

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

Complaint no.	:	219 of 2020
Date of filing complaint:		03.02.2020
First date of hearing	:	18.03.2020
Date of decision	:	21.07.2022

Mr. Anoop Kumar Joshi  
R/o: - Flat no. K-21, Ridgewood Estate, Galleria,  
DLF Phase- IV, Gurugram.

**Complainant**

Versus

M/s Spaze Towers Pvt. Ltd.  
Regd Office at: - A-307, Ansal Chambers 1 and 3,  
Bhikhaji Cama Place, New Delhi-110066

**Respondent****CORAM:**

Dr. K.K. Khandelwal  
Shri V.K. Goyal

**Chairman  
Member****APPEARANCE:**

Shri. Sukhbir Yadav  
Shri. J.K. Dang

Advocate for the complainant  
Advocate for the 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, delay period, if any, have been detailed in the following tabular form:

Sr. No.	Particulars	Details
1.	Name of the project	Spaze Boulevard (I), Sector 47, Gurugram
2.	Date of booking	01.12.2009 (Annexure P-1, page 20 of complaint)
3.	Allotment letter	04.06.2011 (Annexure P4, page 23 of complaint)
4.	Unit no.	319, 3 <sup>rd</sup> floor admeasuring 1141 sq.ft. (Annexure P4, page 23 of complaint)
5.	Date of execution of buyer's agreement	19.10.2011 (Annexure P5, page 27 of complaint)
6.	Possession clause	<b>14.The possession of the said premises is proposed to be</b>

	<p><b>delivered by the developer to the allottee(s) within three years from the date of this agreement.</b> If the completion of the said building is delayed by reason of non-availability of steel and/or cement or other building materials, or water supply or electric power or slow down, strike or due to a dispute with the construction agency employed by the developer, lock out or departmental delay or civil commotion or by reason of war or enemy action or terrorist action or earthquake or any act of God or any other reason beyond the control of the developer, the developer shall be entitled to extension of time for delivery of possession of the said premises. The developer as a result of such a contingency arising, reserves the right to alter or vary the terms and conditions of this agreement or if the circumstances beyond the control of the developer so warrant, the developer may suspend the scheme for such period as it might consider expedient. In case the developer is unable to complete the project on account of any law passed by</p>
--	--

	<p>the legislature or any other government agency, in that event the developer if so advised, shall be entitled to challenge the validity, applicability and/or efficacy of such legislation, rule, order and or bye law by instituting appropriate proceedings before court(s), tribunal(s) or authorities. In such situation, the amounts paid by the allottee(s) shall continue to remain with the developer and the allottee(S) shall not be entitled to initiate any proceedings against the developer for delay in execution of the project. It is specifically agreed that this agreement shall remain in abeyance till final determination of such matters/cases by appropriate court(s)/tribunal(s)/authorities. In case, the developer succeeds in its challenge to the impugned legislation/rule/order and/or bye-law, in that event, this agreement shall be revived. In case, the developer is unsuccessful in its challenge to the impugned legislation/rule/bye law, in that event the developer shall refund without any interest or</p>
--	--

		compensation and in such reasonable manner as may be decided by the developer the amounts paid by the allottee(s). The decision of the developer in this regard shall be final and binding on the allottee (s)..... (Emphasis supplied)
7.	Due date of delivery of possession as per clause 14 of buyer's agreement	19.10.2014
8.	Total sale consideration	Rs.73,85,753/- (Annexure R6, page no 55 of reply the SOA dated 17.11.2020)
9.	Total amount paid by the complainant	Rs. 76,16,982/- (Annexure R6, page no 57 of reply the SOA dated 17.11.2020)
10.	Occupation certificate	27.07.2020 (Annexure R9A, page 67 of reply)
11.	Offer of possession	08.09.2016 (Annexure R10, page 70 of reply)  <b>Note: Not a valid offer of possession as OC was not received at the time of offer of possession.</b>

**B. Facts of the complaint**

The complainant has submitted as under: -

3. That in November 2009, the complainant received a marketing call from a real estate agent, who introduced himself as an authorized agent of the respondent and marketed about the commercial project of Spaze Towers Pvt. Ltd at prime location of sector - 47, Gurgaon. The complainant along with real estate agent visited the project site and marketing office of the respondent. The respondent in collusion with real estate agent showed a rosy picture of the project and assured that project would be ready for possession within 36 months of booking.
4. That the complainant booked an office space unit no. 319, admeasuring 1141 sq. ft. and issued a cheque of Rs. 5,00,000/- vide cheque No. 574980 dated 01.12.2009 drawn at State Bank of India, New Delhi, as the booking amount, in commercial project of the respondent namely 'Spaze Boulevard' and signed a pre-printed application form. The office space was booked for total sale consideration of Rs. 72,20,243/- including B.S.P., E.D.C., I.D.C and car parking, under construction link payment plan.
5. That on demand, the complainant issued a cheque bearing no. 812958 of Rs. 7,75,638/- dated 12.03.2010 drawn at State Bank of India, New Delhi, in favour of the respondent. The respondent issued a receipt against the payment on 16.04.2010. The complainant again issued a cheque of Rs. 4,78,364/- dated 31.05.2010 vide cheque no. 812967 drawn on State Bank of India, New Delhi, in favour of the respondent. The respondent issued a receipt against the payment on 09.06.2010.

6. That the respondent on 04.06.2011, had issued an allotment letter conforming the allotment of unit no. OF – 319 on the third floor with tentatively super area of 1141 sq. ft. for the sale consideration of Rs. 72,20,243/-.
7. That a buyer agreement was executed between the respondent and the complainant on 19.10.2011. As per clause no. 14, the respondent has to give possession of office space within three years from the date of agreement and therefore, the due date of possession was 19.10.2014.
8. That the complainant continued to pay the remaining instalments as per payment schedule of the builder buyer agreement and has already paid the more than 100% amount of the purchase price i.e., Rs. 76,16,982/- along with other allied charges demanded from time to time. However, there was no progress in construction of subject apartment as per the committed time frame, and accordingly raised his grievance to the respondent.
9. That the complainant on 13.09.2017, sent a grievance letter to the respondent on 13.09.2017 and asked for copy of OC/CC and further asked for interest on delayed possession. But there was no reply from it and thereafter he had sent another letter on 06.04.2018. On 13.09.2017, respondent has issued a statement of account against the said unit, which shows that till date 23.11.2016, the respondent had demanded Rs. 76,16,982/- and same had been paid by the complainant.
10. That the complainant on 03.05.2018, again sent a grievance letter and email to the respondent on 03.05.2018 and asked for copy of

OC/CC, interest on delayed possession. He raised his objection on demand of maintenance charges and holding charges, as said offer of possession without OC/CC was illegal.

11. On 19.08.2018, complainant again sent a letter to the respondent and lodged protest against maintenance charges and further asked for copy of OC/CC and interest on delayed possession.
12. That on 12.12.2018, the complainant served a legal notice through his advocate to the respondent and alleged blatant act of cheating and complete disregard of the contractual promise of timely delivery. It was specifically alleged that the respondent had issued an offer of possession without obtaining OC/CC from competent authority. It was further alleged that in the absence of OC/CC, the demand of maintenance charges is illegal. The complainant asked for refund of money along with interest @ 18% p.a.
13. That the respondent got renewed the license of the project from Directorate of Town and Country Planning, Haryana vide letter date 16.10.2019 till 10.09.2024. It is pertinent to mention here that till date, the respondent does not have the OC/CC to offer legitimate offer of possession to allottees.
14. That the present complaint is not for seeking compensation, without prejudice, the complainant reserves the right to file complaint to adjudicating officer of compensation.
15. That the complainant does not want to withdraw from project. The promoter has not fulfilled its obligation. Therefore as per obligations on the promoter it is required to pay delayed



possession interest from due date of possession till valid possession of office space at the prescribed rate.

**C. Relief sought by the complainant.**

The complainant is seeking the following relief:

- Direct the respondent to pay delay possession interest from due date of possession till legitimate possession of office space.
- Refrain the respondent from charging holding charges.
- Refrain the respondent from charging maintenance charges.
- Pass an order to initiate probe against the respondent for offering possession without OC/CC.

**D. Reply by the respondent.**

The respondent had contested the complaint on the following grounds:

16. The present complaint is not maintainable in law or on facts. The complainant had filed the present complaint seeking refund, possession and interest for alleged delay in delivering possession of the apartment booked by him. It is submitted that complaint pertaining to refund, compensation and interest are to be decided by the adjudicating officer under section 71 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as "the Act" for short) read with Rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017, (hereinafter referred to as "the Rules") and not by this authority.
17. That the project of the respondent is an "ongoing project" under RERA and the same has been registered under Real Estate

(Regulation and Development) Act, 2016 and HRERA Rules, 2017. The registration certificate bearing no. 04 of 2018 was granted by the Haryana Real Estate Regulatory Authority vide memo no. HRERA-178/2018/27 dated 02.01.2018. It is submitted that the registration is valid till 10.09.2021.

18. That the complainant was allotted a unit bearing no. OF-319 (hereinafter referred to as the 'said unit') admeasuring 1141 sq. ft. in the project known as Spaze Boulevard I, Sector 47, Sohna Road, Gurugram (hereinafter referred to as "said project") vide allotment letter dated 04.06.2011, on the basis of application form dated 2<sup>nd</sup> of December 2009. The complainant had voluntarily opted for a construction linked payment plan.
19. That buyer's agreement dated 19.10.2011 had been executed between the complainant and the respondent. That prior to approaching the respondent, the complainant had made extensive, elaborate and independent enquiries regarding the project. Only after being fully satisfied about all aspects of the project, including but not limited to the capacity/capability of the respondent to undertake conceptualization, promotion, development and construction of the same, the complainant took an independent and informed decision to purchase the said unit in the said project, un-influenced in any manner by any act/deed/conduct of the respondent/its officials.
20. That the contractual relationship between the complainant and respondent is governed by the terms and conditions of the buyer's agreement. It is submitted that in terms of clause 14 of the buyer's

agreement, the time period for delivery of possession was 3 years from the date of execution of the buyer's agreement, subject to delays or failure on account of departmental delay or due to any circumstances beyond the power and control of the respondent as mentioned in clause 14 and other clauses of the buyer's agreement. Moreover, the handing over of possession was also subject to the allottee having strictly complied with all terms and conditions of the buyer's agreement and not being in default of any provision of the buyer's agreement including remittance of all amounts due and payable by the allottee under the agreement as per the schedule of payment incorporated in the agreement. It is pertinent to mention that the application for approval of building plans was submitted on 23.04.2010 and the approval for the same was granted on 07.09.2010. Therefore, it is submitted that the time period of 3 years as stipulated in the agreement had to be calculated as per the provisions of the agreement.

21. The respondent had contended in clause 14 of the agreement that in case any delay occurred on account of delay in sanction of the building/zoning plans by the concerned statutory authority or due to any reason beyond the control of the developer, the period taken by the concerned statutory authority would also be excluded from the time period stipulated in the contract for delivery of physical possession. Consequently, the period for delivery of physical possession would be extended accordingly. It was further expressed therein that the allottee had agreed not to claim

compensation of any nature whatsoever for the said period extended in the manner stated above.

22. The respondent has contended that without admitting or acknowledging in any manner the truth or legality of the allegations put forth by the complainant and without prejudice to any of the contentions of the respondent, it is submitted that only such allottees, who have complied with all the terms and conditions of the agreement including making timely payment of instalments are entitled to receive compensation under the agreement. In the case of the complainant, he had delayed payment of instalments and consequently, he was not eligible to receive any compensation from the respondent as alleged.
23. The respondent has submitted that there is no default on part of respondent in delivery of possession in the facts and circumstances of the case. The interest Ledger dated 17.11.2020 depicts periods of delay in remittance of outstanding payments by the complainant as per schedule of payment incorporated in the agreement. Thus, it is comprehensively established that there is default in payment of amount demanded by respondent under the payment plan chosen by the complainant and therefore, the time for delivery of possession deserves to be extended as provided in the buyer's agreement.
24. The respondent has submitted that the complainant consciously and maliciously chose to ignore the payment request letters and reminders issued by it and flouted in making timely payments of the instalments which was an essential, crucial and indispensable

requirement under the agreement. Furthermore, when the proposed allottees defaulted in their payments as per schedule agreed upon, the failure has a cascading effect on the operations and the cost for proper execution of the project increases exponentially and at the same time, inflicts substantial losses to the developer. The complainant chose to ignore all these aspects and wilfully defaulted in making timely payments. The respondent despite defaults of several allottees earnestly fulfilled its obligations and is fully committed towards completing the project as expeditiously as possible in the facts and circumstances of the case.

25. That even after sending multiple reminder letters to the complainant to pay the outstanding balance amount, he did not make the full payment to the respondent. Despite the defaults committed by the complainant, the respondent had waived off interest accruing on account of delay in making payment of instalments amounting to Rs.14,535/-. On date, the total outstanding amount liable to be paid by the complainant to the respondent inclusive of interest is Rs.40,155/-
26. That for the purpose of promotion, construction and development of the project, a number of sanctions/permissions were required to be obtained from the concerned statutory authorities. It is respectfully submitted that once an application for grant of any permission/sanction or for that matter building plans/zoning plans etc. are submitted for approval in the office of any statutory authority, the developer ceases to have any control over the same.

The grant of sanction/approval to any such application/plan is the prerogative of the concerned statutory authority over which the developer cannot exercise any influence. As far as respondent is concerned, it has diligently and sincerely pursued the matter with the concerned statutory authorities for obtaining of various permissions/sanctions.

27. The respondent has submitted that the span of time which was consumed in obtaining the following approvals/sanctions deserves to be excluded from the period agreed between the parties for delivery of physical possession. The project in question could not have been constructed, developed and implemented by respondent without obtaining the sanctions referred to above. Thus, the respondent had been prevented by circumstances beyond its power and control from undertaking the implementation of the project during the time period indicated above and therefore the same is not to be taken into reckoning while computing the period of 60 months as has been explicitly provided in the buyer's agreement.
28. The respondent had submitted an application for grant of environment clearance to the concerned statutory authority on 09.05.2017. However, for one reason or the other arising out of circumstances beyond the power and control of respondent, the aforesaid clearance had only been granted on 05.02.2020, despite due diligence having been exercised by respondent in this regard. The issuance of an environment clearance referred to above is a

precondition for submission of application for grant of occupation certificate.

29. The respondent has submitted that all construction activities involving excavation, civil construction were stopped in Delhi and NCR Districts from 1<sup>st</sup> November 2018 to 10<sup>th</sup> November 2018 vide directions issued by Environment Pollution (Prevention & Control) Authority for the national capital region. The said circular was applicable to the project in question and consequently the respondent had to suspend its construction activities for the said period. The respondent cannot be held liable for any delay caused due to this fact as well.
30. The respondent has asserted that it applied for grant of occupation certificate on 08.01.2016. The construction of the building in question had been completed and occupation certificate for the same has been received as well. The occupation certificate dated 27.07.2020 had been received by the respondent with respect to the said project. It is pertinent to mention that possession of the said unit had been offered to the complainant on 08.09.2016 after obtaining the aforesaid occupation certificate. The letter of offer of possession was issued by the respondent on 08.09.2016.
31. That despite being offered possession of the said unit, the complainant has not made payment of outstanding amount and has also not come forward to complete the documentation formalities for reasons best known to him. Thus, the allegation of delay against the respondent is not based on correct and true facts.

32. The respondent has submitted that as per the terms and conditions incorporated in the buyer's agreement, it is further provided that interest/compensation for any delay in delivery of possession shall only be given to such allottees who have not defaulted in payment as per the payment plan incorporated in the agreement. The complainant, having defaulted in payment of instalments, is not entitled to any interest/compensation.
33. Furthermore, in case of delay caused due to non- receipt of occupation certificate or any other permission/sanction from the competent authorities, no compensation shall be payable being part of circumstances beyond the power and control of the developer.
34. It is further submitted that despite there being a number of defaulters in the project, the respondent itself infused funds into the project, earnestly fulfilled its obligations and is fully committed to complete the project as expeditiously as possible in the facts and circumstances of the case. Therefore, cumulatively considering the facts and circumstances of the present case, no delay whatsoever can be attributed to the respondent by the complainant. However, all these crucial and important facts have been deliberately concealed by the complainant from this authority.
35. That the complaint has been preferred on baseless, unfounded and legally and factually unsustainable surmises which can never inspire the confidence of this authority. The accusations levelled by the complainant are completely devoid of merit. The complaint filed by the complainant deserves to be dismissed.



**E. Jurisdiction of the authority**

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**

36. 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 purposes with office 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**

14. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottees 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

### **G.I Findings on the objections raised by the respondent.**

#### **G. I Objection regarding whether the offer of possession is valid or not?**

37. The respondent has contended that in case of any delay occurred on account of delay in sanction of the approvals/sanctions and building/zoning plans by the concerned statutory authority or due to any reason beyond the control of the developer, the period taken by the concerned statutory authority would also be excluded from the time period stipulated in the contract for delivery of physical possession. Consequently, the period for delivery of physical possession would be extended accordingly.
38. The complainant had served a legal notice through his advocate and alleged for the blatant act of cheating and complete disregard of the contractual promise of timely delivery. It was specifically alleged that the respondent had issued offer of possession without obtaining occupation certificate from the competent authority.
39. The authority after detailed consideration of the matter has arrived at the conclusion that a valid offer of possession must have following components:
- i. **Possession must be offered after obtaining occupation certificate-** The subject unit after its completion should have

received occupation certificate from the concerned department certifying that all basic infrastructural facilities have been laid and are operational. Such infrastructural facilities include water supply, sewerage system, storm water drainage, electricity supply, roads and street lighting.

- ii. **The subject unit should be in habitable condition-** The test of habitability is that the allottee should be able to live in the subject unit within 30 days of the offer of possession after carrying out basic cleaning works and getting electricity, water and sewer connections etc from the relevant authorities. In a habitable unit, all the common facilities like lifts, stairs, lobbies, etc should be functional or capable of being made functional within 30 days after completing prescribed formalities. The authority is also of the view that minor defects like little gaps in the windows or minor cracks in some of the tiles, or chipping plaster or chipping paint at some places or improper functioning of drawers of kitchen or cupboards etc. are minor defects which do not render an apartment uninhabitable. Such minor defects can be rectified later at the cost of the developers. The allottees should accept possession of an apartment with such minor defects under protest. This authority will award suitable relief or compensation for rectification of minor defects after taking over of possession under protest.

However, if the subject unit is not habitable at all because the plastering work is yet to be done, flooring works is yet to be

done, common services like lift etc. are non-operational, infrastructural facilities are non-operational then the subject unit shall be deemed as uninhabitable and offer of possession of an uninhabitable unit will not be considered a legally valid offer of possession.

- iii. **Possession should not be accompanied by unreasonable additional demands-** In several cases, additional demands are made and sent along with the offer of possession. Such additional demands could be of minor nature, or they could be significant and unreasonable which puts heavy burden upon the allottees. An offer accompanied with unreasonable demands beyond the scope of provisions of agreement should be termed an invalid offer of possession. Unreasonable demands itself would make an offer unsustainable in the eyes of law. The authority is of the view that if additional demands, the allottees should accept possession under protest.

40. The authority taking both the contentions in consideration, is of the view that, the respondent applied for the OC on 08.01.2016 and received it on 27.07.2020. There is an uncertain delay between these 2 dates which brings us to the conclusion that the application for OC made by the respondent on 08.01.2016 was therefore incomplete and got rejected., which is a default on part of the respondent itself. As per the settled law, one cannot be allowed to take advantage of his own wrongs. Therefore, the offer made by the respondent to the complainant on 08.09.2016 is not a valid offer of possession.

**G. II Objection regarding untimely payments done by the complainant.**

41. The respondent has contended that the complainant has made default in making payments as a result thereof, it had to issue reminder letters. Despite the defaults committed by the complainant, the respondent had waived off interest accruing an account of delay in making payment of instalments amounting to Rs. 14,355/-.
42. At the outset, it is relevant to comment on the terms and conditions of the buyer's agreement. The drafting of the terms and conditions of the buyer's agreement 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 making timely payment as per the payment plan may result in termination of the said agreement and forfeiture of the earnest money. Moreover, the authority has observed that despite complainant being in default in making timely payments, the respondent has not exercised his discretion to terminate the buyer's agreement.

**F. Findings on the relief sought by the complainant.**

**F1: - The respondent be directed to pay interest at the prevailing rate of interest from due date of possession till legitimate possession of office.**

43. 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*

*18(1). 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."*

44. Clause 14 of the buyer's agreement (in short, agreement) provides for handing over of possession and is reproduced below:

*"Clause 14: - That the possession of the said premises is proposed to be delivered by the DEVELOPER to the ALLOTTEE(S) within three years from the date of this Agreement. If the completion of the said Building is delayed by reason of non-availability of steel and/or cement or other building materials, or water supply or electric power or slow down, strike or due to a dispute with the construction agency employed by the DEVELOPER, lock out or departmental delay or civil commotion or by reason of war or enemy action or terrorist action or earthquake or any act of God or any other reason beyond the control of the DEVELOPER, the DEVELOPER shall be entitled to extension of time for delivery of possession of the said premises. The DEVELOPER as a result of such a contingency arising, reserves the right to alter or vary the terms and conditions of this Agreement or if the circumstances beyond the control of the DEVELOPER so warrant, the DEVELOPER may suspend the Scheme for such period as it might consider expedient. In case the DEVELOPER is unable to complete the project on account of any law passed by the legislature or any other government agency, in that event the DEVELOPER if so advised, shall be entitled to challenge the validity, applicability and / or efficacy of such legislation, rule, order and / or bye law by instituting appropriate proceedings before court(s), tribunal(s) or authorities. In such situation, the amounts paid by the ALLOTTEES(S) shall continue to remain with the DEVELOPER and the ALLOTTEE(S) shall not be entitled to initiate any proceedings against the DEVELOPER for delay in execution of the project. It is specifically agreed that this agreement shall remain in abeyance till final determination of such matters / cases by appropriate court(s) / tribunal(s) / authorities....."*

45. 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 application, and the complainant not being in default under any provisions of these agreements 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 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 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.
46. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the rate of 18% p.a. 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, 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.*

47. 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.
48. 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., 21.07.2022 is @7.80%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.80%.
49. 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."*

50. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 9.80% by the respondent/promoter which is the same as is being granted to the complainants in case of delayed possession charges.

**F.2: - Refrain the respondent from charging holding charges.**

**Refrain the respondent from charging maintenance charges.**

51. Both the relief(s) sought have been taken up together as the complainant has raised a contention that the respondent has demanded the maintenance charges and holding charges without the OC being received and offer of possession. To this contention, the complainant has referred to letter and an email as annexure P-9. On examining annexure P-9, it is found that no such charges have been demanded by the respondent/promoter. Further, the complainant has asked the respondent/ promoter to withdraw the maintenance invoice dated 11.06.2017 raised by the preserve facilities private limited. But the complainant has not placed any documentary proof to this effect, nor the respondent/promoter has disputed the contention of the complainant in his reply. The

contention of the complainant is well founded, and the offer of possession is not valid as the OC has been not received at the time of offer of possession.

52. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, 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 14 of the agreement executed between the parties on 19.10.2011, the possession of the subject apartment was to be delivered within stipulated time i.e., by 19.10.2014. The respondent has failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such, the allottee shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 19.10.2014 till the date of OC plus two months, at prescribed rate i.e., 9.80 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules. Further, it is well settled that for a valid offer of possession there are three pre-requisites Firstly, it should be after receiving occupation certificate; Secondly, the subject unit should be in habitable condition and thirdly, the offer must not be accompanied with any

unreasonable demand. But while issuing intimation of possession on 08.09.2016, the builder has not obtained occupation certificate. Hence, the intimation of possession by respondent promoter on 08.09.2016 is not a valid or lawful offer of possession. In order to avoid uncertainty, the authority observes that delayed possession charges are to be paid till the date of OC plus two months as the allottee is obligated to take possession under section 19(10) after two months of OC.

**G. Directions of the authority**


53. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations casted upon the promoter as per the functions entrusted to the authority under section 34(f):

- i. The respondent is directed to pay the interest at the prescribed rate i.e., 9.80 % per annum for every month of delay on the amount paid by the complainant from due date of possession i.e., 19.10.2014 till the date of OC i.e., 27.07.2020 plus two months which comes to 27.09.2020.
- ii. The arrears of such interest accrued from 19.10.2014 till the date of order by the authority shall be paid by the promoter to the allottee within a period of 90 days from date of this order as per rule 16(2) of the rules.
- iii. The respondent is directed to handover possession of the allotted unit complete in all aspects as per specifications of buyer's agreement dated 19.10.2011, within 30 days of date of this order and the complainant is also directed to fulfil the

obligation conferred upon him as per section 19(10) of Act of 2016 and take the physical possession of the allotted unit.

- iv. The respondent shall not charge anything from the complainant which is not the part of the agreement.
  - v. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
  - vi. The respondent is not entitled to charge holding charges from the complainant/allottee at any point of time even after being part of the builder buyer's agreement as per law settled by Hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 on 14.12.2020
54. Complaint stands disposed of.
55. File be consigned to registry.

V.I. -   
(Vijay Kumar Goyal)  
Member

  
(Dr. K.K. Khandelwal)  
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 21.07.2022