

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

Complaint no.	:	1136 of 2020
Date of filing complaint	:	11.03.2020
First date of hearing	:	08.04.2020
Date of decision	:	20.07.2022

Smt. Nirmal Gupta W/o Sh. B.N. Gupta R/o: H. no. 19, Bahubali Enclave, Karkardooma, New Delhi- 110092	Complainant
Versus	
Assotech Moonshine Urban Developers Private Limited Regd. office: H-127, Sector-63, Gautam Budh Nagar, Noida, Uttar Pradesh- 201301	Respondent
CORAM:	
Dr. K.K. Khandelwal	Chairman
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Ms. Aditi Mishra proxy counsel for Sh. Harshit Batra (Advocate)	Complainant
Sh. Nitin Gupta (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 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 allottee as per the agreement for sale executed inter se.

A. Unit and project related details

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

S.No.	Heads	Information
1.	Project name and location	"Assotech Blith", Sector-99, District- Gurugram, Haryana
2.	Project area	12.062 acres
3.	Nature of the project	Group Housing Project
4.	DTCP license no. and validity status	95 of 2011 dated 28.10.2011 Valid up to 27.10.2024
5.	Name of licensee	M/s Moonshine Urban Developers Private Limited M/s Uppal Housing Private Limited
6.	HRERA registered/ not registered	Registered Vide registration no. 83 of 2017 dated 23.08.2017 Valid up to 22.08.2023
7.	Allotment letter dated	20.07.2012 (As per page no. 19 of complaint) (No builder buyer agreement has been executed inter-se parties, but a similar document containing rights and liabilities of both the parties has been placed on record)
8.	Unit no.	F-703 on 7th floor, tower F

		(As per page no. 19 of complaint)
9.	Super area admeasuring	1685 sq. ft. (As per page no. 19 of complaint)
10.	Payment plan	Construction linked payment plan (As per page 42 of complaint)
11.	Total consideration	Rs.88,78,225/- (As per customer ledger on page no. 24 of reply)
12.	Total amount paid by the complainant	Rs.80,50,114/- (As per customer ledger dated 13.11.2019 on page no. 15 of complaint)
13.	Possession Clause	As per Clause 19(I) , <i>The possession of the apartment shall be delivered to the allottee(s) by the company within 42 months from the date of allotment subject to the force majeure, circumstances, regular and timely payments by the intending allottee(s), availability of building material, change of laws by governmental/ local authorities, etc</i>
14.	Grace period clause	As per Clause 19(II) , <i>In case the Company is unable to construct the apartment within stipulated time for reasons other than as stated in sub-clause I, and further within a grace period of six months, the Company shall compensate the intending Allottee (s) for delayed period @Rs. 10/- per sq. ft. per month subject to regular and timely payments of all</i>

		<i>installments by the Allottee (s). No delayed charges shall be payable within the grace period. Such compensation shall be adjusted in the outstanding dues of the Allottee (s) at the time of handing over possession</i>
15.	Due date of possession	20.07.2016 (Due date as per clause 19(I) i.e.; 04.07.2012 + 42 months with grace period of 6 months) Grace- period is allowed
16.	Occupation certificate	Not obtained
17.	Offer of possession	Not offered
18.	Cancellation letter dated	28.06.2022 (As per additional documents submitted by the complainant)

B. Facts of the complaint

- That the real estate project "Assotech-Blith" at Sector-99, Gurugram, and Haryana (hereinafter referred as "project") came to the knowledge of the complainant. The real estate agents of the promoter allured the complainant with the brochure and special characteristics of the project. The complainant believing on such false representation and claims of the respondent, booked an apartment in the said project on 02.04.2012 details of being such- unit no. 703 of tower F, admeasuring super area 1685 sq. ft. and accordingly paid an amount of Rs. 6,00,000/- via cheque no. 040555 and 040554 drawn on Bank of India.

4. That the complainant as per the payment schedule and believing that the respondent is developing project on time, made payment of Rs. 80,05,114/- from 02.04.2012 to 26.04.2016 towards the sale consideration of the unit.
5. That on 20.07.2012, the allotment letter was executed between the parties. As per clause 19(I) and 19(II) the possession of the apartment was to be delivered to the allottee by the company within 42 months from the date of allotment further within a grace period of 6 months. Therefore, the due date of handing over of possession as per the agreement was 20.07.2016.
6. That the complainant has at all times made payment against the demands of the respondent. However, the respondent has not fulfilled the obligation of handing over the possession as per the agreement. It has been over three and a half years and still no offer of possession has been made to the complainant.
7. That the complainant has a home loan from Tata Capital Housing Finance Limited of a huge sum of Rs. 65,00,000/- Accordingly, he is supposed to pay Rs. 56,102/- every month as EMIs. He is under great financial distress and is finding it hard to make ends meet. This inordinate and inexplicable delay in delivery of housing projects cripples the sole purpose of investing in real estate and converts an asset into liability.

8. That the conduct of non-delivery of unit by the respondent company to the complainant even after lapse of more than 3 years suggests that there is absolutely no intent by respondent to fulfil contractual obligations entered into with the complainant.
9. That the respondent-company has withheld the hard-earned money of the complainant for their benefit and has used the money for the own purpose and did not invest the money in the completion of the project for which the complainant was duped to pay.
10. That in view of the aforesaid facts, it is apparent that as per the terms and conditions agreed between the parties, the respondent was duty bound to complete the development work within time and deliver the physical possession of the unit to complainant at earliest. However, in complete disrespect and disregard, the respondent has deliberately and intentionally with malafide intentions, miserably failed to complete construction work of the project and mischievously withheld the amount paid by complainant to the respondent.

C. Relief sought by the complainant:

11. The complainant has sought following relief(s):
 - (i) Direct the respondent to immediately handover the possession of the unit with delayed interest at the prescribed rate for delay in handing over of the possession.
 - (ii) Direct the respondent to pay a sum of Rs.1,00,000/- towards cost of litigation.

12. 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 the respondent

13. The respondent has contested the complaint on the following grounds.
- i. That the complainant has concealed the material facts from the authority. The complainant after going through all the pros and cons, booked a flat in April 2012, bearing no. F-703 in the project of the respondent.
 - ii. That as per the terms and condition of the allotment letter dated 20.07.2012, the cost of the flat no. F-703 in project 'Assotech Blith' Gurugram was agreed to Rs. 91,98,117/- out of which the complainant has paid an amount of Rs. 80,50,114/-. As per the terms and conditions of the said allotment Letter, the possession of the flat in question was estimated to be handed over by June 2016. However, this period was to be extended due to any unforeseen circumstances.
 - iii. That the company has all necessary approvals and licenses which are necessary for the smooth functioning of the project and these licenses and approvals have been kept valid and renewed.
 - iv. That as per the clause 19(II) of the allotment letter dated 20.07.2012, the parties agreed to the provisions stipulated for delayed possession penalty at Rs. 10/- per sq. ft. of the area of the flat per month subject to applicability of other terms and conditions of the allotment letter

- dated 20.07.2012. It was unambiguously clear that if delay in possession of the flat is occurred due to unforeseen circumstances beyond the control of the respondent, the respondent would not be responsible to pay delay possession penalty to the allottees.
- v. That, as per the registration of the project under HARERA, the completion date of the project is 22.08.2023. Thus, it is stated that the complaint filed by the complainant is pre-mature and the same is not maintainable at this stage hence liable to be dismissed on this ground only.
- vi. That the Act of 2016 came into force in the state of Haryana with all sections and rules w.e.f. 2017 wherein registration of every project was mandatory by the developers-promoters and at the time of registration, the time limit for completion of the project is to be mentioned. The RERA has accepted the registration of the respondent for ongoing projects and upcoming projects as per aforesaid terms. The RERA is a punishable Act and it is established law that any punishable act cannot be implemented from retrospective date meaning thereby that developer/promoter should not be punished for the past delay. At the time of registration, the respondent has given time limit of up to August 2023 and the respondent shall complete the projects within the said time limit.
- vii. That it is relevant to mention herein that, in view of the settled law in a plethora of decision of the NCDRC, New Delhi has passed an order dated 11.06.2018 in the **consumer complaint no.1303 of 2018 (Rashmi Bhatt Vs M/s Piyush I.T. Solutions Pvt Ltd)**, relevant portion of which is being quoted herein under:-

"...it would thus be seen that the OP can deliver possession of the apartment to the complainant at any time on or before 01.07.2019 having been instituted on 23.05.2018, the complaint is pre-mature. The complainant is not entitled even to seek refund of the amount paid by him to the opposite party before the aforesaid last date for delivery of possession. The complaint is therefore, dismissed with liberty to complainant to file an appropriate consumer complaint after 01.07.2019, if the possession of the flat is not offered to her by that date.

In view of the above, the present complaint is pre-mature, and complainant cannot raise any demand for refund prior to 12.08.2019 against the opposite party.

- viii. That if, this authority considered the June, 2016, mentioned in clause 19(I) in the allotment letter dated 20.07.2022 as due and effective date of possession then the authority should have considered the quantum of compensation to be paid by the appellant in case of delay in delivery of possession of the flat as mentioned in the same clause. As per principles of justice, terms of a contract cannot be applied partially.
- ix. There is a provision for compensation on account of delay although in view of expressed factors of force majeure, there cannot be introduction of unjustified amount, however clause 19(II) of the terms of allotment provides for the penalty on account of delay. It has been held in the case of ***"DLF Homes Panchkula Pvt. Ltd vs D.S Dhanda and Ors (10.05.2019-SC):II (2019) CP}117, MANU/SC/0744/20191.***

"The forum under the act cannot award interest and/or compensation by applying rule of thumb. the order to grant interest at the maximum of rate of interest charged by nationalized bank for advancing home loan is



arbitrary and no nexus with the default committed. The appellant has agreed to deliver constructed flats. For delay in handing over possession, the consumer is entitled to the consequences agreed at the time of executing buyer's agreement. There cannot be multiples heads to grant of damages and interest when the parties have agreed for payments of damages at the rate of Rs. 10/- per sq. ft per month. Once the parties agreed for a particular consequence of delay in handing over of possession then, there has to be exceptional and strong reasons for the SCDRC/NCDRC to award compensation at more than the agreed rate"

- x. That the relief sought by the complainant from this authority is not tenable in the eyes of law, as the delay in delivery of project is due to the force majeure circumstances beyond its control. The reasons attributable for delay in delivery of possession is mentioned herein under: -
- a. That in year 2012, M/s. Assotech Ltd. created its subsidiary company – M/s. Assotech Moonshine Urban Developers Pvt. Ltd i.e. the respondent company. M/s. Assotech Limited is a holding company of respondent having more than 50% shareholding and rest 49% shareholding of the respondent company was with M/s. SA Mallika Ventures Ltd. M/s. Assotech Ltd. being the holding and parent company of respondent having more than 50% shareholding has control over the affairs of the respondent company.
 - b. That the respondent, M/s. Assotech Limited and two investors- M/s. S.A. Mallika Ventures Ltd. and M/s. Mallika SA Investments LLC, on 20.01.2012, had entered into an investment agreement and a project management agreement (PMA) dated 20.01.2012 for the development of residential group project. As per the investment agreement, the investment, made by the investors was to be utilized for construction and development of the project

in question. In terms of PMA, the Assotech Limited was engaged as project manager who was to be responsible for execution, development, management, construction and supervision of the project inter-alia including day to day activities such as marketing, sales and financial management etc. The Assotech Ltd. was responsible for developing the project within committed timelines and guaranteed costs. The Respondent and M/s. Assotech Ltd. had also entered into a 'construction contract agreement' dated 03.04.2012 whereby the Assotech Ltd., who was a promoter shareholder of the respondent company and had invested Rs. 44.27 crore was also appointed by the respondent as a construction contractor responsible for the construction of the project.

- c. That somewhere between in year 2013 and 2015, Assotech Ltd. got into a bad financial crunch pursuant to which Mr. Manmohan Singh Bhalla preferred a company petition before Hon'ble Delhi High Court against the Assotech Ltd. (holding and contractor company) for initiation of liquidation proceedings u/s 433 of the Companies Act, subsequent to which vide order dated 08.02.2016, official liquidator was appointed as provisional liquidator by the Hon'ble High Court. The progress has been severely delayed as the respondent has not put in sufficient time, attention and resources for the continued construction and completion of the project within stipulated timelines.
- d. That apart from the above, the nominee director of the above investors company had filed a police complaint with the SHO, PS Sushant Lok, Haryana inter alia requesting for registration of FIR against the Assotech Ltd. In the light of above events, the said



investor companies vide their letter dated 13.05.2016 invoked the event of default clause in terms of the investment agreement against the Assotech Ltd. which affected the pace of construction of the project and delayed the delivery of possession of the flat.

- e. That beside to the above, the project is delayed on account of initiation of liquidation proceedings against M/s. Assotech Ltd., to whom contract for development of the project in question was awarded by the respondent company as well as due to failure of Assotech Ltd. to discharge its obligation under the investment agreement, project management agreement and the construction contract agreement the construction of the project also got delayed. Under these agreements, the M/s. Assotech Ltd. was under obligated to construct and deliver the project within stipulated time and cost limits specified under the agreement.
- f. That the project is delayed due to the disputes arose between M/s. Assotech Ltd. and the investors, described above. Subsequent to this dispute, the Investors stopped making payments to the vendors, suppliers, contractor etc. which attributed delay in construction of the project in question.
- g. Vide order dated 07.04.2015, the Hon'ble NGT in OA no. 95/2014, restricted construction activities in NCR due to rising air pollution. Apart from the above, the Hon'ble Supreme Court, Environment Pollution (Prevention & Control) Authority ("EPCA") for the National Capital Region and the Hon'ble National Green Tribunal ("NGT") had issued various orders/ directions/ guidelines from time to time since 2016 for complete ban on

construction activities in National Capital Region, which includes the entire District Gurugram for the control of air pollution.

- h. In year 2016, the NGT passed an order in O.A. No.-21/2014 on 08 Nov' 2016 and banned all construction activities in NCR and same was lifted by passing the guidelines through order dated 23 Nov' 2016 in the same case. So, the construction work was stopped for 16 days.
- i. In the year 2017, NGT passed an order in O.A. No.-21/2014 on 09 Nov' 2017 and banned all construction activities in NCR and same was lifted by passing the guidelines through the order dated 17.11.2017 in same case. So, the construction work was again stopped for 09 days.
- j. In the year 2018, the EPCA released a press note on 31.10.2018 and banned all the construction activities in NCR from 01.11.2018 to 10.11.2018, resulting in stoppage of construction 10 days.
- k. In the year 2019, the EPCA issued guidelines on 01.11.2019 and banned all construction activities in NCR up to 05.11.2019. The same time, Hon'ble Supreme Court of India, passed an order in ***Writ Petition (Civil) NO.- 13029/1985, titled - M. C. Mehta Vs. Union of India & Ors.*** on 04.11.2019 and banned all construction activities in NCR and same was lifted by passing the order dated 09.12.2019 in same case. So, the construction work was again stopped for 39 days.

The summary of total stoppage of construction work in NCR is as following: -

Year	Authority	Date of ban on construction activities	Date of lifting of ban on construction activities	No. of ban days
2016	NGT	08 Nov' 2016	23 Nov' 2016	16
2017	NGT	09 Nov' 2017	17 Nov' 2017	09
2018	EPCA	01 Nov' 2018	10 Nov' 2018	10
2019	EPCA/ Hon'ble Supreme Court	01 Nov' 2019	09 Dec' 2019	39
Total Days Ban on Construction Activities				74

1. Due to sudden stoppage of the construction work, site staff, contractors, construction labour and machinery involved in construction work became idle. Once the construction work at site is stopped then it takes at least one to two months to start and gearup the work to achieve the stage on which, it was stopped. That due to the COVID-19 pandemic, the nationwide lockdown was imposed by the Government of India from 25.03.2020. During the lockdown, a large number of labour moved to their native villages/home town from the NCR. In view of the situation, the Govt. of

India *suo moto* extended the construction period of all projects by 9 months due to COVID 19 pandemic. After the unlock, time to time declared by the Govt., the Respondent started the construction activities at the proeject with few labour and material udner the guidelines of the Government.

- m. That there was shortage of water used for construction activities as per the Hon'ble Punjab and Haryana High Court in which was directed to use only treated water from available Sewerage Treatment Plants (hereinafter referred to as "STP"). As the availability of STP, basic infrastructure and water from STP was very limited in Gurgaon District, the construction activities in fact had to be suspended. The availability of treated water to be used at construction site was very limited.
- n. That despite being ready for possession of the flat, the process for handing over of physical possession of the flat are pending due to non-issuance of the completion certificate by the DTCP, Haryana for the reasons of Circular No. D14/2028, issued by the Dakshin Haryana Bijli Vitran Nagam (DHBVN) thereby it is decided to eliminate 220/66/11 KV system in new sectors of Gurugram (i.e. Sector 58 to Sector 115) & new sectors of Faridabad and to introduce transmission /distribution system of 220/33 KV level in these sectors. As per the circular; for single point connection has to create his own switching station/substation as the case may be on his land at his own cost. As the circular, the builder whose individual ultimate load is less than 15 MVA, would need to form a group in a manner that combined load of group equals 15 MVA or more up to 25 MVA and together they would hand over the land of

size admeasuring approx. 500 sq. yard to DHBVN free of cost for creation of switching station. In a situation where a builder-developer has an ultimate load lesser than 15 MVA and he is also not able to form group, he will have to create 33 KV switching station, on his own his land of size measuring approx. 500 sq. yard. confirming to the regulation at his own cost.

- xi. That on the basis of accounting disclosure of the company certified by Chartered Accountant submitted in RERA, the company has spent an amount of approximately **Rs. 350+ crores** towards the acquisition and development of the project and all the external and internal development charges (EDC/IDC payable by the company to HUDA) have been fully paid as per schedule and license conditions. This means that the proportionate share pertaining to the complainant's booked unit has also been paid on schedule. In turn the company received a total payment of **Rs. 244 crores** by way of collections from customers who had booked units in the project and have paid as per their respective scheduled payment plans. This amount collected from customers includes the payments received by the complainant against their booked unit. The balance cost incurred to date was funded by the shareholders/debenture holders of the company.
14. 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 based on these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority

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

E.I Territorial jurisdiction

15. 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

16. 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)(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;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottee and the real estate agents under this Act and the rules and regulations made thereunder.

17. 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 objections raised by the respondent

F.I Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act

18. The respondent raised a contention that the authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the flat buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld

in the landmark judgment of **Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)** decided on 06.12.2017 which provides as under:

119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter.....

122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."

19. Also, in appeal no. 173 of 2019 titled as **Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya**, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed-

"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."

20. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

F.II Objection regarding handing over possession as per declaration given under section 4(2)(I)(C) of RERA Act

21. The counsel for the respondent has stated that the respondent at the time of registration of the project gave revised date for completion of same and also completed the same before expiry of that period, therefore, under such circumstances the respondent is not liable to be visited with penal consequences as laid down under RERA. Therefore, next question of determination is whether the respondent is entitled to avail the time given to him by the authority at the time of registering the project under section 3 & 4 of the Act.
22. It is now settled law that the provisions of the Act and the rules are also applicable to ongoing project and the term ongoing project has been defined in rule 2(1)(o) of the rules. The new as well as the

ongoing project are required to be registered under section 3 and section 4 of the Act.

Section 4(2)(I)(C) of the Act requires that while applying for registration of the real estate project, the promoter has to file a declaration under section 4(2)(I)(C) of the Act and the same is reproduced as under: -

Section 4: - Application for registration of real estate projects

(2)The promoter shall enclose the following documents along with the application referred to in sub-section (1), namely: —

.....

(I): -a declaration, supported by an affidavit, which shall be signed by the promoter or any person authorised by the promoter, stating: —

(C) the time period within which he undertakes to complete the project or phase thereof, as the case may be....”

23. The time period for handing over the possession is committed by the builder as per the relevant clause of flat buyer's agreement and the commitment of the promoter regarding handing over of possession of the unit is taken accordingly. The new timeline indicated in respect of ongoing project by the promoter while making an application for registration of the project does not change the commitment of the promoter to hand over the possession by the due date as per the apartment buyer agreement. The new timeline as indicated by the promoter in the declaration under section 4(2)(I)(C) is now the new timeline as indicated by him for the completion of the project.

Although, penal proceedings shall not be initiated against the builder for not meeting the committed due date of possession but now, if the promoter fails to complete the project in declared timeline, then he is liable for penal proceedings. The due date of possession as per the agreement remains unchanged and promoter is liable for the consequences and obligations arising out of failure in handing over possession by the due date as committed by him in the apartment buyer agreement and he is liable for the delayed possession charges as provided in proviso to section 18(1) of the Act. The same issue has been dealt by hon'ble Bombay High Court in case titled as ***Neelkamal Realtors Suburban Pvt. Ltd. and anr. vs Union of India and ors.*** and has observed as under:

"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter..."

F.III Objection regarding delay due to force majeure circumstances

24. The respondent-promoter has raised a contention that the construction of the project was delayed due to force majeure conditions such as various orders passed by the National Green Tribunal, Environment Pollution (Prevention & Control) Authority, institution of liquidation proceedings against the contractor-company i.e. Athena Limited and appointment of official liquidator, non-

issuance of occupation certificate by the competent authority on account of 220/66/KV system by DHBVN, shortage of labour due to stoppage of work and lock down due to outbreak of Covid-19 pandemic. Since there were circumstances beyond the control of respondent, so taking into consideration the above-mentioned facts, the respondent be allowed the period during which his construction activities came to stand still, and the said period be excluded while calculating the due date. But the plea taken in this regard is not tenable. The due date for completion of project is calculated as per clause 19 (I) & 19(II) of allotment. Though there has been various orders issued to curb the environment pollution, but these were for a short period of time. So, the circumstances/conditions after that period can't be taken into consideration for delay in completion of the project.

25. The respondent alleged that due to litigation proceedings going on against the contractor company, "Assotech Limited" in the Delhi High Court vide Co. petition no. 357 of 2015 in the mid of year 2015, process of provisional liquidation has been initiated against Assotech Limited. Due to appointment of O.L., office of respondent company was sealed, and various restrictions were levied, due to which construction of the project was affected badly. "Assotech Moonshine Urban Developers Private Limited" is a subsidiary of "Assotech Limited" and there was a contract inter-se respondent and "Assotech Limited" for development

of project. But it is pertinent to note that neither the complainant are party to such contract nor liquidation proceedings are binding on them. Hence, there was no privity of contract with the complainant. Hence, the plea of the respondent on account of delay in completion due to initiation of liquidation proceedings is not tenable.

26. The respondent also took plea that the competent authority caused delay in issuance of occupation certificate due to elimination of 220/66/KV system by DHBVN. The authority is of the considered view that if there is lapse on the part of competent authority in granting the occupation certificate within reasonable time and that the respondent was not at fault in fulfilling the conditions of obtaining occupation certificate then the respondent may approach the competent authority for getting this time period be declared as 'zero time period' for computing delay in completing the project. However, for the time being, the authority is not considering this time period as zero period and the respondent is liable for the delay in handing over possession as per provisions of the Act of 2016.
27. As far as delay in construction due to outbreak of Covid-19 is concerned, Hon'ble Delhi High Court in case titled as ***M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr. bearing no. O.M.P (I) (Comm.) no. 88/ 2020 and IAs 3696-3697/2020*** dated 29.05.2020 has observed that-

"69. The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India.

The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself."

The respondent was liable to complete the construction of the project and handover the possession of the said unit was to be handed over within 42 months from date of execution of allotment along with grace period of 6 months which comes out to be 20.07.2016 and is claiming benefit of lockdown which came into effect on 23.03.2020 whereas the due date of handing over of possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself and for the said reason, the said time period is not excluded while calculating the delay in handing over possession.

G. Findings on the relief sought by the complainant

Relief sought by the complainant:

G.I Direct the respondent to immediately handover the possession of the unit with delayed interest at the prescribed rate for delay in handing over of the possession.

28. The complainant filed additional documents on 15.07.2022 (*inadvertently mentioned as 15.04.2022 in proceedings dated 20.07.2022*) wherein submitting a cancellation letter dated 28.06.2022. Before deciding the admissibility of delayed possession charges, it is pertinent to comment upon the validity of such

cancellation and that would definitely affect the finding sought in relief no. 1.

29. **Validity of cancellation**

The complainant filed additional documents on 15.07.2022 wherein submitting a cancellation letter dated 28.06.2022. The respondent has cancelled the unit of the complainant on account of non-payment of demand of Rs. 7,03,766/-. After sending reminder dated 18.01.2022 & 23.02.2022, the respondent cancelled the unit of the complainant vide letter dated 28.06.2022. The authority observes that the present complaint was filed on 11.03.2020 and the respondent cancelled the unit of the complainant on 28.06.2022, i.e. when the complaint was sub-judice with the authority. Moreover, the complainant has already paid an amount of Rs. 80,50,144/- towards total consideration of Rs. 88,78,225/- which constitutes 90.64% of total consideration and there has been a delay of 6 years from due date of handing over of possession till date. The respondent has taken undue advantage of his dominant position. The act of respondent cancelling the unit of the complainant is wrong and cannot be justified. Hence, the cancellation dated 28.06.2022 by the respondent- builder is set aside by the authority.

30. The counsel for complainant stated at bar that the said demand is raised on account of internal plastering including Rs.25,000/- payable on account of club membership/development charges. The counsel for respondent didn't submit anything in this regard. Due to gross

violations on part of respondent, the authority directs to appoint Sh. RK Garg as enquiry officer to enquire in detail about club including whether the club is constructed or under construction, whether the cost of construction of club is borne out of the funds of resident welfare association/ is being constructed out of FAR area, whether a separate account has been made to bear such cost or not, etc. The enquiry officer shall be payable a fee of Rs. 25,000/- and the same shall be borne by respondent.

31. The respondent is further directed to send a revocation of cancellation dated 28.06.2022 within 7 days of date of this order, failing which the respondent shall be liable for penal action.
32. 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.

"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."

33. Clause 19(I) of the allotment dated 20.07.2012 provides for handing over of possession and is reproduced below:

"Clause 19(I).

The possession of the apartment shall be delivered to the allottee(s) by the company within 42 months from the date of allotment subject to the force majeure, circumstances, regular and timely payments by the intending allottee(s), availability of building material, change of laws by governmental/ local authorities, etc."

34. The authority has gone through the possession clause of the agreement and observes that the respondent-developer proposes to handover the possession of the allotted unit within a period of 42 months from the date of allotment. In the present case, the allotment was on 20.07.2012 as such the due date of handing over of possession comes out to be 20.01.2016.

35. **Admissibility of grace period:** As per clause 19(I) of allotment letter dated 20.07.2012, the respondent promoter has proposed to handover the possession the said unit within a period of 42 months. As per clause 19(II) of said allotment letter, the respondent-promoter shall be entitled for period of 6 months as grace period. The said clause of the allotment letter has been reproduced hereunder: -

"Clause 19(II)

*In case the Company is unable to construct the apartment within stipulated time for reasons other than as stated in sub-clause I, and **further within a grace period of six months**, the Company shall compensate the intending Allottee (s) for delayed period @Rs. 10/- per sq. ft. per month subject to regular and timely payments of all installments by the Allottee (s). No delayed charges shall be payable within the grace period. Such compensation shall be adjusted in the outstanding dues of the Allottee (s) at the time of handing over possession."*

36. The said clause is unconditional and provides that if the respondent is unable to complete the construction of the allotted unit within

stipulated period of 42 months, then a grace period of 6 months shall be allowed to the respondent. Since there were situations beyond the control of respondent such as institution of liquidation proceedings against the contractor company, resulting in shortage of labour at project due to stoppage of work at the project site. Therefore, the authority is of view that the said grace period of 6 months shall be allowed to the respondent. Therefore, as per clause 19(I) & 19(II) of the allotment letter dated 20.07.2012, the due date of possession comes out to be 20.07.2016.

37. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is 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.*

38. 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.

39. 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., 13.08.2022 is @ 7.80%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.80%.
40. 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;"*

41. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 9.80% by the respondent/promoter which is the same as is being granted to them in case of delayed possession charges.
42. On consideration of the documents available on record and submissions made regarding contravention of 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. By virtue of clause 19(I) & 19(II) of the allotment letter executed between the parties on 20.07.2012, the possession of the subject apartment was to be delivered within a period of 42 months plus 6 months from date of execution of such allotment cum agreement. The due date of possession is calculated from the date of allotment letter i.e.; 20.07.2012, which comes out to be 20.07.2016.

43. 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 has yet not obtained by the respondent- builder and has applied for the grant of occupation certificate vide letter dated 12.04.2021. The respondent shall offer the possession of the subject unit to the complainant after obtaining occupation certificate. So, it can be said that the complainant would come 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. This 2 months' of reasonable time is to be given to the complainant keeping in mind that even after intimation of possession practically he 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 i.e. 20.07.2016 till the expiry of 2 months from the date of

offer of possession or till actual handing over of possession, whichever is earlier.

44. Accordingly, it is the failure of the promoter to fulfil its obligations and responsibilities as per the allotment letter dated 20.07.2012 to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such, the allottee shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 20.07.2016 till the date of actual handing over of possession or till offer of possession plus 2 months, whichever is earlier; at the prescribed rate i.e., 9.80 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

G.II Direct the respondent to pay a sum of Rs.1,00,000/- towards cost of litigation.

45. The complainant is claiming compensation in the above-mentioned reliefs. For claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainant may file a separate complaint before Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.

H. Directions of the authority

46. 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 shall pay interest at the prescribed rate i.e. 9.80% per annum for every month of delay on the amount paid by the complainant from due date of possession i.e.; 20.07.2016 till the date of actual handing over of possession or till offer of possession plus 2 months after obtaining occupation certificate, whichever is earlier; as per proviso to section 18(1) of the Act read with rule 15 of the rules.
 - ii. The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement.
 - iii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
 - iv. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.80% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.
47. Complaint stands disposed of.
48. File be consigned to registry.


(Vijay Kumar Goyal)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 20.07.2022