.

- f. That it is submitted that the name of "AEZ Infratech Private Limited" company has now been changed to "ADTV Communications Private Limited" with effect from 12.09.2016 vide fresh certificate of incorporation issued by registrar of companies, New Delhi.
- g. That the complainant had a meeting with the then directors/official of the respondent company in the month of March-2009 regarding the on-going project and the complainant was assured and promised that the project initiated by the respondent company will have ultra-modern facilities and that the company has taken all the necessary sanctions and required approvals from all the competent authorities and there would be no problem in timely completion of the said project.
- h. That based on the assurances and promises made by the respondent company and its officials, the complainant vide an agreement dated 01.04.2009, agreed to purchase a flat no. D-5/802 having an area admeasuring 2244 square feet for a total sale consideration of ₹ 78,00,000/- out of which an amount of ₹ 75,00,000/- was paid by the complainant to the respondents as an advance payment for the purchase of said flat no. D-5/802.
- i. That on different occasions the complainant visited the site to see the progress of the project, but to the utter surprise of the complainant, the project was not moving as per the assurances and promises made by the respondents and the same was brought to the notice of the directors/ officials of the respondent company from time to time and the complainant was assured every time that the project will be completed in due time by putting extra effort and labour.

- j. That it has come to the notice of the complainant that there are certain delays and defaults and violations in the said project by the respondent company and therefore, the competent authority did not issue the completion certificate to the respondent till date even after the expiry of more than 12 years from date of agreement as referred above.
- k. That it is matter of record that some of the buyers have taken the possession of their incomplete flats in the said project even without getting the completion/occupation certificate and they have compromised with the circumstances finding no other alternate remedy as respondent company did not take any serious and vigilant effort for obtaining the occupancy certificate as per rules from the competent authorities for the reasons known to them.
- l. That the complainant is a senior citizen, and he could not take the possession of his incomplete flat forcefully being a law-abiding citizen, rather he chooses to withdraw from the said project in view of Section 12 of the Act and requested the respondent company to refund his entire amount along with interest and compensation as the complainant is no more interested in the said project.
- m. That it is submitted that in spite of several requests made by the complainant from time to time, the respondent company is postponing the matter on one pretext or the other and did not refund an amount of ₹ 75,00,000 /- along with interest and compensation till date to the complainant.

- n. That it is pertinent to mention here that the complainant is a senior citizen and has paid his hard-earned money to the respondent company with a hope that the complainant will have his own independent house. But the respondent company failed to discharge its obligations as per the agreement dated 01.04.2009 and did not return the amount as yet.
- o. That had there been no assurances and promises on behalf of the respondent company, the complainant would not have parted with his hard-earned money and given it to the respondent company. That as a matter of fact the respondent company in order to deceive, cheat the home buyers and the complainant is changing its offices and contact numbers frequently without giving any intimation to the complainant or public at large.
- p. That the respondent no.2 & 3 are the officers in charge and are looking for the day-to-day affairs of the respondent no.1, hence both the respondent no.2 & 3 are also liable and responsible for all affairs of the company, thus both of them are jointly and severally liable to refund the entire principal amount along with interest and compensation to the complainant along with respondent no.1 company.
- q. That the cause of action accrued in favour of the complainant when in spite of receipt of ₹ 75,00,000/- which is 96% of total agreed sale consideration, the respondents failed to perform its part of obligations for timely delivery of possession of the flat rather usurped the complainant funds. Further cause of action arose when despite numerous requests, the respondents failed to refund the principal

amount with interest and compensation to the complainant. The cause of action is still continuing.

B. Relief sought by the complainant: -

9. The complainant has sought following relief(s)
 - a. Direct the respondent to hand over the physical possession of the unit along with the delay possession charges at prescribed rate.
 - b. Compensation
10. The present complaint has been filed on 13.09.2021 and the reply on behalf of the respondent has not been received till date. As the notice could not be served on the registered address of the respondent, the counsel for the complainant on hearing dated 12.05.2022, requested the authority to issue a public notice against the respondent for its appearance on the next date of hearing. Accordingly, the requisite notice was issued in the newspaper "Dainik Jagran" (Hindi) and "The Tribune" (English) on 26.05.2022. Despite proper service of notice the respondent failed to file the written reply and neither appeared before the authority. Accordingly, the respondent is proceeded ex-parte and the defence of the respondent is struck off.
11. 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.

C. Jurisdiction of the authority

12. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

D. I Territorial jurisdiction

13. 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.

D. II Subject matter jurisdiction

14. 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.

15. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

D. Findings on the fact that OC has still not been received by the competent authority.

16. The legislation is very clear in this aspect that a project shall be regarded as an “ongoing project” until receipt of completion certificate. Since in the present matters only part occupation certificate has been obtained by the promoter-builder from the competent authority as mentioned in the deed of declaration. Rule 3 of the Rules, 2017 talks of application for registration and rule 4 provides for ‘additional disclosure by promoters of ongoing projects.’ Therefore, all ‘ongoing projects’ i.e., those that commenced prior to the Act, and in respect of which no completion certificate has yet issued, are covered under the Act. It is plain that the legislative intent was to make the Act applicable to not only to the projects which were to commence after the Act became operational but also to ongoing projects. The issue that arises is whether this is permissible in law? The hon’ble Bombay High Court in **Neelkamal Realtors Suburban Pvt. Ltd. and Anr. Versus Union of India and Ors. [2018(1) RCR (Civil) 298]** has dealt with this issue quite extensively. So, there is no escape from the conclusion that the project in question required registration under section 3 of the Act. Once it is found that the project in question required registration, it will certainly be considered to be the ‘ongoing project’ and provisions of the Act, the rules and the regulations framed thereunder will become applicable.

E. Findings on the relief sought by the complainants.

E.I. Direct the respondent to hand over the physical possession of the unit along with the delay possession charges at prescribed rate of interest.

17. In the present complaint, the complainants are seeking delayed possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under:

"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, —

.....

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."

18. Clause 2 of the agreement to sell dated 01.04.2009 (in short, agreement) provides for possession and is reproduced below: -

"That the actual, physical, vacant possession of the said unit shall be delivered by the first party to the second party upon completion of the entire project simultaneously upon receipt of the full and final sale consideration as agreed hereinabove."

19. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein no due date for handing over possession has been mentioned by the promoter. The promoter has not committed any timeline within which the possession of the subject unit shall be handed over and the allottee cannot be expected to wait endlessly to get the possession of the subject unit for which he has paid a considerable amount.
20. The drafting of this clause and incorporation of such clause is not only vague and uncertain but so heavily loaded in favor of the promoters. The incorporation of such clause in the agreement by the promoters are just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left

with no option but to sign on the dotted lines. However, since in the present matter no specific date for handing over of possession is mentioned therefore the due date of possession cannot be ascertained. A considerate view has already been taken by the Hon'ble Supreme Court in the cases where due date of possession cannot be ascertained then a reasonable time period of 3 years has to be taken into consideration. It was held in matter **Fortune Infrastructure v. Trevor d' lima (2018) 5 SCC 442: (2018) 3 SCC (civ) 1** and then was reiterated in **Pioneer Urban land & Infrastructure Ltd. V. Govindan Raghavan (2019) SC 725 :**

"Moreover, a person cannot be made to wait indefinitely for the possession of the flats allotted to them and they are entitled to seek the refund of the amount paid by them, along with compensation. Although we are aware of the fact that when there was no delivery period stipulated in the agreement, a reasonable time has to be taken into consideration. In the facts and circumstances of this case, a time period of 3 years would have been reasonable for completion of the contract i.e., the possession was required to be given by last quarter of 2014. Further there is no dispute as to the fact that until now there is no redevelopment of the property. Hence, in view of the above discussion, which draw us to an irresistible conclusion that there is deficiency of service on the part of the appellants and accordingly the issue is answered."

21. Accordingly, the due date of possession is calculated as 3 years from the date of agreement i.e., 01.04.2009. Therefore, the due date of possession as mentioned above comes out to be 01.04.2012.
22. Furthermore, the authority observes that clause 18 of the agreement wherein it is stated that the first party i.e., the respondent shall repurchase the unit from the complainant after payment of ₹ 75,00,000/- only during a period of 1 year from the date of hereof, which means till 01.04.2010. Since there is no proof of repurchase therefore the respondent waived off his right to repurchase.

23. Also, a local commissioner was appointed in these matters and according to the report of the local commissioner dated 09.01.2023, the site was visited physically and as per the records available with the maintenance agency the units of the complainants stand allotted in name of third parties. The relevant para of the report is reproduced below:

"The complainant's unit have been developed by the promoter and it is submitted that as per the record of maintenance agency stated by facility manager, the unit no. D5/802 stands allotted in the name of Sh. Vinay Kumar and unit no. D5/803 stand allotted in the name of Sh. Siddharth Bagaria & Ms. Preeti Bagaria.

Both the units were physically inspected, and it is found that the unit no. D5/802 is locked and stands vacant as on date. Further unit no. D5/803 is occupied by Sh. Siddharth Bagaria & Ms. Preeti Bagaria who are residing in the unit. The documents related to Sh. Siddharth Bagaria & Ms. Preeti Bagaria regarding the flat are attached herewith."

24. Now according to clause 5 of the agreement, the respondent agrees to indemnify the complainants if the whole or any portion of the said unit is ever taken away or goes out from the possession of the complainants on account of any legal defect in ownership and title of the first party. Therefore, the authority relying upon the said clause of the agreement opines that it is the contractual obligation of the respondent to indemnify the complainant and also there is no document on record confirming the ownership of the third parties and mere record of maintenance agency cannot be considered as the ownership proof. Accordingly, the complainant is entitled for delay possession charges and the respondent is liable to handover the physical possession of the said units to the complainants along with delay possession charges at prescribed rate of interest.
25. **Admissibility of delay possession charges at prescribed rate of interest:** Proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoters,

interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules.

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., **21.04.2023** is 8.70%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.70%.
28. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

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

Explanation. —For the purpose of this clause—

(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;

(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"

29. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., **10.70%** by the respondent/promoter

which is the same as is being granted to the complainants in case of delayed possession charges.

30. Considering the above-mentioned facts, the authority calculates due date of possession from date of agreement i.e., 01.04.2009 and accordingly the due date comes out to be 01.04.2012. Accordingly, the allottee is entitled for delay possession charges w.e.f. 01.04.2012. As such the allottee shall be paid, by the promoter, interest for every month of delay from due date of possession till the actual handing over the physical possession of the said unit, at prescribed rate i.e., 10.70% p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

E.II. Compensation

31. The complainants in the aforesaid relief are seeking relief w.r.t compensation. Hon'ble Supreme Court of India in civil appeal titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors.* (Civil appeal nos. 6745-6749 of 2021, decided on 11.11.2021), has held that an allottee is entitled to claim compensation under sections 12, 14, 18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation. Therefore, the complainants may approach the adjudicating officer for seeking the relief of compensation.

F. Directions of the authority

32. 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 is directed to handover the physical possession of the unit to the complainants within two months from the date of this order.
- ii. The respondent is directed to pay interest at the prescribed rate of 10.70% p.a. for every month of delay from the due date of possession i.e., 01.04.2012 till the actual handing over of the possession.
- iii. The arrears of such interest accrued from 01.04.2012 till the date of order by the authority shall be paid by the promoter to the allottee within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoter to the allottee before 10th of the subsequent month as per rule 16(2) of the rules.
- iv. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- v. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.70% by the respondent/promoter which is the same rate of interest which the promoters shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.
- vi. The respondent shall not charge anything from the complainants which is not the part of the agreement. However, holding charges

shall not be charged by the promoters at any point of time even after being part of agreement as per law settled by Hon'ble Supreme Court in civil appeal no. 3864-3889/2020.

33. This decision shall mutatis mutandis apply to cases mentioned in para 4 of this order.
34. The complaints stand disposed of. True certified copies of this order be placed on the case file of each matter.
35. Files be consigned to registry.


(Sanjeev Kumar Arora)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 21.04.2023