BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**1360 of 2019**
Date of filing complaint:	**02.04.2019**
First date of hearing:	**30.09.2019**
Date of decision :	**11.05.2022**

	Anjali Vashista and Aman Sharma **Both R/o**: H.no: A112, ground floor, DK road, Uttam Nagar Mohan Garden, West Delhi-110059	**Complainants**
	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. Sukhbir Yadav (Advocate)	Complainants
Sh. J.K. Dang (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 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 "Tristaar", Sector 92, Gurgaon, Haryana.
2.	Project area	2.71875 acres
3.	Nature of the project	Commercial complex
4.	DTCP License	72 of 2013 dated 27.07.2013 and valid up to 26.07.2017
5.	Name of the licensee	Spaze Towers Pvt. Ltd
6.	RERA Registered/ not registered	**Registered vide registration no. 247 of 2017 dated 26.09.2017 valid upto 30.06.2020**
7.	Unit no.	0075, Ground floor [annexure P7, page 47 of complaint]
8.	Unit measuring (super area)	301 sq. ft.
9.	Date of allotment	26.07.2016 [annexure P6, page 43 of complaint]
10.	Date of execution of builder buyer agreement	26.07.2016 [annexure P7, page 44 of complaint]
11.	Possession clause	***11. POSSESSION*** **(a) Schedule for possession of the**

		Said Unit 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. 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:

		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.
12.	Due date of possession	26.07.2021 vide clause 1.2 of the agreement: at the expiry of 60 months from the date of this agreement or at the time of offer of possession which is earlier
13.	Total sale consideration	Rs. 36,85,143/- (as per payment plan, at page 91 of complaint)
14.	Total amount paid by the complainants	Rs.28,02,318/- (as per the statement of account dated 18.04.2019 at page 98 of reply)
15.	Occupation Certificate	During hearing the counsel for the respondent has placed on record the occupation certification bearing Memo No. ZP/925/SD(DK)2021/11018 dated 3.05.2021 issued by the DTCP in respect of the said project/unit.
16.	Offer of possession	Not offered
17.	Delay in handing over possession w.e.f. due date of handing over possession i.e., 26.07.2021 till date of decision i.e., 11.05.2022	9 month and 15 days

B. Facts of the complaint:

3. The complainants have submitted that on 02.11.2013, they received a call from Mr. Vishal Batra (broker dealer/agent) introducing himself authorized agent of respondent developer and marketed about the upcoming project of "Spaze Towers Pvt. Ltd". at prime location of Sector - 92, Gurgaon. They along with real estate agent visited the project site and marketing office of respondent. The respondent in collusion with real estate agent showed rosy picture of project and assured that project would be ready for possession within 42 months of booking. Relying on representations and assurance of respondent, they applied for registration of retail/shop space in upcoming commercial project at sector -92, Gurgaon at ground floor with area admeasuring 301 sq. ft. vide shop no. 0075. They submitted a demand draft of Rs. 4,00,000/- as booking amount and signed a pre-printed application form. The shop was booked for total sale consideration of Rs. 36,85,143/-including B.S.P., E.D.C & I.D.C and PLC under the construction link payment plan but at later stage, PLC was waived off.

4. That on 02.04.2014, 23.05.2014, and 08.07.2014 on a demand of respondent, the complainants issued cheques for Rs. 3,27,148/-, 3,00,000/, 63,574/- in its favour. Till date, the complainants have paid Rs. 10,90,723/- i.e., 30 % of cost. On 25.04.2016, they issued two cheques of Rs. 1,00,000/- and Rs. 1,27,761/- respectively. On 26.07.2016, respondent has issued an allotment letter confirming the allotment of unit no. 0075 on ground floor with tentative admeasuring super area 301 sq. ft. for sale consideration of Rs.

36,85,143/-. After a long follow up, a pre-printed, one sided, arbitrary, shop buyer agreement was executed between the parties. It is pertinent to mention here that there was no firm date of possession in B.B.A. and under the compelling circumstances the complainants had signed the said agreement.

5. On 22.08.2016, the complainants issued two cheques of Rs. 1,18,025/- and Rs. 1,10,000/- followed by another cheque of Rs. 48,302/- dated 30.11.2016. On 03.02.2018, the respondent informed them *"during the course of construction of the project, certain suitable and necessary alterations/changes have taken place in units, consequent to which, some of the units have been relocate/repositioned including aforesaid unit no. 0075"*, which was earlier allotted to them. Therefore, the respondent proposed to shift them to another prime location unit on ground floor. After a long discussion, they choose corner and sector road facing unit no. 54, admeasuring 347 sq.ft. as per department approved/sanctioned plan dated 17.04.2017. On 03.02.2018, respondent endorsed the new unit no. 54 in his record and on allotment letter, builder buyer agreement and payment receipts. The complainants have given a duly signed and notarized undertaking cum indemnity for change in unit no. On 05.02.2018, the respondent issued payment plan and statement of account for new unit no. 0054. The cost of new unit was 45,90,868/- including two PLC, corner PLC Rs. 2,08,200 and sector road facing PLC Rs. 1,18,109/-. It is pertinent to mention here that new unit no. 54 was a corner and two side open shop. On 08.02.2018, respondent

agreed to wave off of Rs. 6,24,600/- + taxes and interest of Rs. 45,817/-. In lieu of that the complainants have to wave off the right of delay payment charges as per RERA.

6. On 09.02.2018, respondent raised a demand on commencement of ground floor slab and on commencement of 2nd floor slab. The complainants issued two cheques of Rs. 2,73,119/- and of Rs. 1,67,000/- in favour of respondent. On 14.02.2018, the complainants issued a cheque Rs. 1,00,000/- in favour of respondent. On 03.10.2018, the respondent raised a demand on commencement of 6th floor slab and complainants issued two cheques of Rs. 1,00,000/- and Rs. 1,00,000/- in favour of respondent. On 19.11.2018, the complainants issued two cheques of Rs. 1,19,365/- and of Rs. 1,20,000/-. On 02.02.2019, the complainants visited the project site and found that respondent raised fresh construction in front of unit of complainants and added new shops. Due to raising fresh construction, the location of allotted unit was changed and now unit no. 54 is a non-prime location unit/back location unit. There were 4-5 additional shops in front of unit no. 54. Due to this change, complainants got aggrieved and send a registered grievance letter and asked for refund along with interest. It is pertinent to mention here that respondent did not obtain the written consent from allottees prior to change in sanctioned plan. The above said project is RERA registered and as per RERA Act, HARERA rules and regulations, the respondent is under an obligation to comply with the same. The change in sanction plans without prior consent is a serious

offence and violation of Act. As per section 12 of the Act, it is obligation on promoter to veracity of the advertisement or prospectus and as per section 14 of the Act, the promoter shall adherence to sanctioned plans and project specifications. On 12.03.2019, the complainants filed an RTI application with HARERA, Gurugram and asked for copy of approved site plan of ground floor, which was filed by respondent to obtain HARERA registration number. It was a utter surprise for complainants that as per record of HARERA, Gurugram, there was an unsigned but similar plan of approved plan dated 17.04.2017 exists in record. In this plan also, unit no. 54 is a two-side open and corner unit. It is again pertinent to mention here that till date, HARERA Gurugram does not had any information or copy of revised sanctioned plan. On 15.03.2019, the complainants sent another grievance email to respondent with photographs and asked for refund of money along with interest. On 16.03.2019, the respondent issued a statement of account, which shows that till 26.09.2018, complainants have paid Rs. 28,02,318 i.e., 65%, out of total sale consideration Rs. 42,64,559/-.

C. Relief sought by the complainants:

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

   i. Pass an appropriate award directing the respondent to demolish the extra construction and strictly adherence to the sanctioned plan dated 17.04.2017 and to give the possession of two side open unit no. 54 to complainants.

OR

Pass an appropriate award directing the respondent to refund/return the amount of Rs. 28,02,318 paid by the complainants to the respondent party as installments towards purchase of shop along with prescribed interest per annum from the date of deposit till realization of funds.

D. Reply by respondent:

8. The present complaint is not maintainable in law or on facts. The complainants have 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 complainants are not an "aggrieved party" or "allottees" as defined under the Act. They are investors who have purchased the unit in question as an investment. The complaint is barred by limitation to the extent the same impugns the buyer's agreement executed on 26.07.2016.

9. 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 26.07.2016, as shall be evident from the submissions made in the following paras of the present reply.

10. It is submitted that the contractual relationship between the parties is governed by the terms and condition of the buyer's agreement dated 26.07.2016. The said agreement was voluntarily and consciously executed by the complainants 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.

11. That furthermore without admitting or acknowledging in any manner the truth or legality of the allegations levelled by the complainants and without prejudice to the contentions of the respondent, it is respectfully 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 26.07.2016 that 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 complainants 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, they have been irregular in payment of instalments and consequently, the respondent has levied interest on delayed payments, in accordance with the buyer's agreement.

12. 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 relied upon by them for seeking interest and other reliefs cannot be called 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; 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 by them. Thus, the institution of the present

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

13. 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 complainants qua the respondent are totally baseless and do not merit any consideration by this authority.

14. 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:

15. 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 complainants at a later stage.

F. Findings on the objections raised by the respondent:

F.1 Objections regarding the complainants being investors:

16. It is pleaded on behalf of respondent that complainants are investors and not consumers. So, they are not entitled to any protection under the Act and the complaint filed by them 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 complainants are buyers 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."*

17. 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 complainants are allottees as the subject unit was allotted to them 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 allottees being an investor are not entitled to protection of this Act also stands rejected.

G. Entitlement of the complainants for refund:

G.1 Direct the respondents to refund full amount i.e., Rs.28,02,318/- deposited by the complainants along with interest at the rates prescribed by the Act of 2016.

18. The complainants submitted that they were allotted a commercial unit bearing no. 0075 ground floor and later on changed to 0054 ground floor admeasuring 347 sq.ft. by the respondent vide letter of allotment dated 26.07.2016 for a sale consideration of Rs. 36,85,143/-. A buyer's agreement was executed between the parties w.r.t the allotted unit. They continued to pay against that unit and deposited a sum of Rs. 28,02,318/- with the respondent.

But when they visited the project site and found that respondent had raised a new construction opposite of the unit of the complainants and constructed new shops. Due to raising new construction, the location of the allotted unit was changed and now that unit is a non-prime location unit. A grievance email was sent by the complainants to the respondent on 11.02.2019. The respondent did not obtain the written consent/permission from the allottees prior to making change in the sanctioned plan. Furthermore, on 12.03.2019, the complainants had filed an RTI application with the authority and requested for a copy of approved site plan of ground floor. However, as per the record, there was an unsigned but similar plan of approved plan dated 17.04.2017. In this plan also, the unit no. 54 is two sided open and a corner unit. On 07.03.2019 and 15.03.2019 also, the complainants had sent grievance emails to the respondent with photographs and asked for refund of money along with interest. On the contrary, the respondent has denied all the averments made by the complainants and submitted that the building plans shown to them were tentative in nature and were subject to change and the same was specifically mentioned in clause 1.6 of the buyer's agreement.

19. Considering the above-mentioned facts, the authority calculated the due date of possession as 60 months as per clause 1.2 of the agreement. Therefore, the due date of handing over of possession comes out to be 26.07.2021. The respondent has obtained the occupation certification vide Memo No. ZP/925/SD(DK)

2021/11018 dated 3.5.2021 issued by the DTCP in respect of the said project/unit and the same was produced during the hearing. But neither there are pleadings in this regard in the written reply nor any reference to the same was given despite receipt of occupation certificate allegedly on the basis of letter of DTCP mentioned above. Secondly, the respondent has also failed to offer possession of the subject unit to the complainants till date after receipt of occupation certificate on basis of above-mentioned letter. Thus, it is the failure on part of the promoter to fulfil its obligations and responsibilities as per the buyer's agreement to hand over the possession within the stipulated period.

20. The complaint seeking refund after withdrawal from the project was filed on 26.03.2019, and the due date for completion of the project as discussed above was 26.07.2021. The complainants sought refund of the deposited amount from the respondent by taking a cue from the provisions of section 14 of Act, 2016. The complainants were allotted a commercial unit bearing no. 0075/GF having a super area of 301 sq. ft. provisionally vide letter of allotment dated 26.07.2016 for Rs. 36,85,143/-. That allotment was later on changed to 0054/GF admeasuring 347 sq. ft. A buyers' agreement was executed between the parties on 26.07.2016 setting out the terms and conditions of allotment of the subject unit its location dimensions, payment plan including the due date for handing over of possession. Though there is clause 1.6 in that document providing change in the sanction of the building plan due to re-sanctioning of the plan and the

authority of the developer to refund the amount received from the allottee but clause 10 of the agreement provides somewhat different and obtaining consent of allottee a condition precedent before making alteration/ modifications resulting + 20% change in super area of the unit. There is payment plan attached with the buyer's agreement. A perusal of the same shows that the respondent mentioned plaza facing charges on commencement of 2nd and 6th floor slabs to the tune of Rs. 2,62,931/- each. Thus, its shows that the unit allotted to the complainants was having two PLC's. The complainants were re-allotted the unit bearing no. 0054 instead of earlier unit bearing no. 0075 as evident from endorsement dated 03.02.3018 on the payment plan as per page 91 of the complaint. It is not the case of respondent that the unit on re-allotment is having preferential location. Though a copy of the building plan dated 31.05.2018(annexure R8) has been placed on the file, but the version of complainants gets collaboration from site plan annexed with P19 and photographs annexed with P20 obtained through RTI. There is no rebuttal to these facts. So, the case of complainants squarely falls within the preview of section 14 of the Act, 2016 providing adherence to sanctioned plans and project specifications by the promoter. It is not the case of respondent that it changed the sanctioned building plan either with the consent of the allottees or as per the provisions of buyer's agreement. It is not a case of minor alteration in the sanctioned building plan and rather major changes have been made with regard to location of the allotted unit. Thus, the complainants

were right in withdrawing from the project by taking shelter under the provision of section 14 of the Act of 2016 and seeking refund.

21. Therefore, taking note of all the circumstances, the authority holds its view that the complainants-allottees are entitled for refund and hereby, directs the respondent to return the amount received by it from the complainants-allottees along with interest at the rate of 9.40% p.a. from the dates of deposit till the date of recovery of the amount within 90 days from the date of this order as per rule 16 of the Haryana Rules, 2017.

H. Directions of the Authority:

22. 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.28,02,318/-received by it from the complainants 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 respondent to comply with the directions given in this order and failing which legal consequences would follow.

23. Complaint stands disposed of.

24. File be consigned to the Registry.

(Vijay Kumar Goyal)
Member

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

Dated: 11.05.2022