

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

Complaint no. :	4893 of 2021
Date of filing complaint:	22.12.2021
First date of hearing:	09.02.2022
Date of decision :	09.02.2022

Ravinder Kumar Phaugat R/o: Flat No. N-201, Sispal Vihar, AWHO Complex, Sohna Road, Sector-49, Gurugram - 122018	Complainant
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. Parikshit Siwach (Advocate)	Complainant
Ms. Neelam Gupta (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottee 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 complainant, 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.	1104,11th floor, tower B2 [Annexure P/8 at page no. 44 of the complaint]
8.	Unit measuring (super area)	700 sq. ft. [Annexure P/8 at page no. 44 of the complaint]
9.	Date of provisional allotment	25.07.2012 [Annexure P/5 at page no. 36 of the complaint]
10.	Date of execution of builder buyer agreement	25.04.2013 [Annexure P/8 at page no. 39 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	25.04.2016 [Calculated from the date of the execution of this agreement] Grace period of 6 months is disallowed
13.	Total sale consideration	Rs.43,11,799/- [As per applicant ledger dated 27.12.2021 at page no. 72-75 of the reply]
14.	Total amount paid by the complainant	Rs. 43,11,799/- [As per applicant ledger dated 27.12.2021 at page no. 72-75 of the reply]
15.	Payment plan	Construction linked payment plan [Annexure C at page no. 70 of the

		reply]
16.	Occupation Certificate	28.11.2019 [Annexure R/3 at page no. 26 of the reply]
17.	Possession certificate	08.08.2020 [Annexure R/6 at page no. 36 of the reply] Offer of possession -30.11.2019 [Page 67 of the complaint]
18.	Delay in delivery of possession till the offer of possession + 2 months i.e. 30.01.2020	3 years 9 months 5 days

B. Facts of the complaint:

3. That a marketing call from a real estate firm, namely "Real Realtors", had been received by the complainant on behalf of the respondent company for investment in their project called "Spire Condominiums/The Plaza at 106" at Sector - 106, Gurugram, Haryana.
4. That the respondent company has been advertising themselves to be working with the mission to provide customers with a benchmark in the industry by adhering to the best in quality, design, delivery on commitment, honesty, transparency and value for money and further had been advertising that the respondent company are coming up with a new project with the name and style of "Spire condominiums/The Plaza at 106" at Sector - 106, Gurugram, Haryana representing that the same is located in the most sought after destination and is created with a vision to overwhelm one with beauty and absolute luxury and a person would discover every facility in the heart of lush greenery and that the project shall be an oasis of unspoilt natural beauty in the midst

of a thriving metropolis and that the project "Spire condominiums/The Plaza at 106" is adorned with all the modern amenities to make every moment joyous and comfortable and that it is a perfect blend of open space, nature, convenience and community, thereby the respondents painted a very rosy picture before the complainant.

5. That believing in the above advertisements and specific representations of the respondent's representatives that the said project shall be delivered within 3 years of signing the agreement with a grace period of 6 months owing to any force majeure and if there is any delay in delivering the project on time, owing to default on the part of the respondent builder, proper compensation will be provided by respondent at the rate of Rs. 5/- per sq. ft. to the complainant/s from the date of default to the date of actual possession without any structural or any other defect, as promised. It is pertinent to mention here that the respondent's representative had specifically mentioned that the buyer's agreement would be signed within two months of providing the advance payment of about 25% of the total amount i.e., about Rs. 10,00,000/- by the complainant, which was duly paid by the complainant on the booking day itself, a cheque of Rs. 2,00,000/- dated 17.03.2012 along with two post-dated cheques, dated for within a month, of 4,00,000/- each, amounting to a total amount of Rs. 10,00,000/-. The buyer's agreement was ought to signed in May, 2012 and the unit was to be delivered in May 2015 with a grace period of 6 months, if required but despite several requests, no heed was given by the builder to the

complainant/apprehensions, as now they (respondent) had an upper hand in deal and had leverage to harass the complainant unnecessary and misappropriate the money given to them on false promises.

6. That believing in the above advertisements and specific representations of the respondent's representatives, complainant as an applicant and his spouse as co-applicant, for his/their personal use and occupation, bought all rights of Tower/block no. B2, floor no. 11th, unit no. 1104, Total super area 700 sq. ft., which had been allotted/confirmed by the respondent for a total basic sale price of Rs. 31,92,000/- @ Rs. 4,560/- per sq. ft. along with Rs. 70,000/- Preferential location charges plus Rs. 2,98,200/- as External Development charges (EDC) plus Rs. 28,000/- as Infrastructure Development Charges (IDC) plus Rs. 3,00,000/- for Covered car parking charges plus 1,00,000/- for club membership charges plus Rs. 70,000/- as Interest Free Maintenance Security Deposit; aggregating to a total amount of Rs.40,58,200/-
7. That to the utter shock and surprise to complainant, respondent came up with a buyer's agreement after almost a year later, on dated 25.04.2013 with a one-sided pre-printed, arbitrary, and unilateral apartment/flat buyer's agreement which was totally against/contrary to the terms agreed between the complainant/buyer and the respondent/builder, which was opposed by the complainant in wholesome, but due to unwarranted, undue and vague pressure owing to the deep pockets and holding of a superior position after getting almost 25% of the total amount of the said unit, the respondent managed

to get signed their one-sided agreement under pressure and coercion.

8. That, according to the above said arbitrary and unilateral buyer's agreement signed between the parties on dated 25.04.2013, the said project should have been delivered by 25.04.2016 with two grace periods of 6 months each i.e., 25.04.2017 and if there is any delay, owing to default of the respondent company, a compensation of Rs. 5/- per square feet is mentioned/provided in the buyer's agreement, but to the contrary of this, huge penalty is imposed/provided for the defaulting allottee. Thereby, proving the buyer's agreement as one-sided pre-printed, arbitrary, and unilateral which was totally against/contrary to the terms agreed between the complainant/buyer and the respondent/builder at the time of booking the apartment.
9. That the complainant till date have paid an amount of Rs. 43,03,539/- to the respondent company against the said flat. However, the possession was offered on dated 28.11.2019 as a deemed date of possession but the actual possession was handed over on dated 18.08.2020 after almost a delay of 9 months from offer of possession, still with deficient common services as promised by the builder/respondent. And it is pertinent to mention here that the project got delayed for 52 months (approx.) without adding grace delay period according to the buyer's agreement.
10. That thereby the respondent failed to deliver the timely possession as assured and all the representations and assurances of the respondent company have turned all false and fraudulent

and it is quite evident that the respondent have been wrongfully availed the monies of the complainant but the possession with all the promised amenities and services still looks distant.

11. That the complainant had been repeatedly visiting the site office but to no avail against the economic might and superior position of the respondent company as none from the respondent company informs anything about the timelines of the project completion with all the promised amenities/services and the representatives just keep passing the buck.
12. That it is pertinent to mention here that the complainant had availed the house loan of Rs.19,50,000/- @08.50% p.a. (Fluctuating) to comply with the agreed terms pertaining to the buyer's agreement to pay timely payment instead of breach of all the obligation from the respondent's side.
13. That before taking the possession of the allotted unit, complainant noticed the change in layout of the said unit in terms of sunroom and minor changes, but no satisfactory reply was provided by the respondent.
14. That the demarcation of the super area and carpet area was also sought from the respondent, but no reply is given till date even when the registration/conveyance of the said unit was offered. It is pertinent to mention here that a clear instruction is being provided in the act/regulations/rules of the RERA that the registration has to be done only on the carpet area of the unit, not on the super area.

15. Due to non-demarcation of the unit in terms of super area and carpet area, the load charges as per the calculation of the complainant comes out to be about 45%, which is very high/exorbitant and the CAM charges also comes out to be very high.
16. That due to the breach of obligations and wrongful conduct of the respondent the complainant has to suffer doubly on the one hand he has not been delivered the unit noted above in time and on the other hand he has blocked his hard-earned money along with borrowed money from the bank, for the dream home, has been speculated/dreamt off by the respondent.

C. Relief sought by the complainant:

17. The complainant has sought following relief(s):
 - i. Direct the respondent to pay the delayed possession charges @18% p.a. compounded annually since May 2015 till date because even after taking possession on 08.08.2020 of the said unit, all the promised facilities and amenities are still not provided by the respondent despite several reminders.
 - ii. Direct the respondent to provide the adequate remedy for the change in layout plan and not providing the sunroom as promised.
 - iii. Direct the respondent to demarcate the super area and carpet area as per the rules and get the conveyance deed registered on the carpet area.

- iv. Direct the respondent to provide adequate remedy for the overburden of load charges these should be moderated reasonably as of now is as high as 45%
- v. Direct the respondent to refund the CAM charges unreasonably of an amount of Rs.73,447/- and interest levied @18% p.a. should be waived off.
- vi. Litigation charges to the tune of Rs. 1,00,000/- towards this complaint.

D. Reply by respondent

18. That the complainant took allotment of unit bearing No. 1104 measuring 700 sq. ft. in super area, on Eleventh (11th) floor of Tower B2 in the project "Plaza At 106-1" Sector-106, Gurugram developed by the respondent vide agreement dated 25.04.2013 for a total consideration of Rs. 43,10,915/- (inclusive of tax). Vide clause 9.1 of the agreement, respondent endeavoured to offer possession of unit by 25.04.2017 including the grace period of 12 months which was independent of any force majeure event. complainant opted for construction linked payment plan and agreed that timely payment of the instalments is essence of the transaction.
19. That the complainant has till date made a payment of Rs.43,10,915/- (i.e., actual paid amount of Rs. 42,01,945/- plus, rebate of Rs.1,08,970/- granted by respondent to complainant at the stage of offer of possession, as compensation in terms of clause 10.4 of the agreement). It is pertinent to point out that complainant made the payment of demands with delay and as a

goodwill gesture and upon his request, waiver of interest of Rs. 7,596/- was granted by the respondent.

20. 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 complainant offering possession of their unit on 28.11.2019 vide email dated 04.12.2019.
21. 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. That the respondent 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 complainant and adjustment of the same was given as rebate of Rs.1,08,970/- from the demands due at the time of offer of possession.
22. That the respondent responded to email of the complainant vide its email dated 10.01.2020 and after being satisfied complainant accepted the adjustment of compensation for delay, given as rebate amount and made the complete payment of the demand without any protest whatsoever of Rs. Rs.3,24,534/- on 17.01.2020.
23. However, due to the unfortunate outbreak of COVID-19 pandemic prevailing then, since February 2020 which led to the shutting down of businesses, complete lock down across the nation from 25.03.2020, restricted movement of labour and person, shortage of supply, etc., complainant could not visit to takeover possession

of unit. After attaining the normalcy, complainant took over possession of the unit to his complete satisfaction, vide possession certificate dated 08.08.2020 without any protest. The complainant vide the said possession certificate also accepted and acknowledged that "all accounts pertaining to the said unit has been fully and finally settled and complainant is left with no claims, whatsoever against the respondent".

24. 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 which Advisory is/was followed by Real Estate Regulatory Authorities and revised certificate has been issued by the Authority extending the date of completion of projects by 6 months considering the force majeure circumstances created by COVID-19 pandemic.
25. The complainant after taking over possession of the unit had also rented out the same to tenant and is earning rent thereof. Hence, claim of the complainant is even otherwise prima-facie wrong and malafide.
26. The respondent even vide letter dated 03.02.2020 invited the complainant for execution and registration of the conveyance deed in his name. However, it is the complainant who has not yet come forward to get conveyance deed executed and registered in his name. whereafter again in furtherance of the above letter dated 03.02.2020, another letter dated 08.01.2021 was sent by respondent intimating the revision in stamp duty charges and invited complainant to get the conveyance deed executed and

registered in respect of unit in its favour. It is submitted that maintenance agreement in respect of the said unit was also executed on 21.08.2020 by the complainant

27. 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) (I) (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.
28. That without prejudice, it is thus, submitted that entitlement of allottees of ongoing projects on the date of commencement of Act, to claim possession of their respective apartments/units is governed by section 19(3) of the Act i.e., as per declaration given by promoter under sub-clause (C) of clause (I) of sub-section (2) of section 4 and not by sections 18(1) or 18(3) or 19(4) of the Act. Here it may be noted that as per declaration given by respondent under sub-clause (C) of clause (I) of sub-section (2) of section 4, the date of completion of subject matter project is 31.12.2021.
29. That when the entitlement to claim possession is as per the declaration given by the promoter for completion of construction u/s 4(2) (I) (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.

30. Be that as it may, respondent has already offered possession on dated 30.11.2019 after receipt of OC dated 28.11.2019 for the aforesaid project and pursuant to same, possession has already been taken over by complainant way back on 08.08.2020 that too after accepting the compensation granted to complainant, as per the agreed terms of the agreement, in form of rebate from the demand due at stage of offer of possession.
31. In this regard, it is submitted that respondent has completed the construction of its project, obtained occupation certificate and offered the possession to complainant on 28.11.2019 vide its letter dated 30.11.2019. Vide email dated 26.12.2019 respondent raised the demand due at the stage of offer of possession vide letter dated 20.12.2019 after giving adjustment credit of the rebate amount of Rs.1,08,049/- as against the actual dues of Rs. 4,32,583/- to be paid by complainant on or before 20.01.2020. It is submitted that the complainant made the complete payment of dues of Rs.3,24,534/- without any protest, whatsoever on 17.01.2020
32. It is submitted that because of the then, prevailing COVID circumstances since February 2020 which led to the shutting down of businesses, movement restrictions and complete lock down across the nation from 25.03.2020 which prevailed at least for 6 months, complainant could not visit the site to takeover possession of unit. After attaining the normalcy, complainant took over possession of the unit to his complete satisfaction, vide possession certificate dated 08.08.2020 without any protest. It is

- submitted that said period of 6 months was declared as force majeure even by the Central Govt. advisory issued on 28.05.2020.
33. It is further submitted that vide the said possession certificate complainant also accepted and acknowledged that "all accounts pertaining to the said Unit has been fully and finally settled and complainant is left with no claims, whatsoever against the respondent". Hence, the belated claim of the complainant that too when he himself admitted that he is left with no claims whatsoever against the respondent, is liable to be dismissed on account of estoppel. Even the complainant has already rented out his unit to tenant and is earning rent from the same.
34. It is submitted that the 'sunroom' indicated in the unit layout was designed, planned and proposed as an extended balcony and the same has been provided to the complainant on-site as part of his unit. The 'sunroom' is meant to serve as a flexible space allowing multiple uses as per the individual needs of the customer/complainant herein.
35. It is further denied that CAM charges are high. It is submitted that the complainant had inspected the project site, seen requisite documents and all other relevant documents related to the competency of the respondent including area calculation and after conducting due diligence pertaining to rights, interest, title, limitation and obligations of the respondent had executed the agreement for the unit in the said project.
36. It is further submitted that respondent shall mention the carpet area and super area and covered area in the conveyance deed.

However, stamp duty is payable on the total consideration of the unit which was sold at super area that too prior to coming into force of the RERA Act of 2016.

37. It is reiterated that the construction of project is complete, occupation certificate already obtained by respondent on 28.11.2019, possession stood offered by respondent to complainant vide letter dated 30.11.2019 much prior to the date of completion i.e., 31.12.2021, as per the registration certificate of the project. Further compensation as per the terms of agreement @ Rs.5/- per sq. ft. per month of super area already stands adjusted by respondent, as rebate from the demands due at the stage of offer of possession, duly accepted by the complainant. After making complete payment, complainant even took over the possession of unit on 08.08.2020 without any protest whatsoever, as due to prevailing COVID -19 pandemic possession could not be handed over between February 2020 to July 2020 due to movement restrictions, shutting down of business and complete lock down. It is submitted that there is no change in the lay out and the unit has been constructed according to the proposed layout.
38. 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:

39. 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 complainant 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:

40. 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.

41. 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)(I)(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)(I)(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: —.....

(1): -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...."

42. 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)(1)(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.

43. 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."

44. 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."

45. 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 complainant:

G.1 Direct the respondent to pay the delayed possession charges @18% p.a. compounded annually since May 2015 till date because even after taking possession on 08.08.2020 of the said unit, all the promised facilities and amenities are still not provided by the respondent despite several reminders.

Admissibility of delay possession charges:

46. In the present complaint, the complainant intends 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

47. 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 complainant 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.
48. 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.

49. 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 complainant 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.

50. **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 25.04.2016.
51. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is 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.

52. 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.
53. 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%.
54. 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 complainant 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 complainant in case of delayed possession charges.

55. 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 25.04.2013. 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 25.04.2016. 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 complainant as per the terms and conditions of the buyer's agreement dated 25.04.2013 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 25.04.2013 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 complainant should be given 2 months' time from the date of offer of possession. This 2 months' of reasonable time is being given to the complainant 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. 25.04.2016 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 complainant is entitled to delay possession at prescribed rate of interest i.e. 9.30% p.a. w.e.f. due date of possession i.e. 25.04.2016 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 provide the adequate remedy for the change in layout plan and not providing the sunroom as promised.

The respondent in its reply submitted that the sunroom indicated in the unit layout was designed, planned and proposed as an extended balcony and the same has been provided to the

complainant. If there is any deficiency in services or otherwise the complainant is at liberty to file case for compensation with the adjudicating officer.

G.3 Direct the respondent to demarcate the super area and carpet area as per the rules and get the conveyance deed registered on the carpet area.

The respondent is directed to specify the carpet area for registering the conveyance deed.

G.4 Direct the respondent to provide adequate remedy for the overburden of load charges these should be moderated reasonably as of now is as high as 45%

Nothing is clear about this relief and no details have been provided.

G.5 Direct the respondent to refund the CAM charges unreasonably of an amount of Rs.73,447/- and interest levied @18% p.a. should be waived off.

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.

G.6 Cost of litigation:

The complainant is claiming compensation in the present relief. The authority is of the view that it is important to understand that the Act has clearly provided interest and compensation as separate entitlement/rights which the allottee can claim. For claiming compensation under sections 12, 14, 18 and section 19 of

the Act, the complainant may file a separate complaint before Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.

H. Directions of the authority:

56. 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 complainant from due date of possession i.e. 25.04.2016 till offer of possession (30.11.2019) plus two months i.e. 30.01.2020.
- ii. The arrears of such interest accrued from 25.04.2016 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 complainant/allottee 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 complainant which is not the part of buyer's agreement.
- v. The respondent is directed to specify the carpet area for registering the conveyance deed.

57. Complaint stands disposed of.

58. File be consigned to registry.


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram


(Dr. KK Khandelwal)
Chairman

Dated: 09.02.2022


HARERA
GURUGRAM