

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

Complaint no. :	5108 of 2019
Date of filing complaint:	29.11.2019
First date of hearing:	19.12.2019
Date of decision :	08.08.2022

1. Cdr M A Rathore S/o Late Sh. I.D Rathore 2. Lt. Cdr Gora Rathore S/o Sh. Cdr M A Rathore <b>Both R/O:</b> Flat no. M-512, Jalvayu Tower, Sector 56, Gurgaon, Haryana	<b>Complainants</b>
Versus	
M/s Assotech Moonshine Urban Developers Private Limited <b>Regd. office:</b> 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. Gaurav Rawat (Advocate)

Complainants

Sh. Nitin Gupta (Advocate)

Respondent

**ORDER**

1. The present complaint has been filed by the complainants/allottees under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed

that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the 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.	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	<b>Registered</b> vide registration No. 83 of 2017 dated 23.08.2017
	Valid up to	22.08.2023
6.	Allotment letter	06.09.2012 (As per page no. 25 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.	A- 501 on 5 <sup>th</sup> floor, tower A (As per page no. 25 of complaint )
8.	Super area admeasuring	1365 sq. ft. (As per page no. 25 of complaint )
9.	Payment plan	Construction linked payment plan (As per page no. 43 of complaint)
10.	Possession clause	<p><b>As per Clause 19(I),</b></p> <p><i>The possession of the apartment shall be delivered to the allottee(s) by the company <b><u>within 42 months from the date of allotment</u></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></p> <p><b>(Emphasis supplied)</b></p>
11.	Grace period clause	<b>As per Clause 19(II),</b>



		<p><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 <b><u>further within a grace period of six months</u></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 in the outstanding dues of the Allottee (s) at the time of handing over possession</i></p>
12.	Due date of delivery of possession	<p><b>06.09.2016</b> (Calculated from date of allotment letter dated 06.09.2012 with grace period of 6 months as per clause 19(II)) <b>(Grace-period is allowed)</b></p>
13.	Total consideration	<p>Rs. 88,97,125/- (As per schedule E on page no. 43 of complaint)</p>
14.	Total amount paid by the complainants	<p>Rs. 69,06,659/- (As per page no. 34 of</p>



		complaint)
15.	Request for withdrawal by the complainant before filing present complaint	04.12.2016 (As per page no. 34 of complaint)
16.	Occupation certificate	Not obtained
17.	Date of offer of possession to the complainant	Not offered

**B. Facts of the complaint:**

3. That lured by the representations, the complainants booked a unit bearing no. A-501, 2BHK on 5th floor admeasuring super area of 1365 sq. ft. in the project of the respondent for a total sale consideration of Rs. 88,97,125/- and paid an amount of Rs. 2,00,000/- through cheque bearing no. 336233 dated 12.08.2012, as initial payment for booking of unit.
4. That the complainants on 25.08.2012 made further payment of Rs. 3,00,000/- through cheque bearing no. 336234 and Rs. 2,88,020/- through cheque no. 336235, against agreed sale consideration as per payment schedule. Vide allotment letter dated 06.09.2012, they were allotted unit no. A-501 in the project of the respondent.
5. That as clause 19 (i) of the allotment letter, the apartment was to be delivered within 42 months from the date of allotment. Therefore, the date of handing over of possession as per this clause was 05.03.2016. Further, as per clause 3 of the allotment, the complainants booked a fully

furnished apartment and the specification as provided by the respondent in the unit is annexed as Schedule D of the allotment letter. However, it is pertinent to note that no such amenity as mentioned in Schedule D of the allotment is present in the unit of the complainant till date.

6. That the complainants further made payments of Rs. 57,18,639/- through various cheques from 11.10.2012 to 22.02.2016, against agreed sale consideration as per payment schedule.
7. That the complainants approached the respondent in March 2016 in respect of handing over of the possession of the unit as per clause 19.1 of the allotment. Despite specific clause for handing over of possession, the respondent apprised that the project has not been completed and it would take long time for its completion.
8. That the complainants on 17.06.2016 made a payment of Rs. 4,00,000/- through NEFT and till date paid total amount of Rs. 69,06,659/- which is around 80% of the total cost of the unit. The total payment made by the complainants was acknowledged by the respondent vide letter dated 04.07.2016 against receipt dated 18.07.2016. The complainant no. 1 is an Ex. Naval Officer and has paid his entire life savings in the project with the dream of having his own flat. The complainant no. 2 took a housing loan of Rs. 35,00,000/- from Naval Group Insurance Fund for making payments towards the total sale consideration of the unit.



9. That after completion of more than 4 years, in September 2016, they visited the project site and shocked to see that the project was way behind from its development schedule and nowhere near its completion. The complainants sent a letter on 04.12.2016 to it, to refund the amount paid towards the total consideration of the unit along with interest @10.9% from the respective dates of deposit till the actual realization as the respondent has failed to fulfil his obligations as mentioned under the terms and conditions of allotment.
10. That the complainants sent various e-mails and letters from 23.12.2016 to 28.09.2018 to respondent, in respect of the refund of the amount paid along with interest. However, the respondent with malicious intention to cheat and dupe the innocent complainants, who are spending their life for protecting the country, did not provide any satisfactory reply. Further, on 04.04.2019, they sent a letter to the SHO, Police Station Sector 10, Gurgaon for lodging a complaint against the respondent for cheating the complainants.
11. That in the year 2017, they filed a complaint bearing no. C-1100/17 before the Learned State Consumer Forum, Delhi for the refund of the amount paid by them along with interest. However, due to long dates after every hearing and a long process, the complainants found the present authority to be the appropriate forum for speedy redressal of

grievances. Thereafter, the complaint before the Learned State Consumer Forum, Delhi was withdrawn.

12. That the complainants suffered mental and financial loss. They are living in a rental accommodation having rent amounting to Rs. 30,250/- per month plus 10% yearly escalation and have paid a rent of Rs. 9,93,000/- from the due date of possession till date due to the unfair trade practices by the respondent.
13. That the respondent-company at the pretext of saving their own skin, in a malafide manner, using its dominant position threatened to cancel and forfeit the amount of the complainant and paid no heed to showcase any desire on their part to resolve the issues.

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

14. The complainants have sought following relief(s):
  - i. Direct the respondent to refund the entire amount paid by the complainants till date along with interest at the prescribed rate under Act of 2016.
  - ii. Direct the respondent to provide detail of transactions done through separately maintained account.

**D. Reply by respondent:**

The respondent by way of written reply made following submissions



15. The respondent denied the facts pleaded by the complainant in para no. 4 to 13 and further stated that the complainants are investors and booked the unit 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.
16. That as per clause 19(II), 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 06.09.2012.
17. 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.
18. 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.

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. I Territorial jurisdiction**

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

**E. II Subject matter jurisdiction**



Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the 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:**

21. 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."*

22. 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:**

23. 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 complainants for refund:**

- G.I Direct the respondent to refund the entire amount paid by the complainant along with interest.**
24. The project detailed above was launched by the respondent as group housing project and the complainants were allotted the subject unit in tower A on 06.09.2012 against total sale consideration of Rs. 88,97,125/- . 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 06.09.2016. It has come on record that against the total sale consideration of Rs. 88,97,125 the complainants have paid a sum of Rs. 69,06,659/- to the respondent.

25. The complainants submitted that the said unit was booked under construction linked payment plan and the despite several follow-ups the regarding handing over the possession of the allotted unit, the respondent-builder didn't pay any heed to the requests of the complainants. 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 **06.09.2016** and there is delay of more than 3 years 02 months 23 days on the date of filing of the complaint i.e. 29.11.2019.
26. 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 allottees 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....."*

27. 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 allottees, as they 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.

28. 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.
29. The complainants through their counsel, requested at bar that even after 4 years of delay the respondent did not refund the amount paid by them. Thus, directions be passed for non-creation of any third-party rights against the unit till payment of entire refundable amount & interest. There is persistent failure on part of respondent to refund the amount for past 4 years. The respondent is directed not to create any third-party rights against the unit before full realization of amount paid by the



complainants, and even if any transfer is initiated with respect to subject unit, the receivable shall be first utilized for clearing dues of allottee-complainant.

30. The authority hereby directs the promoter to return the amount received by him i.e., Rs. 69,06,659/- 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*.

**F.II Direct the respondent to provide detail of transactions done through separately maintained account.**

31. The respondent is also directed to issue fresh statement of account detailing after payment of refund interest within 30 days of date of this order.

**H. Directions of the Authority:**

32. 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. 69,06,659/-** received by it from the complainants along with



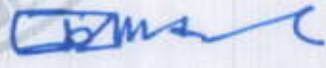
interest at the rate of 9.80% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount.

- ii) The respondent is further directed not to create any third-party rights against the subject unit before full realization of paid-up amount along with interest thereon to the complainants, and even if, any transfer is initiated with respect to subject unit, the receivable shall be first utilized for clearing <sup>the</sup> dues of allottee-complainants.
  - iii) 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.
33. Complaint stands disposed of.
34. File be consigned to the registry.

  
(Vijay Kumar Goyal)

Member

Haryana Real Estate Regulatory Authority, Gurugram

  
(Dr. KK Khandelwal)

Chairman

**Dated: 08.08.2022**