

PROCEEDINGS OF THE DAY

Day and Date	Thursday and 03.01.2019
Complaint No.	1338/2018 Case Titled As Anand Sahu V/S Magic Eye Developers Pvt. Ltd
Complainant	Anand Sahu
Represented through	Complainant in person with Shri Aditya Bhardwaj, Advocate.
Respondent	Magic Eye Developers Pvt. Ltd
Respondent Represented through	S/Shri Amit Sharma and Akhilesh Kumar Mishra on behalf of respondent.
Last date of hearing	
Proceeding Recorded by	Naresh Kumari & S.L.Chanana

Proceedings

Project is registered with the authority and the revised date of delivery of possession is June 2019.

Licence has been obtained by the respondent from DTCP which is still alive.

Arguments heard.

Counsel for the respondent has submitted that project is almost complete and they shall hand over the possession in June 2019.

As per clause 9.1 of the Builder Buyer Agreement dated 14.3.2014 for unit No.1701, 17th floor, Tower B1, in project "The Plaza at 106", Sector 106, Gurugram possession was to be handed over to the complainant within a period of 36 months with two grace period of six months each which comes out to be 14.3.2018. It was a construction linked plan. As on date the

respondent has not delivered the unit in time. Complainant has already paid Rs.31,56,370/- to the respondent against a total sale consideration of Rs.44 Lakhs. As such, complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f 14.3.2018 till the handing over the possession as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016.

Counsel for the respondent brought to the notice of the authority that some of the instalments to be paid by the complainant were delayed as per the agreed construction linked plan. Respondent shall be at liberty to charge interest at the prescribed rate of interest i.e. 10.75% for delay in making monthly instalments and the same can be adjusted against the amount payable by the respondent on account of delay in handing over the possession.

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.

Both the parties are directed to submit their calculation sheet by 09.01.2019.

Complaint is disposed of accordingly. Detailed order will follow. File be consigned to the registry.

Samir Kumar
(Member)

Dr. K.K. Khandelwal
(Chairman)
03.01.2019

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

Complaint no. : 1338 of 2018
First date of hearing : 03.01.2019
Date of decision : 03.01.2019

Mr. Anand Sahu
R/o. 2E/JA Hari Enclave,
Hari Nagar, New Delhi

Complainant

Versus

1.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.

2. Madhyam Estate Linkers (P)Ltd.
12 and 13 , 1st floor, Eldeco Station 1 mall,
Main Mathura road, sector 12, Faridabad

Respondents

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Aditya Bhardwaj with
Complainant in person
Amit Sharma and Akhilesh
Kumar Mishra on behalf of
respondent

Advocate for the complainant
On behalf of respondent



ORDER

1. A complaint dated 22.10.2018 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. Anand Sahu , against the promoter M/s Magic Eye Developers Pvt. Ltd. and Madhyam Estate Linkers (P)Ltd, on account of violation of the clause 9.1 of buyer's agreement executed on 14.03.2014 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 14.03.2014 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 promoters/respondents in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016
3. The particulars of the complaint are as under: -

1.	Name and location of the project	"The Plaza at 106", Sector 106, Gurugram, Haryana.
2.	Project area	3.725 acres
3.	Nature of project	Commercial colony



4.	Registered/not registered	Registered
5.	HARERA registration no.	72 of 2017
6.	HARERA registration valid upto	31.12.2021
7.	DTCP license no.	65 of 2012
8.	Date of execution of buyer's agreement	14.03.2014
9.	Unit no.	1701, 17 th floor, tower no.B1, .
10.	Unit measuring	700sq. ft.
11.	Payment plan	Construction linked payment plan
12.	Basic sale price	Rs.36,75,000/-
13.	Total consideration amount	Rs.44,000,00/- (as alleged by complainant)
14.	Total amount paid by the complainant	Rs.31,56,370/- (as alleged by complainant)
15.	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)	14.03.2018
16.	Delay in handing over possession till date	9 months
17.	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. 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 14.03.2018. 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 respondent through his counsel appeared on 03.01.2019. The case came up for hearing on 03.01.2019. The reply filed on behalf of the respondent has been perused.

Brief facts

6. The complainant submitted that he decided to book a unit in the project and in pursuance of same a cheque bearing number 158773 amounting to Rs. 10,00,000/- drawn on HSBC bank



was given to the respondent no. 2 in the name of respondent no 1.

7. The complainant submitted that the respondent no. 2 also sent a letter dated 10.05.2012 wherein a discount was offered by the respondent no. 2 and the booking was also confirmed.
8. The complainant submitted that the respondent no. 1 sent a letter dated 17.05.2012 wherein the respondent admitted the receipt of application dated 9.05.2012 which was with regard to booking of a unit at measuring 700 sq.ft. at a rate of Rs. 5250 per square feet. In the said letter itself the respondent no 1 demanded a payment of Rs. 30,900 which was to be made on or before 16 June 2012.
9. The complainants received a letter dated 01.06.2012 issued by respondent no 1 whereby the booking of the complainant was confirmed and the payment of Rs. 10,00,00/- towards the initial application was acknowledged by the respondent.
10. The complainant received a letter wherein he was informed that flat bearing number 1701, Tower B1 Block 01, Floor 17th has been allotted to the complainant. The said letter clearly states that the basic sale price of the unit will be Rs. 5250, covered parking charges will be these Rs.3,00,000/-. The total area admeasuring 700 sq. ft. was allotted to the complainants.



11. The complainant received a letter dated 23.03.2013 issued by respondent no 1 wherein a demand of Rs. 2,77,419 was made by the respondent no 1 on account of installment due at foundational level. The said instalment comprised of Rs. 2,67,500 towards the basic sale price and Rs. 9919 towards the service tax. The said amount was to be remitted in the account of the respondent on or before 20.05.2013.
12. The complainant submitted that he was shock and surprise the respondent no. 1 sent the builder buyer agreement in the month of August 2013 to the complainants after 18 months from booking. The said document was signed by the complainant and was returned in the month of September 2013. However the respondent no. 1 very cleverly put the stamp of a notary dated 14 March 2014 in order to show that the agreement has been executed on 14.03.2014 . The said issue was protested however at that time it was stated by the respondent no 1 that in case the complainant failed to make further payments in such case their allotment will be cancelled, and money shall be forfeited. The complainant was shock and surprise of the complainant the period in which the project was to be completed was revised. That as per clause 9.1 of the said agreement the units will be delivered within the



period of three years from the date of execution of the agreement with extension of 12 months. That as a majority of the payment has already been made complainant left with no other option decided to go ahead with the project.

13. The complainant submitted that the respondent no 1 raised a demand against which an amount of Rs. 3,53,421/- was deposited through RTGS. That against the above said payment a receipt dated 07.05.2015 bearing number 2211 was issued by the respondents to the complainant.

14. The complainant received a letter in which it was informed that erstwhile developer i.e Spire Developer Pvt Ltd. has amalgamated with Magic Eye Developers Pvt Ltd. it was further informed that all the communications, payment and queries in future shall be addressed to the Magic Eye Developers Pvt Ltd. it was further informed that all the terms and conditions comprised in the builder buyer agreement shall be binding on the new entity in all respects.

15. The complainant received an email sent by the respondents stating that a demand letter has been sent to the complainant. In reply to the said email complainant sent an email where the respondent no 1 were asked about the final completion and handover of the project. Further being concerned about the



project the complainant also asked the copy of the RERA registration of the project along with certification from the bank that the account is a RERA complied account.

16. The complainant submitted that in reply to the email dated 9 April 2018 which was followed up by telephonic conversation the respondent no. 1 through email informed the complainant that the project shall be ready by mid of 2019. It was further informed that expressway is getting opened in next 3-4 months which will give boost to the current project. It was further informed that the team which is handling of data will provide all the necessary details pertaining to the RERA registration.

17. The complainant wrote an email to the respondent stating the falls assurances given by the respondent to the complainant and other allottees. It was specifically stated by the complainant that the respondent have breached all the timelines which has been given under the agreement, further the unit area offered by the respondent no. 1 is far less than the area which was to be offered under the terms and conditions of the agreement. The complainant also raised questions about the quality of the material used in the project. At last as respondent no. 1 was not able to answer the queries



of the complainant, the complainant decided to seek refund from the respondent.

18. That till date and amount of Rs. 31,56,370 has been paid by the complainant to the respondent against the booking made by the complainant.

19. That the facts and circumstances of the present case clearly makes out a case where the respondent no. 1 has failed to perform its obligation to give position in terms of the agreement for sale and hence in the present scenario section 18(1)(a) Read with Section 19(4) the Haryana Real Estate Regulation and Development Act 2016 is attracted.

20. The complainant submitted that role of the respondent no. 2 was that of a real estate agent and the facts and circumstances of the present case will go on to show that both the respondents have acted hand in glove with each other. The respondent no. 2 from the day one giving false assurance regarding the timely development of the project knowing well that the same was not possible. Against the booking of the complainants the respondent no. 2 has got amount of commission from the respondent no. 1 hence there is a clear violation of the obligations which are real estate agent has to



perform under Section 10(c) Haryana Real Estate Regulation and Development Act 2016.

21. That the complainants reserve its right to file appropriate remedy for compensation subject to outcome of complaint.

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

- i. Whether the respondent has failed to execute and perform its obligations in terms of agreement for sale that is buyer agreement?
- ii. Whether the complainant is entitled to withdraw from the project?
- iii. Whether the complainant are entitled to interest on amount deposit by them?

Relief sought

23. The complainant is seeking the following reliefs:

- i. Direct the respondent to refund of the entire amount of Rs. 31,56,370/- along with interest @18% p.a. .

Respondent's reply:

24. 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.

25. The respondent submitted that the buyer's agreement dated 14.03.2014 executed between parties hereto, though is an agreement and parties are bound by it, 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.

26. 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.



27. 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 14.03.2014 and not by this Act.

28. 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 he 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).

29. The respondent submitted that this hon'ble authority does not have judicial or quasi judicial power to pass adjudicatory orders in relation to dispute between an allottee and promoter of an ongoing project on the date of commencement of act especially in circumstances when there is no violation of any declaration given by promotor at the time of getting the ongoing project registered with Real Estate Regulatory Authority. It is pertinent to mention that the complainant has committed the default in making the payment as per the payment plan agreed by the complainant himself. As per the accounts maintained by the respondent, an amount of Rs.4,62,250/- is due and payable by the complainant to respondent and with respect to the same an intimation letter dated 05.04.2018 was given to complainant for making the payment of Rs. 4,62,250/-. But the complainant has not remitted the said payment.



30. The complainant has been default of making timely payment of instalment despite repeated demands of the respondent. It is to be noted that competition of construction and handover of possession were subject of and depend upon the payment of instalments. The complainant, therefore cannot seek handover of possession when he has himself defaulted the payment and accordingly has acted as catalyst is slowing down the pace of construction. It is further submit that refund shall further hamper the completion of the project as the project is almost nearing completion and the respondent assures to complete the construction of the said unit by mid of year 2019.

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:



31. With respect to the **first** and **third 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 14.03.2014. Therefore, the due date of possession shall be computed from 14.03.2018. 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.”

As the promotor is failed to fulfil its obligation as per the terms of agreement and cannot handover the possession on due date of possession till date. So, 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



32. Accordingly, the due date of possession was 14.03.2018 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."

33. With respect to **second issue** raised by the complainant it is pertained to note that the project is registered and the revised date of delivery date of possession is 31.12.2021 and also from the perusal the record it is seen that the project is almost near completion and respondent will offer possession by mid of 2019 hence in the interest of justice it is not advisable at this stage to allow the complaint to withdraw from the project.

Findings of the authority

34. 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 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.

Directions of the authority

35. Keeping in view the facts and circumstances of the complaint and submissions made by the parties during arguments, the authority is of the view that project is registered with the authority and the revised date of delivery of possession is June 2019. Since, as per clause 9.1 of the builder buyer agreement dated 14.3.2014 for unit no.1701, 17th floor, Tower B1, in project "The Plaza at 106", Sector 106, Gurugram possession was to be handed over to the complainant within a period of 36 months with two grace period of six months each which comes out to be 14.3.2018. It was a construction linked plan. As on date the respondent has not delivered the unit in time.



Complainant has already paid Rs.31,56,370/- to the respondent against a total sale consideration of Rs.44,00,000/-.

36. Therefore, 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, hence 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.
37. The complainant has made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above. The complainant has further requested that necessary directions be issued to the promoter to comply with the provisions and fulfil obligation under section 37 of the Act.
38. Counsel for the respondent brought to the notice of the authority that some of the instalments to be paid by the complainant were delayed as per the agreed construction linked plan. Both the parties are directed to submit their calculation sheet by 09.01.2019.



39. 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 directs the respondent that complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f 14.3.2018 till the handing over the possession as per the provisions of section 18 (1) of the Real Estate (Regulation and Development) Act, 2016.
40. 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.
41. The complaint is disposed of accordingly.
42. File be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member



Dated: 03.01.2019

Judgement Uploaded on 25.01.2019