

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

Complaint no. :	1634 of 2018
Date of filing complaint:	07.12.2018
First date of hearing:	02.04.2019
Date of decision :	08.08.2022

Sh. Abhishek Somani S/o Sh. Ashwani Somani R/O: 69 Engineers Enclave Pitampura Delhi-110085	Complainant
Versus	
M/s Assotech Moonshine Urban Developers Private Limited Regd. office: 148-F, Pocket-IV, Mayur Vihar, Phase-I, Delhi 110091	Respondent

CORAM:	
Dr. KK Khandelwal	Chairman
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Sh. Dinesh Doshi (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 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.

2. The complaint has been received on 01.11.2018 and reply has been filed by the respondent. The complainant generated new proforma B by complaint No. 4328 of 2019. The said complaint i.e. complaint No. 4328 of 2019 is clubbed with complaint No. 1634 of 2018.

A. Unit and project related details

3. 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.	Name and location of the project	"Assotech Blith", Sector 99, Gurugram
2.	Nature of the project	Group housing project
3.	Area of the project	12.062 acres
4.	DTCP License	95 of 2011 dated 28.10.2011
	valid up to	27.10.2024
	Licensee name	M/s Moonshine Developers Private Limited & M/s Uppal Housing Private Limited
5.	RERA registered/ not registered	Registered vide registration No. 83 of 2017 dated 23.08.2017
	Valid up to	22.08.2023
6.	Allotment letter	23.06.2012

		(As per page no. 32 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)
7.	Unit no.	B- 904 on 09 th floor, tower B (As per page no. 30 of complaint)
8.	Super area admeasuring	2310 sq. ft. (As per page no. 32 of complaint)
9.	Payment plan	Construction linked payment plan (As per page no. 49 of complaint)
10.	Possession clause	As per Clause 19(I), <i>The possession of the apartment shall be delivered to the allottee(s) by the company <u>within 42 months from the date of allotment</u> 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> (Emphasis supplied)
11.	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 <u>further within a grace period of six months</u>, the Company shall compensate the intending Allottee (s) for delayed period @Rs. 10/- per sq.</i>

		<i>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</i>
12.	Due date of delivery of possession	23.06.2016 (Calculated from date of allotment letter dated 23.06.2012 with grace period of 6 months as per clause 19(II)) (Grace-period is allowed)
13.	Total consideration	Rs. 1,72,91,200/- (As per schedule E on page no. 26 of reply)
14.	Total amount paid by the complainants	Rs. 1,10,86,971/- (As alleged by the complainant on page no. 16 of complaint)
15.	Occupation certificate	Not obtained
16.	Date of offer of possession to the complainant	Not offered

B. Facts of the complaint:

4. That the respondent launched the project in the year 2010 with wide publicity by media and network of real estate brokers in the area. The complainant booked a flat in the project namely "Assotech Blith" in the revenue estate of Village Dhankot, Sector 99, Gurugram, Haryana in the month of March 2012 and paid booking amount of Rs. 5,99,999/-.

5. That the respondent issued the allotment letter dated 23.06.2012 by which 3 BHK + SR flat bearing no. B-904 on 9th floor admeasuring area 2310 sq. ft. was allotted to the complainant, for a total sale consideration amount of Rs. 1,19,75,600/-. The said allotment letter contains all the terms and conditions and the schedule of payment plan.
6. That the builder has received an amount of Rs. 1,10,86,971/- against consideration of allotted unit including central green facing, club membership unit charge, vehicle parking charges, etc. including vehicle parking charges against total sale consideration of Rs. 1,19,75,600/-.
7. That as per clause no. 57 of allotment letter dated 23.06.2012, the respondent was under an obligation to deliver the possession of the said flat/unit within 42 months from the date of allotment letter dated 23.06.2012. The complainant paid all the demands and when raised by the respondent and remaining amount was to be paid at the time of possession of the flat.
8. That it has failed to comply with the terms and conditions of the allotment letter dated 23.06.2012 and failed to handover the possession of the said flat/unit till today. He visited the site of the project and found that only 50% of the project was completed and it will take more than 4-5 years to the respondent to complete the project. It has utilized the amount so raised, in other projects.

9. That the complainant issued a notice dated 02.08.2018 to it by which he demanded possession of the property or refund the amount with interest @ 24% p.a. from the date of deposit till the date of realization of amount, which was served upon to it. The complainant held a meeting with it on 03rd September, 28th September, 1st October, 12th October and 26th October and demanded the possession of the property as per the allotment letter dated 23.06.2012. But the respondent expressed its inability to deliver the possession of the said unit on one ground or other pretext of previous excuses.
10. That he approached the respondent on various dates i.e. 04.01.2017, 09.05.2017, 19.11.2017, 29.01.2018 but it has failed to deliver the possession to the complainant till today. The project of the respondent is not completed and due to this the complainant is suffering from occupancy and monetary loss and suffered with mental torture and harassment caused by the respondent. He further issued a legal notice dated 02.08.2018 wherein requested the respondent to refund the deposited amount of Rs. 1,10,86,971/- along-with interest @24% p.a.
11. That it failed to give satisfactory explanation and answer with regard to the delivery of possession of said unit to the complainant and continuously made false, vague and dishonest excuses to deliver of possession since expiration of 42 months and 6 months of grace period.

C. Relief sought by the complainant:

12. The complainant has sought following relief(s):
- i. Direct the respondent to refund the entire amount paid by the complainant to the respondent till date along with interest at the prescribed rate under Act of 2016.

D. Reply by respondent :

The respondent by way of written reply made following submissions

13. The respondent denied the facts pleaded by the complainant in para no. 4 to 11 and further stated that the complainant is an investor and booked two units with different names. He wanted to ride on the investment boom in the real estate sector and thereby kept on waiting for the property prices to rise but since the real estate market did not rise and after a long gap files the present complaint.
14. That as per clause 19(H), the said period of 42 months for completion and handing over of unit was subject to force majeure conditions and the respondent having fulfilled all the terms and conditions of the allotment letter dated 23.06.2012.
15. 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 said project and all the external and internal development charges were fully paid as per schedule and license conditions.

16. That 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 from the complainant against the booked unit and the balance cost incurred to date was funded by the shareholders/debenture holders of the company.
17. 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:

18. 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. Entitlement of the complainant for refund:

F.I Objection regarding the complainant being investor:

19. It is pleaded on behalf of respondent that complainant is an investor and not consumer. So, she is entitled to any protection under the Act and the complaint filed by her under Section 31 of the Act, 2016 is not maintainable. It is pleaded that the preamble of the Act, states that the Act is enacted to protect the interest of consumers of the real estate

sector. The Authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states the main aims and objects of enacting a statute but at the same time, the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if he contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the buyer's agreement, it is revealed that the complainant is a buyer and paid considerable amount towards purchase of subject unit. At this stage, it is important to stress upon the definition of the term allottee under the Act, and the same is reproduced below for ready reference:

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

20. In view of above-mentioned definition of allottee as well as the terms and conditions of the flat buyer's agreement executed between the parties, it is crystal clear that the complainant is an allottee as the subject unit allotted to them by the respondent/promoter. The concept of investor is not defined or referred in the Act of 2016. As per definition under section 2 of the Act, there will be 'promoter' and 'allottee' and there cannot be a party having a status of 'investor'. The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal No.0006000000010557 titled as *M/s Srushti Sangam Developers Pvt Ltd. Vs Sarvapriya*

Leasing (P) Ltd. and anr. has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected

F.II Objection regarding force majeure circumstances:

21. The respondent builder took a plea that the said period of 42 months for handing over of possession was subject to force majeure circumstances. The authority observes that clause 19(I) read with 19(II) specifies that 42 months from the date of allotment subject to force majeure circumstances. However, the respondent has failed to provide any specific force majeure circumstances. In view of these circumstances, no further grace on account of force majeure circumstances, over and above specified grace period of 6 months specified under clause 19(II) can be given to the respondent. The said grace period of 6 months specified under clause 19 (II) is allowed to the respondent- builder on account of being unqualified one.

G. Entitlement of the complainant for refund:

G.I Direct the respondent to refund the entire amount paid by the complainant to the respondent till date along with interest at the prescribed rate under Act of 2016.

22. The project detailed above was launched by the respondent as group housing project and the complainant was allotted the subject unit in tower B on 23.06.2012 against total sale consideration of Rs. 1,72,91,200/-. 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 23.06.2016. It has come on record that against the total sale consideration of Rs. 1,72,91,200/- the complainant has paid a sum of Rs. 1,10,86,971/- to the respondent.

23. Due to delay in handing over of possession by the respondent-promoter, the complainant-allottee wishes to withdraw from the project of the respondent. Thus, keeping in view the fact that the allottee- complainant wish to withdraw from the project and is 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 **23.06.2016** and there is delay of more than 2 years 04 months 09 days on the date of filing of the complaint i.e. 01.11.2018.
24. 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....."

25. 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 he wishes 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.

26. This is without prejudice to any other remedy available to the allottee including compensation for which he 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.
27. The authority hereby directs the promoter to return the amount received by it i.e., Rs. 1,10,86,971/- with interest at the rate of 9.80% (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*.

H. Directions of the Authority:

28. 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. 1,10,86,971/-** received by it from the complainant along with




interest at the rate of 9.80% 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.


29. Complaint stands disposed of.

30. File be consigned to the registry.


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram




(Dr. KK Khandelwal)
Chairman

Dated: 08.08.2022