

PROCEEDINGS OF THE DAY

Day and Date	Tuesday and 18.12.2018
Complaint No.	714/2018 Case Titled As Ishwar Singh Dahiya V/S Magic Eye Developers Pvt. Ltd
Complainant	Ishwer Singh Dahiya
Represented through	Shri Sukhbir Yadav Advocate for the complainant.
Respondent	Magic Eye Developers Pvt. Ltd
Respondent Represented through	Shri Akhilesh Kumar Mishra, Advocate for the respondent.
Last date of hearing	
Proceeding Recorded by	Naresh Kumari

Proceedings

Project is registered with the authority.

Arguments heard.

Project is registered with the authority and the revised date of possession is 31.12.2021 but counsel for the respondent has stated at bar that the respondent shall deliver the possession in March 2019.

As per clause 9.1 of the Builder Buyer Agreement dated 21.3.2013, for unit No. 0401, 4th floor, Tower No.A3, in "The Plaza at 106", Sector-106, Gurugram, possession was to be handed over to the complainant within a period of 36 months + two grace periods i.e. 6 month each which comes out to be 21.3.2017. However, the respondent has not delivered the unit in time. Complainant has already deposited Rs.55,04,298/- with the respondent. As

such, complainant is entitled for delayed possession charges @ 10.75% per annum w.e.f 21.9.2016 which is worked out by taking only one six month grace period till offer of possession as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order and failing which the complainant is entitled to seek refund the paid amount with interest. 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)
18.12.2018

Subhash Chander Kush
(Member)
18.12.2018

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

Complaint no. : 714 of 2018
First date of hearing : 18.12.2018
Date of decision : 18.12.2018

Mr. Ishwar Singh Dahiya

Flat no. 801, Arzoo CGHS, Plot no.-5, Near
Artemis Heart Institute, Sector -51,
Gurugram-122003

Complainant

Versus

M/s Magic Eye Developer Pvt. Ltd.
(Earlier known as M/s Spire Developers Pvt.
Ltd.)
Address:GF-09, Plaza M6 Jasola District
Centre,
New Delhi-110025

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Sukhbir Yadav Advocate for the complainant
Shri Akhilesh Kumar Mishra Advocate for the respondent



ORDER

1. A complaint dated 14.08.2018 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. Ishwar Singh Dahiya, 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 21.03.2013 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 21.03.2013 i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, 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 agreement	21.03.2013
7.	Unit no.	0401, 4 th floor, tower no. A3
8.	Unit measuring	1000sq. ft.
9.	Payment plan	Construction linked payment plan
10.	Date of booking	29.08.2012
11.	Total consideration amount as per statement of complainant	Rs.60,06,000/-
12.	Total amount paid by the complainant till date	Rs.55,04,298/-as per statement of complainant
13.	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 + two grace periods of 6 months each)	21.03.2017(including two grace period) But delayed possession charges will be given from 21.09.2016 as taking only one six month grace period
14.	Delay in handing over possession till date	2 years 2 months 27 days
15.	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.
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4. 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 is available on record for the aforesaid unit according to which the possession of the same was to be delivered by 21.09.2016. Neither the respondent has delivered the possession of the said unit as on date to the complainants 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 case came up for hearing on 18.12.2018. The reply filed on behalf of the respondent.



Brief facts

6. The complainant submitted that the respondent Magic Eye Developers Pvt. Ltd. having registered office at: GF-09, Plaza M6 Jasola District Centre, Jasola, New Delhi – 110025, party is a company incorporated under the Companies Act, 1956 (hereinafter called the developer/ builder / respondent) and the project in question is known as The Plaza at 106, Sector - 106, Gurugram, Haryana
7. The complainant submitted that as per section 2(zk) of the Real Estate (Regulation and Development) Act, 2016, the respondent falls under the category of “promoter” and is bound by the duties and obligations mentioned in the said Act. and is under the territorial jurisdiction of this hon’ble regulatory authority.
8. The complainant submitted that on date 29.08.2012, the complainant issued a cheque of Rs. 14,43,260/- (fourteen lakhs forty three thousand two hundred and sixty) as booking amount, vide cheque No. 555573 dated 29.08.2012 drawn in UCO bank, with application form. Applicant booked a residential apartment under construction link plan (plan is



annexed on page No. 21 of BBA). Respondent issued a payment receipt on date 01.09.2012.

9. The complainant submitted that on date 01.10.2012 respondent issued a provisional allotment of apartment / unit no. A3-01-401 in the Project "Spire Condominiums, Sector – 106", Gurgaon, for area admeasuring 1000 sq. ft. apartment was purchased under the construction link payment plan for sale consideration of 60,06,000/- (sixty lakhs and six thousand rupees)
10. The complainant submitted that on date 21.03.2013 a pre-printed, arbitrary, unilateral and one sided apartment buyer's agreement was executed between respondent and complainant on 21.03.2013. Name of project was also changed in builder buyer's agreement. As per clause no. 9.1 of apartment buyer agreement, also respondent have to give the possession within 3 years from the date of execution of this agreement.
11. The complainant submitted that on date 11.04.2014, respondent raised a demand of Rs. 3,77,497/- (three lakhs seventy seven thousand four hundred and ninety seven) as per



payment plan on “at foundation level” and complainant paid the said demand on 30.04.2014. Respondent issued a payment receipt on date 15.05.2014.

12. The complainant submitted that complainant continued to pay the remaining instalment as per the payment schedule of the builder buyer agreement and have already paid the more than 90% amount till date along with interest and other allied charges of actual purchase price, but when complainant observed that there is no progress in construction of subject apartment for a long time, he raised his grievance to respondent, but all time complainant received false assurance and fake promises.

13. The complainant submitted that the main grievance of the complainant in the present complaint is that in spite of complainant paid more than 90% of the actual amounts of apartments as per demand but respondent party fails to give the possession of apartment on promised date.

14. The complainant submitted that it was promised by the respondent party at the time of receiving payment for the apartment that the possession of fully constructed apartment



along with parking, landscaped lawns, etc. as shown in brochure at the time of sale, would be handed over to the complainant as soon as construction work is complete i.e. within 3 years.

15. The complainant submitted that there is a clear unfair trade practice and breach of contract and deficiency in the services of the respondent which makes him liable to answer this hon'ble authority.

16. The complainant submitted that for the first time cause of action for the present complaint arose in or around March 2013 when the buyer agreement containing unfair and unreasonable terms was, forced upon the allottee. The cause of action further arose in 2015, when the respondent party failed to handover the possession of the apartment as per the buyer agreement. Further the cause of action again arose on various occasions, including on: a) December,2015; b) February,2016; c) June, 2016, d) November, 2016; e) March, 2017, f) December, 2017, g) July, 2018 and on many time till date, when the protests were lodged with the respondent party about its failure to deliver the project and the assurances



were given by them that the possession would be delivered by a certain time. The cause of action is alive and continuing and will continue to subsist till such time as this hon'ble authority restrains the respondent party by an order of injunction and/or passes the necessary orders.

17. The complainant submitted that as per section 12 of the RERA Act, 2016, the promoter is liable to returned entire investment along with interest to the allottees of an apartment, building or project for giving any incorrect, false statement etc. as per section 18 of the RERA Act, 2016, the promoter is liable to pay compensation to the allottees of an apartment, building or project for a delay or failure in handing over of such possession as per the terms and agreement of the sale.

18. The complainant submitted that the complainant is entitled to get possession of agreed apartment and also entitled to get compensatory interest @ 24% per annum from March,2015 to date of possession (for delay period). The complainant is also entitled to get Rs. 1,00,000/- (one lakhs) towards the cost of litigation. The complainant are also entitled for any other relief which they are found entitled by this hon'ble authority.



19. Issues raised by the complainant are as follow:

- i. Whether the developer has violated the terms and conditions of apartment/ apartment buyer agreement?**
- ii. Whether there is any reasonable justification for delay to give possession of apartment?**
- iii. Whether there has been deliberate or otherwise, misrepresentation on the part of the developer for delay in giving possession?**
- iv. Whether complainant is entitled for compensatory interest @ 24% per annum from due date of possession March, 2015 to till date of possession?**

Relief sought

20. The complainant is seeking the following reliefs:

- i. Pass an appropriate award directing the respondent parties to pay compensatory interest @ 24% as per section 18 (b) of Act for delay in possession from March, 2015 to date of**



- possession. (Justification: - Section 18 and Section 38 of RERA (Act.)).
- ii. Respondent party may kindly be directed to pay an amount of Rs.1,00,000/- (five lakhs) as litigation expenses; (Justification:- Cost of litigation).
- iii. Respondent party may kindly be directed to hand over the possession of agreed flat to the allottee immediately and not later than three months from the date of judgment, complete in all respects and execute all required documents for transferring / conveying the ownership of the respective flats.
- iv. Respondent party may kindly be directed to provide for third party audit to ascertain / measure accurate areas of the flat and facilities, more particularly, as to the “super area” and “built-up area”.



- v. Respondent party may kindly be directed to refrain from giving effect to the unfair clauses unilaterally incorporated in the flat buyer agreement.
- vi. Any other relief / direction which the hon'ble authority deems fit and proper in the facts & circumstances of the present complaint.
- vii. That in the interest of justice, this authority should pass strict and stringent orders against errant promoters and developers who take huge investments from innocent investors and then deny them the right to take possession as agreed at the time of sale. The purpose and legislative intent behind setting up this authority should also be kept into consideration while deciding the present complaint as the respondent has not only treated the complainant unfairly but many other such buyers.



Respondent's reply:

21. The respondent submitted that buyer's agreement dated 21.03.2018 executed between the parties hereto, though is an agreement and parties are bound by it, is not "agreement for sale" as contemplated by Real Estate (Regulation And Development) Act, 2016. Agreement for sale referred to under section 13(2) of the Act, require special characteristics as provided under the said provision whereas an agreement executed between promoter and allottee prior to commencement of Act may not have such characteristics.
22. The respondent submitted that as per law laid down by Hon'ble Supreme Court in:

1. **Commissioner of Income Tax versus Essar tele holdings 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"*.
2. 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 is unable to deliver possession by the date declared by him, he will be liable to pay interest as per provision of Act to allottee. It is settled law that that penal provision can never be applicable retrospectively **Ritesh Agarwal versus SEBI, 2008(8) SCC 205.**

22. The respondent submitted that present status of construction of building/ tower wherein complainant's unit is situated is as under:-

“Flooring and internal painting work is going on”.

Respondent is confident that he 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 sub- clause C of clause (1) of sub-section (2) of section 4.

23. The respondent submitted that it is a matter of record that complainant has made a total payment of Rs. 52,56,450/- excluding toward cost of said unit as per construction linked



payment plan and Rs. 2,30,917/- towards GST on cost paid by complainant.

24. The respondent submitted that the timeline mentioned in clause 9.1 of buyer's agreement dated 21.03.2013 is merely an estimated timeline and not the firm date of offer of possession. Even the respondent is also entitled to extension of time to deliver possession.

25. The respondent submitted that it is denied that the terms and conditions of buyer's agreement dated 21.03.2013 are unfair or unreasonable. It is submitted that the agreement takes care of interest of both sides and parties have voluntarily executed the same and are bound by the same.

26. The respondent submitted that this hon'ble authority has no jurisdiction to declare any terms or conditions of buyer's agreement dated 21.03.2013 either as void or as onerous or invalid.

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:



27. With respect to the **first and second issues** 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 21.03.2013. Therefore, the due date of possession shall be computed from 21.03.2013. 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."



28. Accordingly, the due date of possession was 21.09.2016 and the possession has been delayed by two years two months and twenty seven 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."

29. With respect to the **third issue** raised by the complainant, the complainant has provided no proof but made only assertion with respect to misrepresentation on the part of the developer. The complainant has made baseless allegations without any supportive documents to prove that the respondent has misrepresented. Hence, these issues are answered in negative.



30. With respect to **fourth issue** raised by complainant, he cannot be entitled for compensatory interest @ 24% per annum from due date of possession till date of possession the promoter is liable under section 18(1) proviso read with rule 15 to pay interest to the complainant, at the prescribed rate i.e 10.75%, for every month of delay till the handing over of possession.

Findings of the authority

31. 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.



32. The complainants made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above.
33. The complainants requested that necessary directions be issued by the authority under section 37 of the Act ibid to the promoter to comply with the provisions and fulfil obligation.
34. The project is registered with the authority and the revised date of possession is 31.12.2021 but counsel for the respondent has stated at bar that the respondent shall deliver the possession in March 2019.
35. As per clause 9.1 of the builder buyer agreement dated 21.03.2013 for unit no. 0401, 4th floor, tower no. A3, in "The Plaza at 106", Sector-106, Gurugram, possession was to be handed over to the complainant within a period of 36 months + two grace period i.e 6 months each which comes out to be 21.03.2017. however, the respondent has not delivered the unit in time. Complainant has already deposited Rs.55,04,298/- with the respondent. As such, complainant is entitled for delayed possession charges @10.75% per annum w.e.f 21.09.2016 which is worked out by taking only one six



months grace period till offer of possession as per the provision of section 18(1) of the Real Estate (Regulation And Development) Act, 2016.

36. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order and failing which the complainant is entitled to seek refund the paid amount with interest. Monthly payment of interest till handing over the possession shall be paid before 10th of subsequent month.

Directions of the authority

37. 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 pay delay possession charges @ 10.75% p.a. on the paid amount Rs.55,04,298/- to the complainant from the due date of



delivery of possession i.e. 21.09.2016 till 18.12.2018
(date of dispose of compliant) amounting to
Rs.13,25,813.25/-.

- ii. The arrears of interest so accrued @ 10.75% p.a. so far shall be paid to the complainant within 90 days from the date of this order. Thereafter monthly payment of interest of **Rs. 49,309.34/-** till handing over the possession shall be paid before 10th of subsequent month.

38. The order is pronounced.

39. Case file be consigned to the registry.

(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram

(Subhash Chander Kush)

Member

Dated: 18.12.2018

HARERA
GURUGRAM



Judgement Uploaded on 08.01.2019