

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

Complaint no. :	1375 of 2020
Date of filing complaint:	16.03.2020
First date of hearing:	09.04.2020
Date of decision :	25.08.2022

Sh. Kapil Maithal S/o Late Sh. S.K Maithal R/O: B-146 , Ground floor, Ramprastha-Colony, Ghaziabad, Uttar Pradesh- 201301	<b>Complainant</b>
Versus	
M/s Assotech Moonshine Urban Developers Private Limited Regd. office: 148-F, Pocket-IV, Mayur Vihar, Phase-I, Delhi 110091	<b>Respondent</b>

**CORAM:**

Dr. KK Khandelwal

**Chairman**

Shri Vijay Kumar Goyal

**Member****APPEARANCE:**

Sh. Rahul Gupta (Advocate)

Complainant

Sh. Sanjeev Dhingra (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 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 allottee 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 complainant, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S.n.	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	<b>Registered</b> <b>Vide registration no. 83 of 2017 dated 23.08.2017</b> Valid up to 22.08.2023
7.	Booking dated	28.12.2012 (As per page no. 09 of complainant)
8.	Allotment letter dated	04.01.2013 (As per page no. 22 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)

9.	Unit no.	A-204 on 2 <sup>nd</sup> floor, tower A (As per page no. 22 of complaint )
10.	Super area admeasuring	1365 sq. ft. (As per page no. 22 of complaint )
11.	Payment plan	Construction linked payment plan (As per page 46 of complaint)
12.	Total consideration	Rs. 92,72,500/- (As per schedule E annexed with allotment letter on page no. 45 of complaint)
13.	Total amount paid by the complainant	Rs. 78,27,805/- (As per demand letter dated 15.03.2017 on page no. 54-55 of complaint)
14.	Possession Clause	As per <b>Clause 19(I)</b> , <i>The possession of the apartment shall be delivered to the allottee(s) by the company within <b>42 months from the date of allotment</b> 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>
15.	Grace period clause	As per <b>Clause 19(II)</b> , <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 <b>within a grace period of six months</b>, 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</i>

		<i>in the outstanding dues of the Allottee (s) at the time of handing over possession</i>
16.	Due date of possession	<b>04.01.2017</b> (Due date as per clause 19(1) i.e.; 04.01.2013 + 42 months with grace period of 6 months) <b>Grace- period is allowed</b>
17.	Occupation certificate	Not obtained
18.	Offer of possession	Not offered

**B. Facts of the complaint:**

- That time and again the respondent issued advertisements in newspapers offering residential flats for sale in their projects and representing to the public at large that they offer world class flats. It was represented that the said project was going to be a state-of-the-art luxury residential apartment and made lucrative promises and showed brochures to the complainant claiming high promises and also represented that the demarcation/zoning plans, layout plans and building plans were already approved by the relevant authorities. The complainant, who is a salaried person and comes from a middle-class background, was interested in purchasing a residential flat for his own residence.
- That based on the representations made by the respondent, the complainant made a booking vide application no. 386 dated 28.12.2012 for allotment of an apartment in the said project. Subsequently, vide allotment letter dated 04.01.2013, apartment no. A-204 on 2nd floor

having super area of 126.81 sq. mtr. (1365 sq. ft.) (approx.), as an independent apartment with impartible and undivided share in the land area beneath the plot.

5. That the said allotment letter dated 04.01.2013 is a unilateral, one-sided contract whereby terms and conditions for the performance thereof, favouring only to the respondent were stipulated. As per said allotment letter, it was specifically promised and represented, that the possession of the allotted flat shall be handed over to the complainant within 42 months from the date of issue of the allotment letter and the said period of 42 months was expired in July 2016.
6. That he opted for construction linked plan annexed as Schedule E of the allotment letter. That in course of time, he has admittedly made total payment Rs. 78,27,805/- towards the sale consideration of the allotted unit.
7. That the complainant has paid the amount demanded by the respondent on 15.04.2016 for casting of the 20th slab regularly and within the due dates of such demands by the respondent. The possession of the allotted flat complete in all aspects, as per the agreement, was to be delivered by July 2016. However, the respondent was yet to cast the complete super structure, framework, internal plaster, flooring, etc.
8. That it was under obligation to furnish information regarding completion of the project from time to time, but no such information has ever been provided to the complainant. Being aggrieved, he contacted the

representatives of the respondent several times, but his calls were met with false assurances and further false representations that possession of the apartment allotted to the complainant would be handed over shortly. Believing the representations of the Respondent, that have since proved to be wrong, the complainant waited patiently but to no avail. Neither the possession has been delivered nor has the said project been completed nor the complainant's hard-earned money along with interest has been refunded to him despite default in delivery of possession by the respondent. The money paid by him towards the allotment has been wrongly retained by it and was diverted for their own advantage and has not utilised the same for the development of the project. Further, the liability to the complainant is admitted by the respondent through various documents, but despite default in fulfilling their obligation, it has not refunded the amount already paid by the complainant. Further, to generate maximum money by befooling innocent customers like the complainant, it has sold his units multiple times. Thus, committed the offence of cheating, fraud and breach of trust. Infact, various FIRs have been registered against the respondent and their misdeeds are under investigation. FIR No.50/2017 PS Mayur Vihar U/s 420/406/34 IPC and FIR No.77/2017 PS EOW, Delhi U/s 406/420/468/471/34 IPC have already been registered against the respondent and the same are under investigation.

9. That malpractices of the respondent have gone far to the extent of cheating the consumers and unauthorizedly selling the apartment on the

basis of super area and not on the basis of carpet area. The carpet area as per the drawing of the apartment appended to the allotment letter being schedule C works out to 770 sq. ft. (approx.). Taking the agreed price into consideration and based on the carpet area of the apartment, the total sale price comes to Rs. 54,05,000/- whereas the complainant has as stated above already paid to the respondent an amount of Rs.78,27,805/ i.e., Rs. 24,22,805/-in excess of the agreed sale price of the allotted flat. The complainant has already withdrawn from its project vide legal notice dated 14.09.2018. The construction of the project even after a passage of more than 7 years from the date of booking and is subsisting till date as he has yet not been handed over the possession of the apartment and further, despite service of notice, it has failed to refund the money along with interest.

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

10. The complainant have sought following relief(s):

- i. Direct the respondent to refund the amount paid by the complainant.
- ii. Direct the respondent to pay interest on the amount paid by the complainant on account of delayed possession as per provision of Act of 2016.
- iii. Direct the respondent to pay compensation to the complainant towards mental harassment, agony suffered for no fault but due to delay caused by the respondent.
- iv. Direct the respondent to Rs.5,00,000/- towards re-imburement of legal fees.

**D. Reply by respondent:**

The respondent by way of written reply made following submissions

11. That the possession of the apartment was to be delivered by the company within 42 months from the date of signing of allotment cum agreement dated 04.01.2013, subject to the force majeure, circumstances, regular and timely payments by the intending allottee.
12. That the construction contract of project namely "Assotech Blith" at Sector 99, Gurugram was executed on 03.04.2012 between respondent and Assotech Limited. The complete construction work including civil, internal and external electrical, plumbing, firefighting and all external development along with internal development was awarded to Assotech Limited. Thereafter, the construction was started by Assotech Limited as per the contract's terms and condition and the work was going as per the completion schedule. Thereafter, the contractor company Assotech Limited in the mid of year 2015 faced litigation in the Hon'ble Delhi High Court and on 08.02.2016, the contractor company "Assotech Limited" was unfortunately put on provisional liquidation by Hon'ble Delhi High Court by Co. Petition no. 357 of 2015 and then the official liquidator was appointed in the contractor company. Thereafter, the appointed O.L. sealed the office of contractor company. The board of directors who looks forward to all the construction activity of this site was became ex-management and accordingly their all powers were taken over by O.L. Even the respondent approached the O.L., appointed by Hon'ble High



Court of Delhi to look into the integrity of this problem so that the construction activity will be carried on but the O.L. has categorically asked the respondent to wait as the matter was already sub-judice before the Hon'ble Delhi High Court.

13. That the respondent tried to arrange other contractor so that the work can be carried on but no one came forward to take up the assignment of construction activities because the work was in the mid-way and huge acute recession was prevailing in the real estate market as a result nobody shown their interest to take the assignment in project. The respondent became helpless to carry the construction work at site. Thus, in these circumstances all the work of the construction sites got hampered badly due to this situation from 2016 to till 2019 Feb. It is pertinent to mentioned here that a legal contract was already executed between respondent and construction company "Assotech Limited" and work till 2016 was almost 70% to 80% completed at site.
14. That the construction of all the towers was almost completed and the finishing work was also in advance stage. So, thus in this grave situation it was very difficult to terminate the contract with "Assotech Limited". Further, the rates of construction material are also enhanced/increased drastically and thus, the cost of construction will increase if new contractor would come for construction. This is because in this contract there was no clause of enhancement of rate and then due to this contract

"Assotech Limited" was bound to do the work and complete the project even contractor has given their written consent to the respondent.

15. That even the real estate market was also deteriorated and there were recession in real estate market from 2015-16 onwards. Thus, due to these unforeseen circumstances the construction was delayed. When the Hon'ble High Court of Delhi ordered for revival of contractor company, the Assotech Limited has immediately restarted the construction work at site with full force of manpower to recap the loss of the time.
16. The delays were caused on account orders passed by Hon'ble National Green Tribunal and the State Pollution Control Board issued various directions to builders to take additional and step to curtail pollution. On account of the aforementioned reasons the progress of the work was abruptly hampered.
17. That all these events led to suspension and stoppage of work on several occasions which also resulted in labourers and contractors abandoning work. As a result of various directions from the authorities at different occasions, regarding water shortage and pollution control etc., coupled with labourers and contractors abandoning the work, it had to run from pillar to post in order to find new contractors and labourers, thus affecting progress of project. The pandemic Covid-19 was also the biggest reason for delay in handing over the possession of the flat/unit. Hence, respondent was not liable for the delay in handing over of possession of apartment of the complainant.

18. 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. 354.98 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) was 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 265 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 and the balance cost incurred to date was funded by the shareholders/debenture holders of the company.
19. 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:**

20. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

**E.1 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 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 promoter, the allottee and the real estate agents under this Act and the rules and regulations made thereunder.*

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 complainant at a later stage.

#### **F. Findings on objections raised by the respondent**

**F.I Objection regarding delay due to force majeure circumstances**

21. 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, 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.
22. 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 than 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.

23. 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 04.01.2017 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. Entitlement of the complainant for refund:**

**G.I Direct the respondent to refund the amount paid by the complainant.**

**G.II Direct the respondent to pay interest on the amount paid by the complainant on account of delayed possession as per provision of Act of 2016.**

24. As per relief sought by the complainant on page no. 06 of complaint, he is seeking relief of refund as well as DPC. Since both the reliefs are contradictory in nature. During the proceedings, the counsel for complainant submitted at bar that he wishes to withdraw from the project of the respondent and seeks refund.
25. The project detailed above was launched by the respondent as group housing project and the complainant were allotted the subject unit in tower A on 04.01.2013 against total sale consideration of Rs. 92,72,500/- . As per clause 19(I) & 19(II) of the said allotment letter executed between the parties, 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 and that period has admittedly expired on 04.01.2017. It has come on record that against the total sale consideration of Rs. 92,72,500/- the complainant has paid a sum of Rs. 78,27,805/- to the respondent.
26. The complainant also sent a legal notice dated 14.09.2018 as there was substantially delay in handing over of handing over of possession. Thus,

keeping in view the fact that the allottee- complainant wish to withdraw from the project and are demanding return of the amount received by the promoter in respect of the unit with interest on his failure to complete or inability to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. The matter is covered under section 18(1) of the Act of 2016. The due date of possession as per agreement for sale as mentioned in the table above is **04.01.2017** and there is delay of more than 3 years 02 months 12 days on the date of filing of the complaint i.e. 16.03.2020.

27. The occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondent-promoter. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the allotted unit and for which they have paid a considerable amount towards the sale consideration and as observed by *Hon'ble Supreme Court of India in Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors., civil appeal no. 5785 of 2019*, decided on 11.01.2021

*" .... The occupation certificate is not available even as on date, which clearly amounts to deficiency of service. The allottee cannot be made to wait indefinitely for possession of the apartments allotted to them, nor can they be bound to take the apartments in Phase 1 of the project....."*

28. Further in the judgement of the Hon'ble Supreme Court of India in the cases of *Newtech Promoter and Developers Private Limited Vs State of U.P. and Ors. (2021-2022(1)RCR(Civil),357)* 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 observed as under:



*25. The unqualified right of the allottee to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed*

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 under section 11(4)(a). The promoter has failed to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottee, as the allottee wish to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of the unit with interest at such rate as may be prescribed.

29. This is without prejudice to any other remedy available to the allottee including compensation for which they may file an application for adjudging compensation with the adjudicating officer under sections 71 & 72 read with section 31(1) of the Act of 2016.

30. The authority hereby directs the promoter to return the amount received by him i.e., Rs. 78,27,805/- with interest at the rate of 10% (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 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

**G.III Direct the respondent to pay compensation to the complainant towards mental harassment, agony suffered for no fault but due to delay caused by the respondent.**

**G.IV Direct the respondent to Rs.5,00,000/- towards re-imburement of legal fees.**

31. The complainant is seeking relief w.r.t compensation in the aforesaid relief, Hon'ble Supreme Court of India in civil appeal titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors. (SLP(Civil) No(s). 3711-3715 OF 2021)*, held that an allottee is entitled to claim compensation under sections 12, 14, 18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints

in respect of compensation. Therefore, the complainant may approach the adjudicating officer for seeking the relief of compensation.

**H. Directions of the Authority:**

33. 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 functions entrusted to the Authority under Section 34(f) of the Act of 2016:

- i) The respondent/ promoter is directed to refund the amount i.e. **Rs. 78,27,805/-** received by him from the complainant along with interest at the rate of 10 % p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount.
- 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.

34. Complaint stands disposed of.

35. File be consigned to the registry.

*V.K. - G*  
**(Vijay Kumar Goyal)**

Member

Haryana Real Estate Regulatory Authority, Gurugram

*[Signature]*  
**(Dr. KK Khandelwal)**

Chairman

**Dated: 25.08.2022**