BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	4040 of 2020
Date of filing complaint:		16.11.2020
First date of hearing	:	11.01.2021
Date of decision	:	21.07.2022

Vimla Gupta
R/o: - BW 25A, Shalimar Bagh,
New Delhi - 110088. **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 **Chairman**
Shri V.K. Goyal **Member**

APPEARANCE:
Shri. Rajan Kumar Hans Advocate for the complainant
Shri. J.K. Dang 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 Apotel (Boulevard II), Sector 47, Gurugram
2.	Date of booking	06.02.2013 (Page 10 of complaint)
3.	Allotment letter	26.06.2013 (Annexure P1, page no. 12 of complaint)
4.	Unit no.	703, 7th floor admeasuring 641 sq.ft. (Annexure P1, page 12 of complaint)
5.	Date of execution of buyer's agreement	No BBA executed **(Note: - As per respondent a letter dated 29.04.2014 along with BBA issued to the complainant but the complainant failed to execute the same)** **(as alleged by respondent on page 4 of reply)**

6.	Possession clause	**11(a) Schedule for possession of the said unit** The developer based on its present plans and estimates and subject to all just exceptions endeavors to **complete construction of the said building / said unit within a period of sixty months from the date of this agreement** unless there shall be delay or failure due to department delay or due to any circumstances beyond the power and control of the developer or force majeure conditions including but not limited to reasons mentioned in clause 11(b) and 11(c) or due to failure of the allottee(s) to pay in time the total consideration and other charges and dues/payments mentioned in this agreement or any failure on the part of the allottee(s) to abide by all or any of the terms and conditions of this agreement. In case there us any delay on the part of the allottee(s) in making of payments to the developer then notwithstanding rights available to the developer elsewhere in this agreement, the period for implementation of the project shall also be extended by a span

		of time equivalent to each delay on the part of the allottee(s) in remitting payment(s) to the developer..... **(Emphasis supplied)** ***Note: Taken from unexecuted BBA.**
7.	Due date of delivery of possession	**29.04.2019** **(Calculated from a letter dated 29.04.2014 along with BBA was issued by the respondent to the complainant)**
8.	Total sale consideration	Rs 66,06,115/- (inclusive basic, IDC & EDC, covered car parking) (Annexure R5, page no 77 of reply the SOA dated 17.11.2020)
9.	Total amount paid by the complainant	Rs. 64,74,238/- (Page no 78 of complainant the SOA dated 17.11.2020)
10.	Occupation certificate	27.07.2020 (Annexure R8, page 89 of reply)
11.	Offer of possession	31.07.2020 (Annexure R7, page 86 of complaint)

B. Facts of the complaint

The complainant has submitted as under: -

3. That complainant has invested in the project i.e., "SPAZE BOULEVARD-II (Previously known as Spaze Apotel)", at Sector 47,

Gurgaon. She booked a unit on 06.02.2013 by paying Rs. 7,00,000/-. The respondent issued allotment letter on 26.06.2013 and allotted unit no. 703, 7th floor admeasuring 641 sq.ft. As per terms and conditions, the cost of the said unit arrived at Rs. 66,06,115/-.

4. That no builder buyer agreement was executed between the complainant and respondent. The complainant has already paid the amount of Rs. 64,74,239/- till date to the respondent. On 31.07.2020, the respondent sent the intimation of the possession along with a demand letter asking for the payment of the Rs. 8,38,504/-. In response to the aforesaid letter, the complainant sent a letter on 10.08.2020 to the respondent whereas a demand to produce the occupancy certificate was raised. The complainant also raised the question of delayed possession charges, GST INPUT CREDIT benefits and along with those queries regarding the imposition of misc charges and labour cess.

5. Various reminders to the respondent went unanswered and the complainant is forced to take it to the Authority for the resolution of the matter. The main grievance of the complainant is that the respondent has taken 7 years to provide the possession of the unit and he is obligated to pay delayed possession charges.

6. That the other grievance of the complainant is that it has mentioned various unwarranted and unexplained entries in the final demand letter which ought to be explained to her and the same be taken back by the respondent builder.

7. Further the cause of action again arose on various occasions, including on: 17.08.2020, 24.08.2020, 07.10.2020, and on many dates till date when the protests were lodged with the respondent about its failure to deliver the project. The cause of action is alive and continuing one.

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

The complainant is seeking the following relief:

I. Pass an appropriate award directing the respondent to count three years from the date of allotment letter as the date of possession.

II. Pass an appropriate award directing the respondent to pay interest @ prescribed rate on delayed possession since due date of possession till date of actual possession on paid amount i.e., **Rs. 64,78,434/-**

III. Pass an appropriate award directing the respondent to justify the other charges in the demand letter and to roll back the labour Cess, sinking fund, Extra IFMS charged in the final demand, and also provide GST INPUT CREDIT.

D. Reply by the respondent.

The respondent had contested the complaint on the following grounds:

8. 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 her. It is submitted that complaints 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.

9. That the project of the respondent is not 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. 387 of 2017 granted by the Haryana Real Estate Regulatory Authority vide memo no. HRERA-178/2017/2459 dated 19.12.2017. It is submitted that the registration is valid till 30.06.2020.

10. That the complainant was allotted a unit bearing no. 703 admeasuring 641 sq. ft. in the project known as Spaze Boulevard II, Sector 47, Sohna Road, Gurugram vide allotment letter dated 26.06.2013 on the basis of application form dated 06.02.2013. The complainant had voluntarily opted for a construction linked payment plan.

11. No Buyer's Agreement had been executed between the parties. It is pertinent to mention that the respondent had issued letter dated 29th of April, 2014 along with which the buyer's agreement containing the

detailed terms and conditions of sale. The respondent had duly mentioned in the aforesaid letter that the complainant was required to execute two copies of the buyer's agreement. The complainant, for reasons best known to her did not come forward to execute the buyer's agreement.

12. That despite the omissions on part of the complainant, the respondent did not cancel her allotment and forfeit the earnest money component as a gesture of good faith. As per Clause 11(a) of the unsigned buyer's agreement, possession of the said unit was to be offered to the complainant within a period of 60 months from the date of execution of the agreement subject to force majeure conditions and timely payments on her part. The timeline with respect to handing over of possession of the said unit cannot be construed in the manner contemplated in the complaint by the complainant. It was further provided in the buyer's 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 authorities would also be excluded from the time period stipulated in the contract for delivery of physical possession.

13. That it is submitted that there is no default on part of respondent in offer of possession of the said unit in the facts and circumstances of the case. The Complainant chose to ignore all these aspects and wilfully defaulted in making timely payments. It is pertinent to mention that as on date, the total outstanding amount liable to be paid by the

complainant to the respondent is Rs. 10,62, 854/-. Thus from the facts and circumstances mentioned above, it is comprehensively established that the time period was consumed in obtaining of requisite permission/sanctions from the concerned statutory authorities. It is pertinent to mention that respondent had submitted an application for grant of environment clearance to the concerned statutory authority on 13.09.2012. However, for one reason or the other arising out of circumstances beyond the power and control of respondent, the aforesaid clearance has only been granted on 24.12.2019 despite due diligence having been exercised by it in this regard. It is pertinent to note that all construction activities involving excavation, civil construction were stopped in Delhi and NCR Districts from 1st of November, 2018 to 10th of November, 2018 vide directions issued by Environment Pollution (Prevention & Control) Authority for the National Capital Region. The respondent had applied for grant of occupation certificate on 20.03.2020. The construction of the building in question has been completed and occupation certificate for the same has been received on 27th of July 2020 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 31st of July 2020 after obtaining the aforesaid occupation certificate.

14. 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 her. Furthermore, the complainant has not executed the buyer's agreement despite issuance of repeated reminders. Thus, the allegation of delay against the respondent is not based on correct and true facts. Moreover, in case of delay caused due to non-receipt of occupation certificate or any other permission/sanction from the competent authorities, no compensation should be payable being part of circumstances beyond the power and control of the Developer. It is further submitted that despite there being a number of defaulters in the project, the respondent had itself infused funds into the project, earnestly fulfilled its obligations and was 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 honourable court. 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

15. 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.

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 handing over of possession

16. 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."*

17. Clause 11(a) of the buyer's agreement (in short, agreement) provides for handing over of possession and is reproduced below:

> ***11(a) Schedule for possession of the said unit***
>
> *The developer based on its present plans and estimates and subject to all just exceptions endeavors to **complete construction of the said building / said unit within a period of sixty months from the date of this agreement** unless there shall be delay or failure due to department delay or due to any circumstances beyond the power and control of the developer or force majeure conditions including but not limited to reasons mentioned in clause 11(b) and 11(c) or due to failure of the allottee(s) to pay in time the total consideration and other charges and dues/payments mentioned in this agreement or any failure on the part of the allottee(s) to abide by all or any of the terms and conditions of this agreement. In case there us any delay on the part of the allottee(s) in making of payments to the developer then notwithstanding rights available to the developer elsewhere in this agreement, the period for implementation of the project shall also be extended by a span of time equivalent to each delay on the part of the allottee(s) in remitting payment(s) to the developer..... **(Emphasis supplied)***
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> ***Note: Taken from unexecuted BBA.**

18. 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 complainants 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 doted lines.

19. **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.

20. 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.

21. 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%.

22. 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;"

23. 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: **Direct the respondent to justify the other charges in the demand letter and to roll back the labourcess, sinking fund, extra IFMS charged in the final demand, and also provide GST input credit.**

- **Labour cess:** Labour cess is levied @1% on the cost of construction incurred by an employer as per the provisions of section 3(1) and 3(3) of the Building and Other Construction Workers' Welfare Cess Act.1996 read with notification no. S.O 2899 da6ed 26.09.1996. It is levied and collected on the cost of construction incurred by employers including contractors under specific conditions. Moreover, this issue has already been dealt with by the authority in complaint titles as ***Mr. Sumit Kumar Gupta and Anr. Vs. Supset Properties Private Limited (962 of 2019)*** wherein it was held that since labour cess is to be paid by the respondent, as such no labour cess should be charges by the respondent. The authority is of the view that the allottee is neither an employer nor a contractor and labour cess is not a tax but a fee. Thus, the demand of labour cess raised upon the complainant is completely arbitrary and she cannot be made liable to pay any labour cess to the respondent. It is the respondent builder who is solely responsible for the disbursement of said amount.

Though labour cess has been claimed from allottee by the builder while raising demand of Rs 10,192/-/-, but legally that amount could not have been collected for the reason that neither the same is part of payment plan nor it is the duty of allottee to pay the same. The builder is supposed to pay a cess for the welfare of the labour employed at the site of construction and which goes to the welfare boards to undertake social security schemes and welfare measure for building and other construction workers. So, the demand raised as labour cess from the allottee is not valid demand and the allottee is not liable to pay the labour cess amount.

- **Extra IFMS:** As per payment plan dated 13.09.2013 the respondent/builder mentioned Rs. 64,100/- being the amount of IFMS. But vide letter dated 31.07.2020, it is demanding that amount @Rs. 150(i.e., 96,150) per sq.ft. of super area though earlier it was @100/- per of super area. It is held that the promoter maybe allowed to collect a reasonable amount from the allottee under the head "IFMS". However, the authority directs that the promoter must always keep the amount collected under this head in a separate bank account and should maintain that account regularly in a very transparent manner. If any allottee of the project requires the promoter to give the details regarding the availability of IFMS amount and the interest accrued thereon, the promoter must provide details to the allottee. It is further clarified that out of this IFMS/IBMS, no amount can be spent by the promoter for the expenditure, and it is liable incur to discharge its liability and obligations as per the provisions of the section 14 of the Act.

- **Sinking Funds:** While issuing offer of possession of the allotted unit, the respondent/builder also raised a demand for Rs. 1,28,200/-. The IFMS is collected for maintenance and upkeep of the said complex and the sinking funds are also collected for the maintenance of the said complex. So, there is no difference between the IFMS and sinking funds. The respondent has already charged for IFMS funds, So, he is not liable to take charges under the head of sinking funds as the purpose of collecting both the amounts is same. So, it is not only unethical on the part of the developer but also illegal.
- **GST Input Credit:** In this context, the attention of the authority was drawn to the fact that the legislature while framing the GST law specifically provided for anti-profiteering measures as a check and to maintain the balance in the inflation of cost on the product/services due to change in migration to a new tax regime i.e. GST, by incorporating section 171 in Central Goods and Services Tax Act, 2017/ Haryana Goods and Services Tax Act, 2017 and the same is reproduced herein below:

"Section 171. (1) Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices."

The intention of the legislature was amply clear that the benefit of tax reduction or 'Input Tax Credit' is required to be passed onto the customers in view of section 171 of HGST/CGST Act, 2017. As per the above said provisions of the Act, it is mandatory for the respondent to pass on the benefits of 'Input Tax Credit' by way of commensurate reduction in price of the flat/unit. Accordingly, respondent should reduce the price of the unit/consideration to be realized from the

buyers' of the flats commensurate with the benefit of ITC received by him. The promoter shall submit the benefit given to the allottee as per section 171 of the HGST Act, 2017.

The builder has to pass the benefit of input tax credit to the buyer. In the event, the respondent-promoter has not passed the benefit of ITC to the buyers of the unit, then it is in contravention to the provisions of section 171(1) of the HGST Act, 2017 and has thus committed an offence as per the provisions of section 171 (3A) of the above Act. The allottee shall be at liberty to approach the State Screening Committee Haryana for initiating proceedings under section 171 of the HGST Act against the respondent-promoter. The concerned SGST Commissioner is advised to take necessary action to ensure that the benefit of ITC is passed on to the allottee in future.

24. 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 11(a) of the undated agreement dated 29.04.2014, the possession of the subject apartment was to be delivered within stipulated time i.e., by 29.04.2019. Accordingly, the OC has been received on 27.07.2020 and respondent has offered the possession on 31.07.2020. 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., 29.04.2019 till 31.09.2020 i.e.,

expiry of two months from the date of offer of possession (31.07.2020) 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.

G. Directions of the authority

25. 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., 29.04.2019 till 31.09.2020 i.e., expiry of two months from the date of offer of possession (31.07.2020) 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.

ii. The demand raised as labour cess from the allottee is not valid demand and the allottee is not liable to pay the labour cess amount.

iii. The respondent has already charged for IFMS funds. So, he is not liable to take charges under the head of sinking funds as the purpose of collecting both the amounts' is same. So, it is not only unethical on the part of the developer but also illegal.

iv. Accordingly, respondent should reduce the price of the unit/consideration to be realized from the buyer of the flats commensurate with the benefit of ITC received by him. The promoter shall submit the benefit given to the allottee as per section 171 of the HGST Act, 2017.

v. The respondent shall not charge anything from the complainant which is not the part of the agreement.

vi. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.

26. Complaint stands disposed of.

27. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 21.07.2022