

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

Complaint no.	:	4539 of 2020
Date of decision	:	16.05.2023

1.Pankaj Thakran 2.Ram Kanwar Thakran Both Resident of: - House no. 219, Ground Floor, May Field Garden, Sector 47, Gurugram-122001	Complainants
Versus	
Spaze Towers Pvt. Ltd. Regd. Office: - Spazedge, Sector 47 Gurugram- 122001	Respondent

CORAM:

Shri Ashok Sangwan	Member
Shri Sanjeev Kumar Arora	Member

APPEARANCE:

Mr. Sanjeev Sharma (Advocate)	Complainants
Mr. J.K. Dang (Advocate)	Respondent

ORDER

1. The present complaint dated 24.12.2020 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 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 provisions 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 complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

Succinct facts of the case are as under: -

S. No.	Heads	Information
1.	Name and location of the project	"Spaze Palazo", Sector-69, Gurugram
2.	Nature of the project	Commercial Project
3.	DTCP license no. and validity status	32 of 2008 dated 19.02.2008
4.	RERA registered/ not registered and validity status	Not registered
5.	Unit no.	409, 4 th floor (Page no. 18 of the complaint)
6.	Unit admeasuring	1347 sq. ft. (Page no. 18 of the complaint)
7.	Date of booking	09.02.2008 (As per page 11 of complaint)
8.	Date of allotment	04.09.2012 (As per page 04.09.2012)
9.	Date of flat buyer's agreement	Not executed

10.	Total consideration	Rs. 1,02,91,685/- (As per page 48 of complaint) Rs. 1,05,14,855/- (As per page 39 of reply)
11.	Total amount paid by the complainants	Rs. 1,07,96,894/- (As per page 11 of complaint)
12.	Possession clause	14. That the possession of the said premises is proposed to be delivered by the developer to the allottee within 3 years from the date of this agreement. (Emphasis supplied)
13.	Due date of delivery of possession	04.09.2015 (Calculated from the date of allotment)
14.	Occupation Certificate	03.05.2018 (As per page 94 of reply)
15.	Completion Certificate	30.04.2019 (As per page 117 of reply)
16.	Offer of possession	(As per complainant, the respondent has made offer on 17.04.2014 which is not valid) (As per page 104 of reply) Permissive Possession on 17.04.2014 (Page 104 of reply)

17.	Lease Undertaking	22.01.2020 (The complainants cum allottees have leased their unit to M/s Oravel Stays Pvt. Ltd. vide lease deed dated 16.05.2019 i.e., page 112 of reply)
18.	Details of rent received by the complainants	From November 2019 till June 2020 (As per additional documents submitted by the respondent.)

B. Facts of the complaint

3. That upon the representations made by the respondent and advertisement done in said behalf, the complainants agreed to purchase a commercial retail space no. 409, 4th Floor, admeasuring 1347 Sq. Ft. in the project i.e., "**Spaze Palazo**" located at Sector-69, Gurgaon, Haryana floated by it and on inducements that the possession of the unit so purchased would be handed over on time with all amenities as promised. The booking amount was paid by the complainants on 09.02.2008 and the receipt in confirmation of the of the same paid was received by the complainants on 18.02.2008. Thereafter, the respondent started asking for various instalments in lieu of the construction process and the complainants paid and adhered to all the demands raised by the respondent from time to time allotted vide letter dated 04.09.2012. A request for execution of buyers agreement w.r.t. the allotted

unit was made but the same was not executed by the respondent due to one reason or the other.

4. That the total sale consideration of the unit was agreed to be Rs. 1,02,91,685/- excluding service tax and other statutory taxes and the complainants by July 2012 had already paid an amount of Rs. 99.35,009 by trusting the respondent. But on enquiry and site visit, the complainants came to know that the construction work at the site was completely stalled, and they were duped of handing over the possession of the unit within the time period mentioned in the letter of allotment.
5. That as per the allotment and in the absence of buyers agreement between the parties w.r.t. the allotted unit, the possession was to be given by February 2011 as the booking amount was paid by February 2008. But the respondent illegally issued the allotment letter on 04.09.2012 with a delay of 4 years after receiving the booking amount and with no retail space buyer agreement executed till date. If grace period of 6 months is added, then the possession of the unit was to be delivered latest by august 2011. Further, it is pertinent to mention here that the respondent being in the dominant role, the complainants were never in a position to negotiate the terms and conditions of the allotment/agreement. The complainants till date have paid a total sum of Rs. 1,07,96,895/- to the respondent as per the statement of account dated 15.12.2016.

6. That though the possession of the unit was supposed to be delivered in August 2011 but after the lapse of 2 years 8 months, the illegal offer of possession was made by the respondent on 17.04.2014 and followed by reminder dated 07.03.2015 wherein the area was tentatively decreased from 1347 sq. ft. to 1324 sq. ft. The offer of possession made by the respondent was completely illegal and malafide as the construction work was stalled and it had received the occupation certificate on 03.05.2018 which clearly shows that the illegal offer of possession made by the respondent on 17.04.2014 with an intention to extort more monies from the complainants without offering any delay possession charges.
7. That the complainants wrote a letter dated 12.10.2015 to the respondent in lieu of the follow-ups as illegal offer of possession without obtaining OC with stalled construction work at the site mentioning that the retail space buyer agreement has not been executed till date and instead of executing the retail space buyer agreement, the respondent had issued the allotment letter and the entire sale consideration was already taken by 2013. Thereafter, the complainants requested to handover the possession along with interest @ 18% for delay possession charges on Rs. 1,07,96,894/-
8. That the complainants seek interest for the delay possession charges from 09.08.2011 till the actual offer of possession which has not been made by the

respondent till date after lapse of 9 years and 4 months along with refund of the excess amount collected by it from them.

C. Relief Sought

- i. To pay interest for delay possession charges against the allotted unit.
- ii. To refund of excess amount received by the respondent.

D. Reply by the respondent

9. That the present complaint is not maintainable in law or on facts. The application for issuance of occupation certificate in respect of the unit in question was made on 08.01.2014. The occupation certificate itself been thereafter issued on 03.05.2018. Without prejudice to the submissions of the respondent that the provisions of the Act are not applicable to the project in question, it is submitted that the present complaint is not maintainable before this Hon'ble Authority. The complainants have filed the present complaint seeking possession, interest, and compensation for alleged delay in delivering possession of the unit booked by them.
10. The complainants have no locus standi or cause of action to file the present complaint. 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 as shall be evident from the submissions made in the following paras of the present reply. The complaint

is barred by limitation. The so-called cause of action as per the version of the complainants arose prior to the Act. The false and frivolous complaint is liable to be dismissed on this ground as well.

11. The complainants had booked a commercial unit in the project of the respondent. A buyer's agreement was sent to the complainants on 04.09.2012 but had not been executed till date by them for reasons best known to them. The aforesaid letter containing agreement was duly received by the complainants. Even the respondent had repeatedly reminded the complainants to execute the buyer's agreement and send back signed copies of that document. However, they failed to come forward and execute the same.
12. The complainants were offered permissive possession of the above-mentioned unit through letter dated 17.04.2014. They were called upon to remit balance payment and to complete the necessary formalities/documentation necessary for handover of the office space. However, they did not take any steps to complete the necessary formalities or to pay the balance amount payable. It is submitted that as per notification dated 08.08.2001 bearing memo no. 10684-10712 issued by the Director, Town & Country Planning, Haryana, Chandigarh, it is permissible to hand over permissive possession of units located in commercial sites/projects without obtaining occupation certificate as the same is a compoundable violation.

Thereafter, the occupation certificate of the project was issued by the concerned authority to the respondent on 03.05.2018.

13. That it is submitted that the respondent anticipating the timely receipt of the Occupation Certificate from Director General Town & Country Planning issued the letter dated 17.04.2014 to facilitate the allottees to carry out the interior adaptations, internal works/ fitouts in their respective units/apartments. It is pertinent to mention here that the complainants without any objection or demur accepted the offer of permissive possession. The officials of the respondent had diligently and sincerely pursued the matter consistently with Directorate of Town & Country Planning, Haryana, Chandigarh but all efforts in this direction made by them proved futile.
14. That it needs to be appreciated that the respondent does not have any control over the functioning of Directorate of Town & Country Planning, Haryana, Chandigarh. The span of time which was consumed in obtaining the following approvals/sanctions deserves to be excluded from the period for delivery of physical possession.
15. That it is pertinent to mention that the complainants had delayed in making payment of the instalments on various occasions. Consequently, interest had been levied upon them by the respondent on account of their failure to make timely payment of the instalments. The copy of the latest statement of account dated 29th of September 2020 has been appended. It would not be out of place

to mention that on date, the complainants are liable to make payment of the outstanding amount of Rs. 41,300/- (Rupees Forty-One Thousand Three Hundred Only) to the respondent. However, instead of seeing reason and clearing their outstanding dues and to take possession of the unit in question, the complainants have proceeded to file the present false and frivolous complaint.

16. That, moreover, the complainants had executed undertaking dated 22nd of January 2020 by way of which they had agreed to lease out the said unit through the respondent to M/s Oravel Stays Private Limited. It had been duly mentioned in the aforesaid undertaking that the said unit had been leased out along with other units in the said project to the aforesaid tenant on account of the area requirement of the tenant. The complainants had agreed to be paid monthly rent by the aforesaid tenant amounting to Rs.63,552/- (Rupees Sixty-Three Thousand Five Hundred Fifty-Two Only) per month calculated at the rate of Rs.48/- per square feet per month. It is submitted that the complainants are contractually bound by the terms and conditions incorporated in the undertaking dated 22.01.2020, voluntarily executed by them. Moreover, they have intentionally omitted to bring the fact pertaining to execution of undertaking dated 22.01.2020 to the notice of this Honourable Authority. The present complaint is liable to be dismissed on this ground as well.

17. That the respondent had made regular payment of the rent amount to the complainants. It is submitted that all the demands that have been raised by the respondent are strictly in accordance with the terms of the payment plan executed between the parties. The allegations levelled by the complainants are totally baseless. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.
18. Copies of all the relevant documents have been duly filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided since these undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority

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

19. 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

The 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 promoter, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

20. 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 Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act

21. The contention of the respondent is that authority is deprived of the jurisdiction to go into the interpretation of rights of the parties inter-se in accordance with the apartment buyer's agreement executed between them and no agreement for sale as referred to under the provisions of the act or the said rules has been executed inter se parties. The authority is of the view that the act nowhere provides, nor can be so construed, that all previous

agreements will be re-written after coming into force of the act. Therefore, the provisions of the act, rules and agreement have to be read and interpreted harmoniously. However, if the act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the act and the rules after the date of coming into force of the act and the rules. The numerous provisions of the act save the terms and conditions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)*** decided on 06.12.2017 and which provides as under:

"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter....."

122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."

22. Further, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya***, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed as under -

"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."

23. The agreements are sacrosanct save and except for the provisions which have been abrogated by the act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

24. Admissibility of delay possession charges at prescribed rate of interest:

The complainants are seeking delay possession charges at the prescribed rate and proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

25. 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.
26. 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., 16.05.2023 is 8.70%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.70%.
27. The definition of term 'interest' as defined under section 2(z) 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;"*

28. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 10.70% by the respondent/promoter which is the same as is being granted to the complainants in case of delayed possession charges.

29. 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 date of allotment on 04.09.2012(as the agreement has not been executed), the possession of the subject apartment was to be delivered within stipulated time i.e., by 04.09.2015. The occupation certificate of the project was received on 03.05.2018 and completion certificate has also been received. The respondent has contended that the said unit was for a leasing arrangement and so, no possession was required to be given and further the complainants have leased out their unit to M/s Oravel Stays Pvt. Ltd. vide lease deed dated 16.05.2019 and permissive possession was given to them on 17.04.2014. On the contrary, the counsel for the complainants have stated at bar that possession can only be called valid once the occupation certificate has been

received and in present case, the same has been received after said permissive possession offer. So, permissive possession without handing over symbolic or actual possession is no possession as it is not legal in the eyes of law. Thus, taking into consideration the rival pleas advanced by the parties and the documents placed on record, the authority is of the view that the complainants are entitled for the delayed possession charges as it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the allotment/agreement to hand over the possession within the stipulated period. 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., 04.09.2015 till date of grant of OC i.e., 03.05.2018 plus two months which comes to 03.07.2018 at prescribed rate i.e., 10.70 % p.a. as per proviso to section 18(1) of the act read with rule 15 of the rules.

G. Directions of the authority

30. 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 complainants are entitled to delayed possession charges at the prescribed rate of interest i.e., 10.70 %p.a. for every month of delay on the amount paid by them to the respondent from the due date of



possession i.e., 04.09.2015 till date of OC i.e., 03.05.2018 plus two months which is 03.07.2018.

ii. The promoter shall not charge anything which is not part of the allotment letter/buyer agreement.

31. Complaint stands disposed of.

32. File be consigned to registry.

 (Sanjeev Kumar Arora) Member		 (Ashok Sangwan) Member
Haryana Real Estate Regulatory Authority, Gurugram		

Dated: 16.05.2023