BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**77 of 2022**
Date of filing complaint:		**18.01.2022**
First date of hearing	:	**11.02.2022**
Date of decision	:	**21.07.2022**

Kamlesh Arora and Ved Prakash Arora
Both R/o: H.no: 101, NAC, Shivalik Enclave, Manimajra, Chandigarh-160101 **Complainants**

Versus

M/s Spaze Towers Private Limited
R/o: Spazedge, Sector 47, Gurgaon Sohna Road, Gurgaon, Haryana **Respondent**

CORAM:

Dr. K.K. Khandelwal — Chairman
Shri Vijay Kumar Goyal — Member

APPEARANCE:

Sh. Sukhbir Yadav (Advocate) — Complainants
Sh. J.K Dang (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 allottees 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	"Spaze privy at 4" Sector-84, village sihi, Gurugram, Haryana.
2.	Project area	10.812 acres (licensed area as per agreement 10.51 acres)
3.	Nature of the project	Group housing complex
4.	DTCP license no. and validity status	26 of 2011 dated 25.03.2011valid up to 24.03.2019
5.	Name of licensee	Smt. Mohinder Kaur and Ashwini Kumar
6.	RERA Registered/ not registered	**Registered vide registration no. 385 of 2017 dated 14.12.2017**
	RERA Registration valid up to	**31.06.2019**
7.	Date of booking	08.04.2011 (Page 28 of complaint)
8.	Endorsement	11.05.2012 (As per page 33 of complaint)
9.	Allotment letter	25.05.2011 (Page 30 of complaint)

10.	Unit no.	Apartment no. 111 on 11th floor, Tower B2 (Page 37 of complaint)
11.	Unit area	1745 sq. ft. (Page 37 of complaint)
12.	Date of approval of building plan	06.06.2012 (Page 143 of reply)
13.	Date of execution of builder buyer agreement	04.04.2012 (Page 34 of complaint)
14.	Total sale consideration	Rs. 80,18,448/- (As per statement of account dated 28.12.2021 at page 79 of complaint)
15.	Total amount paid by the complainant	Rs. 87,97,300 /- (As per statement of account dated 28.12.2021 at page 86of complaint)
16.	Payment plan	Construction linked payment plan (Page 54 of the complaint)
17.	Due date of delivery of possession *Clause 3(a): The developer proposes to hand over the possession of the apartment within a period of thirty-six(36) months (excluding a grace period of 6 months) from the date of approval of building plans or date of signing of this agreement whichever is later*	06.12.2015 Calculated from date of approval of building plan being later **(Grace period is allowed)**
18.	Offer of possession	01.12.2020 (Page 71 of complaint)

19.	Occupation Certificate	11.11.2020 [page 209 of reply]

B. Facts of the complaint:

3. That the family members of complainants i.e., **Kamlesh Arora and Ved Parkash Arora** insisted to buy a flat as they were anxious to buy their own independent flat and that was the right time to own it. That on 08.04.2011, believing on representation and assurance of respondent, **Premila Singh and Rajkumar Singh (original allottees) booked** one Unit/ Flat, and issued a cheque of Rs. 5,00,000/-. That on 25.05.2011, the respondent issued an allotment letter and payment schedule in name of Premila Singh and Raj Kumar Singh (original allottees), conforming to allotment of Flat/Unit purchased under the construction linked Plan for a sale consideration of **Rs.73,80,500/-**.

4. On 04.04.2012, flat buyer agreement/buyer's agreement was executed inter-se the respondent and the original allottees. According to clause 3(a) of the flat buyer agreement, the respondent has to give possession of the said flat within 36 months from the date of the approval of building plans or from the date to the signing of the agreement whichever was later. It is germane that the building plans were approved on 06.06.2012, and therefore, the due date of possession was 06.06.2015. On 11.05.2012, with permission from the respondent, the

original allottee transferred their rights in the flat, in favour of the Kamlesh Arora and V. P. Arora i.e., the complainants. Moreover, the respondent endorsed the name of subsequent allottees in its record and on the BBA and other property papers. Thereafter, Kamlesh Arora and Ved Parkash Arora, continue to pay the balance payment/demands as and when demanded by the respondent.

5. That, since 2015, the complainants are regularly visiting the office of the respondent party, as well as on the construction site, and making efforts to get possession of allotted flats but all in vain.

6. That the complainants had purchased the flat with the intention that after purchase, they would be able to stay in a better environment. Moreover, it was promised by the respondent party at the time of receiving payment for the flat that the possession of a fully constructed flat and developed project would be handed over to the complainants as soon as construction completes i.e., Thirty-Six (36) months from the approval of building plans i.e., on or before **06.12.2015**.

7. That on 01.12.2020, the respondent sent a letter, "notice for offer of possession and payment of outstanding dues" and asked for payment of Rs. **8,96,312/-** in favor of "respondent a/c. besides a demand of Rs.2,06,800/-. It is pertinent to mention here that the respondent increased the super area of the flat by 173 Sq. Ft., without any

justification. The respondent demanded Rs. 22,460/- under the head labour cess, and Rs. 2,74,127 under the head external electrification which are not payable by the complainants. It is further pertinent to mention here that the respondent acknowledged the delay in possession and credited Rs. 4,16,530/- as compensation. Thereafter in response to the demand and under compelling circumstances and under the protest the complainants paid their dues on date 25.12.2020.

8. On 20.08.2021, the complainants sent an email to the respondent and asked for compensation and delayed physical possession. The complainants had paid more than 95% payment in till June 2016 and, but the respondent failed to offer physical possession of the flat. Thereafter, several emails were exchanged between the parties on issues about possession of the unit.

9. That the respondent issued a statement of account dated 28.12.2021 for the apartment allotted to the complainants. According to the statement of account, **Rs. 87,97,300/-** has been paid by the complainants out of the total sale consideration of **Rs. 73,80,500/-**

10. That on 01.04.2021, the respondent issued a letter for an offer of possession. It is pertinent to mention here that the respondent has also increased the super area of the Unit by 173 sq. ft. (the revised area is

1918 sq. Ft., and the original area was 1745 sq. Ft.) without any justification and calculation.

11. It is pertinent to mention here that the respondent took signatures of the complainants on several affidavits cum undertaking and other documents by stating that these are the standard documents and without execution of these undertakings, it would not hand over the physical possession of the flat. It is further pertinent to mention here that as per the possession letter, the respondent took the undertaking on 09.02.2021 and issued a possession letter on 01.04.2021.

12. That the complainants being an aggrieved person filing the present complaint under section 31 with the Authority for violation/contravention of provisions of this Act. That the complainants do not want to withdraw from the project. The promoter has not fulfilled his obligation. Therefore as per obligations on the promoter under section 18(1) proviso, the promoter is obligated to pay the interest at the prescribed rate for every month of delay till the handing over of the possession.

C. Relief sought by the complainants:

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

i. Direct the respondent to give possession of the fully developed/constructed apartment with all amenities.

ii. Direct the respondent to pay the delayed possession interest on the amount paid by the allottee, at the prescribed rate from the due date of possession to till the actual possession of the flat is handed over as per the proviso to section 18(1) of the Real Estate Regulation and Development) Act, 2016.

iii. Direct the respondent to provide area calculation.

iv. Direct the respondent not to charge labour cess.

v. Direct the respondent not to charge external electrification charge.

D. Reply by respondent

1. That the present complaint is not maintainable in law or on facts. It is submitted that no violation of provisions 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") has been committed by the respondent. The institution of the present complaint constitutes gross misuse of process of law. The complaint is liable to be dismissed
2. 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. Registration certificate bearing no. 385 of 2017 granted by the Haryana Real Estate Regulatory Authority vide memo no. HRERA-179/2017/2320 dated 14.12.2017.
3. That the complainants have no locus standi or cause of action to file the present complaint.

4. That the complainants are not "Allottees" but Investors who have booked the apartment in question as a speculative investment in order to earn rental income/profit from its resale. The apartment in question has been booked by the complainants as a speculative investment and not for the purpose of self-use as a residence.
5. That the present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the buyer's agreement dated 4th of April, 2012 (hereinafter "Buyer's agreement"), as shall be evident from the submissions made in the following paras of the present reply.
6. That apartment bearing no.111 situated on the Eleventh Floor in Tower B2, initially admeasuring 1745 square feet of super area approximate (hereinafter referred to as "said unit") of the Residential Group Housing Society known as Privy AT4, situated in Sector 84, Gurugram, Haryana (hereinafter referred to "said project"), was provisionally allotted in favour of Mrs. Premila Singh and Mr. Raj Kumar Singh (Original Allottees), vide allotment letter dated 25.05.2011. Buyer's Agreement was executed between the Original Allottees and the respondent on 4th of April, 2012 and the same has been appended as **Annexure R3**. The Original Allottees and the complainants approached the respondent and requested the transfer of the said unit in favour of the Complainants. Upon execution of transfer documents by the Original Allottees and the Complainants, the allotment was transferred in favour of the Complainants. It is pertinent to mention herein that at the time of purchase in resale, the Buyer's Agreement had already been executed by the Original Allottee and hence, the Complainants had the full opportunity to study the terms and conditions of the Buyer's

Agreement in detail and understand the implications of its terms and conditions. It was only after the Complainants duly accepted the terms and conditions of the Buyer's Agreement that the Complainants proceeded to purchase the said unit, in resale from the original allottees.

7. That the complainants have completely misinterpreted and misconstrued the terms and conditions of Buyer's agreement. So far as alleged non-delivery of physical possession of the apartment is concerned, it is submitted that in terms of Clause 3(a) of the aforesaid contract, the time period for delivery of possession was 36 months excluding a grace period of 6 months from the date of approval of building plans or date of execution of the buyer's agreement, whichever is later, subject to the allottee(s) 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(s) under the agreement as per the schedule of payment incorporated in the buyer's agreement. It is pertinent to mention that the application for approval of building plans was submitted on 26.08.2011 and the approval for the same was granted on 06.06.2012. Therefore, the time period of 36 months and grace period of 6 months as stipulated in the contract has to be calculated from 06.06.2012 subject to the provisions of the buyer's agreement.
8. That in accordance with contractual covenants incorporated in Buyer's agreement 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: -

S. No.	Nature of Permission/ Approval	Date of submission of application for grant of Approval/sanction	Date of Sanction of permission/grant of approval	Period of time consumed in obtaining permission/approval
1	Environment Clearance	30.05.2012	Re-submitted under ToR (Terms of reference) on 06.05.17	4 years 11 months
2	Environment Clearance re-submitted under ToR	06.05.2017	04.02.2020	2 Years 9 months
3	Zoning Plans submitted with DGTCP	27-04-11	03.10.2011	5 months
4	Building Plans submitted with DTCP	26.08.2011	06.06.2012	9 months
5	Revised Building Plans submitted with DTCP	05.02.2019	25.02.2020	12 months
6	PWD Clearance	08.07.2013	16.08.2013	1 month
7	Approval from Deptt. of Mines & Geology	17.04.2012	22.05.2012	1 month
8	Approval granted by Assistant Divisional Fire Officer acting on behalf of commissioner	18.03.2016	01.07.2016	4 months
9	Clearance from Deputy Conservator of Forest	05.09.2011	15.05.2013	19 months
10	Aravali NOC from DC Gurgaon	05.09.2011	20.06.2013	20 months

9. That it is pertinent to mention that it was categorically provided in clause 3(b)(iii) of the Buyer's agreement that in case of any default/delay by the allottees in payment as per schedule of payment incorporated in the buyer's agreement, the date of handing over of possession would be extended accordingly, solely on the developer's discretion till the payment of all of the outstanding amounts to the satisfaction of the developer. Since the complainants have defaulted in timely remittance of payments as per schedule of payment, the date of delivery of possession is not liable to be determined in the manner alleged by them. In fact, the total outstanding amount including interest due to be paid by the complainants to the respondent (without including the amount payable to the maintenance agency) on the date of dispatch of letter of offer of possession dated 05.12.2020 was Rs.8,96,312/-. Although, there was no lapse on the part of the respondent, yet the amount of Rs.4,16,530/- was credited to the account of the complainants.

10. That it is further submitted that the respondent left no stone unturned to complete the construction activity at the project site. But unfortunately, due to the outbreak of COVID-19 pandemic and the various restrictions imposed by the governmental authorities, the construction activities and business of the company was significantly and adversely impacted and the functioning of almost all the government functionaries was also brought to a standstill.

11. That since the 3rd week of February 2020, the respondent has also suffered devastatingly because of outbreak, spread and resurgence of COVID-19 in the year 2021. The concerned statutory authorities had earlier imposed a blanket ban on construction activities in Gurugram. Subsequently, the said embargo had been lifted to a

limited extent. However, in the interregnum, large scale migration of labour had occurred, and availability of raw material started becoming a major cause of concern. Despite all odds, the respondent was able to resume remaining construction/ development at the project site and obtain necessary approvals and sanctions for submitting the application for grant of Occupation Certificate.

12. That the Hon'ble Authority was also considerate enough to acknowledge the devastating effect of the pandemic on the real estate industry and resultantly issued order/direction to extend the registration and completion date or the revised completion date or extended completion date by 6 months & also extended the timelines concurrently for all statutory compliances vide order dated 27th of March 2020. It has further been reported that Haryana Government has decided to grant moratorium to the realty sector on compliances and interest payments for seven months to September 30, 2020, for all existing projects. It has also been mentioned extensively in press coverage that Moratorium period would imply that such intervening period from March 1, 2020, to September 30, 2020, would be considered as "zero period".

13. That the complainants were offered possession of the unit in question through letter of offer of possession dated 01.12.2020. They were called upon to remit balance payment including delayed payment charges and to complete the necessary formalities/documentation necessary for handover of the unit in question to them. However, the complainants refrained from completing their duties and obligations as enumerated in the buyer's agreement as well as the Act.

14. That it is pertinent to mention that possession letter dated 1st of April 2021 (**Annexure R10**) issued by the respondent to the complainants pertains to taking over of possession of the said unit by them. The complainants after duly satisfying themselves and inspecting the said unit took vacant possession of the said unit and duly executed the aforesaid possession letter dated 1st of April 2021. It would not be out of place to mention that the aforesaid possession letter dated 1st of April 2021 had been executed after affidavit cum undertaking dated 09.02.2021 had been voluntarily executed by the complainants in favour of the respondent.

15. That it is pertinent to note that an offer for possession marks termination of the period of delay, if any. The complainants are not entitled to contend that the alleged period of delay continued even after receipt of offer for possession.

16. That without prejudice to the rights of the respondent, delayed interest if any has to calculated only on the amount deposited by the allottees/complainants towards the basic principal amount of the unit in question and not on any amount credited by the respondent, or any payment made by the allottees/complainants towards delayed payment charges (DPC) or any taxes/statutory payments etc.

17. That, without admitting or acknowledging the truth or legality of the allegations advanced by the complainants and without prejudice to the contentions of the respondent, it is respectfully submitted that the provisions of the Act are not retrospective in nature. The provisions of the Act cannot undo or modify the terms of an agreement duly executed prior to coming into effect of the Act. It is further submitted that merely because the Act applies to ongoing

projects registered with the authority, the Act cannot be said to be operating retrospectively. The provisions of the Act relied upon by the complainants for seeking interest cannot be called in to aid in derogation and ignorance of the provisions of the buyer's agreement. The interest is compensatory in nature and cannot be granted in derogation and ignorance of the provisions of the buyer's agreement.

18. That 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 under the buyer's agreement and completed 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 complainants. However, all these crucial and important facts have been deliberately concealed by the complainants from this Honourable Authority.

19. That the complaint has been preferred on absolutely baseless, unfounded and legally and factually unsustainable surmises which can never inspire the confidence of this Honourable Authority. The accusations levelled by the complainants are completely devoid of merit. The complaint filed by the complainants deserves to be dismissed.

i. 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:

14. 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

15. 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 objection raised by the respondent:

F.I Objection regarding maintainability of the complaint.

16. The respondent contended that the present complaint is not maintainable as it has not violated any provision of the Act.

17. The authority, in the succeeding paras of the order, has observed that the respondent is in contravention of the section 11(4)(a) read with proviso to section 18(1) of the Act by not handing over possession by the due date as per the agreement. Therefore, the complaint is maintainable.

F.II Objection regarding entitlement of income/profit from its resale on round of complainants being investor.

19. The respondent has taken a stand that complainants are the investor and not consumers, therefore, they are not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observed that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects enacting a stating but at the same time preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or

rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainants are buyer, and they have paid total price of Rs. 87,97,300/- to the promoter towards purchase of an apartment in its project. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

> *"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"*

In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyer's agreement executed between promoter and complainants, it is crystal clear that the complainants are allottees as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as ***M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.*** has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottees being investors are not entitled to protection of this Act also stands rejected.

G. Findings on the relief sought by the complainants

G.I Calculation for super area

18. The complainants submitted that the allottees booked a unit admeasuring 1745 sq. ft. in the project "Spaze Privy At4. The area of the said unit was increased to 1918 sq. ft. vide letter of offer of possession dated 01.12.2020 without giving any prior intimation to, or by taking any written consent from the allottee. The said fact has not been denied by the respondent in its reply. The allottee in the said complaint prayed inter alia for directing the respondent to provide area calculation. Clause 1.2(d) is reproduced hereunder:

> *"1.2(d) Super Area*
>
> *The consideration of the Apartment is calculated on the basis of Super Area, and it has been made clear to the Apartment Allottee(s) by the Developer that the Super Area of the Apartment as defined in Annexure-I is tentative and subject to change.*

19. From the bare perusal of clause 1.2(d) of the agreement, there is evidence on the record to show that the respondent has allotted an approximate super area of 1918 sq. ft. and the areas was tentative and were subject to change till the time of construction of the group housing complex. Clause 1.1 provides description of the property which mentions about sale of super and the buyer has signed the agreement. Also, by virtue of allotment letter dated 21.01.2014, the complainants had been made to understand and had agreed that the super area mentioned in the agreement was only a tentative area which was subject to the alteration till the time of construction of the complex. The respondent in its defence submitted that as per the terms and conditions of the builder buyer's agreement, the

builder was not bound to inform the allottee with regards to the increase in super area.

20. Relevant clauses of the agreement are reproduced hereunder:

> ***"Clause 1(1.2) (e) (ii) Alterations in the lay out plan and design***
>
> *ii) That in case of any major alteration/modification resulting in excess of 10% change in the super area of the Apartment in the sole opinion of the DEVELOPER any time prior to and upon the grant of occupation certificate, The DEVELOPER shall intimate the APARTMENT ALLOTTEE(s) in writing the changes thereof and the resultant change, if any, in the Sale Price of the APARTMENT to be paid by him/her and the APARTMENT ALLOTTEE(S) agrees to deliver to the DEVELOPER in writing his/her consent or objections to the changes within fifteen (15) days from the date of dispatch by the DEVELOPER of such notice failing which the APARTMENT ALLOTTEE(s) shall be deemed to have given his/her full consent to all such alteration/modification and for payments, if any, to be paid in consequence thereof. If the written notice of the APARTMNET ALLOTTEE(S) shall be deemed to have given his/her full consent to all such alterations/modification and for payments, is any, to be paid in consequence thereof. If the written notice of the APARTMENT ALLOTTEE(s) is received by the DEVELOPER within fifteen (15) days of intimation in writing by the DEVELOPER indicating his/her/its non-consent/objection to such alterations/modifications as intimated by the DEVELOPER to the APARTMENT ALLOTTEE(s), then in such case, the Agreement shall be cancelled without further notice and the DEVELOPER shall refund the money received from the APARTMEN ALLOTTEE(s) after deducting Earnest Money within ninety(90) days from the date of intimation received by the DEVELOPER from the APARTMENT ALLOTTEE(s). On payment of the money after making deductions as stated above the DEVELOPER and/or the APARTMENT ALLOTTEE(S)shall be released and discharged from all its obligation and liabilities under this Agreement. In such a situation, the DEVELOPER shall have an absolute and unfettered right to allot, transfer, sell and assign the APARTMENT and all attendant rights and liabilities to a third party. It being specifically agreed that irrespective of any outstanding amount payable by the DEVELOPER to the APARTMENT ALLOTTEE(s), the APARTMENT ALLOTTEE(S) shall have no right, lien or charge on the APARTMENT in respect of which refund as contemplated by this clause is payable."*

21. As per clause 1(1.2) (e)(ii) of the agreement, it is evident that the respondent has agreed to intimate the allottee in case of any

major alteration/modification resulting in excess of 10% change in the super area of the apartment as per the policy guidelines of DGTCP as may be applicable from time to time and any changes approved by the competent authority shall automatically supersede the present approved layout plan/building plans of the commercial complex. The authority observes that the building plans for the project in question were approved by the competent authority on 06.06.2012 vide memo. No. ZP-699/JD(BS)/2012/9678. Subsequently, he buyer's agreement was executed inter se parties on 21.07.2014. Thereafter, the revised sanction plan was obtained by the respondent on 09.01.2020. A copy of the same has been annexed in the file. The super area once defined in the agreement would not undergo any change if there were no change in the building plan. If there was a revision in the building plan, then also allottee should have been informed about the increase/decrease in the super area on account of revision of building plans supported with due justification in writing.

22. Therefore, the authority is of the opinion that unless and until, the allottees are informed about the increase/decrease of the super area, the promoter is not entitled to burden them with the liability to pay for an increase in the super area. The authority is of the opinion that each and every minute detail must be apprised, schooled and provided to the allottees regarding the increase/decrease in the super area and he should never be kept in dark or made to remain oblivious about such an important fact i.e., the exact super area till the receipt of the offer of possession letter in respect of the unit.

G.II Labour cess

23. The complainants pleaded that the respondent/builder has demanded a charge of Rs 22,460/- on pretext of labour cess vide notice of possession dated 01.12.2020 which is illegal and unjustifiable and not tenable in the eyes of law. The complainants further stated that they approached the office of the respondent for rectification of the alleged illegal and unjustifiable demand by the respondent;/builder but it outrightly refused to do the same. In reply to this, the respondent submitted that all the final demand raised by him are justifiable and the complainants choose to ignore and not pay the same. It is pertinent to mention here that the respondent vide offer of possession letter raised labour cess charge @11.71 sq. ft. totalling to the amount of Rs 22,460/-. On perusal of the BBA signed between both the parties it can be inferred that the agreement contains no such clause as to payment of labour cess charges whereas other charges/demands raised by the respondent /builder are clearly outlined in the BBA. Therefore, the complainants is not liable to pay the labour cess charges as the demand of labour cess charges raised by the respondent is unjustifiable from the allottees and the respondent/builder is himself liable to pay the labour cess charges. The respondent is directed to withdraw the unjustified demand of the pretext of labour cess. The builder is supposed to pay a cess from the welfare of the labour employed at the site of construction and which goes to welfare board to undertake social security schemes and welfare measure for building and other

construction workers. So, the respondent is not liable to charge the labour cess.

G.III External electrification charges

24. While issuing offer of possession of the allotted unit vide letter dated 01.12.2020, besides asking for payment of amount due, the respondent/builder also raised a demand of Rs. 8,96,312/- for external electrification (including 33KV) water, sewer and meter charges with GST. It is pleaded by the respondent that as per buyer's agreement dated 04.04.2012, the allottee are liable to pay that amount.

25. Clause 1.2 of the buyer's agreement is reproduced below:

> *"1.2. Consideration*
> ***a) Sale Price***
> *The Sale Price of the APARTMENT ("Sale Price") payable by the APARTMENT ALLOTTEE(s) to the DEVELOPER inclusive of External Development Charges, Infrastructure development Charges Preferential Location Charges (whenever applicable) is Rs. 72,93,250/- (Rupees Seventy two Lakhs Ninety three Thousand two Hundred Fifty) payable by the Apartment Allottee(s) as per the Payment Plan annexed herewith as Annexure-1. In addition the Apartment Allottee agrees and undertakes to pay Service Tax or any other tax as, may be demanded by the Developer in terms of applicable laws/guidelines."*

26. A perusal of clause 1.2 of the above-mentioned agreement shows the total sale price of the allotted unit as Rs. 73,80,500/- in addition to service tax or any other tax as per the demand raised in terms of applicable laws/guidelines. The payment plan does not mention separately the charges being demanded by the respondent/builder in the heading detailed above. However, there is sub clause (vii) to clause 5 of that agreement providing the liability of the allottees to pay the extra charges on account of external electrification **as demanded by HUDA**. The relevant clause reproduced hereunder:

"*5. Electricity*

vii. *That the Apartment Allottee(s) undertakes to pay extra charges on account of external electrification as demanded by HUDA."*

27. There is nothing no record that any demand in this regard has been raised by HUDA against the developer. So, the demand raised with regard to external electrification by the respondent/builder cannot said to be justified in any manner. Similarly, it is not evident from a perusal of builder agreement that the allottees are liable to pay separately for water, sewer and meter charges with GST. No doubt for availing and using those services, the allottee is liable to pay but not for setting up sewage treatment plant. However, for getting power connection through electric meter, the allottee is liable to pay as per the norm's setup by the electricity department.

G.IV Delayed possession charges

28. In the present complaint, the complainants intend to continue with the project and are 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*

29. The clause 3(a) of the apartment buyer agreement (in short, agreement) provides the time period of handing over of possession and is reproduced below:

3. Possession

a) Offer of possession.

That subject to terms of this clause and subject to the APARTMENT ALLOTTEE(S) having complied with all the terms and conditions of this Agreement and not being in default under any of the provisions of this Agreement and further subject to compliance with all provisions, formalities, registration of sale deed, documentation, payment of all amount due and payable to the DEVELOPER by the APARTMENT ALLOTTEES) under this agreement etc., as prescribed by the DEVELOPER, the DEVELOPER proposes to hand over the possession of the APARTMENT within a period of thirty-Six (36) months (excluding a grace period of six months) from the date of approval of building plans or date of signing of this Agreement whichever is later. It is however understood between the parties that the possession of various Blocks/Towers comprised in the Complex as also the various common facilities planned therein shall be ready & completed in phases and will be handed over to the allottees of different Block/Towers as and when completed and in a phased manner.

30. 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 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.

31. The buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builder/promoter and buyer/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 them. 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.

32. 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.

33. **Admissibility of grace period:** The respondent/promoter has proposed to handover the possession of the unit within a period of 36 months (excluding a grace period of 6 months) from the date of approval and of building plans or date of signing of this agreement whichever is later. In the present case, the promoter is seeking 6 months' time as grace period. But the grace period is unqualified and does not prescribe any precondition for the grant of grace period of 6 months. The said period of 6 months is allowed for the exigencies beyond the control of the promoter. Therefore, the due date of possession comes out to be 06.12.2015.

34. **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.*

35. 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.

36. 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%.

37. 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;"*

38. Therefore, interest on the delay payments from the complainants 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.

39. 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 3(a) of the unit buyer's agreement executed between the parties on 04.04.2012, The developer proposes to hand over the possession of the apartment within a period of thirty-six (36) months (excluding a grace period of 6 months) from the date of approval of building plans or date of signing of this agreement whichever is later. The date of approval of building plans being later, the due date of handing over of possession is reckoned from the date of approval of building plans and the grace period of 6 months is also allowed being unqualified/unconditional. Therefore, the due date of handing over of possession comes out to be 06.12.2015

40. It is pleaded on behalf of the respondent that complaint bearing no. ***1464 of 2019*** titled as ***Deepak Trikha Vs. Spaze Towers Pvt. Ltd.*** pertaining to the project "Spaze Privy at4" also subject matter of the

complaint, disposed on 29.01.2020, the hon'ble authority allowed 139 days to be treated as zero period while calculating delayed possession charges. So, in this case also though the respondent has explained that the delay in completing the project was due to reasons such as the time taken for environment clearance, zoning plans, building plans approval from department of mines, zoology fire NOC, clearance from forest department and Aravli NOC from which comes to be considerable period but in view of earlier decision of the authority, it be allowed grace of 139 days while calculating delay possession charges.

41. Though the respondent took a plea w.r.t giving 139 days of grace period for handing over possession of the allotted unit, the authority is of the view that the grace period of 6 months has already been allowed to the respondent being unqualified and the period of 139 days declared as zero period in the aforesaid complaint is already included in the grace period of 6 months. The respondent cannot be allowed grace period for two time. Therefore, the due date of handing over of possession 06.12.2015.

42. The respondent applied for the occupation certificate on 17.06.2020 and the same has been granted by the competent authority on 11.11.2020. Copies of the same was placed on record. 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 04.04.2012 executed between the parties. It is the failure on part of the promoter to fulfil its obligations and

responsibilities as per the buyer's agreement dated 04.04.2012 to hand over the possession within the stipulated period.

43. 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 case, the occupation certificate was granted by the competent authority on 11.11.2020. 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 + six months of grace period is allowed i.e. 06.12.2015 till the expiry of 2 months from the date of offer of possession (01.12.2020) which comes out to be 01.02.2021.

44. 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., 9.80% p.a. w.e.f. 06.12.2015 till the expiry of 2 months from the date of offer of possession (01.12.2020) which comes out to be 01.02.2021 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.

45. Also, the amount of Rs. 4,60,155/- (as per offer of possession dated 01.12.2020) so paid by the respondent to the complainants towards compensation for delay in handing over possession shall be adjusted towards the delay possession charges to be paid by the respondent in terms of proviso to section 18(1) of the Act.

G. Directions of the authority:

43. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act 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. 9.80% per annum for every month of delay on the amount paid by the complainants from due date of possession + six months of grace period is allowed i.e. 06.12.2015 till the expiry of 2 months from the date of offer of possession (01.12.2020) which comes out to be 01.02.2021 The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order as per rule 16(2) of the rules.

ii. Also, the amount of Rs. 4,60,155/- so paid by the respondent towards compensation for delay in handing over possession shall be adjusted towards the delay possession charges to be paid by the respondent in terms of proviso to section 18(1) of the Act.

iii. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.

iv. 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., 9.80% 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.

v. The respondent is directed to provide the calculation of super area of the project as well as of the allotted unit within a period of 30 days to the complainants

vi. The respondent shall not charge anything from the complainants which is not the part of buyer's agreement. The respondent is not entitled to charge holding charges from the complainants/allottees 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

44. Complaint stands disposed of.

45. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman
Haryana Real Estate Regulatory Authority, Gurugram

Dated: 21.07.2022