

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

| | |
|----------------------------|--------------|
| Complaint no. : | 2467 of 2021 |
| Date of filing complaint : | 17.06.2021 |
| First date of hearing: | 26.08.2021 |
| Date of decision : | 07.03.2023 |

| | |
|---|--------------------|
| Sh. Rajendra Kumar Gupta R/o: B-9/6, DLF City Phase , Gurgaon-122002 | Complainant |
| Versus | |
| Assotech Moonshine Urban Developers Private Limited Regd. office: 148 F, Pocket IV, Mayor Vihar, Phase-I, Delhi 110091 | Respondent |
| CORAM: | |
| Shri Ashok Sangwan | Member |
| Shri Sanjeev Kumar Arora | Member |
| APPEARANCE: | |
| Sh. Abhijeet Gupta (Advocate) | Complainant |
| Sh. Vaibhav Kataria (proxy counsel) | 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. 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 | 29.06.2012 (As per page no. 24 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- 1002 on 10 th floor, tower A |

| | | |
|-----|------------------------|---|
| | | (As per page no. 24 of complaint) |
| 8. | Super area admeasuring | 1365 sq. ft. (As per page no. 24 of complaint) |
| 9. | Payment plan | Construction linked payment plan (As per page no. 51-52 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. 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</i> |

| | | |
|-----|--|---|
| | | <i>Allottee (s) at the time of handing over possession</i> |
| 12. | Due date of delivery of possession | 29.06.2016 (Calculated from date of allotment letter dated 29.06.2012 with grace period of 6 months as per clause 19(II)) (Grace-period is allowed) |
| 13. | Total consideration | Rs. 70,66,750/- (As per page no. 24 of complaint) |
| 14. | Total amount paid by the complainant | Rs. 64,62,697/- (As per applicant ledger dated 7.03.2021 on page no. 51-52 of complaint) |
| 15. | Occupation certificate | Not obtained (Application for grant of OC 12.01.2021) |
| 16. | Date of offer of possession to the complainant | Not offered |

B. Facts of the complaint

3. That the respondent initiated the project namely "AssotechBlith", a group housing project covering an area of 12.062 acres situated in Sector-99, Dhankot, Gurugram, Haryana vide license no. 95 of 2011 dated 28.10.2011 issued by the Director, Town and Country Planning Department, Gurugram, Haryana.
4. That the representatives of the respondent company, sometimes in March 2012, met the complainant and spoke very high on the

reputation of the company of delivery of the project on time and also handed over a brochure and stated that it has conceived and is in the process of contracting and redefining the perception about luxury living, which the respondent is proposing to complete in all respects with reference to civil finishes, flooring, electrical power to distribution panels on each level / floor plumbing and ventilators, elevators, back up diesel generators etc.

5. That in pursuant to the elaborate advertisements, assurances, representations and promises made by the respondent in the brochure circulated by it about the timely completion of a premium project with impeccable facilities and believing the same to be correct and true, the complainant considered and vide application and booking no. ABCI00167I12 and ABBI00100I12-13 respectively dated 21.03.2012, booked a unit bearing no. A-1002 on 10th floor of tower-A having super area of 1365 sq. ft. in the said project having a total consideration of Rs. 73,66,878/- and paid a booking amount of Rs. 12,49,813/- vide cheque no. 104414 dated 22.05.2012 drawn on HDFC Bank, New Delhi and the same was acknowledged by it vide receipt no. ABMR/00335/12-13.
6. That it was represented and assured by the respondent that the possession of his flat would be delivered within 42 months from the date of allotment with a grace period of six months along with possession of the flat.

7. That, pursuant to the booking of the unit, an allotment letter cum builder-buyer agreement dated 29.06.2012 was executed between the parties which included all the details of the project such as amenities promised, site plan, payment schedule, date of completion etc. Under the said builder buyer agreement, it promised, assured, represented and committed to the complainant that this residential project would be completed and will be handed over to the buyer within 42 months from the date of issue of allotment cum builder buyer agreement. Further, as per clause 19 (I) of said agreement, it assured that the time is of the essence.
8. That it is also important to highlight herein that as per the terms and conditions of the allotment letter cum builder buyer agreement, the respondent would abide by the construction/development milestones in accordance with the construction plan set out in the builder/buyer agreement.
9. That the complainant paid an amount of Rs. 6,28,771/- to the respondent vide cheque no. 295023 dated 19.07.2012 drawn on IDBI bank, Gurugram and the same was acknowledged by it vide receipt no. ABMR/00735/12-13.
10. It is pertinent to note that the allotment letter cum buyer's agreement contains the arbitrary such as clause 12(b) and 19(ii) wherein in case of failure on part of the respondent to comply with the provision of the allotment letter, he would be charged @18%,

however, on the other hand the respondent builder would be liable to pay compensation @ Rs10 per sq. ft. only, in case of failure on its part to abide by terms and conditions of the allotment letter.

11. That as per the allotment letter cum agreement, the complainant was supposed to get the peaceful and vacant possession of his unit within 42 months from the date of allotment with a grace period of 180 days (6 months) which came to be 29.06.2016. That to the utter dismay of the complainant that it has failed to offer the possession of his Unit in the stipulated time and there is a delay of almost five years.
12. That the said unit was purchased by the complainant on the pretext of construction linked payment plan as per clause 11 of the allotment letter which provides for stage wise payment of sale consideration to the respondent based on the progressive stage of construction. It is noteworthy to mention that the underlying purpose of option of said plan was that he would be required to pay only part of sale consideration as per agreed stages of consideration, provided that such stage wise demand should be raised by it upon furnishing credible evidences of completing various stages of construction to the satisfaction of the complainant. It raised the demands from the complainant without giving any heed to the construction linked payment plan. That the complainant in good faith paid the amount as and when demanded. That there exists a prime facie case against the

respondent by illegally raising the instalments whereas on the said dates, the construction of the unit has not reached the desired level of construction at all which is firmly in complete disobedience of construction linked payment plan as agreed between the complainant and the respondent

13. That the complainant has already paid almost 95% of the total consideration of the unit i.e. an amount of Rs. 64,62,696.34/- till date. He anticipated and believed that the money collected by the respondent would be utilized in a manner that was commensurate to the stage of construction and further that the complainant would be provided with timely updates regarding the construction work at site. Yet, the complainant herein had to constantly follow up and chase the respondent to inquire about the status of the project, but no satisfactory response or concrete update was provided.
14. That to the further surprise and dismay of the Complainant, all promises of the Respondent turned out to be false and absolutely misleading since after considerable lapse of time and despite of many follow-ups, the builder had failed to keep pace with development of the project as the construction of the said project since the date of start of excavation was going at snail pace and the said project is far from completion and the same will not be able to deliver the possession within the stipulated time. It is abundantly clear that the respondent has played a fraud upon the complainant

and has cheated him fraudulently and dishonestly with a false promise to complete the construction of the project within the stipulated period.

15. That even at the time of the execution of the allotment letter cum agreement the respondent had represented to the complainant that time is essence of the allotment and they are in possession of the necessary approvals from the DTCP, Haryana to commence with the construction work of the residential project. However, he visited the respondent's office and apprised their officials of the anomaly and asked them to explain the deviation but till date the officials did not have any clear explanation about the same and also showed their helplessness in the matter and this amounts to fraud being committed towards the complainant herein. That the only oblique motive of the Respondent is to dupe his hard-earned money.
16. That the complainant was shocked and appalled when they received a letter dated 11.12.2020 with a subject "Revival and Resumption of work at Assotech Blith" from the respondent. The respondent has on its own, extended the date of the completion i.e. 30.11.2021, which is absurd, arbitrary and unjust in nature. Furthermore, due to the absurd terms and conditions imposed by the respondent and this extension of deadline has rendered the agreement executed by and amongst the complainant and respondent, null and void.

17. That there is an apprehension in the mind of the complainant that the respondent has been playing fraud and there is something fishy which the respondent is not disclosing to the him just to embezzle his hard-earned money. The complainant has neither political rivalry nor any business jealousies with the opposite party rather is a common human being.
18. That the respondent is guilty of deficiency in service within the purview of provisions of the Act of 2016 and the provisions of Rules. The complainant has suffered on account of deficiency in services by the respondent and as such the respondent is fully liable to cure the deficiency as per the provisions of the Act and Rules.
19. That the complainant having shattered and scattered dreams of owning his own flat herein is constrained and left with no option but to cancel the allotment of the unit seek refund of the amount including but not limited to all the payments made in lieu of the said unit/flat, as per the terms and conditions of the allotment letter cum agreement executed by the respondent and even otherwise are entitled to the same.
20. That the complainant after losing all the hope from the respondent company, after being mentally tortured and also losing considerable amount, is constrained to approach this Authority for redressal of his grievance.

21. The complainant-allottee filed an application for change in relief dated 19.04.2022 wherein seeking amendment in relief sought from refund to possession along with delay possession charges. The said request of the complaint was allowed.

C. Relief sought by the complainant:

22. The complainant has sought following relief(s):

- (i) Direct the respondent to handover the possession of the allotted unit and to pay interest at the prescribed rate for every month of delay from due date of handing of possession till actual handing over of possession.
- (ii) Direct the respondent to pay cost of litigation.

23. 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

24. The respondent has contested the complaint on the following grounds.

- i. That the agreements that were executed prior to implementation of Act of 2016 and Rules shall be binding on the parties and cannot be reopened. It is clarified in the rules published by the state of Haryana, the explanation given at the end of the prescribed agreement for sale in annexure A of the Rules, that the developer

- shall disclose the existing agreement for sale in respect of ongoing project and further that such disclosure shall not affect the validity of such existing agreement executed with its customers and thus, the parties are bound by the terms of the agreement.
- ii. That the relief(s) sought by the complainant are unjustified, baseless and beyond the scope/ambit of the agreement duly executed between the parties, which forms a basis for the subsisting relationship between the parties. The complainant entered into the said agreement with the respondent with open eyes and is bound by the same and the reliefs sought by him are way beyond the four walls of the agreement between the parties. The complainant while entering into the agreement has accepted and is bound by each and every clause of the said agreement.
 - iii. That the complainant after conducting their due diligence and further investigating the real estate market approached the respondent and applied for booking of unit no. A-1002, having tentative super built-up area about 1,365 sq. ft. in the project "Assotech Blith" at Sector-99, Gurugram, Haryana.
 - iv. That the complainants prior to approaching respondent, had conducted extensive and independent enquiries regarding the project and it was only after she was fully satisfied with regard to all aspects of the project, including but not limited to the capacity of respondent to undertake development of the same and she took an independent and informed decision to purchase the unit, un-influenced in any manner by respondent.

- v. That the complainant wilfully, uninfluenced and after being fully satisfied signed the allotment letter/agreement dated 29.06.2012. further, all the demands were raised by the respondent as per the agreed payment plan and as per the construction milestones achieved by the respondent-company and the respondent through various emails kept her updated with respect to construction status of the unit.
- vi. That vide email dated 11.12.2020, the respondent intimated the complainant that the construction work at the project site is going to be resumed and the same was at halt due to the current Covid-19 pandemic.
- vii. That the possession of the apartment was to be delivered to the complainant by the respondent within 42 months from the date of signing of allotment cum agreement dated 29.06.2012, subject to the force majeure, circumstances, regular and timely payments by the intending allottee. The delays were caused on account of orders passed by Hon'ble National Green Tribunal and the State Pollution Control Board which issued various directions to builders to take additional and step to curtail pollution. On account of the aforementioned reasons, the progress of the work of the respondent was abruptly hampered. All these events led to suspension and stoppage of work on several occasions which also resulted in laborers 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 laborers and contractors abandoning the work, the respondent had to run from pillar to post in order to find new contractors and labourers, thus affecting progress of project. The pandemic Covid-19 is also the biggest reason for delay in handing

over the possession of the flat/unit. Hence, respondent is not liable for the delay in handing over of possession of apartment of the complainant.

- viii. That that construction contract for construction of project namely "Assotech Blith" 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 vide construction contract agreement 03.04.2012. Then, thereafter the construction was started by Assotech Limited as per the contract terms and conditions. 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, wherein 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.
- ix. That the appointed O.L. thereafter sealed office of contractor company and 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 because the matter

was already sub-judice before the Hon'ble Delhi High Court. Even 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 activity because the work was in the mid-way and huge acute recession was prevailing in the real estate market that's the reason nobody shown their interest to take the assignment in project. Hence, 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.

- x. That a legal contract was already executed between respondent and construction company "Assotech Limited" and till 2016 almost 70% to 80% work was completed at site. The construction of all the towers was almost completed. The finishing activity was also in advance stage. So, thus in this grave situation it was very difficult to terminate the contract with "Assotech Limited". Further, no other contractor came forward to enter in this type of on-going project. The rates of construction material has also enhanced / increased drastically and thus, the cost of construction will increase if new contractor will 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. They were ready to complete the aforesaid project as and when this problem will end, and they have also given the bonafide development which is going in the Hon'ble Delhi High Court.

- xi. That respondent has sold the flat mostly prior to this situation and as per the term and condition of the builder buyer agreement, there is no any price / rate enhancement of their flat booking rate. That even the real estate market was also deteriorated and there were recession in real estate market from 2015-16 onwards. Thus, due to this unforeseen circumstances the construction was delayed. When the Hon'ble High Court of Delhi ordered for revival of contractor company, it immediately restarted the construction work at site with full force of manpower to recap the loss of the time.
- xii. 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. 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. The balance cost incurred to date was funded by the shareholders/debenture holders of the company.

- xiii. That the construction of the project is in full swing and is as per the schedule and the respondent-company as committed to deliver the said project as per the RERA registration certificate.
- xiv. That the complainant who was merely an investor and 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, filed the present complaint. On 12.04.2021, it applied for grant of occupation certificate for towers E, F, C and G. After the grant of part OC by DTCP, respondent will offer the possession to respondent.
25. 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

26. 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

27. 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.

28. 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

29. 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 allotment letter 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."

30. 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."

31. 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/allotment letter 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

32. 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.
33. 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: —

.....

(1): -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...."

34. 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)(1)(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 Objections regarding the complainants being investors:

35. It is pleaded on behalf of respondent that complainants are investors and not consumers. So, they are not entitled to any protection under the Act and the complaint filed by them 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 the promoter 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

complainants are buyers and paid considerable amount towards purchase of subject unit. At this stage, it is important to stress upon the definition of 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."

36. 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 complainants are allottees 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 allottees being an investor are not entitled to protection of this Act also stands rejected.

F.IV Objection regarding delay due to force majeure circumstances

37. 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, stoppage of work due to lock down amid Covid-19 pandemic. The work at the project site was hampered due to orders by NGT and EPCA to curb the pollution, however, these were for a short period of time. So, the plea advanced in this regard cannot be taken into consideration.

38. The respondent further 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. Moreover, for the same to be excluded while calculating delay in completing the construction of project, it may approach the competent Authority/ Forum for getting

this time period be declared as 'zero time period'. However, there is no such order placed on record by the respondent-company, wherein such period is declared as "zero-period". Hence, the plea of the respondent on account of delay in completion due to initiation of liquidation proceedings is not tenable.

39. 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 I.As 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 29.06.2016 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 handover the possession of the allotted unit and to pay interest at the prescribed rate for every month of delay from due date of handing of possession till actual handing over of possession.

40. 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."

41. Clause 19(I) of the allotment dated 29.06.2012 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."

42. 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 letter inter-se parties was executed on 29.06.2012 as such the due date of handing over of possession comes out to be 29.06.2016.
43. **Admissibility of grace period:** As per clause 19(I) of allotment letter dated 29.06.2012, 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."*
44. 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 29.06.2012, the due date of possession comes out to be 29.06.2016.

45. **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.

46. 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.

47. 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., 07.03.2022 is @ 10.70 %. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 8.70%.
48. 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;"*
49. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 10.70 % by the respondent/promoter which is the same as is being granted to them in case of delayed possession charges.
50. 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 29.06.2012, 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 letter. The due date of possession is calculated from the date of allotment letter i.e.; 29.06.2012, which comes out to be 29.06.2016.

51. 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. During course of proceedings dated 17.01.2023, the respondent through its counsel stated at bar that it has applied for grant of occupation certificate and has obtained fire NOC. 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. 29.06.2016 till the expiry of two months from the date of offer of possession or till actual handing over of possession, whichever is earlier.

52. Accordingly, it is the failure of the promoter to fulfil its obligations and responsibilities as per the allotment letter dated 29.06.2012 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., 29.06.2016 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., 10.70 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

53. The complainant- allotted also sought relief of possession along with delay possession charges. As per submissions of respondent, application for grant of occupation certificate has been made to the competent authority but since no occupation certificate has been obtained by the respondent till date, the respondent is directed to offer the possession of the allotted unit complete in all aspects as per specifications of allotment letter within two months from date of obtaining occupation certificate.

G.II Direct the respondent to pay cost of litigation.

54. The complainant is seeking relief w.r.t. compensation in the above-mentioned reliefs. Hon'ble Supreme Court of India in *civil appeal nos. 6745-6749 of 2021 titled as M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors. (supra)*, has held that an allottee is entitled to claim compensation & litigation charges 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 & litigation expense 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 & legal expenses. Therefore, 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

55. 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. 10.70 % per annum for every month of delay on the amount paid by the complainant from due date of possession i.e.; 29.06.2016 till the date of actual handing over of possession or till offer of possession plus two 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 is directed to offer the possession of the allotted unit complete in all aspects as per specifications of allotment letter within two months from date of obtaining occupation certificate.

- 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., 10.70 % 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.
- v) The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement.
56. Complaint stands disposed of.
57. File be consigned to registry.


(Sanjeev Kumar Arora)
Member


(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 07.03.2023

HARERA
GURUGRAM