

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

Complaint no.	:	1182 of 2021
Date of filing complaint:		09.03.2021
First date of hearing:		20.04.2021
Date of decision	:	21.07.2022

1. Prakash Agarwal	Complainants
2. Sunita Agarwal Both R/o: B-8, Geetanjali Enclave, Sector - 78, Village - Naurangpur, Gurugram	
Versus	
M/s Spaze Towers Private Limited R/o: A-307, Ansal Chammer - 1-3, Bhikaji Cama Place, New Delhi - 110066	Respondent

CORAM:	
Dr. K.K Khandelwal	Chairman
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
None	Complainant
Sh. J.K. Dang (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of

the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

2. The particulars of the project, the details of sale consideration, the amount paid by the complainant, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S.no	Heads	Information
1.	Project name and location	"Spaze Arrow" Sector-78, village Gurugram, Haryana.
2.	Project area	3.24 acres
3.	Nature of the project	Commercial colony
4.	DTCP license no. and validity status	56 of 2012 dated 06.06.2012
5.	Name of licensee	Ishan Singh
6.	RERA Registered/ not registered	Registered
	RERA Registration valid up to	vide registration no. 13 of 2018 dated 11.01.2018 30.06.2020
7.	Allotment letter	25.05.2012 (Page 16 of complaint)
8.	Unit no.	OF - 1018 and OF - 1019 (Page 16 of complaint)
9.	Unit area	750 sq. ft. per unit (Page 16 of complaint)
10.	Date of execution of builder buyer agreement	Not executed
11.	Total sale consideration	Rs. 20,62,500/- + Rs.

		20,62,500/- = 41,25,000/- (As per page 31 and 57 of complaint)
12.	Total amount paid by the complainant	Rs. 42,52,462/- (Page 16 of complaint)
13.	Date of signing of MOU	25.05.2012 (Both the MOUs are executed on same date)
14.	MOU Clause	<i>Clause 2: That second party shall pay to first party Rs. 20,62,500/- towards entire sales consideration of the super area purchased at the time of booking of the above said space thereafter the second party shall enter into a standard buyer agreement with the first party as and when demanded by the first party. The first party shall give an investment return @Rs. 60 only per sq. ft. per month w.e.f. 09.05.2012 of the super area till such time the office space is leased out on behalf of second party by the first party or for the period of 36 months from the date of offer of possession of said unit by first party to second party, whichever is earlier.</i>
15.	Assured return amount	45000 per month (For both of the units)
16.	Offer of possession	Not offered
17.	Occupation Certificate	Not obtained

B. Facts of the complaint:

3. The complaint is based on the agreement between complainants and respondent in respect of unit in question, the terms and conditions thereof being documented as per two memorandums of understanding (MOUs) both dated 25.05.2012 between the parties. The complainants were induced by respondent to pay a sum of Rs. 20,62,500/- for office space [total: Rs. 41,25,000/-] towards entire sales consideration upfront at time of booking. The complainants relied on the categorical and unequivocal commitment of respondent and obligation of respondent that guaranteed investment return @ Rs.45,000/- per month as per MOU w.e.f. 09.05.2012 for unit No. OF-1018 and guaranteed investment return @ Rs.45,000/- per month as per the other MOU w.e.f. 19.05.2012 for unit No. OF-1019 shall be paid by respondent to complainants till such time the office space is leased out on behalf of complainant by respondent or for a period of 36 months from the date of offer of possession of the said units whichever being earlier.
4. Over last several years, since January 2017, respondent has begun to significantly delay and default in payment of the guaranteed investment return amount to complainants. The written contractual obligations of respondent towards complainants particularly to pay monthly guaranteed investment return under both MOUs still subsists. Instead of continuing to pay monthly guaranteed investment return amounts to complainants in time, respondent sent four letters dated 15.07.2020 for the two MOUs alleging that respondent has been facing and continuing to face

acute financial hardship on account of the unforeseen Covid-19 situation and it was therefore, invoking force majeure event allegedly under clause 8 of the MOUs. The respondent therefore refused to pay even monthly guaranteed investment return commencing from 22.03.2020 till 30.09.2020. The respondent also stated therein that it would make payment from the period commencing from 01.10.2020 after circumstances get normal but without being liable towards interest/ penalty or past arrears, and that depending upon how the force majeure progresses and the respondent may require additional waivers.

5. The complainants duly replied to respondent's four letters dated 15.07.2020 vide their two letters dated 14.08.2020 vehemently disputing stand of respondent and calling upon him to forthwith pay total outstanding amount together with interest, provide necessary commitments in regard to completion of project, date of handing over possession and execution of sale deed for the office spaces in favour of complainants. The complainants are therefore losing on both accounts i.e., are unable to enjoy and realize the market value of the said office space as well as are unable to receive the fair market rent as the guaranteed amount was fixed way back in 2012 and now falls much short of the present prevailing market rent. To add to the difficulties, respondent has now also stopped making payment of even the said minimum guaranteed investment return @ Rs 45,000 per month per office space to complainants and is not proceeding to complete the project quickly and have provided no date of handing over of the offices to complainants.

6. In any case, the respondent has itself alleged "financial hardship" which as per well-established law does not entitle it to take refuge under so called force majeure. Unless fundamental basis of a contract is dislodged and performance of contract is hindered by the unforeseen event, a force majeure clause cannot apply. Further, a force majeure clause is to be interpreted narrowly and not broadly. There has to be 'real reason' and a 'real justification' to be considered in order to invoke a force majeure clause. Respondent does not satisfy any such real justification. The respondent has delayed payments in past several months and has not paid any guaranteed investment return for any month for period commencing from 22.03.2020 till 30.09.2020. The respondent recently issued latest cheques for month of December 2020 in month of February 2021 and it is clear that respondent is not interested in honouring its written contractual obligations. The respondent is thus already in arrears of payment and is liable to pay interest for the delays. Therefore, complainants are seeking full compliance of the contractual and legal obligations by the respondent as prayed.

C. Relief sought by the complainant:

7. The complainants have sought the following relief(s):
- i. To direct the respondent to comply with its obligations under the agreements (the two MOUs) dated 25.05.2012 and forthwith pay to complainants the total outstanding monthly guaranteed investment return @ Rs. 45,000/- per month per office space [total: Rs. 90,000/- per month for both office spaces] for period commencing from 22.03.2020 till



- 30.09.2020 aggregating to Rs.5,69,032/-, and for the month of January 2021 aggregating to Rs.90,000/-, and on a monthly basis thereafter;
- ii. To direct respondent to pay to complainants, interest @ 18% p.a. which amounts to Rs.3,00,932/- till date for delay in payment of monthly guaranteed investment return amounts since the year 2017 as per details in annexure P/3 & P/4, along with continuing interest @18% p.a. on the outstanding amount till the date of actual payment to the complainants.
 - iii. To direct the respondent to pay to the complainants interest at prescribed rate in terms of the Act (in addition to the monthly guaranteed investment return) for every month of delay from the date the possession of the two office spaces ought to have been handed over till the actual date of handing over of the possession by the respondent.
 - iv. To direct respondent to pay to the complainants interest at prescribed rate in terms of the Act (in addition to the monthly guaranteed investment return) for every month of delay from the date the possession of the two office spaces ought to have been handed over till the actual date of handing over of the possession by the Respondent.
 - v. To direct respondent to pay compensation to complainants for a sum of Rs.10,00,000/- or any other amount as deemed fit and proper by this Authority towards mental harassment, agony and costs suffered.

D. Reply by respondent

8. That the present complaint is not maintainable in law or on facts. The complainants have no locus standi or cause of action to file the present complaint. Furthermore, 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 memorandum of understanding dated 25.05.2012, as shall be evident from the submissions made in the following paras of the present reply. The complaint is barred by limitation.
9. That it is submitted that respondent has duly registered the project in question. The complainants, being interested in the project, approached the respondent and expressed the desire for booking units in the project on such terms and conditions as agreed between the parties. It is pertinent to mention that the complainants, prior to approaching the respondent, had made independent and extensive enquiries about all the aspects of the project and only upon being satisfied about the same, did the complainants proceed to book the units in question. The complainants had conveyed to the respondent that their interest was in receiving assured monthly returns on their investment and the date of delivery of possession of the units to be booked by them was not of importance. The respondent acceded to the said request made by the complainants. For the purposes of allotment of units bearing no 1018 and 1019 both located on the 1^{0th} Floor of the project and admeasuring 750 sqft of super area each tentatively, as well as payment of investment returns to the complainants by the respondent, the parties executed two

memorandum of understanding (MOUs), both dated 25.05.2012 (hereinafter referred to as the MOUs).

10. That in accordance with Clause 2 of the MOUs executed between the parties, the complainants paid a sum of Rs 20,62,500/- towards the entire sale consideration of each unit. The respondent had agreed to pay investment return @ Rs 60/- per sqft per month with effect from 09.05.2012 (for unit no 1018) and with effect from 19.05.2012 (for unit no 1019), till such time the units were leased out by the respondent on behalf of the complainants or for a period of 36 months from the date of offer of possession of the units by the respondent to the complainants, whichever is earlier but subject to clauses 7 and 9 of the MOUs. The complainants had agreed and undertook to execute the buyer's agreement with the respondent as and when demanded by it. That clause 9 of the MOUs, *inter alia*, provides that in the event the office spaces leased out so as to give a monthly rental that is less than the investment return of Rs 60/- per sqft per month of super area, the sale consideration of the units shall stand reduced as per the formula given in the said clause. Similarly, if the space is leased out so as to give a monthly rental of more than the investment return of Rs 60/- per sqft per month of super area, the sale consideration of the spaces shall increase as per the formula given in the said clause.
11. That for the purpose of promotion, construction and development of the project referred to above, 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. is 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. It would also not be out of place to mention that for an extremely long span of time the concerned authority was not holding office and functioning in the regular course of its duties. Therefore, the non-grant of environmental clearance for a span of six years has considerably delayed the execution of the project. The said circumstance was/is certainly beyond the power and control of the respondent. The said circumstance is certainly beyond the power and control of the respondent. 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.

12. That, the respondent has 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 for delivery of possession. In any event, it has been explicitly provided in the MOUs that the complainants would execute the buyer's agreement in the standard format of the respondent, as and when demanded by the respondent. The buyer's agreement is yet to be executed between the parties and hence the timelines for delivery of possession would only be calculated upon execution of the buyer's

agreement. It is also pertinent to mention herein that consequent to registration of the present project under the Act, the timeline for delivery of possession stands extended. Thus, the present complaint is misconceived and is premature. 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.

13. That it is further submitted that the respondent left no stones 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 were also brought to a standstill. 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 was 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 the 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.

14. Through a letter dated 15th July 2020, it was communicated to the complainants that in light of the force majeure event and in accordance with clause 8 of the MOUs, the respondent would not be paying investment return commencing from 22 March 2020 till 30 September 2020. It was further communicated to the complainants that the payment of returns for the period ending on 21 March 2020 was being paid in three equal instalments and the cheques for the same had been enclosed along with the said communication. It was further communicated to the complainants that insofar as payment of future investment returns was concerned, payment for the same commencing from 1 October 2020 would commence after normalisation of the situation without any liability towards payment of interest/penalty or past years. It is pertinent to mention here in that the cheques towards returns for the month of October 2020 were also duly presented and encashed by the complainants on 5 December 2020 after they were duly satisfied with the explanation provided by the respondent. That shockingly, the complainants started addressing false and malicious complaints against the respondent to various authorities. The complainants filed complaints before PS Sadar, New Delhi, PS RK Puram, New Delhi, and various other authorities including the Registrar of Companies, New Delhi. 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.

15. 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:

16. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram district. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of

all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings regarding relief sought by the complainant:

- i. To direct the respondent to comply with its obligations under the agreements (the two MOUs) dated 25.05.2012 and forthwith pay to complainants the total outstanding monthly guaranteed investment return @ Rs. 45,000/- per month per office space [total: Rs. 90,000/- per month for both office spaces] for period commencing from 22.03.2020 till 30.09.2020 aggregating to Rs.5,69,032/-, and for the month of January 2021 aggregating to Rs.90,000/-, and on a monthly basis thereafter; and
- ii. To direct respondent to pay to complainants, interest @ 18% p.a. which amounts to Rs.3,00,932/- till date for delay in payment of monthly guaranteed investment return amounts since the year 2017 as per details in Annexure P/3 & P/4, along with continuing interest @18% p.a. on the outstanding amount till the date of actual payment to the complainants.
- iii. To direct respondent to pay to complainants the interest at prescribed rate in terms of the Act (in addition to the monthly guaranteed investment return) for every month of delay from the date the possession of the two office spaces ought to have been handed over till the actual date of handing over of the possession by the Respondent.

- iv. **To direct respondents to pay to complainants the interest at prescribed rate in terms of the Act (in addition to the monthly guaranteed investment return) for every month of delay from the date the possession of the two office spaces ought to have been handed over till the actual date of handing over of the possession by the Respondent.**

The above-mentioned reliefs, as sought by the complainants are being taken together as the findings on one relief would definitely affect the result of the other relief being interconnected. Considering the above-mentioned facts, the authority calculated due date of possession as per date of signing of MOU i.e., **within 36 months from the date of execution of this MOU** As such, the due date of possession comes out to be 25.05.2015. Accordingly, the complainants are entitled for delayed possession charges as per the proviso of section 18(1) of the Real Estate (Regulation and Development) Act, 2016 at the prescribed rate of interest i.e., 9.80% p.a. for every month of delay on the amount paid by the complainant to the respondent from the due date of possession i.e., 25.05.2015 till the date of actual handing of possession or offer of possession plus 2 months whichever is earlier. The complainants have sought assured return as per clause 2 of Memorandum of understanding i.e., monthly return of **Rs.45,000/- with effect from 09.05.2012 till such time the office space is leased out on behalf of second party by the first party or for the period of 36 months from the date of offer of possession of said unit by first party to second party, whichever is earlier.** The respondent has complied with the terms and conditions of the agreement. Though for some time, he paid the amount of assured returns till March 2020 but later on, the respondent refused to pay the same by taking a plea of force majeure on account of COVID-19.

17. The Act of 2016 defines "agreement for sale" means an agreement entered into between the promoter and the allottee [Section 2(c)]. An agreement defines the rights and liabilities of both the parties i.e., promoter and the allottee and marks the start of new contractual relationship between them. This contractual relationship gives rise to future agreements and transactions between them. Therefore, different kinds of payment plans were in vogue and legal within the meaning of the agreement for sale. One of the integral part of this agreement is the transaction of assured return inter-se parties. Though the "agreement for sale" after coming into force of this Act (i.e., Act of 2016) shall be in the prescribed form as per rules but this Act of 2016 does not rewrite the "agreement" entered between promoter and allottee prior to coming into force of the Act as held by the Hon'ble Bombay High Court in case *Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors.*, (Writ Petition No. 2737 of 2017) decided on 06.12.2017. Since the agreement defines the buyer-promoter relationship therefore, it can be said that the agreement for assured return between the promoter and allottee arises out of the same relationship. Therefore, it can be said that the real estate authority has complete jurisdiction to deal with assured return cases as the contractual relationship arise out of agreement for sale only and between the same parties as per the provisions of section 11(4)(a) of the Act of 2016 which provides that the promoter would be responsible for all the obligations under the Act as per the agreement for sale till the execution of conveyance deed of the unit in favour of the allottee. The builder is liable to pay that amount as agreed upon and can't take a plea that it is not liable to pay the amount of assured returns. Moreover, an agreement defines the builder-buyer

relationship. So, it can be said that the agreement for assured returns between the promoter and allottee arises out of the same relationship and is marked by the original agreement for sale.

Now the proposition before the authority is whether an allottee is entitled for assured return even after expiry of due date of possession, can claim both the assured return as well as delayed possession charges?

To answer the above proposition, it is worthwhile to consider that the assured return is payable to the allottee on account of a provision in the BBA or in a MoU having reference of the BBA or an addendum to the BBA/MOU or allotment letter. The assured return in this case is payable w.e.f. 09.05.2012 till *such time the office space is leased out on behalf of second party by the first party or for the period of 36 months from the date of offer of possession of said unit by first party to second party, whichever is earlier.* The promoter has committed to pay monthly assured return of Rs.45,000/- which is more than reasonable in the present circumstances. If we compare this assured return with delayed possession charges payable under proviso to section 18 (1) of the Real Estate (Regulation and Development) Act, 2016, the assured return is much better i.e., the assured return in this case is payable an amount of Rs.45,000/- per month whereas the monthly delay possession charges are payable at the rate of 9.80% per annum i.e., Rs. 33,687/-. Accordingly, the interest of the allottee is protected even after the due date of possession is over as the assured return are payable **till the possession of the said unit.** The purpose of delayed possession charges after due date of possession is served on payment of assured return after due date of possession as the same is

to safeguard the interest of the allottee as his money is continued to be used by the promoter even after the promised due date is over and in return, he is paid either the assured return or delayed possession charges whichever is higher. Accordingly, the Authority decides that in cases where assured return is reasonable and comparable with the delayed possession charges under section 18 and assured return is payable even after due date of possession till **the possession of a said unit**, then the allottee shall be entitled to assured return or delayed possession charges whichever is higher without prejudice to any other remedy including compensation.

Therefore, considering the facts of the present case, the respondent is directed to pay the amount of assured return at the agreed rate from the date the payment of assured return has not been paid *till such time the office space is leased out on behalf of second party by the first party or for the period of 36 months from the date of offer of possession of said unit by first party to second party, whichever is earlier.*

The respondent is directed to pay the outstanding accrued assured return amount till date at the agreed rate within 90 days from the date of this order after adjustment of outstanding dues, if any, from the complainant and failing which that amount would be payable with interest @ 7.80% p.a. till the date of actual realization.

F.II To direct respondent to pay compensation to complainants for a sum of Rs.10,00,000/- or any other amount as deemed fit and proper by this Authority towards mental harassment, agony and costs suffered.

The complainant is claiming compensation in the present relief. The authority is of the view that it is important to understand that the Act has clearly provided interest and compensation as separate entitlement/right which the allottee can claim. For claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainant may file a separate complaint before Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.

I. Directions of the authority

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

- i. The the respondent is directed to pay the amount of assured return at the agreed rate from the date the payment of assured return has not been paid till *such time the office space is leased out on behalf of second party by the first party or for the period of 36 months from the date of offer of possession of said unit by first party to second party, whichever is earlier* as per clause 2 of memorandum of understanding dated 25.05.2012.
- ii. The respondent is also liable to pay the arrears of assured returns as agreed upon up to the date of order with interest@ 7.80% p.a. on the unpaid amount as per proviso to the section 34(1) of the CPC i.e., the rates at which lending of moneys is being made by the nationalized banks for commercial transactions.

iii. The arrears of assured return accrued besides interest would be paid to the complainants within a period of 90 days from the date of this order, after adjustment dues if any from them and failing which, that amount would be recoverable with interest at the rate of 7.80% p.a. till the date of actual realisation.

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

19. Complaint stands disposed of.

20. File be consigned to registry.


(Vijay Kumar Goyal)
Member


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

Dated: 21.07.2022

HARERA
GURUGRAM