

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

Complaint no. : 3409 of 2021
First date of hearing: 21.10.2021
Date of decision : 10.02.2022

1. Kulvinder Singh Kohli
2. Kiran K Kohli
Both RR/o: 47, Jor Bagh, New Delhi

Complainants

Versus

Assotech Moonshine Urban Developers Private
Limited
Regd. office: 148 F, Pocket IV, Mayor Vihar,
Phase-I, Delhi 110091

Respondent

CORAM:
Dr. K.K. Khandelwal
Shri Vijay Kumar Goyal

**Chairman
Member**

APPEARANCE:

Shri. Vikas Tomar
Shri. Sanjeev Dhingra & Rakshit
Srivastava

Advocate for the complainants

Advocate for the respondent

ORDER

1. The present complaint dated 08.09.2021 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 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 allottees 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 complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Project name and location	"Assotech Blith", Sector-99, District- Gurugram, Haryana
2.	Project area	12.062 acres
3.	Nature of the project	Group Housing Project
4.	DTCP license no. and validity status	95 of 2011 dated 28.10.2011 Valid up to 27.10.2024
5.	Name of licensee	M/s Moonshine Urban Developers Private Limited M/s Uppal Housing Private Limited
6.	HRERA registered/ not registered	Registered Vide registration no. 83 of 2017 dated 23.08.2017 Valid up to 22.08.2023
7.	Allotment letter dated	20.06.2012 (As per page no. 11 of reply) (No builder buyer agreement has been executed inter-se parties, but a similar document containing rights and liabilities of both the parties has been placed on record)
8.	Unit no.	C-403 on 04 th floor, tower C (As per page no. 12 of reply)

9.	Super area admeasuring	1365 sq. ft. (As per page no. 12 of reply)
10.	Payment plan	Construction linked payment plan (As per page 44 of complaint)
11.	Total consideration	Rs.71,19,985/- (As per payment plan on page no. 27 of reply)
12.	Total amount paid by the complainants	Rs.65,81,925/- (As alleged by the complainants on page no. 16 of complaint)
13.	Due date of delivery of possession as per clause 19(I) of flat buyer's agreement <i>The possession of the apartment shall be delivered to the allottee(s) by the company within 42 months from the date of allotment subject to the force majeure, circumstances, regular and timely payments by the intending allottee(s), availability of building material, change of laws by governmental/ local authorities, etc.</i>	20.06.2016 (Calculated from date of allotment letter dated 20.06.2012 with grace period of 6 months as per clause 19(II)) Grace-period is allowed
14.	Grace period clause	As per 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
15.	Occupation certificate	Not obtained
16.	Offer of possession	Not offered

B. Facts of the complaint

3. The representative of the respondent company approached the complainants and represented that a project by the name of "Assotech Blith" (hereinafter referred to as the "Project") situated at Northern Peripheral Road Sector-99, NPR (Dwarka Expressway), Gurgaon is being developed and constructed by the respondent company. Thereafter, the respondent company convinced the complainants with their marketing tactics to book independent dwelling unit. The respondent company with their aggressive sale strategies and advertisement of their project compelled the complainants to book an apartment in the project.
4. That the respondent company, through its officials, approached the complainants and continuously under misrepresentation persuaded the complainants by saying that the respondent company has approved building plans, environmental clearance and also convinced that the said project would be one of its kind and that it would be a great investment as the project is located at an upcoming posh location

and that it would be a great place to live, with all the facilities available within the building complex itself.

5. That on the pretext of representations made by the officials of the respondent company, the complainants submitted the application for allotment of a unit and in good faith, agreed to pay a sum of Rs. 12,00,000/-, even before the allotment letter was issued to the complainants.
6. That on 20.06.2012 an allotment letter with a standard format was executed between the complainants and the respondent. The terms and conditions of the aforementioned agreement were one sided and heavily in favour of the respondent. The complainants even requested the officials of the respondent to add some terms and conditions, but the officials of the respondent refused to negotiate and informed the complainants that they only had two choices, either to accept the letter or reject it. They further informed the complainants that if they opt to reject the allotment, then 10% of the basic sale price of the units would be forfeited, therefore, due to the fear of losing their hard earned money, the complainants had no choice but to sign on the dotted lines and continue with the allotment. The complainants were allotted unit no. C-403 (hereinafter referred to as the "flat"), a 2BHK flat, admeasuring 1365 sq. ft. in the above-mentioned project. As per the allotment letter the total sale consideration for the flat is Rs. 71,19,985/-.

7. That as per clause 19(I) and 57 of the allotment letter, the respondent was obliged to handover the possession of the flat within 42 months of signing the allotment letter i.e. by 20.12.2015. However, to the utter dismay of the complainants, the construction of the project is not completed till date.
8. That a construction-based payment schedule was set up wherein the complainants had to make payment every time a construction milestone was completed. However, the respondent kept demanding the payments towards consideration of allotted unit without achieving the specified milestone. The complainants believing in good faith that timely construction was taking place, kept making the payments without any delays. That, the complainants were in complete shock to know that the construction was nowhere close to be completed even after a substantial amount of consideration has been received by the respondent. Thereafter in 2015, the complainants tried to get a regular update on delivery of possession to which no concrete reply was received from the respondent.
9. That 9 years have been passed since the execution of allotment letter and the respondent has very cleverly avoided the execution of a buyer's agreement. That all these actions were a part of respondent's master plan to deceive the complainants and siphon all their hard-earned money. However, during all these years, the respondent kept on demanding the payments and as such as per the demands of the

respondent, a total sum of Rs. 65,81,925/- has been paid by the complainants to the respondent. The last payment was made on 14.07.2017.

10. That the last day of handing over of the possession approached, but the respondent failed to meet their end of the bargain as the construction of the project is still not complete. That thereafter, the complainants wrote multiple mails and made multiple calls to the officials of the respondent but every time the complainants received only disappointment. The construction of the project is still not complete even after almost 5 years from the original date of handing over of the possession.
11. That the complainants tried their level best to resolve the issue of the delayed possession, but the respondent did not pay any heed to the said requests of the complainants but on the contrary the respondent kept on asking for illegal demand of payment from them.
12. That since the respondent has not delivered the possession of the apartment on time because of which the complainants are suffering from economic loss as well as mental agony, pain and thus, the complainant are entitled to compensation as they have invested all of their life time of savings in flat.
13. That the complainants, thereafter, had tried their level best to reach the representatives of respondent to seek a satisfactory reply in respect of the said dwelling unit but all in vain. The complainants have

also informed the respondent about their financial hardship and that they are in an urgent need of funds, but the respondent turned deaf towards the complainants. The complainants further requested the respondent to deliver the possession of the apartment citing the extreme financial and mental pressure he was going through, but the respondent never bothered to listen to their grievances.

14. That the complainants, seek the delivery of possession of the flat i.e. C-403 along with compensation for delay as per the terms and conditions of the allotment letter. The complainants further seek interest @14% on payments made by the complainants from the date of payment till realisation.
15. That almost a period of 113 months has been lapsed from the date of booking of the floor/unit and further a period of almost 109 months have gone since the allotment letter was executed between the complainants and the respondent. Further, almost 68 months have been passed since the date for handing over of possession have lapsed, despite passing of huge time the respondent has deliberately failed to handover the possession of the floor/unit to the complainants.
16. That as per rule 16(2) of the Real Estate (Regulation and Development) Rules, 2018 (amended) the allottee is entitled to claim compensation for delay caused by the builder in handing over possession of the unit.

17. That respondent has not bothered to act accordingly and did not comply with the terms and conditions of the allotment letter and did not handover the possession of the unit till date. The complainants avert that in view of the principle of the parity the respondent is also liable to pay interest as per Act of 2016 in case of any default on its part. They are also liable to pay pendent lite interest and further interest till date of actual payment.

C. Relief sought by the complainants:

18. The complainants have sought following relief(s):
- (i) Direct the respondent to handover the possession of the unit purchased by the complainants.
 - (ii) Direct the respondent to award delay interest @14% on quarterly rest on the amount paid by the complainants from the date of payment till realization or at such rate as decided by the authority.
 - (iii) Direct the respondent to pay compensation and damages of Rs. 20,00,000/-for mental, financial and physical harassment.
19. 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

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

- i. That the matter with respect to jurisdiction of the authority or adjudicating officer is still pending before the Hon'ble Apex Court of India, thus no statutory vested jurisdiction being available with either authority or adjudicating officer. Thus, the present complaint ought to be adjourned sine a die till the final decision of the Hon'ble Apex Court of India. It is further submitted that Hon'ble Apex Court of India has vide order dated 05.11.2020 has stayed the final judgment dated 16.10.2020 passed by the Hon'ble Punjab and Haryana High court at Chandigarh in CWP No. 34271 of 2019. The complainants have no locus standi or cause of action to file the present complaint.
- ii. That the present complaint is based on an erroneous interpretation of the provision of the act as well as incorrect understanding of the terms and condition of the allotment cum builder buyer agreement dated 20.06.2012.
- iii. That the agreements that were executed prior to implementation of Act of 2016 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, it has been clarified 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. The explanation is extracted herein below for ready reference:

"Explanation: (a) The promoter shall disclose the existing Agreement for Sale entered between Promoter and the Allottee in respect of ongoing project along with the application for registration of such ongoing project. However, such disclosure shall not affect the validity of such existing agreement (s) for sale between Promoter and Allottee in respect of apartment, building or plot, as the case may be, executed prior to the stipulated date of due registration under Section 3(1) of the Act."

In view of the above, it is evident that the parties are bound by the terms of the agreement.

- iv. That the relief(s) sought by the complainants 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 complainants entered into the said agreement with the respondent with open eyes and is bound by the same. That the relief(s) sought by the complainants travel way beyond the four walls of the agreement between the parties. The complainants while entering into the agreement has accepted and is bound by each and every clause of the said agreement.
- v. That the detailed relief claimed by the complainants goes beyond the jurisdiction of this authority under the Act of 2016 and therefore, the present complaint is not maintainable qua the reliefs claimed by the complainants. That having agreed to the above, at the stage of entering into the agreement, and raising vague allegations and seeking baseless reliefs beyond the ambit of the agreement, the

complainants are blowing hot and cold at the same time which is not permissible under law as the same is in violation of the 'Doctrine of Aprobate & Reprobate". In this regard, the respondent reserves their right to refer to and rely upon decisions of the Hon'ble Supreme Court at the time of arguments, if required. Therefore, in light of the settled law, the reliefs sought by the complainants in the complaint under reply cannot be granted by this authority.

- vi. That the complainants approached the respondent after conducting thorough due diligence and investigation of the real estate market and applied for booking of unit no. C-403, having tentative super built-up area of 1,365 sq. ft. in the project "Assoctech Blith" at Sector-99, Gurugram, Haryana and thereafter after being fully satisfied, signed the allotment letter cum agreement. It is further matter of record that vide allotment letter dated 20.06.2012, the complainants were allotted the said unit for a total consideration of Rs.71,19,985/-
- vii. That the complainants prior to approaching respondent, had conducted extensive and independent enquiries regarding the project and it was only after the complainants were 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, that the complainants took an independent and informed decision to purchase the unit, un-influenced in any manner by respondent.

- viii. That the complainants wilfully, uninfluenced and after being fully satisfied signed the allotment letter/agreement dated 20.06.2012. The respondent raised demands from the complainants without paying any heed to the construction linked payment plan. It is submitted that the 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. The respondent through various emails kept the complainants updated with respect to construction status of the unit.
- ix. That vide email dated 11.12.2020, the respondent intimated the complainants that the construction work at the project site was at halt due to the current Covid-19 pandemic and the same is going to be resumed.
- x. That as per the said allotment cum agreement, the possession of the apartment shall be delivered to the complainants by the respondent within 42 months from the date of signing of allotment cum agreement dated 20.06.2012, 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 step to curtail pollution. On account of the aforementioned reasons the progress of the work of the respondent was abruptly hampered.

It is further submitted that all these events led to suspension and stoppage of work on several occasions which also resulted in labourers and contractors abandoning work. As a result of various directions from the authorities at different occasions, regarding water shortage and pollution control etc., coupled with labourers and contractors abandoning the work, the respondent had to run from pillar to post in order to find new contractors and labourers, thus affecting progress of project. That further pandemic Covid-19 is also a 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 complainants.

- xi. That the construction contract for project namely "Assotech Blith" was executed on 3rd April 2012 between the 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 terms and conditions of the contract. The work was going as per the completion schedule. Thereafter, the contractor company Assotech Limited in the mid of year 2015 faced litigation in the Hon'ble Delhi High Court and on 08.02.2016, the contractor company "Assotech Limited" was unfortunately put on

provisional liquidation by Hon'ble Delhi High Court by Co. Petition no. 357 of 2015 and then the official liquidator was appointed in the contractor company. The appointed O.L. thereafter sealed office of contractor company. Thereafter, 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 can be carried on but the O.L. has categorically asked the respondent to wait as the matter was already sub-judice before the Hon'ble Delhi High Court. 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. As a result, nobody shown interest to take the assignment of 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 Feb 2019.

- xii. That it is pertinent to mentioned here 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. Moreover, the rates of construction material were enhanced/increased drastically, and the cost of construction would have been definitely increase if new contractor was appointed for construction. But since there was no clause of enhancement of rate, as a contractor "Assotech Limited" was bound to do the work. Even the real estate market was also deteriorated and there was recession in real estate market from 2015-16 onwards. Thus, due to this unforeseen circumstance the construction was delayed. When the Hon'ble High Court of Delhi ordered for revival of contractor company, the Assotech Limited has immediately restarted the construction work at site with full force of manpower to recap the loss of the time.

- xiii. That as per accounting disclosure of the company duly certified by chartered accountant submitted in RERA, the company has spent an amount of approximately Rs.354.98 crores towards the acquisition and development of the project and all the external and internal development charges (EDC/IDC payable by the company to HUDA) have been fully paid as per schedule and license conditions. In turn the company received a total payment of Rs 265 crores by way of collections from the allottees who booked units in the project and paid as per their respective scheduled payment plans. This amount collected from customers includes the payments received by the complainants against their booked unit. The balance cost incurred to

date was funded by the shareholders/debenture holders of the company.

- xiv. It is submitted that construction of the project is in full swing and is as per the schedule and the respondent company is committed to delivery of the said project as per the RERA registration certificate. It is submitted that complainants 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, the complainants proceeded with filing of the present complaint. It is further submitted that on 12.04.2021, respondent applied for grant of occupation certificate for Towers E, F, C and G. After the grant of part O.C by DTCP, the respondent will offer the possession to complainants.

21. 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 preliminary objection raised by the respondent regarding jurisdiction of the authority to entertain the present complaint stands rejected. 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

22. 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

23. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottees as per agreement for sale. Section 11(4)(a) is reproduced as hereunder: सत्यमेव जयते

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 allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA dated..... Accordingly, the promoter is responsible for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.

Section 34-Functions of the Authority:

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

24. 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 complainants at a later stage.

F. Findings on objections raised by the respondent

F.1 Objection regarding jurisdiction of authority w.r.t. buyer's agreement/allotment letter executed prior to coming into force of the Act.

25. The respondent has contended that 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)** 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."

26. 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."

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

contravention of any other Act, rules, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

F.II Objection regarding entitlement of DPC on ground of complainants being investor.

28. The respondent has taken a stand that the complainants are the investors and not consumers, therefore, they are not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted 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 observed 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 main aims & objects of enacting a statute but at the same time 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 apartment buyer's agreement, it is revealed that the complainants are buyers and they have paid total price of Rs. 65,81,925/- to the promoter towards purchase of an apartment in the project of the promoter. At this stage, it is important to stress upon the definition of

term allottee under the Act, the same is reproduced below for ready reference:

"2(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;"

29. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyer's agreement executed between promoter and complainants, it is crystal clear that the complainants are allottee(s) as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given 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. 000600000010557 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.III Objection regarding passing of various force majeure conditions such as NGT orders, orders of SPCB, recession, appointment of official liquidator, shortage of labour and Covid-19.

30. 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, State Pollution Control Board, slow-down in real estate market, institution of liquidation proceedings against the contractor-company i.e. Athena Limited and appointment of official liquidator, shortage of labour due to stoppage of work and lock down due to outbreak of Covid-19 pandemic. Since there were circumstances beyond the control of respondent, so taking into consideration the above-mentioned facts the respondent be allowed the period during which his construction activities came to stand still, and the said period be excluded while calculating the due date. But the plea taken in this regard is not tenable, the due date for completion of project as per clause 19 (I) & 19(II) of allotment letter dated 20.06.2012, comes to 20.06.2016 inclusive of grace period of 6 months. There is no document on file to show vide which order NGT & SPCB has asked the builder to stop the work or institution of liquidation proceedings leading to appointment of official liquidator and shortage of labour. Moreover, the respondent has not contented in his written submission that for what particular period of time such orders prevailed or the liquidation proceedings initiated. The respondent has also contended that there was outbreak of Covid-19 in 2019 that hampered the construction activities of the project. It is to be noted that there was

outbreak of Covid-19 in February- March 2020 and the due date for completion of project & delivery of possession was 20.06.2016. So, the circumstances/ conditions after that period can't be taken into consideration for delay in completion of project.

G. Findings on the relief sought by the complainants

Relief sought by the complainants:

G.I Direct the respondent to handover the possession of the unit purchased by the complainants.

31. As per section 19(3) of Act of 2016, allottees have been entitled to claim the possession of the apartment, plot or building, as the case may be. The relevant part of the Act is reproduced hereunder: -

Section 19

(3) The allottee shall be entitled to claim the possession of apartment, plot or building, as the case may be, and the association of allottees shall be entitled to claim the possession of the common areas, as per the declaration given by the promoter under sub-clause (C) of clause (I) of sub-section (2) of section 4.

32. In the present case, the respondent vide letter dated 12.04.2021 requested the concerned authority for grant of occupation certificate. But there is nothing on record to show that the occupation certificate has been granted by the competent authority. Therefore, the respondent is directed to offer the possession of the allotted unit within one month of grant of occupation certificate.

G.II Direct the respondent to pay compensation and damages of Rs. 20,00,000/-for mental, financial and physical harassment.

54. The complainants are claiming compensation in the present relief. The authority is of the view that it is important to understand that the Act

has clearly provided interest and compensation as separate entitlement/rights which the allottees can claim. For claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainants may file a separate complaint before adjudicating officer under section 31 read with section 71 of the Act and rule 29 of the rules

G.III Direct the respondent to pay delayed possession charges to the complainants for the period of delay calculated at the prescribed rate of interest on the total amount deposited with the respondent till delivery of possession of the allotted unit.

55. In the present complaint, the complainants 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."

56. Clause 19(I) of the allotment cum buyer's agreement (in short, agreement) dated 20.06.2012 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."

57. The authority has gone through the possession clause of the agreement and observed 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 cum buyer's agreement was executed on 20.06.2012 as such the due date of handing over of possession comes out to be 20.12.2015.
58. **Admissibility of grace period:** As per clause 19(I) of allotment letter dated 20.06.2012, 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."

59. The said clause is unconditional and provides that if the respondent is unable to complete the construction of the allotted unit within stipulated period of 42 months, then a grace period of 6 months shall be allowed to the respondent. Since there were situations beyond the

control of respondent such as institution of liquidation proceedings against the contractor company, resulting in shortage of labour at project due to stoppage of work at the project site. Therefore, the authority is of view that the said grace period of 6 months shall be allowed to the respondent. Therefore, as per clause 19(I) & 19(II) of the allotment letter dated 20.06.2012, the due date of possession comes out to be 20.06.2016.

60. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are 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.*

61. 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.

62. 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., 10.02.2022 is @ 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
63. The definition of term 'interest' as defined under section 2(z a) of the Act provides that the rate of interest chargeable from the allottees by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottees, 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;"*
64. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same as is being granted to the complainants in case of delayed possession charges.
65. On consideration of the documents available on record and submissions made regarding contravention of provisions of the Act,

the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 19(I) & 19(II) of the allotment letter executed between the parties on 20.06.2012, 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 cum agreement. The due date of possession is calculated from the date of allotment letter i.e., 20.06.2012, which comes out to be 20.06.2016.

66. Section 19(10) of the Act obligates the allottees 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 is yet not obtained but the respondent- builder has applied for the grant of occupation certificate vide letter dated 12.04.2021. The respondent shall offer the possession of the subject unit to the complainants after obtaining occupation certificate, so it can be said that the complainants shall come to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainants should be given 2 months' time from the date of offer of possession. This 2 months' of reasonable time is being given to the complainants keeping in mind that even after intimation of possession practically he has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 20.06.2016 till the expiry of 2 months from the date of

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

67. Accordingly, it is the failure of the promoter to fulfil its obligations and responsibilities as per the allotment letter dated 20.06.2012 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 allottees shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 20.06.2016 till the date of actual handing over of possession or till offer of possession plus 2 months, whichever is earlier; at prescribed rate i.e., 9.30 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

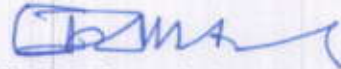
H. Directions of the authority

68. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

- i. The respondent shall pay interest at the prescribed rate i.e. 9.30% per annum for every month of delay on the amount paid by the complainants from due date of possession i.e.; 20.06.2016 till the date of actual handing over of possession or till offer of possession plus 2 months after obtaining occupation certificate, whichever is earlier; as per proviso to section 18(1) of the Act read with rule 15 of the rules.

- ii. The respondent is directed to pay arrears of interest accrued within 90 days from the date of order of this order as per rule 16(2) of the rules and thereafter monthly payment of interest to be paid till date of handing over of possession shall be paid on or before the 10th of each succeeding month.
 - iii. The respondent shall not charge anything from the complainants which is not the part of the flat buyer's agreement.
 - iv. The respondent is directed to offer the possession of the allotted unit within one month of grant of occupation certificate.
 - v. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
 - vi. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% 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.
69. Complaint stands disposed of.
70. File be consigned to registry.


(Vijay Kumar Goyal)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 10.02.2022

JUDGEMENT UPLOADED ON 16.03.2022