BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**158/2022**
Date of filing complaint:	**09.02.2022**
First date of hearing:	**27.04.2022**
Date of decision :	**06.12.2023**

	1. Mr. Onkar Nath Rai **Resident of**: H-602, Central Park-1, Sector- 42, Gurgaon Haryana. 2. Mrs. Poonam Kumra **Resident of**: C-96, 1st Floor, Sun City, Sector-54, Gurgaon, Haryana.	**Complainants**
	Versus	
	M/s Spaze Towers Pvt. Ltd. **Regd. office:** 1. Spazedge, Sector 47, Sohna-Gurgaon Road, Gurugram. 2. A-307, Ansal Chamber-1, 3 Bhikaji Cama Place, New Delhi-110066	**Respondent**

CORAM:	
Shri Ashok Sangwan	**Member**
APPEARANCE:	
Shri Rajesh Yadav Advocate	Complainants
Ms. JK 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 provisions of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project-related details

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

Sr. No.	Particulars	Details
1.	Name of the project	"Spaze privy at 4" Sector-84, village sihi, Gurugram, Haryana.
2.	Project area	10.812 acres
3.	Nature of the project	Group housing complex
4.	DTCP license no. and validity status	26 of 2011 dated 25.03.2011valid up to 24.03.2019
5.	Name of licensee	Smt. Mohinder Kaur and Ashwini Kumar
6.	RERA Registered/ not registered	**Registered vide registration no. 385 of 2017 dated 14.12.2017**
7.	Unit no.	Apartment no. 82 on 8th floor, Tower Kalistaa (Page 46 of complaint)
8.	Unit area admeasuring	2905 sq. ft. (Initially) (Page 46 of complaint)

		3193 Sq ft (Finally) (Page no. 158 of Reply)
9.	Date of execution of Space buyer agreement	08.10.2013 (Page 43 of complaint)
10.	Date of approval of building plan	06.06.2012 (Page 75 of reply)
11.	Possession clause	*Clause 3(a): The developer proposes to hand over the possession of the apartment within a period of forty-two (42) months (excluding a grace period of 6 months) from the date of approval of building plans or date of signing of this agreement whichever is later*
12.	Due date of possession	08.04.2017 (Calculated from date of execution of BBA)
13.	Total sale consideration	Rs. 1,87,90,320/- (Page no. 63 of complaint)
14.	Amount paid by the complainants	Rs. 1,71,73,826 /- (As per statement of account dated 22.01.2022 at page 130 of reply)
15.	Occupation certificate	11.11.2020 (page 155 of reply)
16.	Offer of possession	01.12.2020 (Page 158 of reply)

B. Facts of the complaint:

3. The complainants along with family members visited the project site and marketing office of the respondent. The office bearers

of developer represented the brochure, payment plans and schemes and confirmed that the project will be complete by December 2014 and that it will be duly mentioned in buyer's agreement and that the respondent is obligated to adhere to the agreement. And after trusting the words of the office bearers and reputation of the respondent, the complainants issued cheques of Rs. 750000/- each, totaling an amount of Rs. 1500000/- for a total sale consideration of Rs. 18790320/-

4. The payment of Rs. 1500000/- was towards booking of a 3BHK unit with study room and servant room, comprising of 2905 sq.ft super area on 28.09.2012 through an 'Application form for allotment of flat/ Dwelling unit in Kalistaa' and the same was acknowledged by a receiving copy issued by the respondent dated 15.10.2012.
5. The respondent provisionally allotted unit no. – 082 in tower Kalistaa with super area of 2905 sqft to the complainants by issuing a preprinted arbitrary, unilateral allotment letter on 18.10.2012 in its upcoming ' Spaze Privy AT4' project for sale consideration of Rs. 1,87,90,320/-
6. A pre-printed, arbitrary, unilateral buyer's agreement was executed on 08.10.2013 for unit no. – 082 in KALISTA tower located on 8th floor admeasuring super area of 2905 sq ft by the respondent and the complainant. With specifications mentioned in it along with payment plan, and the project/ unit was expected to be delivered in 36 months i.e. by 08.10.2016.
7. The complainants paid as and when the respondent raised the demands for installments for the booked unit/ flat. And various payments were made as shown in table from 28.09.2012 to 06.03.2017.

Date	Bank / Cheque No.	Amount	Description
28.09.2012	Cheque No - 681342	750000	On Application for Booking
28.09.2012	Cheque No - 333280	750000	On Application for Booking
27.11.2012	Cheque No - 681348	980076	Basic - Demand within 60 days
27.12.2012	336818	980076	Basic - Demand within 60 days
01.03.2013	413016	864884	Basic - within 150 Days from Registration
01.03.2013	681361	864884	Basic - within 150 Days from Registration
22.03.2013	681364	747551	On Casting of Basement Slab
23.03.2013	413022	747551	On Casting of Basement Slab
02.07.2013	652672	652555	On Casting of Ground Floor Slab
02.07.2013	681370	652555	On Casting of Ground Floor Slab
28.10.2013	077705'	500000	On Casting of 2nd Floor Slab
28.10.2013	000001'	500000	On Casting of 2nd Floor Slab
23.12.2013	077711'	252556	On Casting of 2nd Floor Slab
23.12.2013	000012'	252556	On Casting of 2nd Floor Slab
24.04.2014	077713'	500000	On Casting of 8th Floor Slab
09.05.2014	721145	300000	On Casting of 8th Floor Slab
09.05.2014	718356	200000	On Casting of 8th Floor Slab
17.07.2014	000044'	152560	On Casting of 8th Floor Slab
17.07.2014	077714'	152560	On Casting of 8th Floor Slab
01.10.2014	077702'	804500	14th Floor Slab, Car Parking, Corner PLC
01.10.2014	000054'	804500	14th Floor Slab, Car Parking, Corner PLC
09.01.2015	077732'	586982	Brickwork, Car Parking, Corner PLC

09.01.2015	000049'	585982	Brickwork, Car Parking, Corner PLC
19.03.2015	000082'	651055	On Casting of 20th Slab
19.03.2015	077734'	651055	On Casting of 20th Slab
30.03.2016	077733'	658095	On Commencement of Electrical & Plumbing
30.03.2016	000014'	658094	On Commencement of Electrical & Plumbing
06.03.2017	Cheque Payment	48370	VAT
06.03.2017	Cheque Payment	48370	VAT
08.05.2017	Cheque Payment	47583	VAT2
08.05.2017	Cheque Payment	47583	VAT2
29.06.2017	'000033'	300000	VAT 2 & On External Electrification
29.06.2017	'078473'	480293	On External Electrification
	Total Amount	17173826	

8. The complainants have honored all the demands raised by the respondent till 06.03.2017, and paid approx. Rs. 1,71,73,826/- including taxes to the respondent towards the purchased unit no – 082 of KALISTA Tower in its project 'Spaze Privy AT4' against the sale consideration of Rs. 1,87,90,320/- (Inclusive of EDC/IDC, Club, Car Parking, PLC and other charges) i.e. however there were lot of payment heads which were unclear as the various demand amounts were increased without any knowledge of the complainants, the 'basic price' was increased from Rs. 16779280/- to Rs. 18442768/-, club membership was increased from Rs. 200000/- to Rs. 224720/-, car parking (covered) was increased from Rs. 350000/- to Rs. 362978/-, corner PLC was also increased from Rs. 435750/- to Rs. 478950/-. The overall amount paid by the complainants as per the buyer's agreement is more than 91% of the

initial agreed total sale consideration of amount Rs. 18790320/- however until last payment in June 2017 the project was not even 50% complete.

9. The complainants tried to get clarity on the increased super area, unjustified charges of electrification, and miscellaneous charges by personal visits and also over phone calls, however, all his efforts were in vein as the respondent didn't give any convincing reply or answer to the relevant queries and concerns of the complainant. Even the senior official/ CRM of the respondent's office said that the builder has all justification for changes and that the charges are valid and legal, and offered a suspicious discount of 5% on the total outstanding, and denied any delay in offer of possession and any type of adjustments against the dues.

10. The demands raised by the respondent were not aligned with construction stage, and the project got delayed due to respondent's inefficient team or lack of interest, moreover the respondent illegally charged interest @18% and @12% from the complainants on payments which were demanded well ahead of time or not in align with construction in the tower/project.

11. The respondent has failed to give possession as committed in buyer's agreement, and didn't oblige his promises and commitments. The respondent has no clarity on increased super area. The complainants also realize that the additional demands as mentioned in letter of offer of possession are illegal and unjustified unless there is clarity on increased area as per RERA rules, and the respondent is additionally seeking profit margins even on electrification, water and sewer connection.

12. The increase in super area from 2905 sqft to 3193 sqft, overcharging for electrification, water, sewer and other amenities are unjustified and concurrently increasing the cost of unit/ apartment for complainant. If respondent would have handed over the possession on time, the complainants would not have to incur the additional GST charges. These additional excess charges being unjustified are mere a way of self-enrichment of the respondent.

C. Relief sought by the complainant:

13. The complainants have sought the following relief(s):

    i. Direct the respondent to handover the physical possession of flat and to pay interest at the prescribed rate from the due date of possession until the physical possession of the flat as per section 18 of Real Estate (Regulation and Development) Act, 2016.

    ii. Direct the respondent to charge as per the standard rates prescribed by Haryana Govt, and competent authorities on electrification, water, sewer and other mandatory facilities.

D. Reply by the respondent

14. The so called cause of action as claimed by the complainants arose prior to the enforcement of the Act. The complaint is liable to be dismissed on this ground alone.

15. The apartment bearing no 82, located on the 8th floor in tower Kalistaa of the project, tentatively admeasuring 2905 sq. ft. of super area approx. was provisionally allotted in favour of the Complainants , vide allotment letter dated 18.12.2012. Buyer's agreement was executed between the complainants and the respondent on 8th October 2013.

16. The contractual relationship between the complainants and the respondent is governed by the terms and conditions of the buyer's agreement dated 08.10.2013 which has been voluntarily and consciously executed by the complainants after the complainants fully understood and accepted the terms and conditions thereof. Hence, the buyer's agreement dated 08.10.2013 is binding upon the complainants with full force and effect. Once a contract is executed between the parties, the rights and obligations of the parties are determined entirely by the covenants incorporated in the contract. 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.

17. The complainants have completely misinterpreted and misconstrued the terms and conditions of the buyer's agreement dated 08.10.2013. So far as alleged delay in delivery of physical possession of the apartment is concerned, in terms of clause 3(a) of the buyer's agreement, the time period for delivery of possession was 42 months excluding a grace period of 6 months from the date of approval of building plans or date of execution of the buyer's agreement, *whichever is later*, subject to the allottee(s) having strictly complied with all terms and conditions of the buyer's agreement and not being in default of any provision of the buyer's agreement including remittance of all amounts due and payable by the allottee(s) under the agreement as per the schedule of payment incorporated in the buyer's agreement. It is pertinent to mention that the application for approval of building plans was submitted on 26.08.2011 and the approval for the same was granted on 06.06.2012. Since the buyer's agreement dated 08.10.2013 was

executed subsequent to approval of building plans, therefore, the time period of 42 months excluding the grace period of 6 months as stipulated in the contract has to be calculated from 08.10.2013.

18. As per clause 3 (b) of the buyer's agreement dated 08.10.2013, in case any delay occurred on account of delay in sanction of the building/zoning plans by the concerned statutory authority or due to any reason beyond the control of the developer, the period taken by the concerned statutory authority would also be excluded from the time period stipulated in the contract for delivery of physical possession and consequently, the period for delivery of physical possession would be extended accordingly. It was further expressed therein that the allottees had agreed to not claim compensation of any nature whatsoever for the said period extended in the manner stated above.

19. For the purpose of promotion, construction and development of the project referred to above, a number of sanctions/permissions were required to be obtained from the concerned statutory authorities. That once an application for grant of any permission/sanction or for that matter building plans/zoning plans etc. are submitted for approval in the office of any statutory authority, the developer ceases to have any control over the same. The grant of sanction/approval to any such application/plan is the prerogative of the concerned statutory authority over which the developer cannot exercise any influence. The respondent has diligently and sincerely pursued the matter with the concerned statutory authorities for obtaining of various permissions/sanctions.

20. By contractual covenants incorporated in the buyer's agreement, the span of time, which was consumed in obtaining the following approvals/sanctions deserves to be excluded from the period agreed between the parties for delivery of physical possession:

Sno.	Nature of Permission/ Approval	Date of submission of application for grant of Approval/sanction	Date of Sanction of permission/grant of approval	Period of time consumed in obtaining permission/approval
1	Environment Clearance	30.05.2012	not received till date	-
2	Zoning Plans submitted with DGTCP	27-04-2011	03.10.2011	5 month
3	Building Plans submitted with DTCP	26.08.2011	06.06.2012	9 months
4	PWD Clearance	08.07.2013	16.08.2013	1 month
5	Approval from Deptt. of Mines & Geology	17.04.2012	22.05.2012	1 month
6	NOC from AAI	24.01.2017	01.02.2017	-
7	Approval granted by Assistant Divisional Fire Officer acting on behalf of commissioner	18.03.2016	01.07.2016	4 months
8	Clearance from Deputy Conservator of Forest	05.09.2011	15.05.2013	19 months
9	Aravali NOC from DC Gurgaon	05.09.2011	20.06.2013	20 months

21. Additionally, the said project has been hindered on account of several orders/directions passed by various forums/authorities/courts, as has been delineated herein below:-

Sr. No.	Date of Order	Directions	Period of Restriction/ Prohibition	Days Affected	Comments
1.	13.09.2012	The Hon'ble High Court of Punjab & Haryana in CWP No.20032 of 2008 titled as Sunil Singh V/s MoEF & Others vide orders dated 16.07.2012 directed that No building plans for construction shall be sanctioned unless the applicant assures the authority that carrying out the construction under-ground water will not be used and also show all the sources from where the water supply will be taken from construction purposes.	13.09.2012 to 12.10.2012	60	Due to ban on usage of underground water, the construction activity was brought to a standstill as there were no arrangements by the State Government to fullfill the demand of water to be used in construction activity. There was and is only 1 Govt. Sewage Treatment Plant at Chandu Budhera which was inadequate to meet the requirements of the developers.
2.	7th of April 2015	National Green Tribunal **had directed that old diesel vehicles (heavy or light) more than 10 years old would not be permitted to ply on the roads of NCR, Delhi.** It had further been directed by virtue of the aforesaid order that all the registration authorities in the State of Haryana, UP and NCT Delhi would not register any diesel vehicles more than 10 years old and would also file the list of vehicles before the tribunal and provide the same to the	7th of April 2015 to 6th of May 2015	30 days	The aforesaid ban affected the supply of raw materials as most of the contractors/ building material suppliers used diesel vehicles more than 10 years old. The order had abruptly stopped movement of diesel vehicles more than 10 years old which

		police and other concerned authorities.			are commonly used in construction activity. The order had completely hampered construction activity.
3.	19th of July 2017	National Green Tribunal in O.A. no. 479/2016 had directed that no stone crushers be permitted to operate unless they obtain consent from the State Pollution Control Board, no objection from the concerned authorities and have the Environmental Clearance from the competent authority.	Till date the order is in force and no relaxation has been given to this effect.	30 Days	The directions of NGT was a big blow to the real estate sector as the construction activity majorly requires gravel produced from the stone crushers. The reduced supply of gravel directly affected the supply & price of ready mix concrete required for construction activity.
4.	8th of November 2016	National Green Tribunal had directed all brick kilns operating in NCR, Delhi would be prohibited from working for a period of one week from the date of passing of the order. It had also been directed that no construction activity would be permitted for a period of one week from the date of order.	8th of November 2016 to 15th of November 2016	7 days	The bar imposed by National Green Tribunal was absolute. The order had completely stopped construction activity.
5.	7th of November 2017	Environment Pollution (Prevention and Control) Authority had directed to closure of all brick kilns, stone crushers, hot mix plants etc. with effect from 7th of November 2017 till further notice	Till date the order of closure of brick kilns and hot mix plants has not	90 days	The bar for closure of stone crushers simply put an end to construction activity as in the absence of crushed stones and bricks

			been vacated.		carrying on of construction were simply not feasible. The respondent eventually ended up locating alternatives with the intent of expeditiously concluding construction activity but a precious period of 90 days was consumed in doing so. The said period ought to be excluded, while computing the alleged delay attributed to the respondent by the complainant. It is pertinent to mention that the aforesaid bar stands in force regarding brick kilns till date as is evident from orders dated 21st of December 2019 and 30th of January 2020.
6.	9th of November 2017 and 17th of November 2017	National Green Tribunal had passed the said order dated 9th of November 2017 completely prohibiting the carrying on of construction by any person, private or government authority in the entire NCR till the next date of hearing (17th of November 2017). By virtue of the said order, National Green Tribunal had only		9 days	On account of passing of aforesaid order, no construction activity could have been legally carried on by the respondent. Accordingly, construction activity had been completely

		permitted the completion of interior finishing/interior work of projects. The order dated 9th of November 2017 prohibiting construction activity was vacated vide order dated 17th of November 2017.			stopped during this period.
7.	29th of October 2018	Haryana State Pollution Control Board, Panchkula had passed the order dated 29th of October 2018 in furtherance of directions of Environment Pollution (Prevention and Control) Authority dated 27th of October 2018. By virtue of order dated 29th of October 2018 all construction activities involving excavation, civil construction (excluding internal finishing/work where no construction material was used) were directed to remain closed in Delhi and other NCR Districts from 1st to 10th November 2018.	1st November 2018 to 10th November 2018	10 Days	On account of passing of aforesaid order, no construction activity could have been legally carried on by the respondent. Accordingly, construction activity had been completely stopped during this period.
8.	24th of July 2019	National Green Tribunal in O.A. no. 667/2019 & 679/2019 had again directed immediate closure of all illegal stone crushers in Mahendergarh Haryana who have not complied with the siting criteria, ambient air quality, carrying capacity and assessment of health impact. The Tribunal further directed initiation of action by way of prosecution and recovery of compensation relatable to the cost of restoration.		30 Days	The directions of the NGT were again a setback for stone crusher operators who had finally succeeded to obtain necessary permissions from the competent authority after the order passed by NGT on July 2017. Resultantly coercive action was taken by the authorities

					against the stone crusher operators which again was a hit to the real estate sector as the supply of gravel reduced manifolds and there was a sharp increase in prices which consequently affected the pace of construction.
9.	11th of October 2019	Commissioner, Municipal Corporation, Gurugram had passed order dated 11th of October 2019 whereby construction activity had been prohibited from 11th of October 2019 to 31st of December 2019. It was specifically mentioned in the aforesaid order that construction activity would be completely stopped during this period.	11th of October 2019 to 31st of December 2019	81 days	On account of passing of aforesaid order, no construction activity could have been legally carried on by the respondent. Accordingly, construction activity had been completely stopped during this period.
			Total	347 days	

22. As per clause 3(b) (iii) that in case of any default/delay by the allottees in payment as per schedule of payment incorporated in the buyer's agreement, the date of handing over of possession would be extended accordingly, solely on the developer's discretion till the payment of all of the outstanding amounts to the satisfaction of the developer. Since the complainants have repeatedly defaulted in timely remittance of payments as per schedule of payment, the date of delivery of possession is not liable to be determined in the manner alleged by the complainants. the

total outstanding amount including interest due to be paid by the complainant to the respondent as on 22.01.2022 is Rs.52,99,228/-.

23. The complainants consciously and maliciously chose to ignore the payment request letters and reminders issued by respondent and flouted in making timely payments of the instalments which was an essential, crucial and indispensable requirement under the buyer's agreement. Furthermore, when the proposed allottees default in their payments as per schedule agreed upon, the failure has a cascading effect on the operations and the cost for the proper execution of the project increases exponentially and at the same time inflicts substantial losses to the developer. The complainants chose to ignore all these aspects and wilfully defaulted in making timely payments. It is submitted that the respondent despite defaults of several allottees earnestly fulfilled its obligations under the buyer's agreement and completed the project as expeditiously as possible in the facts and circumstances of the case.

24. As per the terms and conditions of the buyer's agreement, the respondent have provided for payment of compensation to the complainants. The respondent has paid compensation amounting to Rs 3,60,340/- to the complainants at the time of offer of possession and have also credited GST refund/adjustment amounting to Rs 72,625/-.

25. Respondent had submitted an application for grant of environment clearance to the concerned statutory authority in the year 2012. However, for one reason or the other arising out of circumstances beyond the power and control of respondent, the aforesaid clearance was granted by Ministry of Environment, Forest &

Climate Change only on 04.02.2020 despite due diligence having been exercised by the respondent in this regard. No lapse whatsoever can be attributed to respondent insofar the delay in issuance of environment clearance is concerned. The issuance of an environment clearance referred to above was a precondition for submission of application for grant of occupation certificate.

26. The respondent left no stone unturned to complete the construction activity at the project site but unfortunately due to the outbreak of COVID-19 pandemic and the various restrictions imposed by the governmental authorities, the construction activity and business of the company was significantly and adversely impacted and the functioning of almost all the government functionaries were also brought to a standstill. Despite all odds, the respondent was able to resume remaining construction/ development at the project site and obtain necessary approvals and sanctions for submitting the application for grant of occupation certificate. Occupation certificate bearing no. 20100 dated 11.11.2020 has been issued by Directorate of Town and Country Planning, Haryana, Chandigarh.

27. The complainants were offered possession of the unit in question through letter of offer of possession dated 01.12.2020. After completion of construction and issuance of occupation certificate, the super area of the unit booked by the complainants was found to be 3193 sq ft and hence the complainants were called upon to make payment towards increase in super area in accordance with the buyer's agreement dated 08.10.2013. The complainants were called upon to remit balance payment including delayed payment

charges and to complete the necessary formalities/documentation necessary for handover of the unit in question to them. However, the complainants intentionally refrained from completing their duties and obligations as enumerated in the buyer's agreement as well as under the Act. Reminders/final opportunity to clear their outstanding dues were sent to the complainants by the respondent on 23.02.2021, 20.03.2021, 07.04.2021, 23.04.2021 and reminder dated 24.08.2021

E. Jurisdiction of the authority:

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

E. I Territorial jurisdiction

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

E. II Subject matter jurisdiction

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

Section 11(4)(a)

> *Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made*

thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

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

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

F. Findings on the objections raised by the respondent:

F.I Objection regarding jurisdiction of the complaint w.r.t the apartment buyer's agreement executed before coming into force of the Act.

30. The respondent submitted that the complaint is neither maintainable nor tenable and is liable to be outrightly dismissed as the flat buyer's agreement was executed between the parties before the enactment of the Act and the provision of the said Act cannot be applied retrospectively.

31. The authority is of the view that the provisions of the Act are quasi-retroactive to some extent in operation and would apply to the agreements for sale entered into even prior to coming into operation of the Act where the transaction is still in the process of completion. The Act nowhere provides, nor can be so construed, that all previous agreements would be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules, and agreements have to be read and interpreted harmoniously.

However, if the Act has provided for dealing with certain specific provisions/situations 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. Numerous provisions of the Act save the provisions 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."*

32. Also, 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-

> *"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."*

33. 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 and regulations made thereunder and are not unreasonable or exorbitant in nature. Hence, in the light of the above-mentioned reasons, the contention of the respondent w.r.t. jurisdiction stands rejected.

F.II Objections regarding Force Majeure

34. The respondent-promoter has raised the contention that the construction of the project has been delayed due to force majeure circumstances such as orders passed by the Hon'ble SC to stop construction, notification of the Municipal corporations Gurugram, Covid 19, etc. The plea of the respondent regarding various orders

of the SC, etc., and all the pleas advanced in this regard are devoid of merit. The orders passed by SC banning construction in the NCR region were for a very short period of time, and such exigencies should have been accounted for at the very inception itself and thus, cannot be said to impact the respondent-builder leading to such a delay in the completion. Furthermore, the due date of possession was 08 .04.2017, and therefore the respondent cannot take benefit of the delay due to COVID-19. Thus, the promoter respondent cannot be given any leniency on the basis of aforesaid reasons and it is a well-settled principle that a person cannot take benefit of his own wrong.

G. Prayer of the complainants regarding justification for increase in area from 2905 Sq Ft to 3193 Sq Ft.

35. The complainants contend that there has been an increase in the super area of the unit offered and that it is unjustified. The complainant argues that the original unit ad measured 2905 sq. ft. and later on at the time of offer of possession, the unit area was increased to 3193 sq. ft. On the other hand, the respondent states that the said increase is justified as per the agreement dated 08.10.2013. On perusal of the record put before the Authority, it is of the view that the said increase is within the limits stated in clause 1(e) of the agreement dated 08.10.2013 and that the increase is less than 10%. The said clause is reproduced below:

> *(i) That the APARTMENT ALLOTTEE(S) authorizes the DEVELOPER on his/her its behall to carry out such additions, alterations, deletions and modifications in the building plans of the Tower, Floor plans, Apartment Plans etc, including the number of*

Apartments/Floors as the DEVELOPER may consider necessary or as directed by any competent authority and/or Developer's Architect at any time even after the building plans for the Tower are sanctioned However, the said clause shall not restrict the rights of the DEVELOPER under clause 7(1) of this Agreement to construct additional floors/additional spaces as sanctioned and approved by the competent authority. It is understood by the Apartment Allottee(s) that the final Sale Price payable shall be recalculated upon confirmation by the DEVELOPER of the final Super Area of the said APARTMENT and any increase or reduction in the Super Area of the said APARTMENT shall be payable or refundable, without any interest, at the same rate per square feet/square meter as agreed herein above. In the event of increase in Super Area, the APARTMENT ALLOTTEE(S) agrees and undertakes to pay for the such increase immediately on demand by the DEVELOPER and conversely in case of reduction in the Super Area, the refundable amount due to the APARTMENT ALLOTTEE(S) shall be adjusted by the DEVELOPER from the final installment as set forth in the payment Plan appended in Annexure I. In case of such alterations, the proportionate share of the Apartment Allottee(s) in the Common Area and Facilities and Limited Common Area and facilities shall stand varied accordingly. Further, all residuary rights in the proposed Complex shall continue to remain vested with the Developer till such time as the same or a part thereof is allotted or otherwise transferred to any particular person/organization or to the Association of Residents of the Complex.

(ii) *That in case of any major alteration/ modification resulting in excess of 10% change in the super area of the Apartment in the sole opinion of the DEVELOPER any time prior to and upon the grant of occupation certificate, the DEVELOPER shall intimate the APARTMENT ALLOTTEE(S) in writing the changes thereof and the resultant change, if any, in the Sale Price of the APARTMENT to be paid by him/her and the APARTMENT*

ALLOTTEE(S) agrees to deliver to the DEVELOPER in writing his/her consent or objections to the changes within titleen (15) days from the date of dispatch by the DEVELOPER of such notice falling which the APARTMENT ALLOTTEE(S) shall be deemed to have given his her full consent to all such alterations/modifications and for payments, if any, to be paid in consequence thereof If the written notice of the APARTMENT ALLOITEE(S) is received by the DEVELOPER within fifteen (15) days of intimation in writing by the DEVELOPER indicating lus her/its non-consent objection to such alterations/ modifications as intimated by the DEVELOPER to the APARTMENT ..."

H. Findings on relief sought by the complainant.

H.1 Direct the respondent to provide possession to the complainant along with the prescribed rate of interest on delay in handing over possession of the apartment on the amount paid by the complainant from the due date of possession till the actual date of possession.

36. In the instant case, the buyer's agreement was executed between the complainants and the respondent on 08.10.2013, and as per clause 3(a), the possession was to be handed over within 42 months. The said clause is reproduced below:

"3(a) The developer proposes to handover the possession of the apartment within a period of forty-two (42) months (excluding a grace period of 6 months) from the date of approval of building plans or the date of signing of this agreement whichever is later)"

Since the building plans were approved on 06.06.2012. Therefore the due date of possession shall be calculated from the date of execution of buyer's agreement i.e. 08.10.2013, therefore the due date of possession comes out to be 08.04.2017.

37. In the instant case, there has been a delay in obtaining the occupation certificate by the respondent, the said OC was obtained

only on 11.11.2020. Thereafter the respondent issued an offer for possession on 01.12.2020 as a certain amount was yet to be paid by the complainant. After this, the complainant filed a complaint with this Authority on 09.02.2022.

38. As the occupation certificate has been obtained by the respondent, the offer of possession can be made by the respondent. As per section 19(10) of the Act, the complainant/allottee is duty-bound to take possession within two months of the occupancy certificate issued for the said unit.

39. On the issue of additional demands, the respondent had issued an offer of possession dated 01.12.2020 which was accompanied by an additional demand of Rs. 57,96,366/- which included a demand for GST, Labour cess, Miscellaneous charges, and another demand of Rs. 3,34,300/- under head pre-serve.

40. Regarding the demand of GST, the Authority made its view clear in "Varun Gupta Vs Emmar Mgf Land Ltd." wherein it was held that

> *"For the projects where the due date of possession was prior to 01.07.2017 (date of coming into force of GST), the respondent/promoter is not entitled to charge any amount towards GST from the complainant(s)/allottee(s) as the liability of that charge had not become due up to the due date of possession as per the builder buyer's agreements. For the projects where the due date of possession was/is after 01.07.2017 i.e., the date of coming into force of GST, the builder is entitled to charge GST, but it is obligated to pass the statutory benefits of that input tax credit to the allottee(s) within a reasonable period."*

In view of the aforesaid finding of the Authority, the demand of GST is invalid as the due date of possession was 08.04.2017 which was before the coming into force of the GST. Hence, the respondent shall not charge any GST from the complainant.

41. On the issue of the demand for labor cess, the labor cess is levied @1% on the cost of construction incurred by an employer as per the provisions of sections 3(1) and 3(3) of the Building and Other Construction Workers Welfare Cess Act, 1996 read with Notification No. S.O 2899 dated 26.9.1996. It is levied and collected on the cost of construction incurred by employers including contractors under specific conditions. Moreover, this issue has already been dealt with by the authority in complaint bearing no. **962 of 2019 titled Mr. Sumit Kumar Gupta and Anr, Vs Sepset Properties Private Limited** where it was held that since labor cess is to be paid by the respondent, no labor cess should be charged by the respondent. The authority is of the view that the allottee is neither an employer nor a contractor and labour cess is not a tax but a fee. Thus, the demand of labor cess raised upon the complainant is completely arbitrary and the complainant cannot be made liable to pay any labor cess to the respondent and it is the respondent builder who is solely responsible for the disbursement of said amount. Hence, the respondent cannot charge the said amount.

42. In the issue of demand for miscellaneous charges, the same has been charged arbitrarily and has no rationale. No justification has been provided for the same either in the offer of possession or in the agreement to sell. Therefore, the respondent cannot charge the said amount.

43. In the issue of demand for IFMS and prepaid electricity meter, the demand for IFMS is justified as per the agreement to sell dated 08.10.2013. Clause 4(c) of the said agreement is reproduced below for ready reference:

> *"4(c) The APARTMENT ALLOTTE(S) agrees and undertakes to pay to the DEVELOPER an Interest Free Maintenance Security Deposit (IFMS) @ Rs. 100/- (Rupees One Hundred only) per sq. ft. of the Super Area of the APARTMENT. In case of failure of the APARTMENT ALLOTTEE(S) to pay the maintenance bill, other charges on or before the due date, the APARTMENT ALLOTTE(S) in addition to permitting the DEVELOPER/ nominated Maintenance Agency to deny him her them the maintenance services, also authorizes the DEVELOPER to deny use of common areas and amenities to the DEVELOPER and to adjust unpaid amount against maintenance bills out of the said IFMS. The Security / IFMS shall also be utilized for replacement, refurbishing, major repairs of plants, machinery, etc. installed in the said Complex or towards defrayment of expenses necessitated by any unforeseen occurrence involving expenditure in relation to the Complex. However, on formation of the "Association of Residents" the balance IFMS available in this Account after adjustment of unpaid maintenance dues of the Apartment Allottee(s), if any, shall be remitted to the Association (without interest) when the maintenance of the Complex is handed over to the Association."*

In view of the above-mentioned clause, the said demand of IFMS is valid, hence the respondent is justified in charging the said amount. The demand for pre-paid electricity meters is justified as per clause 5(vi) of the agreement dated 08.10.2013. The said clause is reproduced below:

> *"5(vi) The apartment allottee(s) agree to pay electricity, water, and sewerage connection connection charges and further undertakes to pay additionally to the developer the actual cost of electricity and water consumption charges and/or any other charges which may be payable in respect of the said apartment."*

In view of the above-mentioned clause, the said demand for pre-paid meter charges is justified and the respondent can charge the same.

44. Therefore, the illegal demands raised in the offer of possession shall not be payable by the complainant, but the offer of possession remains valid. In the context of the aforesaid facts, there has been a considerable delay on the part of the respondent in fulfilling its obligations under the space buyer's agreement. As per the clause 3(a), the due date of possession comes out to be 08.04.2017 (calculated from the date of execution of buyer's agreement). Hence, as per Sec 18 of the Act of 2016, the allottee is entitled to interest on the capital invested by him.

45. In the instant case, the complainant wishes to continue with the project and is seeking DPC as provided under the proviso to sec 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."*

46. **Admissibility of delay possession charges at prescribed rate of interest:** 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's 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.

47. 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.

48. Consequently, as per the website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as of the date i.e., 22.11.2023 is **8.75%**. Accordingly, the prescribed rate of interest will be the marginal cost of lending rate +2% i.e., **10.75%.**

49. The definition of the 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 that 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;"

50. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., **10.75%** by the respondent/ promoter which is the same as is being granted to it in case of delayed possession charges.

51. On consideration of the circumstances, the documents, submissions made by the parties, and based on the findings of the authority regarding contravention as per provisions of rule 28(2), the Authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 3(a) of the agreement executed between the parties on 08.10.2013, the possession of the subject unit was to be delivered within 42 months from the date of the approval of building plans or the date of signing of this agreement whichever is later. Therefore, the due date for handing over possession was 08.04.2017. Accordingly, it is the failure of the respondent/promoter to fulfill 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 a delay on the part of the respondent to offer possession of the allotted unit to the complainants as per the terms and conditions of the buyer's agreement dated 08.10.2013 executed between the parties.

52. Accordingly, it is the failure of the promoter to fulfill its obligations and responsibilities as per the agreement dated 08.10.2013 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 allottees shall be paid, by the

promoter, interest for every month of a delay from the due date of possession i.e. 08.04.2017 till the offer of possession i.e. 01.12.2020 plus two months, as per section 18(1) of the Act of 2016 read with rule 15 of the Rules.

H.II Direct the respondent to charge as per the standard rates prescribed by Haryana Govt, and competent authorities on electrification, water, sewer and other mandatory facilities.

53. The complainant contends that the electrification, sewage, and water charges raised by the respondent are unjustified and must be in accordance with the standard rates. On perusal of the record brought before this Authority, and in view of this Authority's order in "CR/4031/2019 and others" in the case titled "Varun Gupta Vs Emmar Mgf Ltd" wherein it was held that electrification charges cannot be raised but electric, sewage, etc. charges can be raised as per the actual charges incurred by the builder. The relevant para of the order is produced hereunder.

> *"xiii. Electrification charges: The promoter cannot charge electrification charges from the allottees while issuing offer of possession letter of a unit even though there is any provision in the builder buyer's agreement to the contrary."*
>
> *"xiv. Electric, water and sewerage connection charges: The promoter would be entitled to recover the actual charges paid to the concerned departments' from the complainant/allottee on pro-rata basis on account of electricity connection, sewerage connection and water connection, etc., i.e., depending upon the area of the flat allotted to the complainant vis-à-vis the area of all the flats in this particular project. The complainant would also be entitled to proof of such payments to the concerned departments along with a computation proportionate to the allotted unit, before making payments under the aforesaid heads."*

Therefore, the respondent can only charge electric, water, and sewage connection charges, and the complainants are entitled to get proof of the actual charges incurred by the respondent.

I. Directions issued by the Authority:

54. 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 functions entrusted to the Authority under section 34(f) of the Act of 2016:

i. The respondent is directed to pay interest to the complainant against the paid-up amount at the prescribed rate of 10.75% p.a. for every month of a delay from the due date of possession i.e. 08.04.2017 till the offer of possession i.e. 01.12.2020 plus two months, as per section 18(1) of the Act of 2016 read with rule 15 of the Rules.

ii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.

iii. The arrears of such interest accrued from 08.04.2017 till the date of order by the Authority shall be paid by the promoter to the allottees within a period of 90 days from the date of this order and interest for every month of delay shall be paid by the promoter to the allottee before 10th of the subsequent month as per rule 16(2) of the rules;

iv. The rate of interest chargeable from the allottee by the promoter, in case of default, shall be charged at the prescribed rate i.e. 10.75% 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.

v. The respondent shall not charge anything from the complainant which is not part of the buyer's agreement.

vi. The respondent shall provide the proofs of the actual amount incurred by it in providing electric, sewage, and water connection charges.

55. Complaint stands disposed of.

56. File be consigned to the Registry.

Ashok Sangwan

(Member)

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 06.12.2023