BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**3811 of 2021**
Date of filing complaint:	**28.09.2021**
First date of hearing:	**03.12.2021**
Date of decision :	**09.02.2022**

1.	Rajbir Singh	**Complainants**
2.	Sarla Devi Both R/o: Village & P.O Daultabad, Opposite Janghu Traders, Gurugram-122001	
	Versus	
	M/s Magic Eye Developers Private Limited R/o: GF – 09, Plaza M6, Jasola District Centre, Jasola New Delhi - 110025	**Respondent**

CORAM:	
Dr. KK Khandelwal	**Chairman**
Shri Vijay Kumar Goyal	**Member**
APPEARANCE:	
Sh. Sukhbir Yadav (Advocate)	Complainants
Ms. Neelam Gupta (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 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.No.	Heads	Information
1.	Project name and location	"The Plaza at 106," Sector 106, Gurugram
2.	Project area	3.725 acres
3.	Nature of the project	Commercial Colony
4.	DTCP License	65 of 2012 dated 21.06.2012 valid up to 21.06.2022
5.	Name of the licensee	Magic Eye Developers
6.	RERA Registered/ not registered	**Registered Vide no. 72 of 2017 dated 21.08.2017**
	RERA Registration valid up to	31.12.2021
7.	Unit no.	0806,8th floor, tower B2 [Annexure P-3 at page no. 26 of the complaint]
8.	Unit measuring (super area)	700 sq. ft. [Annexure P-3 at page no. 26 of the complaint]
9.	Date of provisional allotment	15.09.2012 [Page no. 23 of the complaint
10.	Date of execution of builder buyer agreement	03.05.2013 [Page no. 25 of the complaint]

11.	Possession clause	**9.1** The developer based on its present plans and estimates and subject to all just exceptions/force majeure/statutory prohibitions/court order etc. 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 unless there is a delay for reasons mentioned in clauses 10.1,10.2 and clause 37 or due to failure of allottee to pay in time the price of the said unit alongwith 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 the part of the allottees to abide by all or any of the terms or conditions of this agreement. **(emphasis supplied)**
12.	Due date of possession	03.05.2016 [Calculated from the date of the execution of this agreement] **Grace period of 6 months is disallowed**
13.	Total sale consideration	Rs. 40,28,530/- [As per applicant ledger dated 16.11.2021 at page 82-85 of the reply]
14.	Total amount paid by the complainants	Rs. 40,28,530/- [As per applicant ledger dated 16.11.2021 at page 82-85 of the reply]
15.	Payment plan	Construction linked payment plan [Annexure C at page 45 of the complaint]

16.	Occupation Certificate	28.11.2019 [Page 24 of the reply]
17.	Possession certificate	25.09.2020 [Page 34 of the reply] Offer of possession- 30.11.2019 [Annexure R/3 at page 26 of the reply]
18.	Conveyance deed	06.03.2021 [Page 43 of the reply]
19.	Delay in delivery of possession till the offer of possession + 2 months i.e. 30.01.2020	3 years, 8 months, 27 days

B. Facts of the complaint:

3. That in April 2012, complainants/petitioners, Mr. Rajbir Singh received a marketing call from the office of the respondent, the caller represented himself as a manager of the respondent company and marketed a commercial project namely "The Plaza at 106" situated at Sector – 106, Gurugram. The complainants visited the Gurugram office and project site of the respondent/builder with his family members. There the complainant's consultant with the marketing staff of Builder and got information about the project. The marketing staff of the respondent gave him a brochure and pricelist and allured him with a shady picture of the project. The marketing staff and office bearers of the respondent allured with the proposed specification and assured that possession of the unit will be handed over within 36 months of the booking.

4. That, believing on representation and assurance of respondent (earlier known as Spire Developers Pvt. Ltd.) the complainants Naveen Kumar, booked one unit bearing No. B2 – 0806 on 8th

floor, admeasuring 700 sq. ft. and paid Rs. 2,00,000/- as booking amount on 05.04.2012 and signed a pre-printed application form. The unit was purchased under the construction linked plan for a sale consideration of Rs. 37,92,200/-

Area	700	
BSP	4180	2926000
Final BSP		2926000
PLC (Plaza facing)	100	70000
EDC	426	298200
IDC	40	28000
Car Parking		300000
Club Membership Charges		100000
IFMS		70000
	Total	3792200

5. That on 15.09.2012, the respondent issued a provisional allotment letter in name of Rajbir Singh & Sarla Devi, conforming to the allotment of unit no. B2-0806 on 8th floor, Block no. 6 for size admeasuring 700 sq. ft.

6. That after a long follow up on 03.05.2013, a pre-printed, unilateral, arbitrary flat buyer agreement/buyer's agreement was executed inter-se the respondent and the complainants. According to clause 9.1 of the buyer agreement, the respondent has to give possession of the said unit within a period of 3 years from the date of execution of this agreement with a grace period of 6 months. Therefore the due date of possession as per BBA is 03.05.2016 (the grace period was for applying and obtaining the occupation certificate, but the respondent did not apply within the said time limit, therefore the builder is not entitled to the 6 months grace period).

7. That on 04.11.2014, the respondent sent a letter to the complainants regarding the amalgamation of Spire developers pvt. ltd. with Magic eye developers pvt. ltd.

8. That the respondent kept raising the demands as per the agreed payment plan and the respondent kept paying the said demands, but the respondent failed to hand over the possession of the unit by 03.05.2016, the complainants made several visits to the office of the respondent to get the possession of the unit, but all went in vain, the office bearers always gave a new date of possession.

9. That on 30.11.2019, the respondent sent a letter stating "Intimation about the receipt of the occupation certificate and Offer of Possession" to the complainants. That on 20.12.2019, the respondent sent another letter stating, "Demand for dues payable at the stage of offer of possession" and raised a demand of Rs. 8,32,553/- and also raised an unreasonable demand of CAM (Common Area Maintenance) charges i.e. Rs.16,520/- from 01-12-2019 to 31-03-2020. It is pertinent to mention here that the respondent has raised the unreasonable demand of CAM charges as the unit was not ready for possession. It is Germane that the respondent has acknowledged the delay in the offer of possession and credited Rs. 1,08,049/- as delayed possession rebate @ Rs. 5 per sq. ft.

10. That on 18.01.2020, the complainants paid a demand of Rs. 1,42,542/- on account of "On Completion of internal flooring" vide cheque No. 113567 drawn on Union Bank of India dated 18.01.2020 & Rs. 8,260/- on account of CAM charges vide cheque No. 039158 drawn on Allahabad Bank dated 18.01.2020.

11. That on 25.09.2020, the respondent sent a possession certificate to the complainants and stated that the complainants have received satisfactory possession of the unit along with the keys on 25.09.2020. It is pertinent to mention here that till today the respondent has not handed/given the physical possession of the unit to the complainants & the offer of possession letter is also a paper possession letter.

12. It is further pertinent to mention here that the complainants have accepted and signed the possession certificate in the anticipation that they will get the rent on the unit as promised by the Respondent, under rental pool policy. But till date, the respondent has not given physical possession of the unit nor given the rent. The conduct of the respondent showing the mischief and dominant possession. Moreover, the complainants have withdrawn their consent from the agreement with COHO, because, the company was not giving any rent to the complainants.

13. That on 22.07.2021, the complainants sent an email to the respondent and stated "In spite of repeated reminders and personally visited to the site office, no satisfactory intimation received so far. You are requested to hand over the keys of the said units at the earliest". That on 24.07.2021, the respondent replied and stated "This is to acknowledge your email. We have shared your request for keys from CoHo. We will confirm you on the same shortly". That on 12.08.2021, the complainants sent another reminder letter to the respondent and alleged "It is intimated that in spite of repeated reminders to you and personal visits to your site office several times, keys of the unit no. 806 &

708 B-2 Tower have yet not been handed over so far. It shows that you are not willing to initiate the favourable action for the benefits of the buyers. We have invested our Hard Earning money in your project, but no earning received so far after passing of Nine years (from the date of investment)". That thereafter the complainants sent many reminder emails to the respondent and asked regarding the due date of physical possession of the unit & handover of keys and delayed possession compensation but the respondent did not paid any heed to the grievances of the complainants.

14. That in the meanwhile, the complainants several times requested the respondent to furnish the latest statement of account but the respondent did not pay any heed to the requests of the complainants and till today have not provided the latest statement of account to the complainants.

15. That as per the calculation of the complainants based on payment receipts issued by the respondent the complainants have paid Rs. 38,97,083/- i.e. more than 100% of the total sale consideration.

16. That since 2016 the complainants are regularly contacting the office bearers of the respondent and making efforts to get possession of the allotted unit but all in vain. Despite several visits and requests by the complainants, the respondent did not give possession of the unit. The complainants have never been able to understand/know the actual state of construction. Though the towers seem to be built up, but there was no progress observed on finishing and landscaping work and amenities for a long time.

17. That the main grievance of the complainants in the present complaint is that despite the complainants paid more than 100% of the actual cost of the unit and ready and willing to pay the remaining amount (justified) (if any), the respondent party has failed to deliver the possession of unit on promised time and till date, the unit is without amenities. Moreover, it was promised by the respondent party at the time of receiving payment for the unit that the possession of a fully constructed unit and the developed project shall be handed over to the complainants as soon as construction completes i.e. 36 months from the date of booking.

C. Relief sought by the complainants:

18. The complainants have sought following relief(s):

    i. Direct the respondent to get physical possession of the fully developed/constructed unit with all amenities within 6 months of the filing of this complaint.

    ii. Direct the respondent to get the delayed possession interest @ prescribed rate from the due date of possession till the actual date of possession (complete in all respect with all amenities).

    iii. Direct the respondent to refund the GST paid (since GST came into force from 01.07.2017 i.e. after the due date of possession).

    iv. Direct the respondent to refrain from charging CAM Charges till the physical handover of the unit. (Since the unit is yet not ready for possession).

v. Direct the respondent to refrain the respondent from giving effect to unfair clauses unilaterally incorporated in the buyer agreement.

D. Reply by respondent

19. That the complainants took allotment of unit bearing no. 0708 measuring 700 sq. ft. in super area, on 8th floor of Tower B2 in the project "Plaza at 106-1" sector-106, Gurugram developed by the respondent vide agreement dated 03.05.2013 for a total consideration of Rs.40,21,518/-. Vide clause 9.1 of the agreement, respondent endeavoured to offer possession of unit by 03.05.2017 including the grace period of 12 months which was independent of force majeure event. The complainants opted for construction linked payment plan and agreed that timely payment of the instalments is essence of the transaction.

20. That the complainants have till date made a payment of Rs. Rs.40,21,518/- (i.e., actual paid amount of Rs. 39,13,469/- plus, rebate of Rs.1,08,049/- granted by respondent to complainants, as compensation in terms of clause 10.4 of the agreement). It is pertinent to point out that complainants made the payment of demands with delay and as a goodwill gesture and upon his request, waiver of interest of Rs.56,069/- was granted by the respondent.

21. That 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 complainants offering possession of his unit on 28.11.2019. The

respondent, thereafter, vide email dated 26.12.2019 raised the demand due at the stage of offer of possession vide letter dated 20.12.2019. And as per the terms of the agreement had also paid the compensation @ Rs.5/- per sq. ft. of super area per month from the date of possession as agreed under the agreement till the date of offer of possession to complainants and adjustment of the same was given as rebate of Rs.1,08,049/- from the demands due at the time of offer of possession.

22. That the complainants had accepted the adjustment of compensation for delay, given as rebate amount and made the payment of the demand of Rs.8,05,487/- after waiver of interest of Rs.27,066/- (i.e. made partial payment of dues of Rs.1,42,542 on 18.01.2020 and balance dues of Rs.6,62,956/- on 11.05.2020).

23. That after completion of construction of project, a brand named 'COHO', approached the respondent and offered to take on lease the Tower A (Ground till 4th floor) and Tower B (2nd floor till 23rd Floor) of the aforesaid project on revenue sharing basis. Though there was no obligation on respondent to lease out the unit as per agreement, however in the larger benefit of its allottees, respondent sent the offer of COHO along with the broad terms to the allottees including the complainants vide letter dated 23.12.2019.

24. That the complainants vide his consent letter dated 18.01.2020 and thereafter made the payment of dues of Rs. Rs.8,05,487/- after waiver of interest of Rs.27,066/- (i.e. made partial payment of dues of Rs.1,42,542 on 18.01.2020 and balance dues of

Rs.6,62,956/- on 11.05.2020). Upon request of the complainants, total interest of Rs.56,069/- was waived of by respondent.

25. That after receipt of acceptance and consent from complainants for leasing out his unit with COHO, the respondent entered a lease deed dated 04.05.2020 with COHO for leasing of units in the aforesaid project of respondent. It was further agreed that upon mutual consent more units may be added from time to time for leasing.

26. That the complainants were duly informed of the terms and conditions being agreed with COHO and the status of lease, from time to time. The complainants again re-affirmed that he had already received all the terms and conditions of COHO and gave his consent for leasing out his unit with brand COHO vide his consent letter dated 16.09.2020.

27. Due to prevailing COVID circumstances at the time when complete payment was made by the complainants on 11.05.2020, the possession certificate was signed between the respondent and complainants on 25.09.2020 for subject matter unit whereby complainants duly agreed and consented "that all the accounts pertaining to the said unit has been fully and finally settled and complainants are left with no claims, whatsoever against the respondent."

Without prejudice to the above, respondent is otherwise entitled to the force majeure for 6 months during which the COVID-19 pandemic was prevailing as per the central advisory dated

28.05.2020. The maintenance agreement in respect of the said unit was executed on 16.10.2020.

28. That as a time of unprecedented uncertainty is prevailing due to spread of the COVID-19 pandemic, which vitiated overall business environment and its impact and delay on regular business activities including sales and leasing in the short to mid-term, the brand COHO was not able to operationalize the units and generate revenue while, it is pertinent to reiterate that the leasing of units was on revenue share basis and not for fixed rentals or minimum guarantee which terms were duly agreed upon by complainants.

29. That the complainants, therefore, vide email dated 07.07.2021 withdrew their consent for leasing with COHO and asked for keys of their unit. Pursuant to the request of complainants, Respondent vide email dated 27.08.2021 asked COHO to return the keys of complainant's unit and handed over the same to the complainants and same was acknowledged by the complainants vide letter dated 14.09.2021.

30. That the complainants have also executed conveyance deed dated 27.08.2021 for subject matter unit, wherein vide "clause 3 possession" of the conveyance deed the complainants have acknowledged the possession of the subject-matter unit to their complete satisfaction and further assured that they shall have no claim, whatsoever against the respondent including in respect of any defect or deficiency in construction or quality of materials used or on account of any delay, etc. and all such claim or objection, if any shall be deemed to have been waived off by the complainants.

31. That the Act does not contemplate execution of any fresh agreement and therefore, buyer's agreement dated 03.05.2013 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 03.05.2013 and not by the Act.

32. That it is pertinent to submit here that section 19(3) does not refer to 'agreement for sale'. It has been designed in such a way that it can cover not only the post RERA 'agreement for sale' but also pre-RERA agreements because it makes allottee entitle for possession not on basis of agreement but on basis of declaration given by promoter under section 4(2) (l) (C) of Act, which in both cases i.e., in case of ongoing project as well as future project is filed after commencement of Act, promoter is made aware of consequences of its said declaration.

33. That when the entitlement to claim possession is as per the declaration given by the promoter for completion of construction u/s 4(2) (l) (c) of the Act, then the necessary corollary to this is that the entitlement for delay possession charges at the RERA rates shall also be from the expiry of the date of completion i.e., 31.12.2021 as provided at the time of registration.

34. That the instant complaint is further liable to be dismissed as not maintainable in as much as, the alleged delay in possession is not due to any act of omission or commission on part of respondent but due to various other factors like demonetization, non-completion of external development works by the Govt., and due to the fact that the completion of construction is linked with the timely payment of the instalments by all the allottees including the complainants. It is submitted that there are many allottees including the complainants who have failed to make payments of instalments as per the construction linked payment schedule which has affected the progress of construction. It is submitted that non-payment of the instalments by the allottees has rather acted, as a catalyst in delay in offer of possession at the end of respondent.

35. Without prejudice, it is submitted that the respondent has been demanding payments as accordance with the construction linked plan after making expenditure on the project, allottees of various units have failed to make payments of their respective units within time, the respondent cannot be expected to expend on the project from its own pocket.

36. It is denied that respondent was to give possession within 3 years from the date of execution of agreement and it is further denied that the 6 months grace period was for applying and obtaining the occupation certificate. The grace period agreed was 12 months that too independent of any force majeure condition which is duly admitted by the complainants vide letter dated 16.04.2018 thus, making the date of possession as 03.05.2017. Even otherwise, the

entitlement of the complainants to seek possession is as per clause 19(3) of the Act i.e., as per the declaration made by respondent under section 4(2) (l) (C) of the Act for completion of construction at the time of registration of the project i.e., by 31.12.2021.

37. Be that as it may, respondent has already offered possession after receipt of OC for the aforesaid project and have even executed the conveyance deed in favour of complainants. It is submitted that the claim is highly belated, as has been filed nearly after two years of the date of offer possession of Unit. Hence, the allegations apart from being malafide and barred by limitation, the complainants are even otherwise estopped from raising these allegations.

38. It is submitted that complainants are liable to pay CAM charges from the expiry of 30 days of the date of offer of possession. Be that as it may, as the complainants consented to lease out the unit to COHO, since April 2020 respondent never raised any demands for CAM charges to the complainants, as the same was the responsibility of COHO till the unit remains with lessee/ COHO. Without prejudice, respondent is ready and willing to adjust the CAM charges paid by complainants towards the CAM charges payable w.e.f. September 2021 i.e., the date of return of keys of the unit to complainants after taking over the same from COHO till November/December 2021.

39. In this regard, it is submitted that respondent offered the possession to complainants on 28.11.2019 vide it letter dated 30.11.2019 and accordingly raised demand for dues payable by complainants at the stage of offer of possession in the sum of Rs.8,32,553/- which was raised after deduction of the rebate

amount of Rs.1,08,049/- as against the actual dues of Rs.9,40,602/- to be paid on or before 20.01.2020.

40. It is submitted that because of prevailing COVID circumstances effective from 23.03.2020 which prevailed at least for 6 months and due to which there was an acute shortage of labour and thereby, said period was declared as force majeure even by the Central Government advisory issued on 28.05.2020. Therefore, the formal possession certificate was signed between the respondent and complainants for subject matter unit on 25.09.2020.

41. It is further submitted that the complainants have also executed conveyance deed dated 27.08.2021 for subject matter unit, wherein vide "Clause 3 possession" of the conveyance deed the complainants have acknowledged the possession of the subject-matter unit to their complete satisfaction and further assured that they shall have no claim, whatsoever against the respondent including in respect of any defect or deficiency in construction or quality of materials used or on account of any delay, etc. and all such claim or objection, if any shall be deemed to have been waived off by the complainants.

42. It is further submitted that as a time of unprecedented uncertainty is prevailing due to spread of the COVID-19 pandemic, which vitiated overall business environment and its impact and delay on regular business activities including sales and leasing in the short to mid-term, the brand COHO was not able to operationalize and failed to generate revenue for the units leased out to it including for complainants unit. It is submitted that respondent was never

under any obligations either to lease the units of allottees/complainants as per agreement or to pay any rent thereof nor any minimum rent was fixed under the said lease and the same was on revenue sharing basis.

43. It is reiterated that respondent has discharged all its obligations under agreement. Further respondent was neither obliged to lease out the unit of the complainants as per terms of agreement nor was liable for payment of rent, as alleged.

44. It is pertinent to submit here that rights and liabilities of the parties including the consequence of default/default of any party have to be governed by buyer's agreement. The respondent has complied with all the obligations under the aforesaid agreement. The respondent has even credited the amount of penalty as per the agreement i.e., @ Rs.5 per sq. ft. per month in the form of rebate and adjusted the same from possession dues payable by customer.

45. It is reiterated that once the possession has been taken over by the complainants as detailed in preliminary submissions and conveyance deed for the unit has already been executed in favour of the complainants and duly acknowledged that they have received possession to their complete satisfaction and assured that they shall have no claims on account of any delay, etc. and all such claim or objection, if any shall be deemed to have been waived off by the complainants.

46. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint

can be decided on the basis of these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority:

47. 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

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

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.

F. Findings on the objections raised by the respondent:

F.I. Objection regarding handing over possession as per declaration given under section 4(2) (I) (C) of Real Estate Regulation and Development Act 2016:

48. The counsel for the respondent has stated that the respondent at the time of registration of the project gave revised date for completion of same and also completed the same before expiry of that period, therefore, under such circumstances the respondent is not liable to be visited with penal consequences as laid down under RERA. Therefore, next question of determination is whether the respondent is entitled to avail the time given to him by the authority at the time of registering the project under section 3 & 4 of the Act.

49. It is now settled law that the provisions of the Act and the rules are also applicable to ongoing project and the term ongoing project has been defined in rule 2(1)(o) of the rules. The new as well as the ongoing project are required to be registered under section 3 and section 4 of the Act.

Section 4(2)(l)(C) of the Act requires that while applying for registration of the real estate project, the promoter has to file a declaration under section 4(2)(l)(C) of the Act and the same is reproduced as under: -

> *Section 4: - Application for registration of real estate projects*
>
> *(2) The promoter shall enclose the following documents along with the application referred to in sub-section (1), namely: —.....*
>
> *(l): -a declaration, supported by an affidavit, which shall be signed by the promoter or any person authorised by the promoter, stating: — .....*
>
> *(C) the time period within which he undertakes to complete the project or phase thereof, as the case may be....."*

50. The time period for handing over the possession is committed by the builder as per the relevant clause of flat buyer's agreement and the commitment of the promoter regarding handing over of possession of the unit is taken accordingly. The new timeline indicated in respect of ongoing project by the promoter while making an application for registration of the project does not change the commitment of the promoter to hand over the possession by the due date as per the apartment buyer agreement. The new timeline as indicated by the promoter in the declaration under section 4(2)(l)(C) is now the new timeline as indicated by him for the completion of the project. Although, penal proceedings shall not be initiated against the builder for not meeting the committed due date of possession but now, if the promoter fails to complete the project in declared timeline, then he is liable for penal proceedings. The due date of possession as per the

agreement remains unchanged and promoter is liable for the consequences and obligations arising out of failure in handing over possession by the due date as committed by him in the apartment buyer agreement and he is liable for the delayed possession charges as provided in proviso to section 18(1) of the Act. The same issue has been dealt by hon'ble Bombay High Court in case titled as ***Neelkamal Realtors Suburban Pvt. Ltd. and anr. vs Union of India and ors***. and has observed as under:

> *"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter..."*

F.2 Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act.

51. Another contention of the respondent is that authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the flat buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt

with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)*** which provides as under:

> *119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter.....*
>
> *122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."*

52. Also, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya***, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed-

> *"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of*

interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."

53. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

G. Findings regarding relief sought by the complainants:

G.1 Direct the respondent to get the delayed possession interest@ prescribed rate from the due date of possession till the actual date of possession (complete in all respect with all amenities)

Admissibility of delay possession charges:

54. In the present complaint, the complainants intend to continue with the project and is seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under:

Section 18: - Return of amount and compensation

If the promoter fails to complete or is unable to give possession of an apartment, plot or building, -

.....

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed

55. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainants not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning.

56. The buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builders/promoters and buyers/allottee are protected candidly. The apartment buyer's agreement lays down the terms that govern the sale of different kinds of properties like residentials, commercials etc. between the buyer and builder. It is in the interest of both the parties to have a well-drafted apartment buyer's agreement which would thereby protect the rights of both the builder and buyer in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision with regard to

stipulated time of delivery of possession of the apartment, plot or building, as the case may be and the right of the buyer/allottee in case of delay in possession of the unit. In pre-RERA period it was a general practice among the promoters/developers to invariably draft the terms of the apartment buyer's agreement in a manner that benefited only the promoters/developers. It had arbitrary, unilateral, and unclear clauses that either blatantly favoured the promoters/developers or gave them the benefit of doubt because of the total absence of clarity over the matter.

57. The authority has gone through the possession clause of the agreement. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainants not being in default under any provisions of this agreements and in compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the apartment buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as

to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

58. **Admissibility of grace period:** The respondent promoter has proposed to handover the possession of the unit within a period of three years from the date of execution of this agreement with two grace periods of six months. The two grace period of 6 months each are disallowed as no substantial evidence/documents have been placed on record to corroborate that any such event, circumstances, condition has occurred which may have hampered the construction work. Therefore, the due date of possession comes out to be 03.05.2016.

59. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges however, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

> ***Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
>
> *(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:*
>
> *Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of*

India may fix from time to time for lending to the general public.

60. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

61. Consequently, as per website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as on date i.e., 09.02.2022 is @ 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

62. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

> *"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.*
> *Explanation. —For the purpose of this clause—*
> *(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default.*
> (ii) *the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same as is being granted to the complainants in case of delayed possession charges.

63. On consideration of the documents available on record and submissions made by both the parties, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 9.1 of the buyer's agreement executed between the parties on 03.05.2013. The developer proposes to hand over the possession of the apartment within a period of three years from the date of execution of this agreement with two grace periods of six months. The two grace periods of 6 months each are disallowed so the possession of the booked unit was to be delivered on or before 03.05.2016. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainants as per the terms and conditions of the buyer's agreement dated 03.05.2013 executed between the parties. It is the failure on part of the promoter to fulfil its obligations and responsibilities as per the flat buyer's agreement dated 03.05.2013 to hand over the possession within the stipulated period.

Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the respondent

has applied for the occupation certificate and same has been received from the competent authority on 28.11.2019. The respondent has offered the possession of the subject unit on 30.11.2019. Therefore, in the interest of natural justice, the complainants should be given 2 months' time from the date of offer of possession. This 2 months' of reasonable time is being given to the complainants keeping in mind that even after intimation of possession practically he has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 03.05.2016 till offer of possession (30.11.2019) plus two months i.e. 30.01.2020.

Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainants are entitled to delay possession at prescribed rate of interest i.e. 9.30% p.a. w.e.f. due date of possession i.e. 03.05.2016 till offer of possession (30.11.2019) plus two months i.e. 30.01.2020 as per provisions of section 18(1) of the Act read with rule 15 of the rules and section 19(10) of the Act of 2016.

G.2 Direct the respondent to get physical possession of the fully developed/constructed unit with all amenities within 6 months of the filling of this complaint.

The respondent submitted in its reply that the construction of the project is complete and after obtaining OC on 28.11.2019, it

offered the possession of the unit on 30.11.2019. The complainants have taken the possession of the unit vide possession certificate dated 25.09.2020. Considering the above-mentioned facts, the authority is of the view that the complainants have already taken the possession of the unit and the same has been placed on the record which is evident from the possession certificate i.e. 25.09.2020 placed on the file.

G.3 Direct the respondent to refund the GST paid.

For projects where due date of possession was prior to 1.4.2017 (date of coming into force of GST).

As per BBA, clause 2 the complainants/allottees agreed to pay all the Government rates, tax on land, municipal property taxes and other taxes levied or leviable now or in future by Government, municipal authority or any other government authority. But this liability was to be confined only up to the deemed date of possession. The delay in delivery of possession is the default on the part of the respondent/promoter and the possession was offered on 28.11.2019. By that time, the GST had become applicable. But it is settled principle of law that a person cannot take the benefit of his own wrong/default. So, the respondent/promoter is not entitled to charge GST from the complainants/allottees as the liability of GST had not become due up to the deemed date of possession as per the agreement.

G.4 Direct the respondent to refrain from charging CAM charges till the physical handover of the unit.

The respondent is right in demanding common area maintenance charges at the rates' prescribed in the builder buyer's agreement at the time of offer of possession. However, the respondent shall

not demand these charges for more than one year from the allottee even in those cases wherein no specific clause has been prescribed in the agreement or where the CAM has been demanded for more than a year. CAM charges to be charged from the date of offer of possession plus two months.

G.5 Direct the respondent to refrain from giving effect to unfair clauses unilaterally incorporated in buyer's agreement.

The complainants have not disclosed about the unfair clauses in the complaint. So, this relief can't be allowed as well as the respondent is directed not to charge anything which is not part of BBA.

H. Directions of the authority:

64. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act of 2016 to ensure compliance of obligation cast upon the promoter as per the function entrusted to the authority under section 34(f) of the Act of 2016:

i. The respondent is directed to pay the interest at the prescribed rate i.e. 9.30% per annum for every month of delay on the amount paid by the complainants from due date of possession i.e. 03.05.2016 till offer of possession (30.11.2019) plus two months i.e. 30.01.2020. If any payment for the delay in possession, has been paid or credited in the account of allottee, it shall be adjusted in the amount of delayed possession charges to be paid as per above directions.

ii. The arrears of such interest accrued from 03.05.2016 till the date of order by the authority shall be paid by the promoter to the allottees within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoter to the allottees before 10th of the subsequent month as per rule 16(2) of the rules.

iii. The rate of interest chargeable from the complainants/allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delay possession charges as per section 2(za) of the Act.

iv. The respondent shall not charge anything from the complainants which is not the part of buyer's agreement.

v. The respondent is directed to charge common area maintenance from the date of offer of possession plus two months.ie. 30.01.2020.

65. Complaint stands disposed of.

66. File be consigned to registry.

V.I-S

(Vijay Kumar Goyal)
Member

(Dr. KK Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 09.02.2022