

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

Complaint no.: 4547 of 2022
Complaint filed on: 22.06.2022
Date of decision: 21.12.2023

1. Rajeev Sethi
2. Nidhi Sethi

Both RR/o:- 221, Deep plaza complex, opposite civil court, Gurugram, Haryana

Complainants

Versus

Spaze Tower Pvt. Ltd.
Corporate office: Spazedge sector 47, Sohna road,
Gurugram

Respondent

CORAM:

Shri Vijay Kumar Goyal

Member

APPEARANCE:

Shri Sanjeev Sharma, Advocate

Complainants

Shri Harshit Batra, 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 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 to the allottees as per the agreement for sale executed inter-se them.

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, delay period, if any, have been detailed in the following tabular form:

S.No.	Particulars	Details
1.	Name of the project	"Spaze Corporate Park", Sector-69 & 70, Gurugram
2.	Allotment letter	25.08.2011
3.	Unit no.	4,GF admeasuring 388 sq. ft. (page 20 of complaint)
4.	Date of execution of buyer's agreement	16.05.2013 (page 18 of complaint)
5.	Possession Clause	<p>14.</p> <p><i>The possession of the said premises is proposed to be delivered by the developer to the allottee(s) within three years from the date of this agreement. If the completion of the said building is delayed by reason of non availability of steel and / or cement or other building materials, or water supply or electric power or slow down, strike or due to a dispute with construction agency employed by the DEVELOPER, lock out or departmental delay or civil commutation or by reason of war or enemy action or terrorist action or earthquake or any act of God or any other reason beyond the control of the DEVELOPER shall be extension of time for delivery of the possession of the said permises.....(Emphasis Supplied)</i></p>

6.	Due date of delivery of possession as per clause 14 of the buyers agreement	16.05.2016
7.	Basic sale consideration	Rs.38,86,530/- (as per allotment letter page 51 of complaint)
8.	Total sale consideration	Rs.49,82,362/- (as per the written submission submitted by respondent)
9.	Total amount paid by the complainants	Rs.49,82,362/- (as confirmed by the counsel for the respondent during proceeding dated 21.12.2023)
10.	Occupation certificate	28.01.2020 (page 32 of reply)
11.	Offer of possession	29.01.2020 (page 35 of reply)
12.	Possession taken over letter	28.02.2020 (page 50 of complaint)

B. Facts of the complaint

3. The complainants have made the following submissions: -

- I. That M/s Wellworth Housing Pvt. Ltd. and M/s Raj Realtech Pvt. Ltd. own approximately 12.981 acres of land in Badshahpur, Tehsil & District Gurugram, Haryana. The Director Town and Country Planning, Haryana Chandigarh granted a license for developing a commercial colony on the

land, where the respondent floated a commercial complex titled "Spaze Corporate Park".

- II. That the builder buyer agreement was executed between the parties on 16.05.2013 and the complainants were allotted unit no. 04, ground floor, tower-A admeasuring 388 sq. ft. for a sale consideration of Rs.38,86,530/- inclusive of possession charges along with all the statutory taxes.
 - III. That the complainants made a total payment of Rs.40,03,346/- against the sale consideration. As per the buyer's agreement, the possession of the allotted unit was to be handed over by 16.05.2016, but was offered on 28.02.2020 without adjusting any delay possession charges. The complainants, aggrieved by not receiving delay possession charges on time, filed a complaint before the authority. (**Note:** During proceedings dated 21.12.2023 the counsel for the respondent submitted that the complainants had paid Rs.49,82,362/- for the allotted unit.)
4. On the date of hearing, the authority explained to the respondent/promoter about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

C. Relief sought by the complainants

5. The complainants have filed the present compliant for seeking following reliefs:
- i. Direct the respondent to pay delay possession charges.
 - ii. Direct the respondent to pay the litigation cost of Rs.1,00,000/-

D. Reply by the respondent

6. The respondent has contested the complaint on the following grounds:
- a. That the present complaint is not valid in law or based on facts. The Real Estate (Regulation and Development) Act, 2016 does not apply to the



project in question. The application for the occupation certificate was submitted before the notification of the Haryana Real Estate Regulation and Development Rules 2017, and the certificate was issued thereafter. According to Rule 2(0) of the Rules, the project does not fall within the definition of an "ongoing project," and therefore this court lacks jurisdiction to address this matter.

- b. That the complainants are not "allottee" but an investor who booked the unit in question as a speculative investment in order to earn profit from its resale. The said unit was booked by the complainants as a speculative investment. Therefore, no equity lies in favor of the complainants
- c. That the complainants expressed their interest in booking a unit in the "Spaze Corporate Park" project in Gurugram, Haryana, after conducting independent inquiries and being fully satisfied. The complainants applied for a provisional allotment and were allotted a unit bearing no 04, ground floor, tower-A admeasuring 388 sq. ft. vide provisional allotment letter dated 25.08.2011. The complainants opted for a construction-linked payment plan and assured the respondent of timely instalment payments. The respondent allotted the unit without suspecting any wrongdoing by the complainants.
- d. Subsequently, a builder buyer agreement was executed between the parties on 16.05.2013. The timeline for possession was subject to force majeure circumstances and events beyond the control of respondent. The timely payment by the complainants was essential as per the agreement, and possession date could be extended at the respondent's discretion in case of payment default. The complainants defaulted in timely remittance of payments as per the schedule payment, the date of delivery of

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possession was not liable to be determined in the manner sought to be done by the complainants.

- e. That the delivery of possession was subject to force majeure circumstances as per clause 14 of the agreement. The respondent faced challenges such as construction bans, material availability, and regulatory restrictions, yet completed the project diligently and on time. The development of the project was hindered by the orders from various authorities and courts including NGT in NCR on account of the environmental condition etc. and Covid-19 pandemic before the subjective due date of possession.
- f. That the respondent applied for occupation certificate on 30.09.2019 and the same was issued on 28.01.2020 by the competent authority. Once an application for grant of occupation certificate is submitted for approval in the office of the concerned statutory authority, respondent ceases to have any control over the same. The grant of sanction of the occupation certificate is the prerogative of the concerned statutory authority over which the respondent cannot exercise any influence. No fault or lapse can be attributed to the respondent in the facts and circumstances of the case. Therefore, the time period utilized by the statutory authority to grant occupation certificate to the respondent is necessarily required to be excluded from computation of the time period utilised for implementation and development of the project. Thereafter, the complainants were offered possession of the unit in question vide letter dated 29.01.2020. The complainants were called upon to remit the balance payment including delayed payment charges and to complete the necessary formalities and documentation necessary for handover of the unit in question, following which the physical vacant possession of the unit was taken by the

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complainants on 28.02.2020. The complainants have been a defaulter even before the expiry of the subjective due date and has consciously diluted the possession timelines.

g. That an offer for possession marks termination of the period of delay, if any. The Complainants are not entitled to contend that the alleged period of delay continued even after receipt of offer for possession. The Complainants have mischievously left out the offer of possession and have only annexed the possession letter with their complaint. The respondent had duly offered possession to the complainants on 29.01.2020, any delay by the complainants taking possession cannot be brought upon the respondent. The complainants consciously and maliciously refrained from obtaining possession of the unit in question. The complainants are liable for the consequences including holding charges, as enumerated in the buyer's agreement for not obtaining possession. The complainants finally took the possession of the unit on 28.02.2022. The liabilities and obligations of the respondent as enumerated in the allotment letter or the buyer's agreement stand satisfied. The complainants have intentionally distorted the real and true facts in order to generate an impression that the respondent has reneged from its commitments.

7. 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 based on these undisputed documents made by both the parties.

E. Jurisdiction of the authority

8. The respondent has raised a preliminary submission/objection the authority has no jurisdiction to entertain the present complaint. The objection of the respondent regarding rejection of complaint on ground of jurisdiction stands

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rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint.

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.

9. So, in view of the provisions of the Act of 2016 quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside the compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

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F. Findings on the objections raised by the respondent:

F.I Objections regarding force majeure.

10. The respondents-promoter has raised the contention that the construction of the project, has been delayed due to force majeure circumstances such as orders passed by National Green Tribunal to stop construction, dispute with contractor, non-payment of instalment by allottees, GST, demonetization, shortage of labour, and Covid- 19. The plea of the respondent regarding various orders of the NGT and demonetisation and all the pleas advanced in this regard are devoid of merit. The orders passed by NGT banning construction in the NCR region was for a very short period of time and thus, cannot be said to impact the respondent-builder leading to such a delay in the completion. The plea regarding demonetisation is also devoid of merit. Further, any contract and dispute between contractor and the builder cannot be considered as a ground for delayed completion of project as the allottee was not a party to any such contract. Also, there may be cases where allottees has not paid instalments regularly but all the allottees cannot be expected to suffer because of few allottees. Thus, the promoter respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

F. II Objection regarding exclusion of time taken by the competent authority in processing the application and issuance of occupation certificate.

11. As far as contention of the respondent with respect to the exclusion of time taken by the competent authority in processing the application and issuance of occupation certificate is concerned, the authority observed that the respondent has applied for grant of occupation certificate on 30.09.2019 and thereafter vide memo no. ZP-621/JD(RD)/2020/2730 dated 28.01.2020, the occupation certificate has been granted by the competent authority under

the prevailing law. The authority cannot be a silent spectator to the deficiency in the application submitted by the promoter for issuance of occupancy certificate. It is evident from the occupation certificate dated 28.01.2020 that an incomplete application for grant of OC was applied on 30.09.2019 as fire NOC from the competent authority was granted only on 06.11.2019 which is subsequent to the filing of application for occupation certificate. As such, the application submitted on 30.09.2019 was incomplete and an incomplete application is no application in the eyes of law.

12. The application for issuance of occupancy certificate shall be moved in the prescribed forms and accompanied by the documents mentioned in sub-code 4.10.1 of the Haryana Building Code, 2017. As per sub-code 4.10.4 of the said Code, after receipt of application for grant of occupancy certificate, the competent authority shall communicate in writing within 60 days, its decision for grant/ refusal of such permission for occupation of the building in Form BR-VII. Therefore, in view of the deficiency in the said application dated 30.09.2019 and aforesaid reasons, no delay in granting occupation certificate can be attributed to the concerned statutory authority

F.III Objection regarding the complainants being investors.

13. The respondents have taken a stand that the complainants are the investors and not consumers, therefore, they are not entitled to the protection of the Act and are not entitled to file the complaint under section 31 of the Act. The respondents also submitted 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 observed that the respondents are 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 preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same

time 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 the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

"2(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;"

14. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyer's agreement executed between promoter and complainants, it is crystal clear that the complainants are allottee(s) as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act stands rejected.

G. Findings regarding relief sought by the complainants.

G. I Direct the respondent to pay delay possession charges.

15. In the present complaint, the complainants intend to continue with the project and are seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec 18(1) proviso reads as under.

"Section 18: - Return of amount and compensation



18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —

.....

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

16. Clause 14 of apartment buyer's agreement provides for handing over of possession and is reproduced below:

The possession of the said premises is proposed to be delivered by the DEVELOPER to the ALLOTTEE(S) within three years from the date of this Agreement. If the completion of the said Building is delayed by reason of non-availability of steel and / or cement or other building materials, or water supply or electric power or slow down, strike or due to a dispute with the construction agency employed by the DEVELOPER, lock out or departmental delay or civil commotion or by reason of war or enemy action or terrorist action or earthquake or any act of God or any other reason beyond the control of the DEVELOPER, the DEVELOPER shall be entitled to extension of time for delivery of possession of the said premises.

17. The authority has gone through the possession clause of the agreement. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainant not being in default under any provision of this agreement and in compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions is not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning.

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18. The buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builder/promoter and buyer/allottee are protected candidly. The flat agreement lays down the terms that govern the sale of different kinds of properties like residentials, commercials etc. between the builder and the buyer. It is in the interest of both the parties to have a well-drafted buyer's agreement which would thereby protect the rights of both the builder and buyer in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision with regard to stipulated time of delivery of possession of the unit, plot or building, as the case may be and the right of the buyer/allottee in case of delay in possession of the unit.

19. **Admissibility of delay possession charges at prescribed rate of interest:**
The complainants are seeking delay possession charges however, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, 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.

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20. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

21. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 21.12.2023 is **8.85%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.85%**.

22. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation. —For the purpose of this clause—

- (i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default.*
- (ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

23. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 10.85 % by the respondent/promoter which is the same as is being granted to them in case of delayed possession charges.

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24. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. The authority has observed that the buyer's agreement was executed on 16.05.2013 and the possession of the subject unit was to be offered within a period of three years from date of execution of agreement. The Authority calculated due date of possession from the date of agreement i.e., 16.05.2016. The respondent has failed to handover possession of the subject unit till due date of possession. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. The authority is of the considered view that there is delay on the part of the respondent to offer of possession of the allotted unit to the complainant as per the terms and conditions of the agreement to sell dated 16.05.2013 executed between the parties.

25. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 28.01.2020. The respondent offered the possession of the unit in question to the complainants only on 29.01.2020, So it can be said that the complainants came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainants should be given 2 months' time from the date of offer of possession. These 2 months of reasonable time is being given to the complainants keeping in mind that even after intimation of possession practically they have to arrange a lot of logistics and requisite documents

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including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession till actual handing over of possession or offer of possession plus two months whichever is earlier.

26. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such, the complainants are entitled to delay possession charges at rate of the prescribed interest @ 10.85% p.a. from the due date of possession i.e. 16.05.2016 till possession letter i.e. 28.02.2020 as per section 18(1) of the Act of 2016 read with rule 15 of the rules.

G.I Direct the respondent to pay litigation cost.

27. The complainant is seeking above mentioned relief w.r.t. compensation. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors. (supra)*, has held that an allottee is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses.

H. Directions of the authority:

28. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligation cast

upon the promoter as per the function entrusted to the authority under section 34(f) of the act of 2016:

- I. The respondent is directed to pay interest to the complainants against the paid-up amount at the prescribed rate of 10.85% p.a. for every month of delay from the due date of possession i.e., 16.05.2016 till possession letter i.e. 28.02.2020 as per section 18(1) of the Act of 2016 read with rule 15 of the rules. The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order as per rule 16(2) of the rules.
- II. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.85% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.
- III. The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement.

29. Complaint stands disposed of.

30. File be consigned to registry.

Dated: 21.12.2023

V.1-3
(Vijay Kumar Goyal)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram