

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

Complaint no.: 1990 of 2024
Date of decision: 02.04.2025

1. Shikha Kalia
2. Bodh Raj Kalia
Both R/o:- 4196, Sector-23-A, Gurugram.

Complainants

Versus

M/s Eminence Townships India Pvt Ltd.
Registered Office at: Plot No. 44,
Ground Floor, Sector-32, Institutional Area,
Gurugram, Haryana.

Respondent

CORAM:

Shri Ashok Sangwan

Member

APPEARANCE:

Dinesh Munday (Advocate)

Complainants

Sumit Mehta (Advocate)

Respondent

ORDER

1. The present complaint has been filed by the complainants/allottees under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations

made there under or to the allottees as per the agreement for sale executed inter se.

A. Unit and project related details

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

| S.No. | Particulars | Details |
|-------|-------------------------|--|
| 1. | Name of the project | "Kimberly Suites" |
| 2. | Nature of project | Commercial colony |
| 3. | Location of the project | Sector-112, Gurugram, Haryana. |
| 4. | RERA registered | Registered Vide registration no. 74 of 2017 Dated-21.08.2017 |
| 5. | DTCP License | Licence no. 35 of 2012 Dated-22.04.2012 |
| 6. | Allotment letter | 06.04.2013 (As on page no. 31 of complaint) |
| 7. | Buyer's Agreement | 02.12.2013 (As on page no. 42 of complaint) |
| 8. | Unit no. | C-0402, Floor-4 th (As on page no. 43 of complaint) |
| 9. | Unit Area | 601 sq.ft. [Super Area] (As on page no. 43 of complaint) |

| | | |
|-----|------------------------|---|
| 10. | Possession clause | <p>Clause-27 Schedule for possession of the Said unit</p> <p><i>The Company based on its present plans and estimates and subject to all exceptions shall endeavor to complete the construction of the said Project 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, 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 clauses 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> <p><i>[Emphasis supplied]</i></p> <p><i>(As on page no. 48 of complaint)</i></p> |
| 11. | Due date of possession | <p>01.12.2017</p> <p>[Calculated 36 months from the date of casting of "Ground Floor Roof Slab" i.e., 01.06.2014 plus 6 months grace period]</p> <p>[Note: Date of casting of "Ground</p> |

| | | |
|-----|------------------------|--|
| | | Floor Slab" ascertained from the reply filed by the respondent at page no. 2 of its reply] |
| 12. | Sale consideration | Rs.39,39,672/- (As per structure of payments on page no.41 of reply) |
| 13. | Amount paid | Rs.30,09,653/- |
| 14. | Occupation certificate | 11.07.2019 (As on page no. 66 of reply) |
| 15. | Offer of possession | 20.07.2019 (as on page no. 68 of reply) |

B. Facts of the complaint:

3. The complainants made the following submissions in the complaint.
1. That the respondent launched a Group Housing project namely "Eminence Kimberly Suites" at Sector-112, Gurugram, Haryana. In 2011, after seeing many alluring advertisements of the respondent in different newspapers about offering a residential flat/unit in their said upcoming project i.e. "Eminence Kimberly Suites" of the respondent, the complainants contacted the respondent to purchase flat in the said project and the complainants booked a Flat bearing no- C-0402, on fourth floor, having an approximate super area admeasuring 601 sq. ft. in the project for a total sale consideration of Rs.38,65,632/- and paid an amount of Rs.3,00,000/- on 22.09.2011 through cheque/DD and the same was acknowledged vide acknowledgment dated 23.10.2011.

- II. That on 25.01.2012 the complainants made a payment amounting to Rs.3,50,000/- . As per the demand of respondent, on 29.03.2013 the complainants also made the payment of Rs.4,50,000/- .
- III. That thereafter the respondent issued an Allotment Letter dated 06.04.2013 to the complainants in respect of aforesaid unit. As per the demand of respondent, on 27.07.2013 the complainants also made the payment of Rs.3,65,000/- vide cheque no. 296129 to the respondent and the same was acknowledged by the respondent on 30.07.2013.
- IV. That as per the demand of respondent, on 03.03.2014 the complainants paid Rs.3,43,114/- vide cheque no. 011202 to the respondent. That the complainants paid Rs.63,735/- vide cheque no. 148201 on 30.01.2015. Rs.2,80,000/- vide cheque no. 000003 on 24.01.2015.
- V. That the Buyer's Agreement was executed on 02.12.2013 with the complainants for the sale & transfer of the unit with the promise and assurance that all the terms and conditions of the same would be duly complied by the respondent without any default.
- VI. That at the time of booking of the flat, the respondent duly assured the complainants that they would deliver the physical possession of the unit within 36 months plus 6 months grace period from the date of start of construction.
- VII. That the complainants visited the project site and were shocked to see that the construction work was not in progress and from physical verification at the project site, the complainants were of the view that the respondent will not be able to deliver the possession of the unit in the near future.

- VIII. That the complainants made the payments as per the Payment Plan and have paid a total sum of Rs.30,09,653/- to the respondent in respect of the above said unit.
- IX. That the above said period of 36 months (plus grace period) expired in the month of April, 2016 but till date the physical possession of the unit has not been handed over to the complainants.
- X. That in view of the delay in handing over possession of the unit, the complainants seeks refund of the entire amount paid to the respondent in respect of the above said unit along with interest @ 24% per annum from the date of deposit till the realization of the amount along with penalty amount and towards mental harassment and agony caused by the respondent i.e. Rs.10,00,000/-.
- XI. That the respondent have ignored the request of the complainants to refund their amounts. It is pertinent to mention here that the terms of the agreement are completely one sided and favour only the company and the same has been formulated in a way that they can take undue advantage of their dominant position at the site where the project is being developed and harass the complainants into making payments as and when demanding.

C. Relief sought by the complainants:

4. The complainants have filed the present compliant for seeking following reliefs:
- i. Direct the respondent to refund the total amount of Rs.30,09,653/- paid by the complainants to the respondent along with interest from the date of deposit till the realization of the amount.
 - ii. Direct the respondent to pay litigation charges amounting to Rs.10,00,000/-.

5. On the date of hearing, the Authority explained to the respondent /promoter about the contravention 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 respondent:

6. The respondent has contested the present complaint on the following grounds:

- I. That the complainants have not approached the Authority with clean hands and have deliberately suppressed material facts, warranting the dismissal of the present complaint on the grounds of 'Suppressio Veri'. According to the terms of the Buyer's Agreement, the complainants had opted for a "Construction Linked Payment Plan", requiring them to make timely payments in accordance with the construction progress of the tower in which their unit is located.
- II. That the complainants defaulted on payments after the 9th installment, which was due "On Start of Terrace Floor" and was paid on 03.10.2017 and 07.10.2017. Subsequently, the complainants failed to make payments for the next five installments as per the Buyer's Agreement, resulting in an outstanding principal balance of Rs.12,23,172.70/-. Despite numerous reminders, including those sent at the time of Offer of Possession on 20.07.2019, the complainants have failed to fulfill their payment obligations and have suppressed these facts from the Authority.
- III. That as per clause 27 of the Builder Buyer Agreement, the possession of the unit was to be handed over within 36 months along with a grace of 06 months from the date of casting of "Ground Floor Roof Slab" subject to Force Majeure Conditions i.e. a period of 42 months starting

from 01.06.2014 and completing on 01.12.2017 subject to force Majeure Conditions. The construction on the project site (in the tower in which the complainant's unit is situated) were duly completed by the respondents in the month of January 2017, when the demand for flooring works was raised.

- IV. That the respondent applied for the revision of the Building Plans on 04.10.2016 and received an In-Principle Approval for the same on 01.09.2017. Thereafter, the suggestions were invited from all the existing allottee (s) including the complainant, and it was only after due scrutiny, the building plans were approved on 08.02.2018. Thus, thereby causing a delay of 493 days i.e. the intervening period between 01.04.2016 to 08.02.2018 on account of departmental delays in approval of revised 'Building Plan', thereby making the due date for Offer of Possession as 07.04.2019.
- V. That further, immediately after the receipt of the revised building plans, the respondent on 19-03-2018, applied for renewal of license for the said project, and it was only on 03-08-2018, the DTCP, Chandigarh reverted back to the respondent. But due to some accounting error on the part of DTCP, Chandigarh an erroneous demand of EDC / IDC charges got raised and further it was only on account of efforts of the respondent, the said demand was rectified and reduced from Rs.488.93 lakhs to Rs.366.63 lakhs on 01-02-2019.
- VI. That it is noteworthy to state that in an event a wrong EDC / IDC charge would have got levied and payable by the allottees of the project including the present complainants and thus, it shall not be wrong to state that the respondents should not be penalized for acting in the interest of the customers. Irrespectively, due to the

governmental delays caused due to from 19.03.2018 till 01.02.2019, the period of delay of 319 days is due to be exempted on account of Force majeure conditions and the due date for possession stood extended upto 20.02.2020.

- VII. That the respondent have already granted the Occupation Certificate on 11-07-2019. It is further submitted that the period taken by the government office for grant of part occupation certificate from the date of application is also covered under force majeure conditions and thus the period for offer of possession stood further, extended by 106 days and the due date for possession got extended upto 05-06-2020.
- VIII. That even after the existence of the Force Majeure Condition, as the respondent was excessively diligent in executing the work, the possession of the unit was offered well before the due date for offer of possession and the offer of possession was made on 20.07.2019. Thus, the offer of possession was given to the complainants in a timely manner and even before lapse of the agreed time period as specified in the application form and the Builder Buyer Agreement. Thus, the complaint is liable to be dismissed on this account itself.
- IX. That the complaint suffers from bar of the Limitation Act, 1963, the complainant has placed reliance that the relief of refund is being sought on account of delay in handover of the possession of the allotted unit. It is stated that the complainants have concealed the very fact that the "Offer of possession" of the unit was offered on 20.07.2019 and numerous reminders were also sent to the complainant. It is on account of failure of the complainants themselves that they have not taken over the physical possession of the unit for more than 5 years. That as the cause of action is claimed to have been

arisen on account of failure of delivery of possession, and in the light of offer of possession the complaint is bad in law and is liable to be dismissed and the complainant be directed to make the balance payment and take-over the physical possession of the unit.

7. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority:

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

E. I Territorial jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram district. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottees as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11(4)(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 allottee as per the agreement for sale, or to the association of allottee, as the case may be, till the conveyance of all the apartments,

plots or buildings, as the case may be, to the allottee, or the common areas to the association of allottee or the competent authority, as the case may be;

9. 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.
10. Further, the Authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2021-2022 (1) RCR (Civil), 357*** and reiterated in case of ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*** wherein it has been laid down as under:

"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. if the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."

11. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the cases mentioned above, the Authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

F. Findings on the objections raised by the respondent

F.I Objection regarding Force majeure circumstances.

12. The respondent-promoter has raised an objection that the handover of possession has been delayed due to certain circumstances which were beyond the control of the respondent and stated that the delay was caused due to the revision of the building plans, renewal of license for the project, accounting errors on the end of the DTCP, Chandigarh in calculating the EDC/IDC charges, governmental delays caused due from 19.03.2018 till 01.02.2019, the period of 319 days is due to be exempted on account of Force Majeure conditions.
13. The Authority observes that as per Clause 27 of the Buyer's Agreement dated 02.12.2013, the respondent had to handover possession of the unit to the complainants within 36 months (plus 6 months grace period) from the date of start of casting of the ground floor roof slab of the particular tower in which the unit of the complainant's is situated. As per the reply, the respondent admitted that the date for "Casting of ground floor roof slab" was 01.06.2014 and therefore the due date for handing over of possession was 01.12.2017 (36 months from the date 01.06.2014 plus grace period of 6 months). The respondent-promoter has raised an objection that the delay have been caused due to certain force majeure circumstances. However, the Authority is of the view that the circumstances stated by the respondent i.e, the time period taken by the governmental agency in revision of the building plans and renewal of the licenses for the project cannot be excluded as the same

were not due to any fault of the complainant. The grace period of six months is already granted in favour of the respondent-promoter being unqualified. Thus, no further relaxation is granted to the respondent-promoter in this regard.

G. Findings on the reliefs sought by the complainants

G.I. Direct the respondent to refund the total amount of Rs.30,09,653/- paid by the complainants to the respondent along with interest from the date of deposit till the realization of the amount.

14. In the present complaint, the complainants intends to withdraw from the project and are seeking return of the amount paid by them in respect of subject unit along with interest at the prescribed rate as provided under section 18(1) of the Act. Sec. 18(1) of the Act is reproduced below for ready reference.

“Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building.-

(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.”

(Emphasis supplied)

15. The complainants submitted an application for the provisional allotment of a serviced apartment in the commercial project namely “Kimberly Suites,” located at Sector-112, Gurugram. An allotment

letter was issued in favor of the complainants on 06.04.2013, and they were allotted a serviced apartment bearing no. C-0402 on the 4th Floor, with a carpet area of 601 sq. ft., for a sale consideration of Rs. 39,39,672/- within the respondent's project.

16. The Buyer's Agreement was executed between the complainants and the respondent on 02.12.2013. As per clause 27 of the Agreement dated 02.12.2013, the respondent undertook to handover possession of the unit within 36 months from the date of start of casting of the ground floor roof slab of the tower in which the unit is situated plus 6 months grace period. As submitted by the respondent in its reply, the date of start of casting of ground floor roof slab was 01.06.2014. Accordingly, the due date for handing over possession of the unit is calculated 36 months from 01.06.2014 plus six months i.e., the due date of handing over of possession comes out to be 01.12.2017 .
17. The respondent obtained the Occupation Certificate from the competent authority for the project on 11.07.2019, and the offer of possession was made to the complainants on 20.07.2019. The complainants have paid a sum of Rs. 30,09,653/- out of the sale consideration of Rs. 39,39,672/-.
18. After considering the documents on record and the submissions made by the parties, the Authority observes that the respondent obtained the Occupation Certificate for the complainants' unit on 11.07.2019. The due date for possession, calculated as 36 months from the date of casting of the ground floor roof slab, plus a grace period of six months i.e., 01.12.2017. The complainants did not indicate any intention to withdraw from the project prior to the offer of possession. Through the present complaint, they sought relief of refund of the amount paid. In this case, the promoter has made significant investments to

complete the project and has offered possession of the allotted unit and thereafter after the offer the complainants wants to withdraw from the project, that too after a delay of almost four years from the date of grant of Occupation Certificate.

19. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottee as per agreement for sale.
20. In case the allottee wishes to withdraw from the project, the promoter is liable on demand to return the amount received by it with interest at the prescribed rate if it fails to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale. The words "liable on demand" need to be understood in the sense that the allottee has to make intentions clear to withdraw from the project and a positive action on his part to demand return of the amount with prescribed rate of interest if he has not made any such demand prior to receiving occupation certificate and unit is ready then he impliedly agrees to continue with the project.
21. In the present case, the unit was allotted to the complainants through an allotment letter dated 06.04.2013, with the due date for possession being 01.12.2017. The Occupation Certificate was obtained on 11.07.2019, and the offer of possession was made on 20.07.2019. The Authority observes that the complainants did not express any intention to withdraw from the project prior to filing the complaint i.e., 09.05.2024. The complainants stated that the complainants have earlier too made the request for refund but the respondent have ignored the request of the complainants to refund their amounts.

22. The Authority observes that the complainants have by way of emails dated 02.10.2023, 08.10.2023 and 10.11.2023, raised their grievances regarding the non completion of the project work and requested the respondent to share the latest building material and structure strength report approved by the competent authorities. Therein the complainants further stated that in the alternate the refund of the amount paid by them be granted alongwith the delay possession charges. The same is reproduced below:

" Respected Sir/madam,

.....

It is requested of you to please share the latest building material and structure strength report approved by all concerned government authorities so that people don't witness another building collapse in Gurugram. Or refund my money including post delay possession charges, interest for money usage and inflation."

[Emphasis supplied]

23. The Authority is of the view that here the complainants have mentioned about the refund but have failed to show his clear intention to seek refund. Thus, it is construed that the complainants have for the first time expressed their intention to withdraw from the project on the filing of the complaint.
24. In this case, refund can only be granted after certain deductions as prescribed under the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, which provides as under: -

"5. AMOUNT OF EARNEST MONEY

Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment/plot/building as the case may be in all cases where the

cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer"

25. Thus, keeping in view the aforesaid factual and legal provisions, the respondent is liable to refund the paid-up amount of Rs.30,09,653/- after deducting 10% of the sale consideration of Rs.39,39,672/- being earnest money along with an interest @11.10% p.a. (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 on the refundable amount, from the date of surrender i.e., 09.05.2024 (i.e. date of filing of complaint) till actual refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

G.II Direct the respondent to pay litigation charges amounting to Rs.10,00,000/-.

26. The complainants are seeking the above mentioned reliefs w.r.t compensation. The Hon'ble Supreme Court of India in Civil Appeals no. 674445-679 of 2021 titled as **M/s Newtech Promoters and Developers Ltd. V/s State of UP (Supra)** has held that an allottee is entitled to claim compensation and litigation charges under Section 12, 14, 18 and Section 19 which is to be decided by the Adjudicating Officer as per Section 71 and the quantum of compensation and litigation charges shall be adjudicated by the adjudicating officer having due regards to the factors mentioned in Section 72. Therefore, the complainants may approach the adjudicating officer for seeking the relief of compensation

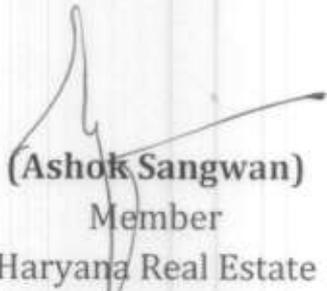
G. Directions of the Authority:

27. 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) of the Act.

- i. The respondent/promoter is directed to refund the paid-up amount of Rs.1,02,01,348/-, after deducting 10% of the sale consideration being earnest money along with interest on such balance amount at the rate of 11.10% as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017, from 04.02.2025 till its actual realization.
 - ii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.
28. Complaint stands disposed of.
29. File be consigned to the registry.

Dated: 02.04.2025


(Ashok Sangwan)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram