HARERA
GURUGRAM

Complaint No. 4798 of 2021

BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**4798/2021**
Date of filing complaint:	**09.12.2021**
First date of hearing:	**28.01.2022**
Date of decision :	**22.11.2023**

Mr. Subramanian Krishnan **Resident of:** Flat no. 30 A, Gayatri Apartments, Plot- 21, Sector 9, Rohini, New Delhi-110085	**Complainant**
Versus	
M/s Spaze Towers Pvt. Ltd. **Regd. office:** Spazeedge, Sector 47, Sohna-Gurgaon Road, Gurugram.	**Respondent**

CORAM:	
Shri Ashok Sangwan	**Member**
APPEARANCE:	
Shri Gaurav Rawat Advocate	Complainant
Ms. JK Dang Advocate	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottee 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 complainant, 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 AT4, Sector – 84, Gurugram
2.	Project area	10.15 acre
3.	Nature of the project	Group Housing Residential Complex
4.	DTCP license no. and validity status	26 of 2011 dated 25.03.2011 valid upto 24.03.2019
5.	Name of licensee	Mohinder Kaur and others
6.	RERA Registered/ not registered	385 of 2017 dated 14.12.2017
7.	Unit no.	Tower – B-2, 143 on 14th floor (Page 29 of the complaint)
8.	Unit area admeasuring	2070 sq. ft. (Originally) (Page 29 of the complaint) 2275 sq. ft. (Increased) (Page 64 of the complaint)
9.	Date of building plan approval	06.06.2012 (Page 88 of the reply)

10.	Date of execution of Space buyer agreement	29.12.2011 (Page 26 of the complaint)
11.	Possession clause	**3(a)** The developer proposes to handover the possession of the apartment within a period of thirty-six (36) 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 (Page 33 of the complaint))
12.	Due date of possession	06.06.2015 (Calculate from the date of approval of building plans as it is the later one)
13.	Endorsement letter	03.10.2013 (Original allottee i.e., Paramjit singh Gill endorsed the present unit in favor of Mr. Subramanian Krishnan (present complainant) (Page 63 of the complaint)
14.	Tripartite agreement	07.11.2013 (Page 42 of the reply)
14.	Total sale consideration	Rs. 89,05,186/- (Page 47 of the complaint)
15.	Amount paid by the complainants	Rs. 89,74,629/- (Page 143 of reply)
16.	Occupation certificate	Obtained dated 11.11.2020 (Page 182 of reply)

17.	Offer of possession	Offered dated 01.12.2020 (Page 64 of complaint)

B. Facts of the complaint:

3. Relying on the representations, warranties, and assurances of the respondent about the timely delivery of possession, the original allottee M/s Paramjeet Singh Gill (HUF), booked an apartment no. 143 on the 14th floor in tower B2 admeasuring 2070 sq. ft. Super Area along with one covered car parking space in the the real estate development of the respondent, known under the name and style of "SPAZE PRIVY AT4" at Sector 84, Gurugram, Haryana, vide an application dated 03.10.2011.

4. The original allottee bought the said unit from the authorized representative of the respondent. The authorized representative, for and on behalf of the respondent, making tall claims in regard to the project and the respondent, lured the complainant into booking a unit in the project of the respondent.

5. Subsequent to the agreement, the said unit was transferred and endorsed in the name of the complainant/subsequent allottee vide the acknowledgment for endorsement dated 03.10.2013 by virtue of which the subsequent allottee entered into the shoes of the original allottee.

6. The complainant entered into the agreement by virtue of which the respondent was obligated to deliver the possession of the said unit within time to the complainant. However, the respondent miserably failed to comply with the said obligation which directly flowed from clause 3 of the agreement despite being bound by the terms and conditions of the said agreement.

7. Calculating from the date of approval of building plans i.e. 06.06.2012, the due date for handing over possession comes out to be 06.06.2015. The respondent has delayed by over 5 years and 6 months in offering the possession of the said unit as is evident from the fact that the notice for offer of possession was furnished only on 01.12.2020. The respondent has always been vague and ambiguous in updating about the status of development in the project.
8. The respondent with utmost *malafide* intent, has made advertisements and executed the Agreement without having building plans beforehand.
9. The Respondent failed to comply with all the obligations, not only with respect to the Agreement with the Complainant but also with respect to the concerned laws, rules, and regulations thereunder, due to which the Complainant faced innumerable hardships. Moreover, the Respondent made false statements vide the demand letters by stating that "...the above project is progressing fast and is creating good value...,"
10. The Respondent neither provided the occupation certificate ("OC") to the complainant nor it is uploaded on the website of the Department of Town & Country Planning ("DTCP"). Moreover, the notice of offer of possession doesn't mention about the occupation certificate.
11. The complainant took a housing loan for INR 71,00,000/- from the State Bank of India.
12. The respondent has increased the super area by 205 sq. ft. i.e., from 2070 to 2275 sq. ft. without prior notice to the complainant, which resulted in a tremendous financial burden upon the complainant.

The increase in the super area amounts to 10%. Such an increase cannot be regarded as 'minor alterations' within the meaning of section 14(2) of the Act.

13. The Hon'ble authority has also passed the judgment dated 04.09.2018 in complaint no. 49/2018, titled as ***Parkash Chand Arohi Vs. M/s Pivotal Infrastructure Pvt. Ltd.*** of the Haryana Real Estate Regulatory Authority, Panchkula wherein it has been observed that the possession of the flat in term of the buyer's agreement was required to be delivered on 1.10.2013 and the incidence of GST came into operation thereafter on 01.07.2017. So, the complainant cannot be burdened to discharge a liability that had accrued solely due to the respondent's own fault in delivering timely possession of the flat.

C. Relief sought by the complainant:

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

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

    ii. Direct the respondent to charge the complainant as per 2070 sq. ft, i.e., the super area agreed upon at the time of agreement and not for the arbitrary increase in the super area;

D. Reply by the respondent

15. The complaint is barred by limitation. The cause of action in favor of the complainant arose prior to the enforcement of the Act. The complaint is liable to be dismissed on this ground alone.

16. The complaint is bad for non-joinder of the State Bank of India which holds a lien over the unit in question.

17. The apartment bearing no A2-143, tentatively measuring 2070 sq. ft. of super area approx. was provisionally allotted in favor of M/s Paramjeet Singh Gill (HUF) (original allottee), vide allotment letter dated 29.11.2011. The buyer's agreement was executed between the original allottee and the respondent on 29th November 2011. The original allottee transferred the allotment in favor of the complainant. Upon execution of transfer documents by the original allottee and the complainant, the allotment was transferred in favor of the complainant on 03.10.2013. At the time of purchase in resale, the buyer's agreement had already been executed by the original allottee, and hence the complainant had the complete opportunity to study the terms and conditions of the buyer's agreement in detail and understand the implications of its terms and conditions. It was only after the complainant independently conducted his due diligence and duly accepted the terms and conditions of the buyer's agreement that the complainant proceeded to purchase the apartment in question, in resale from the original allottee.

18. In terms of clause 3(a) of the buyer's agreement dated 29.11.2011, the time period for delivery of possession was 42 months including 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. 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 building plans were approved subsequent to the execution of the buyer's agreement, therefore, the time period of 42 months including the grace period of 6 months as stipulated in the contract has to be calculated from 06.06.2012 subject to the provisions of the buyer's agreement

19. It was provided in Clause 3 (b) of the buyer's agreement dated 29.11.2011 that 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.

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

S no.	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 to 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	05.09.2011	20.06.2013	20 months

	DC Gurgaon				

21. Additionally, the development and implementation of the said project have 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	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

		taken from construction purposes.			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 police and other concerned authorities.	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 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	Till date the order is in force and no relaxation	30 Days	The directions of NGT was a big blow to the real

		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.	has been given to this effect.		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 been vacated.	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 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		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 stopped during this period.

		only 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.			
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	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.

		where no construction material was used) were directed to remain closed in Delhi and other NCR Districts from 1st to 10th November 2018.			
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. A period of 347 days was consumed on account of circumstances beyond the power and control of the respondent owing to the

passing of orders by statutory authorities. Thus, the respondent has been prevented by circumstances beyond its power and control from undertaking the implementation of the project during the time period indicated above and therefore the same is not to be taken into reckoning while computing the period of 42 months including the grace period of 6 months as has been explicitly provided in the buyer's agreement.

23. As per clause 3(b)(iii), 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 complainant has repeatedly defaulted in timely remittance of payments as per the schedule of payment, the date of delivery of possession is not liable to be determined in the manner alleged by the complainant. The total outstanding amount including interest due to be paid by the complainant to the respondent as of date is Rs.16,40,789/-.

24. The complainant consciously and maliciously chose to ignore the payment request letters and reminders issued by the respondent and flouted in making timely payments of the installments which were an essential, crucial, and indispensable requirement under the buyer's agreement. Furthermore, when the proposed allottees default in their payments as per the schedule agreed upon, the failure has a cascading effect on the operations and the cost for proper execution of the project increases exponentially and at the same time inflicts substantial losses to the developer. The

complainant chose to ignore all these aspects and wilfully defaulted in making timely payments.

25. The 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.

26. 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.

27. The respondent amidst all the hurdles and difficulties striving hard has completed the construction at the project site and submitted the application for obtaining the occupation certificate with the concerned statutory authority on 16.06.2020 and since then the matter was persistently pursued. An occupation certificate bearing no.20100 dated 11.11.2020 has been issued by the Directorate of Town and Country Planning, Haryana, Chandigarh. The time period utilized by the concerned statutory authority for granting the occupation certificate needs to be necessarily excluded from the computation of the time period utilized in the implementation of the project in terms of the buyer's agreement.

28. The complainant was offered possession of the unit in question through a letter of offer of possession dated 01.12.2020. After completion of construction and issuance of the occupation certificate, the super area of the unit booked by the complainant was found to be 2275 sq ft and hence the complainant was called upon to make payment towards the increase in super area in accordance with the buyer's agreement dated 29.11.2011. The complainant was called upon to remit the balance payment including delayed payment charges and to complete the necessary formalities/documentation necessary for the handover of the unit in question to them. However, the complainant intentionally refrained from completing his duties and obligations as enumerated in the buyer's agreement as well as the Act.

29. Buyer's agreement further provides that compensation for any delay in delivery of possession shall only be given to such allottees who are not in default of the agreement and who have not defaulted in payment as per the payment plan incorporated in the agreement. The complainant, having defaulted in payment of installments, is not entitled to any compensation under the buyer's agreement.

E. Jurisdiction of the authority:

30. 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.

31. 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.

32. 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.

33. 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."

34. 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."

35. 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 Objection regarding the complainant is a subsequent allottee.

I. Where the subsequent allottee had stepped into the shoes of the original allottee before the due date of handing over possession.

36. In the instant case, the original allottee and complainant/subsequent allottee had intimated the respondent about the endorsement of the said unit in the name of the complainant/subsequent allottee vide endorsement letter dated 03.10.2013. The authority has perused the said endorsement letter, furthermore, the space buyer agreement dated 29.12.2011 has been signed on behalf of the complainant, and thereafter all the demands have been raised upon the complainant, and such demands have been paid under the complainant's name only. The aforesaid facts clearly state that the subsequent allottee/complainant entered into the shoes of the original allottee. As per the space buyer agreement, the due date of delivery of possession was 06.06.2015, but the unit was not ready by that time. The offer of possession was only made on 01.12.2020 after a considerable delay. If these facts are taken into consideration, the complainant/subsequent allottee had agreed to buy the unit in question with the expectation that the respondent/promoter would abide by the terms of the builder-buyer agreement and would deliver the subject unit by the said due date. At this juncture, the subsequent purchaser cannot be expected to know by any stretch of the imagination that the project will be delayed and the

possession will not be handed over within the stipulated period. So, the authority is of the view that in the cases where the subsequent allottee had stepped into the shoes of the original allottee before the due date of handing over of possession, the delayed possession charges shall be granted w.e.f the due date of handing over of possession.

F.III Objections regarding Force Majeure

37. 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 06.06.2015, 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. Findings on relief sought by the complainant.

G.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.

38. In the instant case, the space buyer agreement was executed between the original allottee and the respondent on 29.12.2011, thereafter, the same was endorsed in the name of the complainant on 03.10.2013 and as per clause 3(a), the possession was to be handed over within 3 years. The said clause is reproduced below:

> *"3(a) The developer proposes to handover the possession of the apartment within a period of thirty-six (36) 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]"*

Therefore the due date of possession comes out to be 06.06.2015.

39. 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 09.12.2021.

40. 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.

41. 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. 13,78,815/- which included a demand for GST, Labour cess, Miscellaneous charges, and another demand of Rs. 2,42,500/- under head pre-serve.

42. 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 06.06.2015 which was before the coming into force of the GST. Hence, the respondent shall not charge any GST from the complainant.

43. 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.

44. 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.

45. In the issue of demand for IFMS and prepaid electricity meter, the demand for IFMS is justified as per the agreement to sell dated 29.12.2011. 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 29.12.2011. 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.

46. 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 06.06.2015 (calculated from the date of approval of building plans). Hence, as per Sec 18 of the Act of 2016, the allottee is entitled to interest on the capital invested by him.

47. 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."*

48. **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.*

49. 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.

50. 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%.**

51. 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;"

52. 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.

53. 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 29.12.2011, the possession of the subject unit was to be delivered within 36 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 06.06.2015 (calculated from the date of approval of building plans i.e. 06.06.2012). 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 29.12.2011 executed between the parties.

54. Accordingly, it is the failure of the promoter to fulfill its obligations and responsibilities as per the agreement dated 29.12.2011 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. 06.06.2015 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.

G.II Direct the respondent to charge the complainant as per 2070 sq. ft, i.e., the super area agreed upon at the time of agreement and not for the arbitrary increase in the super area;

55. The complainant contends that there has been an increase in the super area of the unit offered and that it is illegal and unjustified. The complainant argues that the original unit ad measured 2070 sq. ft. and later on at the time of offer of possession, the unit area was increased to 2275 sq. ft. On the other hand, the respondent states that the said increase is justified as per the agreement dated 29.12.2011. 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 29.12.2011 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 1. 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 failing 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. Directions issued by the Authority:

56. 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. 06.06.2015 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 06.06.2015 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.

57. Complaint stands disposed of.

58. File be consigned to the Registry.

Ashok Sangwan

(Member)

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 22.11.2023