

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

Complaint no. :	5969 of 2022
Date of filing complaint:	30.08.2022
Date of order reserve	02.08.2024

Pavan Datta R/O: House No. D5/9, 2nd Floor, Dlf Phase 1, Gurugram	Complainant
Versus	
M/S Magic Eye Developers Pvt Ltd Regd. Office: Gf-09, Plaza M6, Jasola District Centre, Jasola, New Delhi - 110025	Respondent

CORAM:

Shri Sanjeev Kumar Arora

Member

APPEARANCE:

Sh. Varun Hooda (Advocate)

Complainant

Sh. Gaurav Rawat (Advocate)

Respondent

ORDER

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

A. Unit and project related details

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

S. N.	Particulars	Details
1.	Name and location of the project	The Plaza, Sector-106
2.	Nature of the project	Commercial
3.	DTCP license no.	65 of 2012 dated 21.06.2012 Valid till 21.06.2022
4.	Registered/not registered	Registered vide no. 72 of 2017 dated 21.08.2017 Valid till 31.12.2021
5.	Unit no.	0204, T-B1 [pg. 52 of complaint]
6.	Unit area admeasuring (Super area)	700 sq. ft. [pg. 52 of complaint]
7.	Allotment Letter	06.03.2014 [pg. 45 of complaint]
8.	Date of buyer's agreement	07.03.2014 [pg. 47 of complaint]
9.	Possession Clause	9.1 Three years from the date of execution of agreement with two grace periods of six months each.....
10.	Due date of possession	07.03.2018 (Grace period included being unqualified)
11.	Total sale consideration	Rs. 43,90,476/- (As per applicant ledger dated 26.09.2022 at page 74 of reply)
12.	Basic Sale Consideration	Rs. 32,58,500/-

		(Pg. 52 of complaint)
13.	Amount paid by the complainant	Rs. 15,75,395/- (as per applicant ledger dated 26.09.2022 at pag 75 of reply) Inadvertently mentioned in the proceeding of the day as Rs. 15,81,083/-
14.	Request for refund through an email dated	20.01.2017 , 20.08.2018 , 08.09.2018 [pg. 72 , 73 of complaint]
15.	Occupation certificate	28.11.2019 [pg. 33 of reply]
16.	Offer of possession	30.11.2019 [pg. 35 of reply]
17.	Cancellation letter	23.11.2021 [pg. 46 of reply]
18.	Amount refunded by the respondent after cancellation vide cheque and the same has also been admitted by the complainant having received the same vide proceedings dated 12.07.2024	Rs.6,35,344/- [pg. 47 of reply]

B. Facts of the complaint:

3. That the respondent enticed and coaxed the complainant to book a unit in their project "the plaza at 106" situated at sector-106, Gurugram and the complainant in lieu of the promises made by the respondent, namely M/s Magic Eye Developers Private Limited, agreed for booking residential unit/apartment in their project/residential group housing namely "The Plaza At 106" situated at Sector-106, Gurugram, Haryana.

4. That the complainant paid an amount of Rs. 2,00,000/- as "registration deposit" and Rs. 4,00,000/- at the time of booking as "confirmation of

booking" vide cheque bearing no. 786850, dated 26.04.2012 drawn on Indian Overseas Bank. The complainant then paid Rs. 4,00,000/- to the respondent vide cheque bearing no. 786849, dated 02.05.2012 drawn on Indian Overseas Bank towards allotment of the said unit within 30 days of confirmation of booking as per payment terms agreed between the parties.

5. That the respondent vide e-mail dated 06.11.2012, regarding allotment of units, asked the complainant to select desired unit from available units with the respondent. The complainant vide e-mail of the same day replied back to the respondent selecting unit no. B1-0204 located on 2nd floor of tower/building No. B1 in the said group housing complex, having an approximate super area of 700 sq. ft. Subsequently, after not receiving any response from the respondent, the complainant emailed the respondent on 23.01.2013 whereby informing the respondent that neither the allotment letter and nor builder buyer agreement has yet been received by the complainant despite timely payments as demanded by the respondent. The complainant requested the respondent to supply the same immediately, which fell on deaf ears and the same was not complied with by the respondent.

6. That the complainant became apprehensive regarding the mala-fide conduct of the respondent as after taking a sum of Rs. 10,00,000/- from the complainant there was no communication or response to emails or messages by the complainant and nor was any allotment made even after all terms and conditions of the respondent were timely complied with by the complainant. The complainant repeatedly requested the respondent multiple times to sign

and execute builder buyer agreement whereby the complainant agreed to buy a residential unit no. b1-0204 located on 2nd floor of tower/building no. b1 in the said group housing complex, having an approximate super area of 700 sq. ft., located at "the plaza at 106" but again to no avail and the complainant request again fell on deaf ears.

7. That a provisional allotment letter was subsequently supplied by the respondent on 06.03.2014, almost two years after receiving the allotment/booking amount from the complainant without any just cause or reason given for the delay by the respondent. The complainant was allotted unit no. 0204, tower no. b1, block no. 04, 2nd floor in the project. The complainant repeatedly requested the respondent multiple times to sign and execute builder buyer agreement whereby the complainant agreed to buy a residential unit no. b1-0204 located on 2nd floor of tower/building no. b1 in the said group housing complex, having an approximate super area of 700 sq. ft., located at "the plaza at 106" for a basic sale price of Rs. 32,58,500/- .A buyer's agreement was finally executed on 27.03.2014 after a delay of almost two years from payment of allotment/booking amount without any just cause or reason given for the delay by the Respondent. The total amount payable by the complainant inclusive of all unilaterally imposed charges and fees was Rs. 41,24,700/- exclusive of taxes.

8. That the complainant subsequently kept paying all the instalments as demanded by the respondent and till today has paid approximately 50% of total bsp amounting to Rs. 15,85,875/- out of total bsp of Rs. 32,58,500/- as per the applicant account ledger dated 24.09.2019 provided by the

respondent. As per clause 9.1 of the buyer agreement the respondent was supposed to complete construction 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.

9. That the respondent company assured and made the complainant believe that they are developing the project at a fast pace and possession of the completed apartment along with occupation certificate would be handed over to the complainant within 36 months but delivery of the project was delayed well beyond the 36 months as promised by the respondent. The payments were to be made as per the construction linked plan which is annexed as annexure-c of the builder buyer agreement.

10. That the complainant finally after waiting for about five years, and in absence of any committed date of delivery of possession by the respondent, sent a refund notice to the respondent on 20.01.2017 and then again on 20.08.2018 & 08.09.2018 requesting the respondent to refund the hard-earned money of the complainant so taken by the respondent on false representations and promises of timely delivery of the unit as per the buyer's agreement. The complainant was assured by the representatives of the respondent that amount paid by the complainant would be duly refunded to the complainant.

11. That to the utter shock and surprise of the complainant the respondent retreated from their earlier assurance of an amicable settlement and sent an email dated 21.08.2018 whereby they acknowledged the receipt of refund demands by the complainant and assured of a refund after unilaterally

illegally deducting "a) earnest money deposit 15%; b) taxes; c) brokerage paid, if any". Such deductions are illegal, arbitrary and outside the purview of the law as well as Rera Act & Rules.

12. That the complainant time and again reminded the respondent to complete the project in time and to provide possession of the apartment despite paying the demanded amount within time but to no avail as the respondent has completely failed to complete the project within the stipulated time reneging from their own assurances and promises. The complainant sent various emails to the respondent enquiring about the status of construction and thereafter when no response was received asking for a refund due to inordinate delay in delivery of the unit by the respondent, but the respondent did not care to respond or revert or listen to the said grievances nor was any bonafide reply given by it.

13. That the respondent, subsequent to the remands of refund raised by the complainant, sent letter titled "intimation about receipt of the occupation certificate and offer of possession" dated 30.11.2019 to the complainant. This offer was rejected by the complainant as there were ongoing negotiations and discussions between the parties regarding refund of the amount paid by the complainant and this was against the settlement terms as discussed between the parties.

14. That the respondent blatantly ignored the requests of refund of the complainant and sent a "final reminder" notice dated 09.03.2021 whereby a demand for balance outstanding payment amounting to Rs. 28,09,577/- was raised by the respondent, failing which they shall be constrained to cancel

the said unit/allotment and forfeit the amount as per the terms of the buyer's agreement.

15. That shocked and appalled by nonchalant and deceitful conduct of the respondent, the complainant sent an email dated 23.04.2021, through his nephew who is also suffering from the same grievance in the same project, whereby not accepting the terms of the "final reminder" and also again demanding a refund as was agreed between the complainant and the representatives of the respondent on multiple in-person meetings for settlement.
16. That the respondent as per cancellation letter dated 23.11.2021 cancelled the unit of the complainant. The respondent further proceeded to unilaterally and arbitrarily deduct amount from the total amount paid by the complainant and return only Rs. 6,35,344/- via cheque dated 18.11.2021, in gross violation of law as laid down in various judgments by Hon'ble Supreme Court of India and RERA. . The respondent has also wrongly calculated the amount paid the complainant as Rs. 15,75,395/- and is contradictory to their own admission that the complainant has paid Rs. 15,85,875/- as per the applicant account ledger dated 24.09.2019 provided by the respondent. The respondent is also not entitled to deduct more than 10% of the basic cost of the unit and is obligated to return the rest of the deposited amount to the complainant.
17. The aforementioned cheque was accepted under protest without any prejudice to the rights of the complainant, which was conveyed to the respondent via protest letter dated 14.12.2021.

18. No written submissions have been filed till date.

C. Relief sought by the complainant:

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

- i. Direct the respondent to place on record all statutory approvals and sanctions of the project.
- ii. Direct the respondent to provide complete details of EDC/IDC and statutory dues paid to the competent Authority and pending demand if any.
- iii. Direct the respondent to refund the entire amount of Rs. 15,85,875/- along with interest at the rate of highest MCLR plus 2% as per RERA Act and Rules from dates of respective payments till realization of the same in favour of the complainant after deduction of Rs. 6,35,344/- already paid as full and final settlement.
- iv. Direct the respondent to set aside cancellation letter dated 23.11.2021 and subsequent issuance of cheque dated 18.11.2021 amounting to Rs. 6,35,344/- as full and final settlement.
- v. Direct the respondent to set aside / quash interest charged illegally by the respondent on a project that was delayed by their own fault and actions.
- vi. Direct the respondent to quash/set aside agent brokerage charged illegally by the respondent on a project that was delayed by their own fault and actions.
- vii. Direct the respondent to quash any illegal demands raised by the respondent demanding money even when no work had been done on site.

viii. Direct the respondent to compensate the complainant for a sum of Rs.1,00,000/- as on the account of litigation cost.

D. Reply by respondent:

The respondent by way of written reply made following submissions: -

20. That the complainant took allotment of unit bearing no. 204 measuring 700 sq. ft. in super area, on 2nd floor of tower b1 in the project "plaza at 106-1" sector-106, Gurugram developed by the respondent vide agreement for a total consideration of Rs.43,90,476/- (BSP Rs. 4655/- plus other charges Rs. 666/- per sq. ft.) (plus taxes). Vide clause 9.1 of the agreement, the respondent endeavoured to offer possession of unit by 06.03.2018 which was further subject to any force majeure event. The complainant opted for construction linked payment plan and agreed that timely payment of the instalments is essence of the transaction. The complainant has till date made a total payment of Rs. 15,75,395/-. The last payment was made by the complainant in the year 2014.

21. That the respondent had vide letter dated 03.07.2014 intimated the complainant to pay due instalment of Rs. 3,11,090 /-on casting of plinth beam. The respondent had vide letter dated 03.09.2014 sent the reminder intimation to pay the aforesaid amount along with delayed interest Rs. 5063/- to which the complainant paid the due instalment amount but defaulted in paying the aforesaid interest amount. The respondent thereafter continued defaulting the payment of instalment as per the construction linked payment plan opted under the aforesaid agreement. The respondent sent various letter of intimations and demand letters dated

09.04.2015, 10.08.2015, 25.09.2015, 17.11.2015, 01.03.2016, 02.01.2017, 23.05.2017, 5.04.2018, 24.01.2019, 22.05.2019, 13.05.2019, 22.05.2019 for payment of due instalment as per the payment plan opted by the customer. However, the complainant did not respond to these letters and thus acted in breach of the terms of the aforesaid agreement.

22. That the respondent completed the construction of project and after obtaining the occupation certificate on 28.11.2019 issued letter of intimation-cum-offer of possession dated 30.11.2019 to the complainant for offering possession of his unit.
23. That the respondent, thereafter, vide letter dated 20.12.2019 raised the demand due at the stage of offer of possession of Rs.38,60,642/- as the total due amount payable inclusive of interest of Rs. 10,67,585/- for delay in making payment of instalments, excluding the CAM charges of Rs. 16,520/- However, no payment was received therein even after the reminder letter dated 12.03.2020, 28.04.2020, 05.11.2020, 09.03.2021 sent by the respondent to the complainant. The respondent even vide letter dated 03.02.2020 invited the complainant for execution and registration of the conveyance deed in his name. However, it is the complainant who has not yet come forward to get conveyance deed executed and registered in his name. Thereafter 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 complainant to get the conveyance deed executed and registered in respect of unit in its favour.

24. That the Act does not contemplate execution of any fresh agreement and therefore, buyer's agreement dated 07.03.2014 cannot be affected by the provisions of Act and has to be implemented in toto and 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 have to be governed by buyer's agreement dated 07.03.2014 and not by the Act.
25. That the respondent has started defaulting the payment of installment from the year 2014 itself and thus materially breached the agreement. It is clearly provided in clause 9.1 of the agreement that the respondent could not seek the timely possession of the unit if installments are due and not paid on time. However, the respondent kept sending intimations and demands letters for installments due as per the payment plan opted by the complainant under the said agreement and even offered the possession vide letter dated 30.11.2019 subject to clearance of the due installments. However, the complainant did not oblige the terms of the agreement and defaulted in making the due installments. Therefore, the respondent had no other option than to cancel the aforesaid unit vide cancellation letter dated 23.11.2021 and to refund the amounts after deductions, agreed by the complainant under clause 3 of the Agreement read with clause 11 of the said agreement.
26. All other averments made in the complaint were denied in toto.

27. No written submissions have been filed till date.

28. Copies of all the relevant documents have been filed and placed on record.

Their authenticity is not in dispute. Hence, the complaint can be denied on the basis of these undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority:

29. 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

30. 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 promoter, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

31. 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.

32. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (Supra)*** and 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*** wherein it has been laid down as under:

"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section

72 of the Act. if the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."

33. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the cases mentioned above, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

F. Entitlement of the complainant for refund:

F.I Direct the respondent to refund the entire amount of Rs.15,85,875/- along with interest at the rate of highest MCLR plus 2% as per RERA Act and Rules from dates of respective payments till realization of the same in favour of the complainant after deduction of Rs. 6,35,344/- already paid as full and final settlement.

F.II Direct the respondent to set aside cancellation letter dated 23.11.2021 and subsequent issuance of cheque dated 18.11.2021 amounting to Rs. 6,35,344/- as full and final settlement.

34. The section 18(1) 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 not obtained occupation certificate and possession has been offered by it. The complainant in the present case has surrendered the said unit on 20.01.2017 by sending an email for refund which is prior to the due date of possession.

35. The complainant is admittedly the allottee of respondent – builder of a unit on the basis of allotment letter dated 06.03.2014. The total sale consideration of the unit is Rs.43,90,476/- and the complainant has paid an amount of Rs.15,75,395/-.The buyer's agreement was executed between the parties on 07.03.2014. As per clause 9.1 of the buyer's agreement the developer 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. The buyer's agreement was executed on 07.03.2014 along with two grace period of six months each. The grace period is allowed being unqualified. Therefore the due date comes out to be 07.03.2018.
36. That in the present case the complainant has surrendered the said unit vide mail dated 20.01.2017 i.e., before the due date. The respondent was bound to act and respond to the pleas for surrender/withdrawal and refund of the paid-up amount accordingly but instead the respondent offered the possession of the said unit on 30.11.2019 after receiving OC from the competent authority on 28.11.2019. However the respondent later on cancelled the unit of the complainant on 23.11.2021 and has already refunded an amount of Rs.6,35,344/-.
37. The Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018, provides as under-

"5. AMOUNT OF EARNEST MONEY

Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission

and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment/plot/building as the case may be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer"

38. Thus, keeping in view the aforesaid factual and legal provisions, the respondent cannot retain the amount paid by the complainant against the allotted unit and is directed to refund the same in view of the agreement to sell for allotment by forfeiting the earnest money which shall not exceed the 10% of the basic sale consideration of the said unit and shall return the balance amount along with interest at the rate of 11% (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 surrender i.e., 20.01.2017 till the actual date of refund of the amount after adjusting the amount already credited in the account of the complainant within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

F.III. Direct the respondent to place on record all statutory approvals and sanctions of the project.

F.IV. Direct the respondent to provide complete details of EDC/IDC and statutory dues paid to the competent Authority and pending demand if any.

F.V Direct the respondent to set aside / quash interest charged illegally by the respondent on a project that was delayed by their own fault and actions.

F.VI Direct the respondent to quash/set aside agent brokerage charged illegally by the respondent on a project that was delayed by their own fault and actions.

F.VII Direct the respondent to quash any illegal demands raised by the respondent demanding money even when no work had been done on site.

39. In the present complaint the complainant has sought the relief of refund. Thus deliberation on other reliefs becomes redundant.

F.VIII Direct the respondent to compensate the complainant for a sum of Rs.1,00,000/- as on the account of litigation cost.

40. The complainant is seeking above mentioned relief w.r.t. compensation. Hon'ble Supreme Court of India in case titled as M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors. 2021-2022(1) RCR (C), 357 held that an allottee is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses.

G. Directions of the Authority:

41. Hence, the authority hereby passes this order and issue 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. 15,75,395/- after deducting 10% of the basic sale consideration of the unit i.e., Rs. 32,58,500/- being earnest money after adjusting the amount already credited in the account of the complainant, if any along with interest @ 11% p.a. on the refundable amount, from the date of surrender i.e., 20.01.2017 till the actual date of refund of the amount after adjustment of amount already paid.
- 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.

42. Complaint stands disposed of.

43. File be consigned to the registry.

HARERA
GURUGRAM


(Sanjeev Kumar Arora)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 02.08.2024