

PROCEEDINGS OF THE DAY

Day and Date	Tuesday and 11.12.2018
Complaint No.	572/2018 case titled as Mr. Yogesh Tomer Vs. Magic Eye Developers Pvt Ltd.
Complainant	Mr. Yogesh Tomer
Represented through	Shri Sandeep Sharma Advocate for the complainant.
Respondent	Magic Eye Developers Pvt Ltd.
Respondent Represented through	Shri Tarun Singla and Ms. Neelam Gupta, Advocates for the respondent.
Last date of hearing	20.9.2018
Proceeding Recorded by	Naresh Kumari

Proceedings

Project is registered with the authority.

Arguments heard.

As per clause 9.1 of the Builder Buyer Agreement dated 20.3.2013 for unit No.0501, 5th floor, Tower No.B1, Block No.01, in project "The Plaza at 106", Sector-106, Gurugram, possession was to be handed over to the complainant within a period of 36 months + grace period of six months + 6 months i.e. (12 months) which comes out to be **20.3.2017**. However, the respondent has not delivered the unit in time. Complainant has already deposited Rs.29,46,129/- against total sale consideration amount of Rs.41,21,200/-.

Counsel for the respondent has submitted that they shall give the possession of the unit in June 2019. Project is registered with the authority and as per registration application, the revised date of delivery of unit is **31.12.2021** and as such, complainant is entitled for delayed possession charges at the prescribed rate of interest i.e 10.75% per annum w.e.f **20.3.2017**, as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016 till the handing over the offer of possession failing which the complainant is entitled to seek refund of the amount with interest.

The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order and thereafter monthly payment of interest till handing over the possession shall be paid before 10th of subsequent month.

Complaint is disposed of accordingly. Detailed order will follow.

File be consigned to the registry.

Samir Kumar
(Member)
11.12.2018

Subhash Chander Kush
(Member)
11.12.2018

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

Complaint no. : 572 of 2018
First date of hearing : 20.09.2018
Date of decision : 11.12.2018

Mr. Yogesh Tomer

R/o. Flat No.4048, Pocket 5 & 6,
Sector B, Vasant Kunj, New Delhi-110070.

Complainant

Versus

M/s Magic Eye Developer Pvt. Ltd.
(Earlier known as M/s Spire Developers Pvt.
Ltd.)
Address: 8/33, 3rd floor, Satbharva
School Marg, WEA Karol Bagh,
New Delhi-110025.

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Sandeep Sharma Advocate for the complainant
Shri Tarun Singla along with Advocates for the respondent
Ms. Neelam Gupta

ORDER

1. A complaint dated 23.07.2018 was filed under section 31 of the Real Estate (Regulation and Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 by the complainant Mr. Yogesh Tomer, against the promoter M/s Magic Eye Developers Pvt.



Ltd., on account of violation of the clause 9.1 of buyer's agreement executed on 20.03.2013 in respect of unit described as below for not handing over possession by the due date which is an obligation of the promoter under section 11(4)(a) of the Act *ibid*.

2. Since, the buyer's agreement has been executed on 20.03.2013 i.e. prior to the commencement of the Act *ibid*, therefore, the penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non-compliance of contractual obligation on the part of the promoter/respondent in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016.
3. The particulars of the complaint are as under: -

- Nature of the project- commercial colony
- DTCP license no.- 65 of 2012

1.	Name and location of the project	"The Plaza at 106", Sector 106, Gurugram, Haryana.
2.	Project area	3.725 acres
3.	Registered/not registered	Registered
4.	HRERA registration no.	72 of 2017 dated 21.08.2017
5.	HRERA registration valid upto	31.12.2021
6.	Date of execution of buyer's	20.03.2013



	agreement	
7.	Unit no.	0501, 5 th floor, tower no. B1, Block no. 01.
8.	Unit measuring	700sq. ft.
9.	Payment plan	Construction linked payment plan
10.	Basic sale price	Rs.33,25,000/-
11.	Total consideration amount as per agreement (BSP+EDC+IDC+Car parking+club membership +IFMS)	Rs.41,21,200/-
12.	Total amount paid by the complainant till date as admitted by the respondent in the reply	Rs.29,46,129/-
13.	Percentage of consideration amount	Approx. 68 percent
14.	Date of delivery of possession as per clause 9.1 of buyer's agreement i.e. 36 months from the execution of buyer's agreement dated 20.03.2013 + two grace periods of 6 months each)	20.03.2017
15.	Delay in handing over possession till date	1 year 8 months 21 days
16.	Penalty clause as per buyer's agreement	Clause 10.4 of the agreement i.e. if the agreement is terminated, the respondent to refund the amount paid by the allottee along with interest @9% per annum OR if respondent choose not to terminate then Rs.5/- per sq. ft. of the super area of the said unit per month for the period of delay.



4. The details provided above have been checked on the basis of record available in the case file which has been provided by the complainant and the respondent. A buyer's agreement dated 20.03.2013 is available on record for the aforesaid unit according to which the possession of the same was to be delivered by 20.03.2017. Neither the respondent has handed over the possession of the said unit as on date to the complainant nor they have paid any compensation as per clause 10.4 of the buyer's agreement. Therefore, the promoter has not fulfilled his committed liability as on date.
5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. The respondent through his counsel appeared on 20.09.2018. The case came up for hearing on 20.09.2018 and 11.12.2018. The reply filed on behalf of the respondent on 25.09.2018 has been perused.

Brief facts

6. Briefly stated, the facts of the complaint are that the complainant booked a unit no.0501 (700 sq. ft.) in "The Plaza at 106" at 5th floor, tower no. B-1, Block no.1 as per provisional allotment letter dated 20.02.2013. The builder buyer agreement was executed on 20.03.2013 for the basic



total cost of Rs.33,25,000/- excluding EDC, IDC, one covered car parking, club membership charges and no preferential charges.

7. The complainant submitted that he paid a total sum of Rs.29,46,390/- out of total price of said unit to the developer. Thereafter, the developer issued a demand notice dated 05.04.2018 thereby demanding a sum of Rs.4,28,390/- from the complainant as due instalment towards the said unit.

8. **Issues raised by the complainant are as follow:**

- i. Whether the respondent has delayed in handing over the possession of the said unit/flat?
- ii. Whether the quality of construction of flat/unit is sub-standard and not in accordance with the provisions of the agreement?
- iii. Whether there has been deliberate or otherwise misrepresentation on the part of the developer wherein higher covered area is committed/promised whereas lesser covered area has been given?
- iv. Whether the facilities and amenities as agreed upon/ approved in the layout plan have been provided?



Relief sought

9. The complainant is seeking the following reliefs:
 - i. The complainant is seeking delivery of physical possession of the said unit along with compensation of Rs.6,00,000/- apart from interest which the complainant paid to the bank; OR
 - ii. The complainant is seeking refund of the entire amount of Rs.29,46,390/- along with interest @18% p.a. with effect from 31.03.2015.

Respondent's reply: सत्यमेव जयते

10. The respondent raised certain preliminary objections and submissions challenging the jurisdiction of this hon'ble authority. The respondent submitted that instant complaint is neither maintainable in law or on facts. Instant complaint is without cause of action and has been filed with malafides. Therefore, instant complaint is not maintainable and is liable to be rejected.

11. The respondent submitted that the buyer's agreement dated 20.03.2013 executed between parties hereto, though is an agreement and parties are bound by it and the same is not an "agreement for sale" as contemplated in the Act *ibid*. The



respondent submitted that as per law laid down by the Hon'ble Supreme Court in Commissioner of Income Tax Vs. Essar Teleholdings Limited, 2018 (3) SCC 253, "It is a settled principle of statutory construction that every statute is prima facie prospective unless it is expressly or by necessary implications made to have retrospective operations". It is submitted that there is no provision in the Act which make it retrospective in operation. It may be noted that liability to pay interest by promoter to allottee under Act is a penal liability, which cannot be enforced retrospectively. Promoter should be aware beforehand that if he unable to deliver possession by the date declared by him, he will be liable to pay interest as per provisions of the Act to allottee.

12. The respondent submitted that there is no provision in the Act which affects the agreement executed between the parties prior to the commencement of Act. 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 consequences of default/ default of any party have to be governed by buyer's agreement dated 20.03.2013 and not by this Act.

13. The respondent submitted that the date of completion of subject matter project as per section 4(2)(l)(c) is 31.12.2021. The respondent submitted that construction/development works at the project site is going on in full swing as per schedule of construction declared by respondent at the time of taking registration under the Act *ibid*. Present status of construction of building/tower wherein complainant's unit is situated is "external plaster work" is going on. The respondent is submitted that it is confident that it will be able to offer possession of complainant's unit much before the above-mentioned date of completion declared by it (i.e. 31.12.2021) in its above mentioned declaration under section 4(2)(l)(c).

14. The respondent submitted that the complainant approached the respondent for the booking of the unit with a view to



make the investment in the real estate market. In furtherance of which both the parties hereto have executed a buyer's agreement dated 20.03.2013 whereby respondent has allotted unit no.501 measuring 700 sq. ft. in super area situated on 5th floor in tower B-1 of commercial real estate project namely "The Plaza at 106", Gurugram.

15. The respondent submitted that it is matter of record that the complainant has till date made a total payment of Rs.28,03,971/- (including od EDC, IDC, car parking) and Rs.1,42,158/- towards service tax/GST on cost paid by complainant.
16. The respondent submitted that complainant himself is at default and has failed to make the payment till date of principal amount of Rs.4,28,400/- raised by the respondent vide demand letter dated 05.04.2018 in accordance with the construction linked payment plan. It is further submitted that complainant had on earlier occasion also made the payments with delay. However, irrespective of what has been stated in the buyer's agreement dated 20.03.2013 respondent has not



charged any interest for any delay in payment of instalments by allottee.

Determination of issues

After considering the facts submitted by the complainant, reply by the respondent and perusal of record on file, the issue wise findings of the authority are as under:

17. With respect to the **first issue** raised by the complainant, as per clause 9.1 of buyer's agreement, the possession of the unit was to be handed over within 3 years from the date of execution of the said agreement along with two grace periods of 6 months each. The buyer's agreement was executed on 20.03.2013. Therefore, the due date of possession shall be computed from 20.03.2013. The clause regarding the possession of the said unit is reproduced below:

"9.1 Schedule for the possession of the said unit

The developer based on its present plans and estimates and subject to all just exceptions/force majeure/statutory prohibitions/court's order etc., contemplates to complete the construction of the said building/said unit within a period of 3 years from the date of execution of this agreement, with two grace periods of 6 months each, unless there is a delay for reasons mentioned in clause 10.1, 10.2 and clause 37 or due to failure of allottee(s) to pay in time the price of the said unit along with the 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 part of



the allottee(s) to abide by all or any of the terms or conditions of this agreement.”

18. Accordingly, the due date of possession was 20.03.2017 and the possession has been delayed by one year eight month and twenty days till the date of decision. The delay compensation payable by the respondent @ Rs. 5/- per sq. ft. of the super area of the said unit per month for the period of delay as per clause 10.4 of buyer's agreement is held to be very nominal and unjust. The terms of the agreement have been drafted mischievously by the respondent and are completely one sided and unilateral. It has also been observed in para 181 of ***Neelkamal Realtors Suburban Pvt Ltd Vs. UOI and ors. (W.P 2737 of 2017)***, wherein the Bombay HC bench held that:

“...Agreements entered into with individual purchasers were invariably one sided, standard-format agreements prepared by the builders/developers and which were overwhelmingly in their favour with unjust clauses on delayed delivery, time for conveyance to the society, obligations to obtain occupation/completion certificate etc. Individual purchasers had no scope or power to negotiate and had to accept these one-sided agreements.”

19. With respect to the **second, third and fourth issues** raised by the complainant, the complainant has provided no proof but made only assertion with respect to sub-standard quality of construction in the complaint. The complainant has made



baseless allegations without any supportive documents to prove that the respondent has misrepresented or has failed to provide the facilities and amenities. Hence, these issues are answered in negative.

Findings of the authority

20. The authority has complete jurisdiction to decide the complaint in regard to non-compliance of obligations by the promoter as held in ***Simmi Sikka V/s M/s EMAAR MGF Land Ltd.*** leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Department of Town and Country Planning, 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.

21. The possession of the flat was to be delivered by 20.03.2017 as per the clause referred above, the authority is of the considered opinion that the promoter has failed to fulfil his obligation under section 11(4)(a) of the Haryana Real Estate



(Regulation and Development) Act, 2016. As the promoter has failed to fulfil his obligation under section 11, the promoter is liable under section 18(1) proviso of the Act *ibid*, to pay to the complainant interest, at the prescribed rate, for every month of delay till the handing over of possession.

22. The complainants made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above. The complainants requested that necessary directions be issued to the promoter to comply with the provisions and fulfil obligation under section 37 of the Act.

Directions of the authority

23. After taking into consideration all the material facts as adduced and produced by both the parties, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issues the following directions to the respondent in the interest of justice and fair play:

- i. The respondent is directed to handover the possession to hand over the possession of the said unit by 31.12.2021 as committed by the respondent in HRERA registration certificate.



ii. The respondent is directed to pay the interest so accrued on the amount paid by the complainant i.e. Rs.29,46,129/- at the prescribed rate i.e. 10.75% for every month of delay from the due date of possession i.e. 20.03.2017 till the actual date of handing over of the possession.

iii. The respondent is directed to pay accrued interest i.e. Rs.5,47,515/- to the complainant from the due date of possession till the date of decision, on account of delay in handing over of possession to the complainants within 90 days from the date of decision. Thereafter, the monthly payment of interest i.e. Rs.26,392/- till handing over of the possession, so accrues shall be paid by 10th of every succeeding month.

Principal amount paid by the complainant	Interest accrued upto date of decision	Monthly interest to be paid till handover of possession
Rs.29,46,129/-	Rs. 5,47,515/-	Rs.26,392/-

24. The order is pronounced.

25. Case file be consigned to the registry.

(Samir Kumar)

Member

(Subhash Chander Kush)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: