

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

Complaint no. :	2366 of 2018
Date of filing complaint:	02.04.2019
First date of hearing:	30.09.2019
Date of decision :	11.05.2022

Nipun Mehta R/o: H.no: A112, ground floor, DK road, Uttam Nagar Mohan Garden, West Delhi-110059A-58, Vikaspuri, New Delhi-110018	Complainant
Versus	
M/s Spaze towers Pvt. Ltd. R/o: A-307, Ansal chamber-1,3, Bhikaji Cama Place, New Delhi-110066	Respondent

CORAM:	
Dr. KK Khandelwal	Chairman
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Sh. Bhupender Pratap Singh (Advocate)	Complainant
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 unit details, sale consideration, the amount paid by the complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S. No.	Particulars	Details
1.	Name of the project	Spaze "Tristaar", Sector 92, Gurgaon, Haryana.
2.	Project area	2.71875 acres
3.	Nature of the project	Commercial complex
5.	DTCP license no. and validity status	72 of 2013 dated 27.07.2013 valid up to 26/07/2017
6.	Name of licensee	Spaze Towers Pvt. Ltd
8.	RERA Registered/ not registered	Registered vide registration no. 247 of 2017 dated 26.09.2017
9.	RERA registration valid up to	30.06.2020
10.	Unit no.	2120, 2 nd floor [page 60 of complaint]
11.	Unit area admeasuring	500 sq. ft.
12.	Allotment letter	03.11.2014 [page 60 of complaint]
13.	Date of execution of agreement to sell	15.11.2014

		[page 62 of complaint]
15.	Possession clause	<p>11. POSSESSION</p> <p>(a) Schedule for possession of the Said Unit</p> <p>The Developer based on its present plans and estimates and subject to all just exceptions endeavours to complete construction of the Said Building/ Said Unit in terms of the approvals (including the renewal/extended period described therein) and in accordance with the terms 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 or any part thereof and other charges to abide by all or any of the terms and conditions of this Agreement. In case there is 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.</p>

		<p>The possession clause is given in file, but the time period is not mentioned. Therefore, the due date is calculated as per clause 1.2, relevant part is reproduced below:</p> <p><i>Escalation charges shall be computed at the expiry of sixty month from the date of this agreement or at the time of offer of possession (permissive or otherwise), whichever is earlier. The RBI indexes for the month of execution of this agreement and for the month at the expiry of sixty months from the date of this agreement/month of offer of possession (permissive or otherwise), whichever is earlier, shall be taken as the opening and closing indexes respectively to compute the escalation charges.</i></p> <p>[Page 44 of reply]</p>
16.	Due date of possession of possession as per clause 1.2 of buyer's agreement	15.11.2019 Due date is calculated w.e.f. 60 months from the date of this agreement.
17.	Total consideration as per payment plan at page 80 of reply	Rs. 43,76,400/- (inclusive of BSP, EDC & IDC, PLC, and car parking)
18.	Total amount paid by the complainant as per the statement of account dated 26.12.2018 at page 87 of reply	Rs. 25,41,455/-
19.	Occupation certificate	During hearing the counsel for the respondent has placed on record the

		occupation certificate bearing Memo no. ZP/925/SD(DK) 2021/11018 dated 03.05.2021 issued by the DTCP in respect of the said project/unit.
20.	Offer of possession	Not offered
21.	Delay in handing over possession w.e.f. due date of handing over possession i.e., 15.11.2019 till date of decision i.e., 11.05.2022	2 years 5 month 26 days

B. Facts of the complaints

3. The complainant has submitted that vide prescribed application form dated 07.12.2013, he applied under pre-launch for a unit no. 2120, second floor admeasuring 500 sq. ft., in "Spaze Tristar" commercial project of developer-Spaze Towers Pvt. Ltd. The application form was duly filled along with booking amount of Rs. 2,00,000/- vide cheque on 09.12.2013. At the time of application, allotment & execution of agreement the abovesaid project was not registered with the authority but it was registered later on under registration no. 247 of 2017.
4. The complainant has submitted that there is no clause in the builder buyer agreement that speaks out of the word possession date and penalties in case of delayed possession. This makes the project an indefinite one & positions the developer/respondent in the dominating position. Later on, the developer changed the floor plan and as per media, advertisement & through their marketing & sales team, the building is now limited to five floors instead of fourteen floors. Due to

developer's misconduct and change in floor plan without the consent of complainant, the underlying unit was dislocated from a prime location i.e., piyaza facing to a corner location for adjusting the better interests of bigger corporate clients like food court in the place of the underlying unit location. The images of the original location of the unit and the revised location are attached in the annexure for reference. Therefore, the whole purpose of booking the unit was defeated by the change in floor plan & location of the unit by the developer.

5. The developer also got initially approved building plan changed to accommodate new floor plan without informing the complainant/buyer and also gave a false no objection consent from allottee/buyers to the chief town planner, Town & Country Planning Department, Haryana which is on record in the revised building plan approval as attached in the annexure. In fact, developer never sought buyer's opinion & vote for change in building plan through any communication.
6. As per demand due on 25.08.2017 & 26.09.2018 of the developer, piyaza facing charges are still being demanded when the unit is no more preferential facing. Moreover, the complainant has not received any reply of any of his correspondence in this regard sent by me through registered. As per earlier floor plan, the payment plan under construction linked plan depicts payments to be made by buyer till 14th floors. However, the floor plan now stands at 5th floor only and developer is raising arbitrary demand sixth floor onwards that does not

exist. The developer also has not revised the payment plan as per new approved building plan by DTCP, Haryana. The amount by way of interest is being raised arbitrarily by developer using modus operandi of gaining time and putting buyer in a situation to not pay the unjustified demands of developer on the following subheads:

- i. Wrongful levy of piyaza facing charges when the unit has been moved to a non piyaza facing location. The revised floor plan with unit no. 2120 attached for reference.
 - ii. Wrongful demand raised on commencement of 6th floor slab wherein at present, the revised floor plan depicts building only till 5th floors..
 - iii. Wrongful charging of interest on delayed payment that got delayed by putting buyer in situation of uncertainty as to what holds in future for the investment made by him in unit no. 2120 and made him hold on to the false payment demands of the developer.
7. The developer charged excess IDC/EDC charges & failed to refund excess IDC/EDC charges as per new notification on calculation & charging of IDC/EDC charges issued by government of Haryana and applicable in Gurugram. The developer has purposefully drafted one sided agreement which does not indicates time line of completion & possession of his unit not does it provides any provision binding on developer to pay penalty charges for delay in possession and completion of project.

C. Relief sought by the complainant:

8. The complainant has sought following relief(s).

- i. Direct the respondent to refund the amount of Rs. 25,41,455/- paid by the complainant along with prescribed interest.

D. Reply by the respondent

- i. The respondent contested the complaint on the following grounds. The present complaint is not maintainable in law or on facts. The complainant has filed the present complaint seeking refund, interest and compensation. It is respectfully 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, and by this hon'ble authority. The present complaint is liable to be dismissed on this ground alone. The complainant is not an "aggrieved party" or "allottees" as defined under the Act. He is an investor who has purchased the unit in question for an investment. The complaint is also barred by limitation.
- ii. That complicated questions of fact and law are involved in the present lis which can be disposed of in a regular trial after leading of evidence and which cannot be decided in summary proceedings before this authority. 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 15.11.2014, as shall be evident from the submissions made in the following paras of the present reply.

- iii. It is submitted that the contractual relationship between the parties are governed by the terms and condition of the buyer's agreement dated 15.11.2014. The said agreement was voluntarily and consciously executed by the complainant after reading and understanding the contents thereof and comprehending and appreciating the implications and consequences of the provisions of the buyer's agreement. Once a contract is entered into between the parties, the rights and obligations of the parties are determined entirely by the covenants incorporated in it. No party to a contract can be permitted to assert any right of any nature at variance with the terms and conditions incorporated in the contract.
- iv. That furthermore without admitting or acknowledging in any manner the truth or legality of the allegations levelled by the complainant and without prejudice to the contentions of the respondent, it is submitted that so far as delivery of physical possession of the unit in question is concerned, it was contemplated in clause 1.2 of buyer' agreement dated 15.11.2014 that the respondent would endeavour to complete the construction of the project within a period of 60 months from the date of execution of the builder buyer agreement. It is pertinent to

mention here that the time contemplated for completion of the project has not lapsed yet. Therefore, the complaint preferred by the complainant is premature and is liable to be dismissed on this ground alone. The complainant had opted for a partly time bound, construction linked plan in which the first three payments were construction linked while the remaining instalments were payable upon achievement of the milestones provided therein. From the very beginning, he has been irregular in payment of instalments and consequently, the respondent has levied interest on delayed payments, in accordance with the buyer's agreement.

- v. That, without admitting or acknowledging the truth or legality of the allegations advanced by the complainant 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 relied upon by him seeking interest and other reliefs cannot be called to aid in derogation and ignorance of the provisions of the buyer's agreement. The respondent has registered the said project under the provisions of the Act and the period of registration has been granted up till 30.06.2020. In other words, the respondent is committed to complete the project and deliver the unit in question by June 2020, subject to force majeure conditions and timely payment of instalments and compliance of the terms and conditions of the buyer's agreement. Thus, the

institution of the present complaint is highly premature and misconceived and the same is liable to be dismissed at the very threshold.

- vi. It is submitted that the respondent has acted strictly in accordance with the terms and conditions of the buyer's agreement between the parties. There is no default or lapse on the part of respondent. It is evident from the entire sequence of events, that no illegality can be attributed to the respondent. Thus, the allegations levelled by the complainant qua the respondent are totally baseless and do not merit any consideration by this authority.
9. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submissions made by the parties.

D. Jurisdiction of the authority

11. 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 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 complainant at a later stage.

E. Finding on the objections raised by the respondent:

E.I. Objection regarding the complainant being investor:

10. It is pleaded on behalf of respondent that complainant is an investor and not consumer. So, he is not entitled to any protection under the Act and the complaint filed by him under Section 31 of the Act, 2016 is not maintainable. It is pleaded 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 observes 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 the preamble is an introduction of a statute and states the main aims and objects of enacting a statute but at the same time, the 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 he 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 buyer's agreement, it is revealed that the complainant is a buyer and paid considerable amount towards purchase of subject unit. At this stage, it is important to stress upon the definition of term allottee under the Act, and the same is reproduced below for ready reference:

"Z(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."

11. In view of above-mentioned definition of allottee as well as the terms and conditions of the buyer's agreement executed between the parties, it is crystal clear that the complainant is an allottee as the subject unit was allotted to him by the respondent/promoter. The concept of investor is not defined or referred in the Act of 2016. As per definition 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) Ltd. 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 allottee being an investor is not entitled to protection of this Act also stands rejected.

F. Findings on the relief sought by the complainant

F.I Direct the respondent to refund the amount of Rs. 25,41,455/- paid by the complainant along with prescribed interest.

12. Vide letter dated 03.11.2014, the complainant was allotted the subject unit by the respondent for a total sale consideration of Rs. 43,76,400/-. A buyer's agreement dated 15.11.2014 was executed between the parties. The due date of possession of the subject unit was fixed as 60 months from the date of signing of agreement which comes to 15.11.2019. After signing of flat buyer's agreement, the complainant started depositing various amounts against the allotted unit and paid a sum of Rs. 25,41,455/- up to 25.08.2018 as is evident from ledger dated

26.12.2018. It is the case of complainant that since the construction of project was not as per terms and conditions of the agreement, so he did not want to continue in the project and which ultimately led to his withdrawal from the project on 10.08.2017 by sending a letter (page 126 of complaint), followed by reminders dated 22.11.2017 & 12.09.2018 respectively (page 130 & 133 of complaint). So, keeping in view the fact that the allottee- complainant wishes to withdraw from the project and is demanding return of the amount received by the promoter in respect of the unit with interest on his failure to complete or inability to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. the matter is covered under section 18(1) of the Act of 2016.

13. The occupation certificate of the building/tower where allotted unit of the complainant is situated was obtained (*inadvertently mentioned in the proceeding of the day dated 11.05.2022 as having not been received*) after filing of application by him for return of the amount received by the promoter on failure of promoter to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. The complainant-allottee has already wished to withdraw from the project and the allottee has become entitled to the right under section 19(4) to claim the refund of amount paid along with interest at prescribed rate from the promoter as the he has failed to comply or unable to give possession of the unit in accordance with the terms of agreement for sale. Accordingly, the promoter is liable to return the amount received by

him from the allottee in respect of that unit with interest at the prescribed rate.

14. Further in the judgement of the Hon'ble Supreme Court of India in the case of *Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2021-2022(I), RCR (civil),357* and followed by the Hon'ble High Court of Punjab & Haryana in case *Ramprashtha Promoters and Developers Pvt Ltd Vs Union of India and Ors. in CWP No.6688 of 2021* decided on 04.03.2022, and wherein it was observed as under:

25. The unqualified right of the allottee to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed

15. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottees as per agreement for sale under section 11(4)(a). The promoter has failed to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottee, as he wishes to

withdraw from the project, to return the amount received by it in respect of the unit with interest at such rate as may be prescribed.

16. This is without prejudice to any other remedy available to the allottee including compensation for which he may file an application for adjudging compensation with the adjudicating officer under sections 71 & 72 read with section 31(1) of the Act of 2016.
17. The authority hereby directs the promoter to return the complainant the amount received by it i.e., Rs. 25,41,455/- with interest at the rate of 9.40% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

H. Directions of the Authority:

18. Hence, the Authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoters as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:
 - i. The respondent/promoter is directed to refund the amount i.e., Rs.25,41,455/-received by it from the complainant along with interest at the rate of 9.40% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the deposited amount

ii. A period of 90 days is given to the respondents to comply with the directions given in this order and failing which legal consequences would follow.

19. Complaint stands disposed of.

20. File be consigned to the Registry.



(Vijay Kumar Goyal)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 11.05.2022





(Dr. KK Khandelwal)

Chairman



HARERA
GURUGRAM