

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

<b>Complaint no.</b>	:	<b>655 of 2023</b>
<b>Date of complaint</b>	:	<b>14.02.2023</b>
<b>Date of order</b>	:	<b>07.08.2024</b>

Lomesh Dutta, S/o Sudarshan Kumar Dutta, R/o: H. No. 47, New Colony, Gurugram-122001.	<b>Complainant</b>
Versus	
M/s Magic Eye Developers Private Limited <b>Regd. office:</b> GF-09, Plaza M6, Jasola District Centre, Jasola, New Delhi-110025.	<b>Respondent</b>
<b>CORAM:</b>	
Ashok Sangwan	<b>Member</b>
<b>APPEARANCE:</b>	
Varun Hooda (Advocate)	Complainant
Gaurav Rawat (Advocate)	Respondent

**ORDER**

1. The present complaint has been filed by the complainant/allottee under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

**A. Unit and project related details**

2. The particulars of the project, the details of sale consideration, the amount paid by the complainant, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S. No.	Particulars	Details
1.	Name of the project	The Plaza at 106, Sector-106, Gurugram
2.	Project area	3.73 acres area
3.	Nature of project	Commercial Colony
4.	DTPC License no.	65 of 2012 dated 21.06.2012 valid upto 21.06.2022
5.	Name of licensee	Magic Eye Developers
6.	RERA registered/not registered	Registered vide no. 72 of 2017 dated 21.08.2017 valid upto 31.12.2021
7.	Allotment Letter	07.12.2012 (page 22 of reply)
8.	Unit no.	Service Apartment bearing no. 0303, Tower-B2, 3 <sup>rd</sup> floor (page 22 of reply)
9.	Unit area admeasuring	700 sq. ft. (page 22 of reply)
10.	Date of execution of buyer's agreement	Not executed
11.	Possession clause	N/A
12.	Due date of possession	07.12.2015 [Calculated as per <i>Fortune Infrastructure and Ors. vs. Trevor D'Lima and Ors. (12.03.2018 - SC); MANU/SC/0253/2018</i> ]
13.	Total sale consideration	Rs.43,90,476/- (As per applicant ledger dated 25.07.2023 at page 52 of the reply)
14.	Amount paid by the complainant	Rs.15,98,132/- (including interest paid by the complainant for delayed payment of Rs.22,844/-) (As admitted by the respondent at page 4 of the reply)

		(inadvertently mentioned as Rs.15,75,288/- on proceedings dated 22.05.2024)	
15.	Refund notice send by the complainant	20.01.2017 (Page 62 of the complaint)	
16.	Occupation certificate	28.11.2019 (page 56 of reply)	
17.	Offer of possession	30.11.2019 (page 58 of reply)	
18.	Cancellation on	23.11.2021 (page 74 of reply)	

**B. Facts of the complaint:**

3. The complainant has made the following submissions: -

- I. That the complainant was allotted an apartment bearing no. 0302 having an approximate super area of 700 sq. ft. located on the 3rd floor of Tower B2 in the project of the respondent named "The Plaza At 106" situated at Sector-106, Gurugram.
- II. That the complainant emailed on 23.01.2013 whereby informing the respondent that the allotment letter and the BBA has yet not been received and requested the respondent to supply the same, which again fell on deaf ears and the same was not complied with by the respondent in a timely manner.
- III. That the complainant subsequently requested the respondent multiple times to sign and execute the builder buyer agreement, whereby the complainant agreed to buy the said unit for a basic sale price of Rs.32,58,500/-.
- IV. That the respondent handed over an unsigned copy of the BBA to the complainant and the respondent never executed any BBA with the complainant despite taking booking/allotment payment from the complainant. The respondent had even purchased non-judicial stamp



paper dated 27.11.2014 for the execution of the BBA, yet never signed/executed it themselves and supplied an unsigned copy of the BBA to the complainant.

- V. That the complainant subsequently kept paying all the instalments as demanded by the respondent and till today has paid approximately 50% of total BSP amount.
- VI. That as per clause 9.1 of the buyer agreement, the respondent was supposed to complete constructions and deliver possession of the said unit to the complainant within a period of 36 months from the date of execution of the buyer agreement, which the respondent has grossly defaulted upon.
- VII. That the complainant finally after waiting for about five (5) years, and in absence of any committed delivery of possession date by the respondent, sent a refund notice to the respondent on 08.05.2017 and then again on 23.04.2021. The complainant was assured by the representatives of the respondent that the amount paid by the complainant would be duly refunded.
- VIII. That the respondent sent an email dated 26.12.2019 to the complainant, whereby another demand for payment was raised. That along with the demand for payment the respondent also informed the complainant that they had received "Occupation Certificate" from the concerned authority for Towers A, B & C and offered possession within the same email dated 26.12.2019.
- IX. That the respondent subsequently sent a "final reminder cum pre-cancellation letter" dated 23.07.2021 wherein the respondent raised an unjustified and illegal demand for Rs.42,79,749/-. Thereafter, the respondent, as per cancellation letter dated 23.11.2021 cancelled the unit of the complainant. The respondent further proceeded to arbitrarily

deduct amount from the total amount paid by the complainant and return only Rs.6,35,237/- via cheque dated 18.11.2021, in gross violation of law as laid down in various judgments by Hon'ble Supreme Court of India. The aforementioned cheque was accepted under protest which was conveyed to the respondent via protest letter dated 14.12.2021.

- X. That the complainant is now facing hardship as hard-earned money of the complainant is stuck with the respondent. In light of the above-stated facts, the complainant is left with no other alternative except for raising the demand for refund with the Authority.

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

4. The complainant has sought following relief(s):
- Direct the respondent to refund the paid-up amount alongwith prescribed rate of interest.
  - Quash cancellation letter dated 23.11.2021 and subsequent issuance of cheque dated 18.11.2021 amounting to Rs.6,35,257/- as full and final settlement.
  - Litigation cost.
5. On the date of hearing, the authority explained to the respondent/promoter about the contraventions 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 respondent:**

6. The respondent vide reply dated 27.07.2023 contested the complaint on the following grounds:
- That the complainant after careful reading and agreeing to the terms and conditions of booking through the broker of his choice, applied for allotment of unit with Spire Developers Pvt. Ltd., in project Plaza 106-1 at Sector-106, Gurugram. Pursuant to the aforesaid booking application, lay out plan and payment plan of the project was sent to complainant on 06.11.2012 alongwith the list of units available for allotment. As per the





preference opted by the complainant, unit no. B2-302 measuring 700 sq. ft. in super area in the said project was allotted vide letter dated 07.12.2012 for a total consideration of Rs.43,90,476/-. The complainant opted for construction linked payment plan. The complainant vide clause 16 of the terms and conditions of the booking application form it was agreed that *"Developer shall execute builder buyer agreement regarding allotment of Apartment only after receiving 30% of effective basic price of Apartment. In case, applicant(s) does not execute builder buyer's agreement, in developer's standard format, due to any reason whatsoever within a period of thirty days of developer's call in this regard, developer shall have the right to reject/cancel applicant(s) application/booking/allotment."*

- ii. That the complainant further vide clause 6 of the terms of the booking agreed that *"Timely payment by applicant(s) of installments towards consideration/price for allotment of Apartment, as per payment plan opted by the applicant(s) is the essence of this transaction."*
- iii. That in terms of the said booking/application two copies of agreements for signing of the complainant was sent by opposite party on 29.08.2013. The respondent vide its email dated 19.02.2014 reminded to the complainant that agreements sent on 29.08.2013 has not been returned and the same are pending for execution and requested to send back the signed agreements for execution. The respondent sent another reminder dated 25.08.14 and 05.01.2015 to complainant requesting to sign and return the DBA for execution. Also asked for original booking application form and PAN card which was pending against the booking.
- iv. That in the meanwhile, the Spire Developers Private Limited got amalgamated with M/s Magic Eye Developers Pvt. Ltd. vide Hon'ble High Court of Delhi's Order dated 21.07.2014 and the same development was intimated to complainant vide letter dated 04.11.2014.

- v. That the complainant since, did not return the signed agreement despite reminders and the Spire Developers Private Ltd. amalgamated with Magic Eye Developers Pvt. Ltd., respondent sent fresh agreements between complainant and Magic Eye Developers Pvt. Ltd. for signatures of the complainant vide letter dated 13.08.2015. A reminder to the said letter was sent vide email dated 28.08.2015 and on 03.09.2015 requesting the complainant to return the signed agreement for further action, but the complainant never signed and returned the agreement for further action and hence, the agreement remains unexecuted, as on date.
- vi. That complainant was also informed of the construction status that first floor has been completed and the payment is due and payable by him in terms of demand letter dated 09.04.2015. Various other demand letters and reminders including the final reminders commensurate with the updated construction status were sent to the complainant on 25.09.15, 17.11.15, 01.03.16, 02.01.17, 23.05.17, 05.04.18, 20.08.18, 24.01.19, 13.05.19, 22.05.19.
- vii. That the complainant inspite in receipt of various demand and reminder letters, as stated above for making the payment and despite agreeing vide clause 6 of the terms and conditions of booking application form, in complete breach of the material terms and conditions of the booking application has failed to make the payment of instalment due and to even return the signed agreements till date for further execution.
- viii. That the complainant has till date made only a payment of Rs.15,75,288/- (exclusive of interest paid by complainant for delayed payment of Rs.22,844/- and the discounts provided to customer in sum of Rs.5688/-). Last payment was made by the complainant on 22.09.2014.
- ix. That the complainant kept slumbering over his rights till 08.05.2017 when he for the first time sought refund for an amicable settlement as he, himself

has been in breach of the terms and conditions of the booking/allotment since inception and was aware that as per the terms of booking earnest money, brokerage paid, and discounts allowed shall be deducted from the amount paid till date. The respondent had discussed the matter with the complainant that refund is not possible at this stage, as it would hamper the completion of the project. The complainant, thereafter, did not raise any concerns for refund.

- x. That in the meanwhile, despite the fact that complainant and many other allottees did not pay the instalments linked with construction due, respondent with its own funds completed the construction of its commercial project and obtained occupation certificate in respect of the same on 28.11.2019, i.e., prior to the 31.12.2021 which is the date of completion, as declared before this hon'ble Authority at the time of taking registration under RERA for this project. The respondent after receipt of occupation certificate, offered possession of unit to complainant vide its letter of intimation cum offer of possession dated 30.11.2019 sent vide email dated 04.12.2019 and also demanded dues at the stage of offer of possession vide letter dated 20.12.2019.
- xi. That complainant despite agreeing to continue with possession has failed to take over possession of the unit and failed to make complete payment of dues despite in receipt of various reminders dated 12.03.2020, 08.04.2020, 28.04.2020, 05.11.2020 and final reminder dated 09.03.2021 and 22.04.2021. Despite agreeing to continue with possession after discussions held in April-May 2017, complainant with malafide intention after approx. 4 years upon receipt of the reminder dated 22.04.2021 instead of taking over possession and making complete payment of dues, again started seeking refund vide email dated 23.04.2021.



xii. That after receipt of email of complainant seeking refund, parties again discussed the matter in October 2021 and various options were given to amicably settle the matter, but the complainant did not agree despite huge discounts and waivers were offered to him. Therefore, in terms of the clause 21 read with clause 17 of the terms and conditions of booking application form cancelled the allotment vide cancellation letter dated 23.11.2021 and refunded the balance amount of Rs.6,35,237/- vide cheque no. 002156 dated 18.11.2021 drawn upon HDFC bank towards full and final settlement of all rights, title, interest, claims or lien, etc. of the complainant in the aforesaid allotment of unit which already stands encashed by the complainant.

7. 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 on the basis of those undisputed documents and submissions made by the parties.

**E. Jurisdiction of the authority:**

8. 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**

9. 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**

10. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee's 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.*

11. 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.

**F. Findings on the relief sought by the complainant.**

**F.I To refund the entire amount deposited alongwith prescribed rate of interest.**

**F. II Quash cancellation letter dated 23.11.2021 and subsequent issuance of cheque dated 18.11.2021 amounting to Rs.6,35,257/- as full and final settlement.**

12. In the present complaint, the complainant intends to withdraw from the project and is seeking return of the amount paid by him in respect of subject unit along with interest at the prescribed rate as provided under section 18(1) of the Act. Sec. 18(1) of the Act is reproduced below for ready reference:

**"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.-*

*(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or*

*(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,*



*he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:*

*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."*

*(Emphasis supplied)*

13. **Due date of handing over of possession:** As per the documents available on record, no BBA has been executed between the parties and the due date of possession cannot be ascertained. A considerate view has already been taken by the Hon'ble Supreme Court in the cases where due date of possession cannot be ascertained then a reasonable time period of 3 years has to be taken into consideration. It was held in matter *Fortune Infrastructure v. Trevor d' lima (2018) 5 SCC 442 : (2018) 3 SCC (civ) 1* and then was reiterated in *Pioneer Urban land & Infrastructure Ltd. V. Govindan Raghavan (2019) SC 725 -:*

*"Moreover, a person cannot be made to wait indefinitely for the possession of the flats allotted to them and they are entitled to seek the refund of the amount paid by them, along with compensation. Although we are aware of the fact that when there was no delivery period stipulated in the agreement, a reasonable time has to be taken into consideration. In the facts and circumstances of this case, a time period of 3 years would have been reasonable for completion of the contract i.e., the possession was required to be given by last quarter of 2014. Further there is no dispute as to the fact that until now there is no redevelopment of the property. Hence, in view of the above discussion, which draw us to an irresistible conclusion that there is deficiency of service on the part of the appellants and accordingly the issue is answered."*

14. Accordingly, the due date of possession is calculated as 3 years from the date of allotment i.e., 07.12.2012. Therefore, the due date of handing over of the possession for the flat/unit comes out to be 07.12.2015.
15. **Admissibility of refund along with prescribed rate of interest:** The complainant is seeking refund the amount paid by him along with interest

prescribed rate of interest as provided 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.

16. 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.
17. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 07.08.2024 is 9%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 11%.
18. The complainant has submitted that the respondent has handed over an unsigned copy of the BBA to the complainant and it has never executed any BBA with the complainant despite taking booking/allotment payment from him. Further, after waiting for about five years, and in absence of any committed delivery of possession date by the respondent, the complainant sent an email dated 08.05.2017 seeking refund of the amount paid alongwith interest, but the said request was not acceded by the respondent. Moreover, post cancellation of the allotment vide cancellation letter dated 23.11.2021, it has arbitrarily deducted amount from the total amount paid by the complainant and has only refunded an amount of Rs.6,35,237/- via cheque dated 18.11.2021 to him. The aforesaid cheque was accepted under



protest and the same was conveyed to the respondent via protest letter dated 14.12.2021. However, the respondent has submitted that two copies of agreements for signing of the complainant was sent by it on 29.08.2013 and despite issuance of several reminders, the complainant never signed and returned the agreement for further action and hence, the agreement remains unexecuted, as on date. Further, after receipt of occupation certificate from the competent authorities on 28.11.2019, the respondent offered possession of unit to complainant vide its letter of intimation cum offer of possession dated 30.11.2019 and also demanded dues at the stage of offer of possession vide letter dated 20.12.2019. However, the complainant has failed to take over possession of the unit after payment of outstanding dues, despite receipt of various reminders and final reminder-cum-pre cancellation letter dated 23.07.2021. Therefore, in terms of the clause 21 read with clause 17 of the terms and conditions of booking application form, the respondent cancelled the allotment vide cancellation letter dated 23.11.2021 and refunded the balance amount of Rs.6,35,237/- vide cheque towards full and final settlement of all rights, title, interest, claims or lien, etc. of the complainant in the aforesaid allotment of unit which already stands encashed by the complainant.

19. On consideration of the documents available on record as well as submissions made by both the parties, 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. The possession of the subject unit was to be delivered by 07.12.2015 whereas, the occupation certificate for the project was obtained by the respondent on 28.11.2019. However, the complainant has already withdrawn from the project and sought refund of the paid-up amount alongwith interest vide email dated 20.01.2017 followed by subsequent emails dated 08.05.2017 and 23.04.2021, due to





inordinate delay on part of the respondent; but the said request was completely ignored by the respondent and it has ultimately cancelled the allotment of the unit vide letter dated 23.11.2021, mentioning the failure of the complainant in taking possession of the unit and to clear the outstanding dues. So, cancellation of the allotted unit vide cancellation letter dated 23.11.2021, on the basis of non-payment of dues or failure in taking over of possession by the complainant, does not hold any ground and is bad in the eyes of law in view of surrender request already made by the complainant vide email dated 20.01.2017. In view of the above-mentioned facts, the allottee intends to withdraw from the project and is well within the right to do the same in view of section 18(1) of the Act, 2016.

20. Moreover, 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. observed as under: -

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

21. 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 allottees as per agreement for sale

under section 11(4)(a). The promoter has failed to complete or unable to give possession of the unit by the due date of possession. Accordingly, the promoter is liable to the allottee, as he wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by it in respect of the unit with interest at such rate as may be prescribed.

22. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such, the complainant is entitled to refund of the entire amount paid by him at the prescribed rate of interest i.e., @11% p.a. (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount after deducting the amount already credited by the respondent vide cheque dated 18.11.2021, within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

**F. III Cost of litigation.**

23. The complainant is seeking above mentioned relief w.r.t. compensation. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors. (supra)*, has held that an allottee is entitled to claim compensation and litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation and litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation. Therefore, the complainant is advised to approach

the adjudicating officer for seeking the relief of compensation and litigation expenses.

**G. Directions of the Authority:**

24. Hence, the Authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

- i. The respondent/promoter is directed to refund the paid-up amount of Rs.15,98,132/- received by it from the complainant along with interest at the rate of 11% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual realization of the amount after deducting the amount already credited by the respondent vide cheque dated 18.11.2021.
- ii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

25. Complaint stands disposed off.

26. File be consigned to the registry.

  
**(Ashok Sangwan)**  
Member

Haryana Real Estate Regulatory Authority, Gurugram  
Dated: 07.08.2024