

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

Order pronounced on: 02.05.2024

<b>NAME OF THE BUILDER</b>		<b>M/s Eminence Township India Private Limited</b>	
<b>PROJECT NAME</b>		<b>"Eminence Kimberley Suites"</b>	
<b>S. No.</b>	<b>Case No.</b>	<b>Case title</b>	<b>APPEARANCE</b>
1.	CR/285/2023	Khursheed Zafar V/S M/s Eminence Township (India) Private Limited	Ms. Medhya Ahluwalia Advocate and Ms. Sumit Mehta Advocate
2.	CR/286/2023	Filzah Ehtesham and Dr. Syed Asad Rahman V/S M/s Eminence Township (India) Private Limited	Ms. Medhya Ahluwalia Advocate and Ms. Sumit Mehta Advocate

**CORAM:****Shri Vijay Kumar Goyal****Member****ORDER**

1. This order shall dispose of both the complaints titled as above filed before the 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 allottee 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, "**Eminence Kimberley Suites**" (commercial colony) being developed by the same respondent/promoter i.e., M/s Eminence Township (India) Private Limited. The terms and conditions of the buyer's agreement against the allotment of units in the upcoming project of the respondent /builder and fulcrum of the issues involved in both the cases pertains to failure on the part of the promoter to deliver timely possession of the units in question, seeking award of handover the physical possession of the allotted unit along with delayed possession charges and others.

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:

<b>Project Name and Location</b>	<b>M/s Eminence Township India Private Limited at " Eminence Kimberley Suites ", Sector - 112, Gurugram.</b>
<b>Occupation Certificate: - 28.05.2019</b>	
<b>Possession Clause: -</b>	
<p><b>27. <u>Schedule for Possession of the Said Unit:</u></b>  <i>The company based on its presentation plans and estimates and subject to all exceptions shall endeavour to complete the construction of the said project <b>within 36 months (plus 6 months grace period) from the date of start of the ground floor roof slab of the particular tower</b> in which the booking is made, subject to timely payment by the Allottee(s) of sale price and other charges due and payable according to the Payment Plan applicable to him/her/them and/or as demanded by the company and subject to force majeure circumstances including but not limited to clause 27 and 28. The possession of the Said unit(s) shall, however, be offered only after grant of completion/occupation certificate from the Competent Authority.</i></p>	

4. The aforesaid complaints were filed against the promoter on account of violation of the buyer's agreement against the allotment of units in the upcoming project of the respondent/builder and for not handing over the physical possession by the due date, seeking award of handover the physical



possession of the allotted unit along with delayed possession charges and others.

Sr. No	Complaint No., Case Title, and Date of filing of complaint	Reply status	Unit No.	Date of execution of agreement to sell and Offer of possession	Due date of possession	Total Consideration/Total Amount paid by the complainants in Rs.
1.	CR/285/2023  Khursheed Zafar V/S M/s Eminence Township (India) Private Limited  Date of Filing of complaint 31.01.2023	Reply received on 28.11.2023	B-1106 on 11 <sup>th</sup> floor Tower B,  Area admeasuring 601 sq. ft.  [As per annexure- C1 on page no. 30 of the complaint]	<b>15.11.2013</b>  (As per annexure- 2 at page no. 25 of the complaint)  <b>Offer of possession: - 17.07.2019</b>  (Page no. 52 of the complaint)	01.12.2017  [Calculated from the date of start of the ground floor roof slab of the particular tower i.e., 01.06.2014 being later as clarified by the counsel of the respondent during proceeding dated 02.05.2024]  (Grace period of 6 months is allowed)	TSC: - 39,39,672/-  (As per payment plan on page no. 49 of the complaint)  AP: - 38,70,234/-  (As receipt information at page no. 51 of complaint)
2.	CR/286/2023  Mrs. Filzah Ehtesham and Dr. Syed Asad Rahman V/S M/s Eminence Township (India) Private Limited  Date of Filing of complaint 31.01.2023	Reply received on 28.11.2023	1006 on 10 <sup>th</sup> floor, Tower C  Area admeasuring 601 sq. ft.  (As per annexure- C1 on page no. 31 of the complaint)	<b>17.10.2013</b>  (As per annexure- C1 on page no. 26 of the complaint)  <b>Offer of possession: - 17.07.2019</b>  (as per annexure C-4, at page no. 54	01.12.2017  [Calculated from the date of start of the ground floor roof slab of the particular tower i.e., 01.06.2014 being later as clarified by the counsel of the respondent	TSC: - 47,51,022/-  (As per payment plan on page no. 51 of the complaint)  AP: - 46,77,475/-  (As receipt information at page no. 51 of complaint)

*R*

				of the complaint)	during proceeding dated 02.05.2024]  (Grace period of 6 months is allowed)	
<p><b>The complainant in the above complaints have sought the following reliefs:</b></p> <ol style="list-style-type: none"> <li>1. Direct the respondent to handover the possession of the unit in all respect of the complainant immediately as per the buyer's agreement.</li> <li>2. Direct the respondent to pay interest @18% p.a. for every month of delay from the date of payment till the handing over of possession of the apartment complete in all aspects.</li> <li>3. Direct the respondent not to charge any payment from the complainants due to premature possession.</li> </ol>						
<p><b>Note: In the table referred above, certain abbreviations have been used. They are elaborated as follows:</b></p> <p><b>Abbreviation Full form</b>  TSC Total Sale consideration  AP Amount paid by the allottee(s)</p>						

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 both the complaints filed by the complainant(s)/allottee(s) are also similar. Out of the above-mentioned case, the particulars of lead case **CR/285/2023 titled as Khursheed Zafar V/S M/s Eminence Township (India) Private Limited** are being taken into consideration for determining the rights of the allottee(s) qua of handover the physical possession of the allotted unit along with delayed possession charges and others.

**A. Project and unit related details**



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

***CR/285/2023 titled as Khursheed Zafar V/S M/s Eminence Township (India) Private Limited***

S. N.	Particulars	Details
1.	Name and location of the project	"Eminence Kimberley Suites", Sector-112, Village Bajghera, Gurugram
2.	Project area	2.875 acres
3.	Nature of Project	Commercial colony
4.	DTCP license no. and validity status	35 of 2012 dated 22.04.2012 Valid up to 21.04.2025
5.	Name of Licensee	M/s Eminence Township (India) Pvt. Ltd. (Formerly known as KPS Colonizer Pvt. Ltd.)
6.	RERA registered/not registered and validity status	<b>Registered</b> registered vide 74 of 2017 dated 21.08.2017 Valid up to 31.12.2020
7.	Unit No.	B-1106, 11 <sup>th</sup> Floor, Tower-B (Page no. 27 of complaint)
8.	Unit area admeasuring	601 sq. ft. (Page no. 27 of complaint)
9.	Allotment letter	17.07.2013 (Page no. 25 of reply)
10.	Date of buyer agreement	<b>15.11.2013</b> (Page no. 25 of complaint)
11.	Possession clause	<b>27. Possession</b> <i>The company based on its presentation plans and estimates and subject to all exceptions shall endeavour to complete the construction of the said project <b>within</b></i>



		<p><b>36 months (plus 6 months grace period) from the date of start of the ground floor roof slab of the particular tower in which the booking is made, subject to timely payment by the Allottee(s) of sale price and other charges due and payable according to the Payment Plan applicable to him/her/them and/or as demanded by the company and subject to force majeure circumstances including but not limited to clause 27 and 28. The possession of the Said unit(s) shall, however, be offered only after grant of completion/occupation certificate from the Competent Authority.</b></p> <p><b>(Emphasis Supplied)</b></p>
12.	Date of commencement of construction	01.06.2014 (Note: - To be clarified by the counsel of the respondent during proceeding dated 02.05.2024)
13.	Date of approval of revised building plans	08.02.2018 (As per information available on the website of tcpharyana.gov.in)
14.	Due date of possession	01.12.2017 (Note: - Calculated from the date of start of the ground floor roof slab of the particular tower i.e., 01.06.2014 being later)
15.	Total Sale Consideration	Rs.39,39,672/- (as per payment plan at page no. 49 of complaint)
17.	Amount paid by complainants	Rs.38,70,234/- (Page no. 51 of complaint)
18.	Occupation certificate	11.07.2019 for Tower-2, 3, Commercial Block & Basement. (as per data available at official website of DTCP)

19	Offer of possession	17.07.2019 (Page no. 52 of complaint)
----	---------------------	--

**B. Facts of the complaint**

8. The complainant has made the following submissions in the complaint: -
- a. That sometime in November, 2013, the complainant was desirous of purchasing a studio apartment in a gated society in Gurugram and were heavily influenced by the brochure issued and circulated by the respondent in the market. The complainant approached the respondent to explore the units in the project namely "Eminence Kimberley Suites" situated at Sector 112, Village Bajghera, Gurgaon Tehsil, Gurgaon, and Haryana.
  - b. That the respondent painted an extremely rosy picture of the subject project, stating that the respondent is developing the above project with the assistance of internationally renowned architects and the project shall be a state of art premier project and would be one of its kinds. It was also stated that the project i.e., "Eminence Kimberly Suites" are exclusive studio apartment being raised on picturesque landscape along-side a tailor-made commercial hub. The respondent/promoter induced the complainant by stating that the project shall have unmatched facilities from world class swimming pool to a power yoga center. It was represented by the respondent that all necessary sanctions and approvals had been obtained to complete the project and the said project will be developed and possession will be handed over within the promised timeframe.
  - c. That believing upon the false representations made by the representatives of the respondent, the complainant shortlisted a unit in

the project in question. The complainant, after the various negotiations for an apartment suited to their taste and budget, booked the unit and paid a substantial amount towards booking unit charges.

- d. That based upon the representations of the respondent, the complainant was induced to sign a pre-printed flat buyer's agreement dated 15.11.2013. The complainant had opted for construction linked plan which is duly recorded in the annexure-III (structure of payments) of the said flat buyer's agreement. As per buyer's agreement the respondent had allotted a unit bearing no. 1106 in tower b, admeasuring super area of 601 sq. ft. in favor of the complainant.
- e. That the respondent/promoter had accepted the booking from the complainant and other innocent purchasers in year 2012, however the respondent deliberately and with mala-fide intentions delayed the execution of the buyer's agreement. Furthermore, the respondent very slyly has stated in clause 32 of the buyer's agreement that the period of handing over of possession shall being from the date when the demand for laying of ground floor roof slab shall be raised by the respondent, however neither any such demand was ever raised nor any such demand is mentioned in the payment schedule annexed with the buyer's agreement and rather demand for construction of stilt floor was raised by the respondent on 02.01.2014.
- f. That the respondent had promised to complete the project within a period of 36 months from the date of laying ground floor slab, i.e., 01.02.2014 with a further grace period of six months. However, the respondent has failed to complete the project in the said timeframe, resulting in extreme kind of mental distress, pain and agony to the



complainant. Furthermore, the respondent/promoter had collected more than 95% of the sale consideration within three years of the booking and as such the gross delay in completion of the project is solely attributable to the respondent/promoter. It is further most humbly submitted that the Respondent has delayed the execution of the buyer's agreement in order to safeguard itself from the compensation clause as enshrined under the buyer's agreement and hence the delay in execution of the agreement is solely attributable upon the respondent and thus the period of 36 months should begin from the date of first payment.

- g. That the respondent has failed to complete the project in time, resulting in extreme mental distress, pain and agony to the complainant. The respondent has deliberately delayed the execution of the BBA as it is only the builder buyer agreement which contains the possession delivery clause and also the compensation clause and hence to safeguard itself from the liabilities and future litigation, the respondent delayed the execution of BBA.
- h. The bare reading of the clauses in the buyer's agreement for example clause 9,17,21,24,25,26,31, and 32 etc. show the unfairness and arbitrariness of the terms imposed upon the innocent buyers. The respondent exercised arbitrary power and highhanded approach and moreover the unfair attitude is apparent on face of record as the respondent has imposed all liabilities on buyers and conveniently relieved itself from the obligations on its part.
- i. The complainant has made visits at the site and observed that there are serious quality issues with respect to the construction carried out by respondent till now. The apartments were sold by representing that the

same will be luxurious apartment however, all such representations seem to have been made in order to lure complainant to purchase the apartments at extremely high prices. The respondent has compromised with levels of quality and are guilty of mis-selling. There are various deviations from the initial representations. The respondent marketed luxury high end apartments, but they have compromised even with the basic features, designs and quality to save costs. The structure, which has been constructed, on face of it is of extremely poor quality. The construction is totally unplanned, with sub-standard low grade defective and despicable construction quality.

- j. The respondent/ promoter in the year 2017 invited objections from the all the allottees in order to comply with the directions of DTCP in regard to change in sanctioned plan. It is respectfully submitted that the complainant submitted their objections to the DTCP giving their no-objection with regard to the change in the sanctioned plan, however till date the complainant has neither heard a single word from the respondent nor the respondent has informed the complainant about the change in plan and its consequences on the complainant.
- k. The respondent upon receipt of the occupation certificate for the unit in question has immediately sent a pre-mature offer of possession dated 17.07.2019 to the complainant, despite the fact that neither the unit is complete till date nor the promised facilities and amenities. It is stated that replying on the one-sided unfair terms of the builder buyer's agreement, they have imposed excessive penalties and costs.
- l. That the respondent has sold the project stating that it will be next landmark in luxury housing and will redefine the meaning of luxury but

the respondent has converted the project into a concrete jungle. There are no visible signs of alleged luxuries. It is stated that by issuing the premature offer of possession, the respondent trapped the complainant to make payment of exorbitant amount while the respondent was aware that he had not fulfilled his own commitments to the complainant.

**C. Relief sought by the complainant: -**

9. The complainant has sought following relief(s)
  - a. Direct the respondent to handover the possession of the unit in all respect of the complainant immediately as per the buyer's agreement.
  - b. Direct the respondent to pay interest @18% calculated from 01.12.2017 i.e., 36 months from the date of the agreement, by when construction ought to have been completed and possession handed over.
  - c. Direct the respondent not to charge any payment from the complainants due to pre-mature possession.
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 contested the complaint on the following grounds: -
  - i. That the complaint on own accord approached the respondent to purchase a commercial unit, in the one of the projects namely "Eminence Kimberly Suites" situated in Sector 112, Village Bajgerha, Gurugram, Haryana vide a duly filled application form. It is needless to state that the application form, was duly filed by the complainant, contained all the terms of the allotment and sale, which were replicated by the respondent in builder buyer agreement. That, as per the terms of application form, it was categorically



agreed in clause 13 of the application form that, the construction of the said unit is proposed to be completed by the company within 36 months (plus 06 months grace period) from the date of start of the ground floor roof slab of the particular tower in which the booking is made, subject to timely payment by the applicant(s) of sale price, stamp duty, and other charges due and payable according to the payment plan applicable to him/her/them and/or as demanded by the company and subject to force majeure circumstances. The possession of the said unit shall, however, be offered only after grant of completion/occupation certificate from the competent authority, thus, the question of duress and un-arbitrary agreement does not arise.

- ii. That subsequent to the above application form a letter of allotment for unit bearing no. B-1106, admeasuring 601 sq. ft. stood duly allotted in the name of the complainant (s) vide an allotment letter and subsequently, on 15.11.2013, a buyer's agreement was executed between the complainant & respondent. That as per the said buyer's agreement, it was clearly stated & mutually agreed by the complainant & respondent in clause 30, that subject to all exceptions, the respondent shall endeavour to completethe construction of the said project within 36 (thirty-six) months (plus 6 months grace period) from the date of start of the stilt/ground floor slab of the particular tower in which the booking is made by the allottee.
- iii. That the complainant has not come with clean hands before the Authority and has suppressed material facts thus the present petition should be dismissed on the ground of '*Supressio Veri*'. That, the complainant has misappropriated the fact that the respondent has offeredthe possession without providing basic amenities in the project such as water, electricity

A

etc. whereas, the respondent has obtained the part occupancy certificate and has provided all the required amenities at the project site. That, apart from being patently untrue, the contentions as imposed by the complainant, reek of a desperate greed to unlawfully extracting money from the respondent, as the possession was offered by the respondent on 17.07.2019, and the same stands acknowledged by the complainant.

iv. That the complainant on 17.07.2019, the complainant was already communicated with the offer of possession but even after post-delivery of possession offered by the respondent, the complainant in order to evade from the maintenance charges has filed the present complaint under an ill-intention & with a sole motive of extorting money from the respondent, without any fault of the respondent. It is submitted that the respondent has diligently invested all the money collected from the investors in the project itself and has never diverted any funds on any account and even if, for the sake of arguments, it is presumed, that the construction has got jeopardized then also it has purely been caused due to unfavorable & unforeseen circumstances, in the intervening periods which has materially and adversely affected the project and were beyond the control of the respondent, the same are being set out herein under: -

- On account of every halt due to the Ban on Construction Activities, following the order of National Green Tribunal and Pollution Control Board, the entire machinery of the Respondent used to suffer adversely and it took long periods, for the Respondent to remobilize the entire construction activity and increased cost of construction. The delay account of force majeure is as follows: -

12

S. No.	Year	Order Dated	Closure of sites (From-To)	Delay, due to halt
1.	2016	10.11.2016	09.11.2016- 15.11.2016	90 days
2.	2017	09.11.2017	09.11.2017- 16.11.2017	75 days
3.	2018	14.06.2018	15.06.2018 16.06.2018	45 days
4.	2018	29.10.2018	01.11.2018- 10.11.2018	45 Days
5.	2018	24.12.2018	25.12.2018- 26.12.2018	35 Days

- That further in the month of 19.03.2018, when the respondent was about to apply for occupancy certificate, it faced challenges in for renewal of license for the said project and it was only after a period of 06 months i.e. on 03.08.2018, the DTCP reverted back to the respondent company with erroneous demand and further after efforts of the respondent company, the said demand was rectified and was notified back to the respondent on 01-02-2019, only and the said demand has already been paid along with future due demands by the respondent company, acting under its bonafide. It is stated that the occupancy certificate, which is to be obtained before offer of possession was applied for immediately after said rectification. Thus, the force majeure existed from 19.03.2018 till 01.02.2019 i.e., approx. 11 months on account of governmental delays.
- That even otherwise the period of possession of the said unit, as per the builder buyer's agreement is to be counted from the date of laying off the ground floor roof slab i.e. starting from 01.06.2014. Thus, in the terms of the builder buyer agreement, it is stated that the due date for

*A*

possession was 01.12.2017 i.e. 42 months from the date of laying of ground floor slab, subject to force majeure.

- That it is pertinent to mention herein that on account of delays due to NGT orders (09 months and 20 days), correction of erroneous EDC/ IDC demand (11 months), overlaps with each other and caused a total period of force majeure as 18 months, and in the light of the above stated force majeure, the work at the project site was to be completed on or before May 2019 and accordingly possession was to be offered.
- That the works at the project site were completed on 26.03.2018 and the respondent had applied for occupancy certificate to DGTCP, Haryana at Chandigarh and subsequently the DGTCP, Haryana post its inspection & as per provisions of applicable law, have already granted the occupancy certificate on 11.07.2019.
- That the offer of possession has already been issued by the respondent to the complainant on 17.07.2019 and the unit is pending physical possession, payment of outstanding dues, and execution of conveyance deed for which the complainant themselves are liable to purchase the stamp duty and provide the same to respondent for execution of sale deed. Thus, the present petition of the complainant is liable to be dismissed as the offer of possession has been complied with in accordance to the law and as per the terms of buyer's agreement and thus, on account of default of the complainant, the present complainant is neither legitimate nor permissible under law. Thus, there is no delay which has been caused.

A

- v. That the respondent has constructed the project as per its brochure and has complied with all the norms & directives as set by the State of Haryana and the complainant has not come before the Authority with clean hands and has made every plausible effort to misguide the authority by making a bogus claim. That, it is stated by the respondent, that the project is complete with all the necessary amenities.
- vi. That, the complaint, filed by the complainant is vexatious, frivolous and not maintainable as the same is devoid of true facts and thus is liable to be dismissed at the very threshold.
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 written submissions made by the parties.

**E. Jurisdiction of the authority**

13. The authority has complete territorial and 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, Haryana the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. 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**

*12*



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 of 2016 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 delay due to force majeure events.**

17. The respondent-promoter raised the contention that the construction of the project was delayed due to force majeure conditions such as various orders passed by Hon'ble Supreme Court and other Authorities to curb the pollution in NCR and outbreak of Covid-19 pandemic. The counsel for the respondent also contended that the unit/tower was completed on 26.03.2018 and application for renewal of licence was made but grant of OC delayed due to renewal of licence which was also obtained. The delay in grant of OC also

happened due to reconciliation of EDC dues. The delay has happened due to ban on construction and demonetization. It further requested that the said period be excluded while calculating due date for handing over of possession. The Authority observes that the respondent has placed reliance on orders dated 01.11.2019 and 04.11.2019 of Environment Pollution (Prevention & Control) Authority and Hon'ble Supreme Court of India to curb the pollution in the NCR. Further, in the instant complaint, as per clause 27 of agreement dated 15.11.2013 executed between the parties, the due date of handing over of possession was provided as 01.12.2017. Grace period of 6 months is allowed being unconditional. The respondent/builder in the instant matter has already obtained the occupation certificate of the complainant unit from the competent authority on 11.07.2019. Hence, the plea regarding admissibility of any further grace period on account of aforesaid circumstances is untenable and does not require any further explanation.

**F.II. Objection regarding entitlement of DPC on ground of complainants being investor.**

18. The respondent has taken a stand that the complainant is the investor and not consumers and therefore, she is not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same

time the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainant is buyer and he has paid total price of Rs.38,70,234/- to the promoter towards purchase of an apartment in its project. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

*"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"*

19. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyer's agreement executed between promoter and complainant, it is crystal clear that they are allottee(s) as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.

**G. Findings on the relief sought by the complainant.**

- G.1 Direct the respondent to handover the possession of the unit in all respect of the complainant immediately as per the buyer's agreement.**

20. The complainant took a plea that offer of possession was made in 2019, but the respondent has failed to handover the physical possession of the allotted unit. On the documents available on record, the respondent has offered the possession of the allotted unit on 17.07.2019 after obtaining occupation certificate from competent authority on 11.07.2019.
21. The respondent is under obligation to handover the possession of the allotted unit to the complainant complete in all aspects as per specifications of buyer's agreement on payment of outstanding dues if any. After consideration of the facts and circumstances, the authority is of view that as per section 19(6) and 19(7) of the Act every allottee shall be responsible to make necessary payments as per agreement for sale along with prescribed interest on outstanding payments from the allottee and to take physical possession of the apartment as per section 19(10) of the Act. In view of the same, complainant/allottees shall make the requisite payments within a period of 2 months of the fresh demand raised by the respondent after revising the rate of interest to be levied on the maintenance dues as per the provisions of sections 19(6) and (7) of the Act. Thus, the complainant is directed to take physical possession of the subject unit after payment of outstanding dues if any, within two months from the date of this order as the OC and CC in respect of the said project has already been obtained by the respondent from the competent authority.

**G.II Direct the respondent to pay interest @18% calculated from 01.12.2017 i.e., 36 months from the date of the agreement, by when construction ought to have been completed and possession handed over.**

22. In the present complaint, the complainant intends to continue with the project and is seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under:

A

**Section 18: - Return of amount and compensation**

*"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."*

23. As per clause 27 of the buyer's agreement dated 15.11.2013, provides for handover of possession and is reproduced below:

**27. Schedule for Possession of the Said Unit:**

*The company based on its presentation plans and estimates and subject to all exceptions shall endeavour to complete the construction of the said project within 36 months (plus 6 months grace period) from the date of start of the ground floor roof slab of the particular tower in which the booking is made, subject to timely payment by the Allottee(s) of sale price and other charges due and payable according to the Payment Plan applicable to him/her/them and/or as demanded by the company and subject to force majeure circumstances including but not limited to clause 27 and 28. The possession of the Said unit(s) shall, however, be offered only after grant of completion/occupation certificate from the Competent Authority.*

24. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the flat buyer's agreement by the promoter are just to evade the liability towards timely delivery of subject unit and to

A

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.

25. **Admissibility of grace period:** The respondent/promoter has proposed to handover the possession of the unit within 36 (thirty six) months (plus 6 months grace period) from the date of start of the ground floor roof slab of the particular tower in which the booking is made. The grace period of 6 months is allowed as is unqualified/unconditional and is sought for handing over of possession. Therefore, the due date of possession comes out to be 01.12.2017.
26. During proceeding dated 02.05.2024, the counsel for the respondent contends that the due date for possession of the unit in question is to be computed from the initiation of the ground floor roof construction of the specific tower, which commenced on 01.06.2014. Accordingly, the due date of possession, inclusive of a grace period of six months, was 01.12.2017. It is further highlighted that an offer of possession was already stand made to the complainant on 17.07.2019 subsequent to obtaining the Occupancy Certificate (OC) from the Department of Town and Country Planning (DTCP) on 11.07.2019.
27. **Conversely**, the counsel for the complainant asserts that the unit fails to meet the specifications as outlined on page 52 of complaint. He further contends that maintenance charges have been levied from the date of offer of possession offer, rather than from the actual date of possession.
28. **Admissibility of delay possession charges at prescribed rate of interest:**  
The complainant is continuing with the project and seeking delay possession

charges. However, proviso to section 18 provides 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 possession, at such rate as may be prescribed and it has been prescribed 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.

29. 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.
30. 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., 02.05.2024 is **8.85%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.85%**.
31. The definition of term 'interest' as defined under section 2(z) 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;"*

32. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 10.85% by the respondent/promoter which is the same as is being granted to the complainants in case of delayed possession charges.
33. On consideration of the documents available on record and submissions made by the parties regarding contravention as per provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. The authority has observed that the apartment buyer agreement was executed on 15.11.2013 and the possession of the subject unit was to be offered with in a period of 36 months plus 6 months from the date of start of the ground floor roof slab of the particular tower. The authority calculated due date of possession from the date of start of the ground floor roof slab of the particular tower i.e., 01.06.2014 which comes out to be 01.12.2017. As far as grace period is concerned, the same is allowed for the reasons quoted above. Occupation certificate was granted by the concerned authority on 11.07.2019 and thereafter, the possession of the subject flat was offered to the complainant on 17.07.2019. Copies of the same have been placed on record. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the subject flat and it is failure on part of the promoter to fulfil its obligations and responsibilities as

A



per the buyer's agreement dated 15.11.2013 to hand over the possession within the stipulated period.

34. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 11.07.2019. The respondent offered the possession of the unit in question to the complainant only on 17.07.2019, so it can be said that the complainant came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainant should be given 2 months' time from the date of offer of possession. These 2 months of reasonable time is being given to the complainant keeping in mind that even after intimation of possession practically she has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession till actual handing over of possession or offer of possession plus two months whichever is earlier.
35. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainant is entitled to delayed possession at prescribed rate of interest i.e., 10.85 % p.a. w.e.f. 01.12.2017 till the expiry of 2 months from the date of offer of possession (17.07.2019) which comes out to be 17.09.2019 as per provisions of section 18(1) of the Act read with rule 15 of the rules and section 19(10) of the Act.

A

**G.III Direct the respondent not to charge any payment from the complainants due to pre-mature possession.**

36. As far as holding charges are concerned as per annexure C-5 at page 54 of the complaint, the developer having received the sale consideration has nothing to lose by holding charges of the allotted unit, except that it would be required to maintain the apartment. Therefore, the holding charges will not be payable to the developer. Even in a case where the possession has been delayed on account of the allottee having not paid the entire sale consideration, the developer shall not be entitled to any holding charges though it would be entitled to interest for the period the payment is delayed.
37. Further, the respondent is not entitled to claim holding charges from the complainant/allottee at any point of time even after being part of the buyer's agreement as per law settled by *Hon'ble Supreme Court in Civil appeal nos. 3864-3899/2020 decided on 14.12.2020 (supra)*. Therefore, in light of the above, the respondent shall not be entitled to any holding charges though it would be entitled to interest for the period the payment is delayed.
38. Moreover, the respondent is right in demanding advance maintenance charges at the rates' prescribed in the builder buyer's agreement at the time of offer of possession. However, the respondent shall not demand the advance maintenance charges for more than one year from the allottee even in those cases wherein no specific clause has been prescribed in the agreement or where the AMC has been demanded for more than a year.

**H. Directions of the Authority**

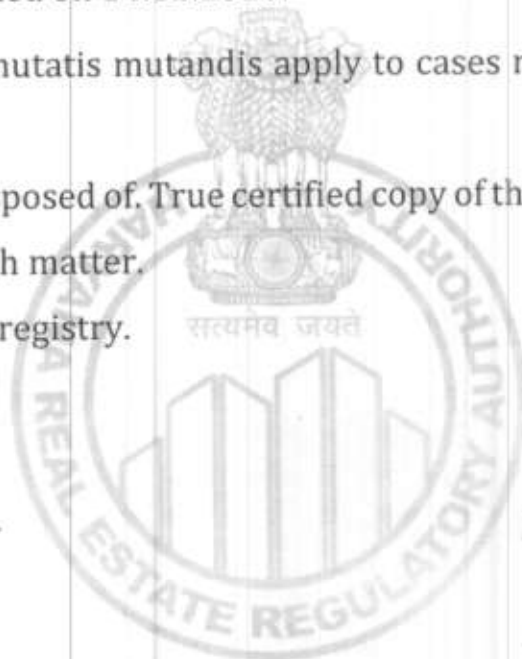
39. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast

upon the promoter as per the function entrusted to the authority under section 34(f):

- i. The respondent is directed to pay interest to each of the complainant against the paid-up amount at the prescribed rate i.e., 10.85% per annum for every month of delay on the amount paid by the complainant from due date of possession i.e. 01.12.2017 till the expiry of 2 months from the date of offer of possession (17.07.2019) which comes out to be 17.09.2019 as per provisions of section 18(1) of the Act read with rule 15 of the rules and section 19(10) of the Act. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order as per rule 16(2) of the rules.
- ii. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.85% by the respondent/promoter which is the same rate of interest which the promoter 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.
- iii. The respondent is directed to issue a revised statement of account after adjustment of delay possession charges within a period of 15 days.
- iv. The complainant is directed to pay outstanding dues, if any, within 30 days after receipt of the revised statement of account and the respondent shall handover the physical possession in next 30 days to the complainant /allottee.

- v. The respondent shall not charge anything from the complainants which is not the part of the buyer's agreement. The respondent is not entitled to charge any amount against holding charges from the complainant/allottee at any point of time even after being part of the buyer's agreement as per law settled by Hon'ble Supreme Court in Civil appeal nos. 3864-3889/2020 decided on 14.12.2020.
40. This decision shall mutatis mutandis apply to cases mentioned in para 3 of this order.
41. Complaints stand disposed of. True certified copy of this order shall be placed in the case file of each matter.
42. File be consigned to registry.

Dated: 02.05.2024



**HARERA**  
**GURUGRAM**

v.1 - 5  
(Vijay Kumar Goyal)  
Member  
Haryana Real Estate  
Regulatory Authority,  
Gurugram