BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**2311 of 2022**
Date of filing complaint:	**27.05.2022**
First date of hearing:	**03.08.2022**
Date of decision :	**03.08.2022**

1.	Mrs. Archana Ahuja	**Complainants**
2.	Mrs. Anshu Manchanda **Both R/o:** H.No. 487, Sector – 7, Gurugram - 122001.	
	Versus	
	M/s Magic Eye Developers Private Limited **Registered office at:** GF – 09, Plaza M6, Jasola District Centre, Jasola New Delhi - 110025	**Respondent**

CORAM:	
Dr. KK Khandelwal	**Chairman**
Shri Vijay Kumar Goyal	**Member**
APPEARANCE:	
Sh. Parikshit Siwach (Advocate)	Complainants
Ms. Neelam Gupta (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 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 the project, the details of sale consideration, the amount paid by the complainants, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Project name and location	"The Plaza at 106," Sector 106, Gurugram
2.	Project area	3.725 acres
3.	Nature of the project	Commercial Colony
4.	DTCP License	65 of 2012 dated 21.06.2012 valid up to 21.06.2022
5.	Name of the licensee	Magic Eye Developers
6.	RERA Registered/ not registered	**Registered** **Vide no. 72 of 2017 dated 21.08.2017**
	RERA Registration valid up to	31.12.2021
7.	Unit no.	1107, 11th floor, Tower no B2 [Page 21 of the complaint]
8.	Unit measuring (super area)	700 sq. ft. [Page 21 of the complaint]
9.	Date of provisional allotment	19.11.2012 [Page 19 of the complaint]

10.	Date of execution of builder buyer agreement	29.04.2013 [Page 20 of the complaint]
11.	Addendum to agreement dated 29.04.2013	28.10.2020 [Page 49 of the complaint]
12.	Possession clause	**9.1** The developer based on its present plans and estimates and subject to all just exceptions/force majeure/statutory prohibitions/court order etc. contemplates to complete the construction of the said building/said unit within a period of **three years from the date of execution of this agreement with two grace periods of six months each** unless there is a delay for reasons mentioned in clauses 10.1,10.2 and clause 37 or due to failure of allottee to pay in time the price of the said unit alongwith other charges and dues in accordance with the schedule of payments given in annexure C or as per the demands raised by the developer from time to time or any failure on the part of the allottees to abide by all or any of the terms or conditions of this agreement.**(emphasis supplied)**
13.	Due date of possession	29.04.2016 [Calculated from the date of agreement i.e. 29.04.2013] Grace period is disallowed as no substantial evidence/document has been placed on record to corroborate that any such event, circumstances, condition has occurred which may have hampered the construction work.

14.	Total sale consideration	Rs.40,38,075/- [Page 25 of the complaint] Rs.42,81,793/- [As per applicant ledger dated 08.07.2022 at page 64-67 of the reply]
15.	Total amount paid by the complainants	Rs.42,94,725/- [As per applicant ledger dated 08.07.2022 at page 64-67 of the reply]
16.	Payment plan	Construction linked payment plan [Page 40 of the complaint]
17.	Occupation Certificate	28.11.2019 Annexure R/3 at page no.27 of the reply
18.	Offer of possession letter	30.11.2019 Annexure R/4 at page no.29 of the reply

B. Facts of the complaint:

3. That the respondent has been advertising themselves to be working with the mission to provide customers with a benchmark in the industry by adhering to the best in quality, design, delivery on commitment, honesty, transparency and value for money and further had been advertising that the respondent company are coming up with a new project with the name and style of "Spire Condominiums/The Plaza at 106" at Sector – 106, Gurugram, Haryana representing that the same is located in the most sought after destination and is created with a vision to overwhelm one with beauty and absolute luxury and a person would discover every facility in the heart of lush greenery and that the project shall be an oasis of unspoilt natural beauty in the midst of a

thriving metropolis and that the project "Spire Condominiums/The Plaza at 106" is adorned with all the modern amenities to make every moment joyous and comfortable and that it is a perfect blend of open space, nature, convenience and community, thereby the respondents painted a very rosy picture before the complainants.

4. That believing in the above advertisements and specific representations of the respondent's representatives that the said project shall be delivered within 3 years of signing the agreement with a grace period of 6 months owing to any force majeure and if there is any delay in delivering the project on time, owing to default on the part of the respondent builder, proper compensation will be provided by respondent at the rate of Rs. 5/- per sq. ft. to the complainants from the date of default to the date of actual possession without any structural or any other defect, as promised. It is pertinent to mention here that the respondent's representative had specifically mentioned that the Buyer's Agreement would be signed within two months of providing the advance payment of about 25% of the total amount i.e., about Rs. 10,00,000/- by the complainants, which was duly paid by the complainants. The Buyer's Agreement was ought to signed in May, 2012 and the unit was to be delivered in May 2015 with a grace period of 6 months, if required but despite several requests, no heed was given by the builder to the complainants apprehensions, as now they (respondent) had an upper hand in deal and had

leverage to harass the complainants unnecessary and misappropriate the money given to them on false promises.

5. That believing in the above advertisements and specific representations of the respondent's representatives, complainants (Archana Ahuja) along with her father (Gian Prakash Manchanda), for her/their personal use and occupation, bought all rights of Tower/Block No. B2, Floor No. 11th, Unit No. 1107, Total Super Area 700 Sq. Ft., which had been allotted/confirmed by the respondent for a total basic sale price of Rs. 32,41,875/- @ Rs. 4,631.25/- per Sq. Ft. along with Rs. 2,98,200/- as External Development charges (EDC) plus Rs. 28,000/- as Infrastructure Development Charges (IDC) plus Rs. 3,00,000/- for Covered Car Parking charges plus 1,00,000/- for Club membership charges plus Rs. 70,000/- as Interest Free Maintenance Security Deposit; aggregating to a total amount of Rs. 40,38,075/- .It is pertinent to mention here that one of the original allotee i.e., Gian Prakash Manchanda had passed away and an addendum agreement had been signed on dated 28.10.2020 to include the legal heirs of the deceased namely Anshu Manchanda.

6. That, according to the above said arbitrary and unilateral Buyer's Agreement signed between the parties on dated 29.04.2013, the said project should have been delivered by 28.04.2016 with two grace periods of 6 months each i.e., 28.04.2017

7. That the complainants till date have paid an amount of Rs. 42,94,725/- to the respondent company against the said flat. However, the possession was offered on dated 28.11.2019 as a

deemed date of possession but the unit was not fully prepared to take actual possession for almost a year. It is pertinent to mention here that from time-to-time various deficiencies were pointed out by the complainants to the respondents, but no action was taken by them. Some of the deficiencies and point of concerns are as follows:

a. The quality of construction is not up to the mark, cheap material had been used in the construction which is evident upon seeing the plaster and upon minute detailing of the project.
b. The size of the unit was never measured in front of the complainants even after many requests and physical visits by giving one or the other excuses.
c. Demarcation of the super area and carpet area is never done and never apprised to the complainants even after several requests till now.
d. Change in the layout plan of the unit without informing or compensating the complainants. sunroom was present in the original agreement which was signed on dated 29.04.2013 but when the site was visited no sign of sunroom was there and no explanation was provided by the respondent.
e. Load factor of the unit is very high which is about 75, which should ideally be 30-40 in Delhi NCR. Actual load factor could only be found out upon correct demarcation given by the respondent.

f. Very high rate of the CAM charges for the complainants, which were decided arbitrarily and illegally by the respondent.

8. That after offer made to take possession of the allotted unit, complainants noticed the change in layout of the said unit in terms of sunroom and other changes. It is pertinent to mention here that a clear instruction is being provided in the act/regulations/rules of the RERA that the registration has to be done only on the carpet area of the unit, not on the super area.

9. Due to non-demarcation of the unit in terms of super area and carpet area, the load factor as per the calculation of the complainants comes out to be about 75 (estimated), which is very high/exorbitant and the CAM charges also comes out to be very high.

10. That the collective e-mail regarding exorbitant and arbitrary CAM charges had been sent to the respondent, but no satisfactory action was taken by the respondent.

C. Relief sought by the complainants:

11. The complainants have sought following relief(s):

i. Direct the respondent to return the amount received by the promoter along with interest at prescribed rate.

ii. Direct the respondent to pay litigation expenses of Rs. 2,55,000/- and impose the penalty upon the respondent for its failure to complete the project and for the harassment caused by it.

D. Reply by respondent:

12. That the project of the respondent is duly registered with the Hon'ble Authority. As per the declaration submitted under section 4(2)(l)(c) of the Act of 2016, the date of completion of project is 31.12.2021 which is accepted by the Hon'ble Authority and Authority preferred to grant registration on 21.08.2017 to respondent's project with 31.12.2021 as date of completion of project.

13. That respondent has obtained occupation certificate in respect of the same from Director General Town and Country Planning, Chandigarh vide Memo bearing no. ZP-833/AD/(RA)/2019/29244 dated 28.11.2019. and after receipt of occupation certificate offered possession of unit to complainants vide its letter of intimation cum offer of possession dated 30.11.2019 sent vide email dated 04.12.2019. The buyer's agreement was executed between the parties on 29.04.2013That the complainants have till date made a total payment of Rs.41,27,814/- i.e., excluding rebate amount of Rs. 1,08,510/-, discounts of Rs.37,209/-, and Interest paid by complainants for delayed payments Rs.12,932/-.

14. The complainants even deemed to have taken over possession of unit on 20.01.2020 when the consent for leasing of their Unit to COHO was provided and thereafter, made the complete payment of the dues on 21.01.2020. The complainants never raised any request for refund nor raised any protest at any point of time till filing of the instant complaint that the unit is incomplete, or

complainants were made to sign on the pre-printed Agreement, or that the Unit is without amenities, as alleged. The allegations/claims of complainants are prima-facie malafide, concocted and highly belated, therefore, instant complaint is liable to be dismissed on account of estoppel.

15. That respondent was under no obligation to lease out the unit as per agreement or to pay rent to the complainant(s), however in the larger benefit of its allottees, as the brands were approaching for taking on lease Tower A and B of the project respondent, vide email dated 26.12.2019 sent along the letter of demand for dues payable at the stage of offer of possession dated 20.12.2019, the offer of COHO along with the broad terms to the allottees including the complainant(s) vide letter dated 23.12.2019.

16. Pursuant to the said letter of offer of possession, possession has already been deemed to be taken over by the complainant(s) on 20.01.2020 when they gave their consent for leasing out their unit to brand COHO on revenue sharing basis after reading and understanding the broad terms, as offered by the brand CoHo for taking the units including the subject matter Unit on lease. However, it the complainants who never turned up to take physical possession of their unit and thereby are in breach of section 19(10) of the Act.

17. It is pertinent to point out that there was no minimum guaranteed rent under broad terms as offered by COHO and duly accepted by the complainants. The complainants consented to with a condition that if rental payment for first 6 months is

irregular and not as per my expectations, then I will revoke my lease consent with COHO.

18. It is submitted that complainants after completely satisfied took over symbolic possession by giving consent to lease out their Unit to COHO and made the complete payment of dues for the subject matter unit only on 21.01.2020.

19. Without prejudice, it is submitted that as per the terms of clause 10.4 of the agreement for sale, the respondents had also paid the compensation @ Rs.5/- per sq. ft. of super area per month from the date of possession as agreed under the agreement till the date of offer of possession to complainant(s) and adjustment of the same was given as rebate of Rs.1,08,510/- from the demands due at the time of offer of possession. The complainants accepted the said adjustment of compensation by way of rebate and made the complete balance payment due on 21.01.2020 and never raised any protest thereafter till the filing of instant complaint.

20. That lease deed was executed with COHO on 04.05.2020. Unfortunately, as COVID-19 pandemic was prevailing at the time when lease with COHO was executed, which led to complete lockdown, restricted movement and shutting down of business which prevailed at least for 6 months w.e.f. March 2020 till September 2020 and was thereby also declared as force majeure period through the advisory dated 28.05.2020 issued by Central Government, Due to said COVID-19 since, COHO could not operationalize its business. Despite various reminders sent by respondent to complainants to take over possession of Unit

complainants, have failed to take over the physical possession of unit or to revoke the consent for leasing to COHO. Thus, complainants are themselves at default and hence, not entitled to seek any relief from this Hon'ble Authority.

21. The respondent, thereafter, vide email dated 26.12.2019 raised the demand due at the stage of offer of possession vide letter dated 20.12.2019. That the respondent as per the terms of the agreement had also paid the compensation @ Rs.5/- per sq. ft. of super area per month from the date of possession as agreed under the agreement till the date of offer of possession to complainants and adjustment of the same was given as rebate of Rs.1,08,510/- from the demands due at the time of offer of possession.

22. That after completion of construction of project, a brand named 'CoHo', approached the respondent and offered to take on lease the Tower A (Ground Floor till 4th Floor) and Tower B (2nd Floor till 23rd Floor) of the aforesaid project on revenue sharing basis. Though there was no obligation on respondent to lease out the unit as per agreement or to pay the rent, however in the larger benefit of its allottees, respondent sent the offer of COHO along with the broad terms to the allottees including the complainant(s) vide letter dated 23.12.2019.

23. The complainant(s) accepted the broad terms offered by brand COHO vide their consent letter dated 20.01.2020 with the condition that if rent payment for first 6 months shall be irregular, I will revoke my consent to lease to COHO and thereafter, accepting the adjustment of compensation for delay, given as

rebate amount made the complete payment of dues without any protest on 21.01.2020.

24. That after receipt of acceptance and consent from complainant(s) for leasing out their unit with COHO, the respondent entered a lease deed dated 04.05.2020 with COHO for leasing of Units in the aforesaid project of respondent. It was further agreed that upon mutual consent more units may be added from time to time for leasing.

25. That the complainant(s) was duly informed of the terms and conditions being agreed with COHO and the status of lease, from time to time. As time of unprecedented uncertainty is prevailing due to spread of the COVID-19 pandemic, which vitiated overall business environment and its impact and delay on regular business activities including sales and leasing in the short to mid-term, the brand COHO was not able to operationalize the Units and generate revenue while, it is pertinent to reiterate that the leasing of units was on revenue share basis and not for fixed rentals or minimum guarantee which terms were duly agreed upon by complainant(s). Therefore, respondent acting on the condition of the complainants that they will revoke the consent, in case of irregular rent payment, requested the complainants to take over the physical possession of unit on 12.11.2020. However, complainants neither revoked their consent for leasing with COHO nor took over physical possession of the Unit, despite various requests and reminders sent by respondent in this regard.

26. The respondent even vide letter dated 03.02.2020 invited the complainants for execution and registration of the conveyance deed in his name. However, it is the complainants who has not yet come forwarded to get conveyance deed executed and registered in his name. whereafter again in furtherance of the above letter dated 03.02.2020, another letter dated 08.01.2021 was sent by respondent intimating the revision in stamp duty charges and invited complainants to get the conveyance deed executed and registered in respect of unit in its favour.

27. That it is pertinent to submit here that Section 19(3) does not refer to 'agreement for sale'. It has been designed in such a way that it can cover not only the Post RERA 'agreement for sale' but also Pre-RERA agreements because it makes allottee entitle for possession not on basis of agreement but on basis of Declaration given by promoter under Section 4(2) (l) (C) of Act, which in both cases i.e., in case of ongoing project as well as future project is filed after commencement of Act, promoter is made aware of consequences of its said declaration.

28. That without prejudice, it is thus, submitted that entitlement of allottees of ongoing projects on the date of commencement of Act, to claim possession of their respective apartments/units is governed by section 19(3) of the Act i.e., as per declaration given by promoter under sub-clause (C) of Clause (l) of Sub-Section (2) of Section 4 and not by sections 18(1) or 18(3) or 19(4) of the Act. Here it may be noted that as per declaration given by respondent

under sub-clause (C) of Clause (I) of Sub-Section (2) of Section 4, the date of completion of subject matter project is 31.12.2021.

29. That when the entitlement to claim possession is as per the declaration given by the Promoter for completion of construction u/s 4(2) (l) (c) of the Act, then the necessary corollary to this is that the entitlement for delay possession charges at the RERA rates shall also be from the expiry of the date of completion i.e., 31.12.2021 as provided at the time of registration.

30. It is submitted that agreement executed between the parties especially prior to commencement of Act has to be read and interpreted "as it is" without any external aid including without aid of subsequent enactment especially the enactment which do not especially require its aid to interpret agreements executed prior to commencement of such enactment. Hence, rights and liabilities of the parties including the consequence of default/default of any party is to be governed by buyer's agreement dated 29.04.2013 and not by the Act.

31. It is submitted that buyers agreement was signed by the complainant no.1, Mr. Gyan Prakash Manchanda (father of complainant no.1, since deceased) and executed on 29.04.2013 after reading and understanding all the terms and conditions of the agreement. It is submitted that if the terms of the agreement were not agreeable to the complainants, complainants had the option to apply for cancellation or withdrawal of the booking and in that case only Rs.50,000/- was liable to be deducted as administrative charges. But complainants being completely

satisfied proceeded to sign the terms and conditions and agreement was executed between the parties without any objection or protest at any time by the complainants.

32. Vide email dated 26.12.2019 respondent raised the demand due at the stage of offer of possession vide letter dated 20.12.2019 after giving adjustment credit of the rebate amount of Rs.1,08,510/- as against the actual dues of Rs.4,39,090/- to be paid by complainants on or before 20.01.2020. It is submitted that the complainant(s) consented to lease out their unit to COHO vide consent letter dated 20.01.2020, on which date the possession has been deemed to be taken over by complainants and thereafter, complainants, accepting the rebate given as adjustment towards compensation in terms of clause 10.4 of the agreement, made the complete payment of dues of without any protest, whatsoever on 21.01.2020.

33. It is submitted that the 'Sunroom' indicated in the unit layout was designed, planned and proposed as an extended balcony and the same has been provided to the complainants on-site, as part of his unit. The 'Sunroom' is meant to serve as a flexible space allowing multiple uses as per the individual needs of the customer/complainants herein.

34. It is submitted that layout plan of unit as proposed to complainants which bears signature of complainants as well as respondent. The unit has been constructed as per said proposed layout plan only. It is submitted that CAM Charges are reasonable and as per industry practice.

35. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority:

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

E. I Territorial jurisdiction

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

E. II Subject matter jurisdiction

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

Section 11(4)(a)

> *Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made*

thereunder or to the 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;

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.

So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

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

F.I. **Objection regarding handing over possession as per declaration given under section 4(2) (I) (C) of Real Estate Regulation and Development Act 2016:**

37. 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.

38. 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)(l)(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)(l)(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: —.....*
>
> *(l): -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...."*

39. 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)(l)(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.2 Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act.

40. Another contention of the respondent is that authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the flat buyer's agreement 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."*

41. 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."

42. 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.

G. Findings regarding relief sought by the complainants:

G.1 Direct the respondent to return the amount received by the promoter along with interest at prescribed rate.

43. Vide letter dated 19.11.2012, the complainants were allotted the subject unit by the respondent for a total sale consideration of Rs. 40,38,075/-. A buyer's agreement dated 29.04.2013 was executed between M/s Spire Developers Pvt. Ltd. and the complainants. The due date for delivery of the possession of the allotted unit was

fixed as 29.04.2016 Though as per that agreement, the complainants started depositing various amounts as per the buyer's agreement but M/s Spire Developers Pvt Ltd. with whom they have entered into buyer's agreement on 29.04.2013 amalgamated with M/s Magic Eye Developers Pvt Ltd. i.e. the respondent as per the order dated 21.07.2014 of Hon'ble High Court of Delhi and afterwards the addendum to agreement dated 29.04.2013 was executed between the M/s Magic Eye Developers Pvt Ltd. and the complainants with regard to the subject unit on 28.10.2020. The due date of possession of the subject unit was to be calculated as per clause 9.1 where the possession was to be handed over within a period of three years from the date of execution of the agreement with two grace periods of six months which comes out to be 29.04.2016. The complainants had deposited various amounts against the allotted unit and paid a sum of Rs. 42,94,725/- as is evident from applicant ledger dated 08.07.2022 at page 64-67 of the reply.

44. Section 18(1) of the Act of 2016 is applicable only in the eventuality where the promoter fails to complete or unable to give possession of the unit in accordance with terms of agreement for sale or duly completed by the date specified therein. This is an eventuality where the promoter has offered possession of the unit after obtaining occupation certificate and on demand of due payment at the time of offer of possession, the allottee wishes to withdraw from the project and demand return of the amount

received by the promoter in respect of the unit with interest at the prescribed rate.

45. It is a fact that after completion of the project the respondent builder applied for occupation certificate and the same was received by it on 28.11.2019 (annexure R/3 at page 27 of the reply). An intimation in this regard was given to the complainants on 30.11.2019 vide annexure R/4 and possession of the allotted unit was also offered to them. The complaint seeking refund of the deposited amount was filed before the authority on 27.05.2022. Thus, up to the date of offer of possession i.e., 30.11.2019, the complainants never moved to withdraw from the project and sought refund from the respondent builder.

46. The due date of possession as per agreement for sale as mentioned in the table above is **29.04.2016 and there is delay of more than 3 years** on the date of filing of the complaint. The allottee in this case has filed this application/complaint on 27.05.2022 after possession of the unit was offered to him after obtaining occupation certificate by the promoter. The allottee never earlier opted/wished to withdraw from the project even after the due date of possession and only when offer of possession was made to him and demand for due payment was raised then only filed a complaint before the authority. The occupation certificate /part occupation certificate of the buildings/towers where allotted unit of the complainants are situated is received after obtaining occupation certificate. Section 18(1) gives two options to the allottee if the promoter fails to complete or is

unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein:

(i) Allottee wishes to withdraw from the project; or
(ii) Allottee does not intend to withdraw from the project

47. The right under section 18(1)/19(4) accrues to the allottee on failure of the promoter to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein. If allottee has not exercised the right to withdraw from the project after the due date of possession is over till the offer of possession was made to him, it impliedly means that the allottee has tacitly wished to continue with the project. The promoter has already invested in the project to complete it and offered possession of the allotted unit. Although, for delay in handing over the unit by due date in accordance with the terms of the agreement for sale, the consequences provided in proviso to section 18(1) will come in force as the promoter has to pay interest at the prescribed rate of every month of delay till the handing over of possession and allottee's interest for the money he has paid to the promoter are protected accordingly.

48. Further in the judgement of the Hon'ble Supreme Court of India in the cases of ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra)*** reiterated in case of ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020*** decided on 12.05.2022. it was observed

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

49. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottee as per agreement for sale under section 11(4)(a). This judgement of the Supreme Court of India recognized unqualified right of the allottee and liability of the promoter in case of failure to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. But the allottee has failed to exercise this right although it is unqualified one. He has to demand and make his intentions clear that the allottee wishes to withdraw from the project. Rather tacitly wished to continue with the project and thus made him entitle to receive interest for every month of delay till handing over of possession. It is observed by the authority that the allottee invest in the project for obtaining the allotted unit and on delay in completion of the project never wished to withdraw from the project and when unit is ready for possession, such withdrawal

on considerations other than delay such as reduction in the market value of the property and investment purely on speculative basis will not be in the spirit of the section 18 which protects the right of the allottee in case of failure of promoter to give possession by due date either by way of refund if opted by the allottee or by way of delay possession charges at prescribed rate of interest for every month of delay.

50. In the case of ***Ireo Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors. Civil appeal no. 5785 of 2019 decided on 11.01.2021***, some of the allottees failed to take possession where the developer has been granted occupation certificate and offer of possession has been made. The Hon'ble Apex court took a view that those allottees are obligated to take the possession of the apartments since the construction was completed and possession was offered after issuance of occupation certificate. However, the developer was obligated to pay delay compensation for the period of delay occurred from the due date till the date of offer of possession was made to the allottees.

As per proviso to sec 18(1)

> *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 possession, at such as rate as may be prescribed.*

51. In case allottee wishes to withdraw from the project, the promoter is **liable on demand** to the allottee return of the amount received by the promoter with interest at the prescribed rate if promoter fails to complete or unable to give possession of the unit in

accordance with the terms of the agreement for sale. The words liable on demand need to be understood in the sense that allottee has to make his intentions clear to withdraw from the project and a positive action on his part to demand return of the amount with prescribed rate of interest if he has not made any such demand prior to receiving occupation certificate and unit is ready then impliedly he has agreed to continue with the project i.e. he does not intend to withdraw from the project and this proviso to sec 18(1) automatically comes into operation and allottee shall be paid by the promoter interest at the prescribed rate for every month of delay. This view is supported by the judgement of Hon'ble Supreme Court of India in case of of ***Ireo Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors.(Supra***) and also in consonance with the judgement of Hon'ble Supreme Court of India in case ***of M/s Newtech Promoters and Developers Pvt Ltd Versus State of U.P. and Ors.,***

52. The authority hereby directs that the allottee shall be paid by the promoter an interest for every month of delay till offer of possession (30.11.2019) plus two months i.e. 30.01.2020 whichever is earlier at prescribed rate i.e. the rate of 9.80% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 within the timelines provided in rule 16(2) of the Haryana Rules 2017 ibid. The allottee is obligated to take the possession of the apartment since the construction is completed and possession has

been offered after obtaining of occupation certificate from the competent authority.

G.2. **Direct the respondent to pay litigation expenses and impose the penalty upon the respondent for its failure to complete the project and for the harassment caused by it.**

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

H. Directions of the authority:

53. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act of 2016 to ensure compliance of obligation cast upon the promoter as per the function entrusted to the authority under section 34(f) of the Act of 2016:

i. The relief for the refund of the deposited amount made by the complainants with the respondent is declined.

However, the complainant-allottees are obligated to take possession of the allotted unit after making outstanding payments along with prescribed rate of interest since its construction is complete and possession has been offered after obtaining of occupation certificate from the competent authority. The developer is also directed to pay delay interest @ 9.80% for the period of delay occurred from the due date of possession i.e., 29.04.2016 till the date of offer of possession (30.11.2019) plus two months i.e. 30.01.2020 made to the allottees.

ii. The arrears of such interest accrued from 29.04.2016 till the date of order by the authority shall be paid by the promoter to the allottees within a period of 90 days from date of this order.

iii. The rate of interest chargeable from the complainants/allottees by the promoter, in case of default shall be at the prescribed rate which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delay possession charges as per section 2(za) of the Act.

iv. The complainants are directed to take possession of the subject unit, within a period of two months after payment of outstanding dues, if any after adjustment of interest for the delayed period.

v. The respondent would not charge anything which is not part of buyer's agreement. The holding charges shall not be charged by the promoter at any point of time even

after being part of agreement as per law settled by Hon'ble Supreme Court in civil appeal no. 3864-3889/2020.

54. Complaint stands disposed of.

55. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. KK Khandelwal)
Chairman
Haryana Real Estate Regulatory Authority, Gurugram

Dated: 03.08.2022