# BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

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| **Complaint no.:** | **2069 of 2022** |
| **Date of complaint:** | **10.05.2022** |
| **Date of order:** | **10.10.2024** |

1.Varun Tully
2.Nitin Tully
**R/o:** - L-28/4, DLF Phase- II, Gurugram
122002 **Complainants**

Versus

Spaze Towers Pvt. Ltd.
**Regd. Office at:** - Tower-C, Spazedge, Sector-47, Gurugram, Haryana **Respondent**

**CORAM:**
Shri Vijay Kumar Goyal **Member**

**APPEARANCE:**
Shri Garvit Gupta (Advocate) Complainants
Shri Harshit Batra (Advocate) Respondent

## ORDER

1. The present complaint has been filed by the complainant/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the

Rules and regulations made thereunder or to the allottee as per the agreement for sale executed *inter se*.

**A. Unit and project related details.**

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

| S No. | Particulars | Details |
|---|---|---|
| 1. | Name of the project | Tristar, Sector-92 Gurugram, Haryana. |
| 2. | Total area of the project | 2.71875 acres |
| 3. | Nature of the project | Commercial |
| 4. | DTCP license no. | 72 of 2013 dated 27.07.2013 |
| | Validity of license | 26.07.2017 |
| | Licensee | Spaze Towers Pvt. Ltd |
| 5. | Registered/not registered | Registered<br>247 of 2017 dated 26.09.2017 |
| 6. | Unit no. | 79, ground floor |
| 7. | Area of the unit (super area) | 1362 sq. ft.<br>1618 sq. ft. (revised unit size) |
| 8. | Allotment letter | 06.10.2014<br>(page 35 of reply) |
| 9. | Date of execution of buyer's agreement | 15.11.2014<br>(page 33 of complaint) |
| 10. | Possession clause | *11.*<br>***(a). Schedule for possession of the Said Unit***<br>*The Developer based on its present plans and estimates and subject to all just exceptions endeavors to complete construction of the Said Building/Said Unit in terms of the approvals (including the renewal/extended period described therein) and in accordance with the terms of this Agreement unless there shall be delay or failure due to department delay or due to any circumstances beyond the power and control of the Developer or Force Majeure conditions including but not limited to reasons mentioned in clause 11(b) and 11(c) or due to failure of the Allottee(s) to pay in time the Total Consideration or any part thereof and other charges and dues/payments mentioned in this Agreement or any failure on the part of the Allottee(s) to abide by all or any of the terms and conditions of this Agreement. In case there is any delay on the part of the Allottee(s) in making of payments to the* |

| | | |
|---|---|---|
| | | *Developer then notwithstanding rights available to the Developer elsewhere in this Agreement, the period for implementation of the project shall also be extended by a span of time equivalent to each delay on the part of the Allottee(s) in remitting payment(s) to the Developer.* ***(No time period specified)*** |
| 11. | Due date of possession | 15.11.2019 (as per escalation clause no.1.2 page 44 and also complainant's submission page 23) |
| 12. | Total consideration | Rs.2,01,34,685/- (as per payment plan at page 81 of complaint) |
| 13. | Total amount paid by the complainant | Rs.70,27,815/- (as per final account settlement page 104 complaint) |
| 14. | Reminder letter dated | 29.08.2017, 22.10.2018, 30.10.2018, 28.05.2019, 14.06.2019 (page 39-6 of reply) |
| 15. | Termination/cancellation letter dated | 11.06.2021 (page 53A of reply) |
| 16. | Occupation certificate | 03.05.2021 (page 48 of reply) |
| 17. | Offer of possession | 05.05.2021 (page 51 of reply) |
| 18. | Request for refund | 26.03.2022 vide email (page 128 of complaint) |

**B. Facts of the complaint:**

3. The complainant has made the following submissions: -

I. That the respondent offered for sale of units in a multi storied building known as 'Tristaar' on a piece and parcel of land admeasuring 2.71875 acres situated in revenue estate of Dhorka, Sector 92, Gurugram, Haryana. The respondent also claimed that the DTCP, Haryana had granted license bearing no. 72 of 2013 dated 27.07.2013 for development of a commercial complex.

II. That the complainants received a marketing call from the office of respondent in the month of March, 2014 for booking in the project of the

respondent. The complainants had also been attracted towards the aforesaid project on account of publicity given by the respondent through various means like brochures, posters, advertisements etc. The complainants visited the sales gallery and consulted with the marketing staff of the respondent. The marketing staff of the respondent painted a very rosy picture of the project and made several representations with respect to the innumerable world class facilities to be provided by the respondent in their project. The marketing staff of the respondent also assured timely delivery of the unit. It was specifically assured by the marketing representatives of the respondent that the unit would be delivered to the complainants by the first quarter of 2017.

III. That the complainants had on demands of the respondent, made the payment of Rs.6,00,000/- at the time of booking on 11.04.2014 vide cheque no. 196106. The complainants at the stage of 'within 60 days from the booking' made the payment of Rs.9,00,000/- on 11.06.2014 vide cheque no. 196419, Rs.9,00,000/- on 11.07.2014 vide cheque no. 196420 and Rs.9,05,257/- on 11.08.2014 vide cheque no. 196421. The complainants signed several blank and printed papers at the instance of the respondent who obtained the same on the ground that the same were required for completing the booking formalities. The complainants were not given chance to read or understand the said documents and they signed and completed the formalities as desired by the respondent. Furthermore, no copy of any document, prior to the execution of the agreement, was ever shared with the complainants by the respondent.

IV. That a copy of the agreement was sent to the complainants which was a wholly one-sided document containing totally unilateral, arbitrary, one-sided, and legally untenable terms favoring respondent and was totally against the interest of the purchaser, including the complainants herein.

V. That while in the case of the complainants making the delay in the payment of instalments, the respondent company is shown to be entitled to charge interest @ 18% per annum, as is evident from the payment demand letters, and on the other hand, the agreement is completely silent with respect to the consequences on account of failure of the respondent to offer the possession. Furthermore, the fact that the agreement is completely unilateral and arbitrary is evident from the fact that the respondent has deliberately not provided any timeline in the possession clause of the agreement within which it was supposed to hand over the possession of the unit to the complainants. There is no mention of any clause in the agreement wherein any type of compensation or interest or penalty is shown to be payable to the complainants in case of default on the part of the respondent. The compensation payable by the complainants, in case of their defaults without defining the liabilities of the respondent in the event of its defaults, has deliberately been formulated to the detriment of the complainants and the same is illegal and unsustainable.

VI. That moreover the fact that the respondent was in a completely dominant position and wanted to deliberately exploit the same at the cost of the innocent purchasers including the complainants and is further evident from Clause 1.8 and 1.20 of the agreement wherein it limited the power of the allottees including the complainants to raise any objections.

VII. That the respondent gave itself unlimited powers to such an extent that the respondent could charge any amount as deemed fit by it for the purpose of providing/supplying the electric power. Furthermore, the respondent had given itself unlimited and arbitrary powers to amend and modify the terms of the agreement as per its own whims, fancies and convenience without giving any justification to the complainants or without even seeking any consent from her.

VIII. That the above stated provisions of the agreement besides other similar one sided provisions are on the face of it were highly illegal, absurd, unilateral, arbitrary, unconscionable and not valid. The legislature has promulgated the Real Estate (Regulation and Development) Act, 2016 to balance the bargaining power of the allottees who have been disadvantaged by the abuse of the dominant position of the developers.

IX. That the complainants made vocal their objections to the arbitrary and unilateral clauses of the agreement to the respondent. Prior to the signing of the agreement, complainants had made payment of Rs.33,05,257/- out of the consideration amount of Rs.1,59,35,400/. Since the complainants had already parted with a considerable amount of more than 20% of the sale consideration, they were left with no other option but to accept the lopsided and one-sided terms of the agreement. The complainants felt trapped and had no other option but to sign the dotted lines. Hence the agreement dated 15.11.2014 was executed.

X. That the respondent kept on raising payment demands despite giving no clarification with respect to the due date to handover the possession. The complainants met the representatives of the respondent at its office and the representatives of the respondent assured the complainants that the unit would be handed to the complainants by first quarter of 2017 and that they should keep on making the payments towards the sale consideration in order to avoid any heavy interest. Accordingly, the complainants, left with no other option made part-payments.

XI. That vide payment demand dated 01.03.2017, the respondent sent the payment demand towards the construction milestone of 'on commencement of 1st basement floor slab'. The complainants on the receipt of the said demand went to meet the representatives of the respondent at the project site to enquire about the possession of the unit and were

shocked to see the construction status of the project. No construction activities were going on at the project site and it was clear that the work has been at standstill since several months. The actual ground reality at the construction site was way different than what the respondent had claimed to the complainants regarding the completion of the project. The unit which was supposed to be handed over to the complainants by first quarter of 2017 was not even close to the completion as per the payment demand sent by the respondent. The complainants made it clear to the representatives of the respondent that since there was an inordinate delay on the part of the respondent in completion and handing over the possession to the complainants, they would not make payments until the delayed possession charges, as per applicable law are adjusted and possession was handed over.

XII. That despite having drafted the agreement dated 15.11.2014 containing terms very much favourable as per the wishes of the respondent, still the respondent miserably failed to abide by its obligations thereunder. The respondent even failed to perform the most fundamental obligation of the agreement which was to handover the possession of the commercial unit within the promised time frame, which in the present case was delayed for an extremely long period of time. The failure of the respondent and the fraud played by it is writ large. When the complainants confronted the respondent regarding the due date and that there was no specific mention of the same in the agreement, it was informed to them that the due date to handover the possession would be 60 months from the date of the agreement as per combined reading of Clause 1.2 with Clause 11 of the agreement.

XIII. That despite considerable delay on the part of the respondent, it kept on sending communications to the complainants for the purpose of creating

false evidence and in order to somehow unnecessarily harass, pressurize and blackmail the complainants to submit to their unreasonable and untenable demands. Vide statement of account sent by the respondent on 24.08.2018, the respondent unilaterally increased the basic price of the unit from Rs.1,59,35,400/- to Rs.1,63,44,000/-. The said statement of account was nothing but an attempt of the respondent/promoter to raise demand as per its whims and fancies and not in accordance with the payment plan. The complainants yet again met the representatives of the respondent. The respondent kept on misleading the complainants by giving incorrect information and assurances that it would hand over the possession to the complainants very soon. However, it was clearly evident that the respondent was nowhere near the completion of the construction of the unit. The payment demands sent by the respondent were not corresponding to the actual construction at the project site The complainants yet again made it clear to the respondent that it would make the payment towards the due amount only when the possession is handed over as per the balanced terms.

XIV. That despite the lapse of the due date to handover the possession, the respondent in order to create false evidence kept on sending baseless and false communications to the complainants. The representative of the respondent on 08.04.2021 intimated to the complainants that the allotment of the complainants was already under cancellation and he asked the complainants to clear the dues to avoid cancellation of the unit. The respondent tried to claim premium of its own wrongs, delays and laches. It thus became clear that all the assurances and representations made by the respondent were nothing but a way of misleading the complainants by giving incorrect information and assurances.

XV. That the complainants all this while were ready and willing to honour their contractual obligations of making payment towards the remaining sale consideration towards the unit in question provided that the delayed payment charges were adjusted and an exact date to handover the possession was intimated to them. However, the respondent deliberately, mischievously, fraudulently and with malafide motives cheated the complainants and sent a termination/ cancellation intimation dated 11.06.2021 to the complainants. The complainants were informed vide the said letter that the allotment stood terminated/cancelled with effect from 26.06.2019. It was also intimated that with effect from 26.06.2019, the complainants were left with no right, interest or lien. The said cancellation was wholly unilateral, arbitrary and was not in accordance with the terms of the allotment and without any sufficient cause. There has been deliberate lethargy, negligence and unfair trade practice by the respondent. The high headedness of the respondent is an illustration of how the respondent conducts its business which is only to maximize the profits with no concern towards the buyers. The fact that the respondent has indulged in gross illegality is evident from the fact that despite terminating the unit with effect from 26.06.2019, the said fact was brought to the knowledge of the complainants first time only vide letter dated 11.06.2021. Moreover, the respondent kept on sending reminders to the complainants even after 26.06.2019 i.e. the date from which the cancellation of the unit was being given effect to by the complainants.

XVI. That the complainants confronted the respondent about the illegal cancellation of the unit and sought refund of the principal amount along with interest. Despite sending termination letter dated 11.06.2021, the representative of the respondent kept on persuading the complainants to make the payments by stating that it would offer them the possession of an

alternate smaller unit of which the construction has already been completed. On the assurances of a separate unit, the complainants made payment of Rs. 3,75,000/- on 19.10.2021 to the respondent. When the complainants visited the site to inspect the offered unit, they were shocked to see that the respondent was actually offering only a very small part of the commercial unit which was earlier allotted to them. The respondent had illegally changed the entire layout plan of the commercial unit by dividing the allotted unit into three parts bearing nos. 79, 79A and 79B. Thus what was being offered to the complainants now was only a very small portion (about 30% ) of the allotted unit which was located at a backside location with a sewage line and rainwater pipes passing through the offered Unit.

XVII. That the complainants after enquiring have also been informed that the respondent has already sold the divided portions of the allotted unit. The complainants have a strong apprehension that the reason why the respondent had specifically stated the date of termination as 26.06.2019 in its letter dated 11.06.2021 was on account of such illegal change in the layout of the plan which was committed by the respondent and eventual selling of the same. The complainants intimated to the respondent that they don't want any association with the respondent on account of blatant violations committed by the respondent and requested the representative of the respondent to refund the amount to the complainants. The representative of the respondent informed the complainants that the respondent was ready to refund only a part of the principal amount.

XVIII. That the complainants are aggrieved as the very purpose of making the booking has been defeated. Due to the faults of the respondent, the complainants suffered very badly. On account of complete failure of the respondent to abide by its obligations, the complainants again requested the respondent vide their email dated 26.03.2022 to refund the amount

paid by complainants along with interest. That the complainants have been duped of hard earned money paid to the respondent. The complainants have requested the respondent several times to refund back the principal amount along with interest but the respondent has been dillydallying the matter. The complainants have been running from pillar to post and have been mentally and financially harassed by the conduct of the respondent.

XIX. That the respondent is enjoying the valuable amount of consideration paid by the complainants out of their hard earned money and on other hand the complainants after having paid the substantial amount towards the unit are still empty handed. The respondent has been brushing aside all the requisite norms and stipulations and has accumulated huge amount of hard-earned money of various buyers in the project including the complainants and are unconcerned about the return of the amount despite repeated assurances.

XX. That the respondent/promoter has been acting not only in contrary to the terms of the agreement which were drafted by the respondent itself but also on account of its own acts and has reduced the complainants at its mercy wherein and the complainants' questions have been left un-answered and the respondent/promoter is continuing with its illegal acts acting strictly in violation of the provisions of the RERA Act, 2016 and Haryana Rules, 2017.

XXI. That the respondent has violated several provisions of the RERA Act, 2016 and Haryana RERA Rules, 2017 and is liable for the same. It is submitted that as per Section 18 of the RERA Act, 2016, the respondent/ promoter is liable to return the amount and to pay compensation to the complainants for delay and failure in handing over of such possession as per the terms and agreement of sale.

XXII. That the respondent in utter disregard of its responsibilities has left the complainants in the lurch and the complainants have been forced to chase the respondent for seeking relief. Thus, the complainants have no other option but to seek justice from the Authority.

XXIII. That the cause of action for the present complaint is recurring one on account of the failure of the respondent to perform its obligations. The cause of action arose when the respondent failed to handover possession and compensation for the delay on its part, when it wrongly terminated the allotment and finally about a week ago, when the respondent refused to refund the amount paid by the complainants along with compensation/damages and interest.

**C. Relief sought by the complainants:**

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

   I. Direct the respondent to refund the entire amount paid by the complainants along with interest.

5. On the date of hearing, the authority explained to the respondent/promoter about the contraventions as alleged to have been committed in relation to section 11(4)(a) of the Act to plead guilty or not to plead guilty.

**D. Reply by the respondent.**

6. The respondent has contested the complaint on the following grounds: -

   i. That the complainants, being interested in the real estate development of the respondent under the name and style of TRISTAAR, Sec-92, Village Dhorka, Gurugram, Haryana tentatively booked a unit in the project of respondent on 11.04.2014 and was allotted a unit no. 0079 on ground floor admeasuring 1362 sq. ft. vide allotment letter dated 06.10.2014.

   ii. Thereafter a buyer's agreement was executed on 15.11.2014 between the parties. As per the Clause 11 of the agreement, the due date for the delivery of possession was subject to the approvals (*including the renewal/extension period*) and in accordance with the terms of the agreement. However, the

parties did not agree to a specific date for offer of possession. In such circumstances, the authority has been noted to have considered the date of expiry of the registration certificate. The validity of the registration certificate was 30.06.2020 and after the extension granted by the authority, the validity extends to 30.12.2020. Thus, the proposed due date for offer of possession can be regarded as 30.12.2020.

iii. Moreover, the due date for offer of possession was extendable if there was a failure of allottee(s) to pay in time the total consideration or any part thereof, and other charges and dues mentioned in the agreement or any failure on part of the allottee to abide by all or any of the terms and conditions of the agreement. The construction of the of the project was gravely hit by various force majeure conditions beyond the control of the respondent which are directly consequential to timely completion of the construction of the project and allow extension of timelines for completion.

iv. That the complainants are habitual defaulter and has continuously defaulted in making payments against the demands raised as per the payment of schedule and has till date not cleared his dues. It is because of the conduct of the allottees, like the complainants in the present case, the real estate projects get delayed and the promoter has to face the consequences because of allottee's failure to fulfil their obligations. That as is known and practically understood that regular and timely payments by the allottees are pertinent towards the completion of a real estate project, yet without the same being done in the present case, the respondent has shoes exemplary conduct as a real estate promoter which should be duly taken into account.

v. That the construction of the project faced significant delays due to various force majeure events, such as restrictions on diesel vehicles, stone crushers, and brick kilns imposed by the NGT and other certain orders passed by the authorities. These directives hindered the supply of raw materials essential

for construction activities, leading to a total delay of 377 days. Additionally, orders from environmental authorities/courts and the covid-19 pandemic further impacted construction activities. Despite these challenges, the respondent managed to progress with the construction, obtain necessary approvals, and offer possession of the unit. Given the circumstances were beyond the control, the respondent should be granted an extension of 377 days.

vi. Moreover, the due delivery as per clause 11, shall only be made after the allottee has made the complete payment of sale consideration and other charges to the respondent. The complainant has been a habitual defaulter since the allotment of the subject unit and has been defaulting in making payments towards the demands raised against the Said Unit. The conduct of the complainant can be seen from the statement of accounts, which clearly show that the complainant has failed to make any payments post August 2016 against the demands raised by the respondent as per the payment of schedule. The respondent sent a number of reminders to the complainant for the payment of dues against the said unit. However, the complainant turned a deaf ear to the payment requests of the respondent and refused to pay any amount against the demands so raised. That the respondent vide letter dated 11.06.2019 gave a last and final opportunity to the complainants to clear his previous dues and outstanding payments of Rs.1,45,38,417/-, after having given a number of reminders at previous occasions.

vii. That the complainants again turned a blind eye to all the said letters/reminders and had a continuous default in making the payments against the unit. Several, opportunities were given to the complainants to make the payment against the subject unit. However, the complainants wilfully and voluntarily defaulted in doing so. Despite the default caused by the complainants in fulfilling their obligations, the respondent did not default

and instead completed the construction of the project without having regular payment of monies by the complainants.

viii. That the respondent, despite defaults on part of the complainants, earnestly fulfilled its obligation under the buyer's agreement and completed the project as expeditiously as possible in the facts and circumstances of the case. The default committed by the complainant and various factors beyond the control of the respondent are the factors responsible for delayed development of the project. The respondent cannot be penalised and held responsible for the default of its customers or due to force majeure circumstances. Thus, the present complaint deserves to be dismissed at the very threshold.

ix. That the respondent has complied with all of its obligations, not only with respect to the buyer's agreement with the complainants but also as per the concerned laws, rules and regulations thereunder and the local authorities. Despite innumerable hardships being faced by the respondent, the respondent completed the construction of the project and applied for the occupation application vide application dated 09.10.2020 before the concerned Authority and successfully attained the occupation certificate dated 03.05.2021. That once an application for grant of occupation certificate is submitted to the concerned statutory authority to respondent ceases to have any control over the same. The grant of occupation certificate is the prerogative of the concerned statutory authority and the respondent does not exercise any influence in any manner whatsoever over the same. There is a delay of around 7 months caused due to the non-issuance of the occupation certificate by the statutory authority while calculating the period of delay. Therefore, it is respectfully submitted that the time period utilised by the concerned statutory authority for granting the occupation certificate is liable

to be excluded from the time period utilised for the implementation of the project.

x. That after the construction of the unit was completed, the area of the unit was revised to 1618 sq. ft. It is a matter of fact that the area of the unit was tentative and subject to change, as was willingly and voluntarily agreed between the parties. The respondent had to intimate to the complainants about such change, only if the same was beyond 20%. However, in the present case, the change is area is less than 20% and hence, as per the terms and conditions of the agreement, wilfully and voluntarily executed between the parties, no intimation was required.

xi. Thereafter, the complainants were legally sent the offer of possession dated 05.05.2021 and was requested to make the payments against the unit and take the physical possession. However, the complainant continued to default against the unit and take the possession thereby causing fundamental breach of contract.

xii. That after having sent a number of reminders, and the continuous default of the Complainant, the unit was finally terminated vide cancellation letter dated 11.06.2021 when the respondent sent a letter for full and final settlement of accounts of the complainant with regards to unit no. 0079 with forfeiture amount (earnest money + interest + brokerage) to be paid as Rs.95,56,836/-. The complaint had made the payment of Rs.70,27,815/- and the amount recoverable from the complainant came out to be Rs. 25,29,021/-.

xiii. As, per the clause 52 of the agreement, any defaults, breaches and/or non-compliance on part of the terms and conditions of the agreement shall be deemed to be events of defaults liable for consequences stipulated herein and upon the occurrence of one of more event(s) of default in this agreement, the developer reserves the sole right to cancel the agreement by

giving in writing to rectify such default as specified in such notice within 30 days from the issue of such notice, if the issue in not rectified within the stipulated period, then the agreement shall stand cancelled without any further notice, intimation and the developer shall have right to retain the earnest money, discounts, brokerage along with the interest on delayed payments, any interest paid or payable and any other amount of non-refundable nature.

xiv. That the respondent builder has rightly and lawfully terminated the captioned unit as per the terms and conditions of the application form. That the charges forfeited are valid and lawful. In the model agreement of the authority, clause 9.3(ii), the authority categorically notes that in cases of cancellation by the promoter where the allottee stands in the event of default, the promoter can forfeit the booking amount paid for the allotment and interest component on delayed payment.

xv. That in accordance with the above, the cancellation of the unit has been rightly done in accordance with the terms and conditions of the agreement. That as noted above, after forfeiture of the said charges amounting to Rs.95,56,836/-, an amount of Rs. 25,29,021/- is recoverable by the promoter from the allotee as the amount paid by the allottee against the unit is Rs.70,27,815/- and hence, the present case does not lie. Instead, the allottee should be rightly directed to make the payment of Rs.25,29,021 to the respondent.

xvi. That the prices of the unit have decreased from the time of booking. The complainants being an investor, is seeking to withdraw from the project upon non delivery of the possession. However, the possession has already been offered by the respondent and the complainant stands in default of not taking the same.

xvii. That the malafide of the complainants, where the complainant, had approached the respondent and to make payment towards the said unit and issued 5 cheques in lieu of the said payment, however, all the said five cheques returned unpaid with return memo stating "No funds". This clearly shows the malafide intention of the complainant who clearly gave these cheques knowingly that the said cheques would return unpaid just to harass the respondent and further shows that the cancellation of the unit by the respondent was lawful and valid. That accordingly, the present complaint is liable to be dismissed.

xviii. That after the termination of the unit of the complainant, the complainant had approached the respondent stating his inability to pay the total sale consideration of the subject unit. That the respondent having a customer centric approach, only upon the request of the complainant, had bifurcated the unit of the allottee into 3 parts and had allotted the complainant a smaller portion of the unit admeasuring 450 sq. ft. in accordance with the willingness of the complainant to pay.

xix. That the respondent had divided the unit of the complainant into three parts upon the request of the complainant, bearing unit no. 0079, 0079A and 0079B. Further the units no. 0079A and 0079 B have already been sold to new allottees and third-party rights have already been created in this regard. The said third party rights were only created only after duly terminating the unit of the complainant for non-payment of dues despite constant reminders and notices.

xx. Further the respondent has shown exemplar behaviour and has, at every point tried to work with the needs of the complainant and had even issued the complainant a unit as per their own request and their ability to pay, despite that the complainant failed to make any payments towards the said

unit and instead preferred a false and frivolous complaint before this authority which is liable to be dismissed.

7. All other averments made in the complaint were denied in toto.

8. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submissions made by the parties.

## E. Jurisdiction of the authority

9. The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

### E.I Territorial jurisdiction

10. 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

11. 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) The promoter shall-*
>
> *(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.*

12. 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 the complainant being investors.

13. The respondent has taken a stand that the complainants are investors and not a consumer, therefore, they are not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observed that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

> *"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"*

14. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyer's agreement executed between promoter and complainants, it is crystal clear that the complainants are allottee(s) as the subject unit was allotted to them by the promoter. The concept of investor is

not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act stands rejected.

**F.II Objection regarding the force majeure.**

15. 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 NGT to stop construction, notification of the Municipal corporations Gurugram, Haryana state pollution control authority, etc. The plea of the respondent regarding various orders of the NGT, etc., and all the pleas advanced in this regard are devoid of merit. The orders passed by NGT 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. Thus, the promoter-respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

16. Further, the respondent-promoter has raised the contention that the construction of the project was delayed due to reasons beyond the control of the respondent such as COVID-19 outbreak, lockdown due to outbreak of such pandemic and shortage of labour on this account. The authority put reliance judgment of Hon'ble Delhi High Court in case titled as ***M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr. bearing no. O.M.P (I) (Comm.) no. 88/ 2020 and I.As 3696-3697/2020*** dated 29.05.2020 which has observed that-

> *"69. The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an*

*excuse for non- performance of a contract for which the deadlines were much before the outbreak itself."*

17. In the present complaint, the respondent was liable to complete the construction of the project in question and handover the possession of the said unit by 15.11.2019. The respondent is claiming benefit of lockdown which came into effect on 23.03.2020 whereas the due date of handing over of possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself and for the said reason the said time period is not excluded while calculating the delay in handing over possession.

**G. Relief sought by the complainants.**

**G.I Direct the respondent to refund the entire amount paid by the complainant to the respondent along with interest till the date of its realization.**

18. That the complainants entered into a builder-buyer agreement with the respondent on 15.11.2014 for unit no. 79 ground floor admeasuring 1362 sq. ft. for a total sale consideration of Rs.2,01,34,685/- in the respondent's project "Tristaar," Sector-92, Gurugram. The complainants paid an amount of Rs.70,27,815/- towards the subject unit. The respondent obtained the occupation certificate for the said project on 03.05.2021 and offered possession of the subject unit to the complainants vide letter dated 05.05.2021. Subsequently, the unit was terminated by the respondent vide letter dated 11.06.2021 and thereafter, the complainant vide email dated 26.03.2022 requested the cancellation of the allotment and a refund of the amount paid to the respondent. The complainant then filed the present complaint on 10.05.2022, seeking a refund of the entire amount paid.

19. On considering the documents available on record as well as submissions made by both the parties, it can be ascertained that the complainants have paid only 35% of the sale consideration. Therefore, the authority is of considered view

that the respondent is right in raising demands as per payment plan agreed between the parties and the complainant has failed to fulfil the obligations conferred upon them vide section 19(6) & (7) of the Act of 2016, wherein the allottees were under an obligation to make payment towards consideration of allotted unit. Also, the respondent after giving various reminders on multiple dates between 2017 and 2019 for making payment for outstanding dues as per payment plan sent an offer of possession on 05.05.2021 to the complainants. However, the complainants failed to take possession and clear the outstanding dues. Subsequently, the respondent sent a termination letter dated 11.06.2021 for the subject unit to the complainants and thereafter, the complainants vide email dated 26.03.2022 requested the respondent to cancel the allotment and refund the amount paid, citing the change in location of the unit without any prior approval from the complainants. The relevant para of the said email is extracted below:

> *"Respected Sir*
> *This is in reference to our Allotment.*
> *We are the Original Allottee for the above said Shop No. G 79*
> ***You are requested to kindly cancel the Allotment and refund the paid up amount** of approx. Rs 71 Lakhs with Interest Charges and Other Miscellaneous charges paid if any on priority basis as per RERA Guidelines Only, **as we understand that LOCATION OF THE SHOP HAS BEEN CHANGED FROM THE MAIN SECTOR ROAD FACING TO THE INNER SIDE WITHOUT ANY INTIMATION / APPROVAL FROM US AND YOUR COMPANY HAS RECEIVED THE PAYMENTS IN COMPLETE FROM OTHER BUYERS BUT HAVE FAILED TO REFUND OUR MONEY".***

20. However, after considering the submissions, the authority notes that the complainants have not provided any documentary evidence to substantiate their claim regarding the change in the location of the unit. Additionally, the complainants' objection regarding the unit being divided into three parts also lacks merit. As, the respondent submitted allotment letter (Annexure-R9) showing that unit no. 79 was divided into three-parts unit no. 79A and 79B after the cancellation of the original unit on 11.06.2021 and allotment for the

above said units to the subsequent purchasers were made on 28.08.2021 and 02.03.2022. Moreover, no objections were raised by the complainants when possession of the original unit was offered to them on 05.05.2021. Hence, the respondent rightfully terminated the complainants' unit due to their failure to clear the outstanding dues.

21. As, per clause 4 of the agreement dated 15.11.2014 executed between the parties, the respondent/promoter have right to cancel the unit and forfeit the earnest money where an allotment of the unit is cancelled due to default of complainant to make timely payments as per the agreed payment plan. Clause 4 of the buyer's agreement is extracted below:

> *4. Earnest Money*
> ***The Allottee(s) agrees and confirms that out of the total amounts) paid/payable by the Allottee(s) for the Said Premises/Unit, 20% of the Total Consideration of the said Unit + Interest Due + Brokerage paid/payable + other non-refundable amounts etc. shall be treated as Earnest Money to ensure fulfillment of the terms and conditions*** *as contained in the Application and this Agreement. In the event, the Allottee(s) fails to perform any obligations or commit breach of any of the terms and conditions, mentioned in the Application and/or this Agreement, including but not limited to the occurrence of any event of default as stated in this Agreement and the failure of the Allottee(s) to sign and return this Agreement in original to the Developer within 30 days of dispatch, the Allottee(s) agrees, consents and authorizes the Developer to cancel the allotment and* ***on such, the Allottee(s) authorizes the Developer to forfeit the Earnest Money, brokerage, interest on delayed payments alongwith Non Refundable Amounts.*** *Thereafter the Allottee(s) shall be left with no right, interest and lien on the Said Unit/Said Complex. This is in addition to any other remedy/right, which the Developer may have.*

22. Now, the issue arises with regard to deduction of earnest money. In cases ***of Maula Bux VS. Union of India, (1970) 1 SCR 928 and Sirdar K.B. Ram Chandra Raj Urs. VS. Sarah C. Urs., (2015) 4 SCC 136,*** and wherein it was held that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in the nature of penalty, then provisions of section 74 of Contract Act, 1872 are attached and the party so forfeiting must prove actual damages. After cancellation of allotment, the flat remains with the builder as such there is hardly any actual damage. National Consumer Disputes Redressal

Commissions in CC/435/2019 ***Ramesh Malhotra VS. Emaar MGF Land Limited*** (decided on 29.06.2020) and ***Mr. Saurav Sanyal VS. M/s IREO Private Limited*** (decided on 12.04.2022) ***and followed in CC/2766/2017 in case titled as Jayant Singhal and Anr. VS. M3M India Limited decided on 26.07.2022***, held that 10% of basic sale price is reasonable amount to be forfeited in the name of "earnest money". Keeping in view the principles laid down in the first two cases, a regulation known as the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, was farmed providing as under-

> ***"5. AMOUNT OF EARNEST MONEY***
> *Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money* ***shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment/plot/building as the case may*** *be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer."*

23. So, keeping in view the law laid down by the Hon'ble Apex court and provisions of regulation 11 of 2018 framed by the Haryana Real Estate Regulatory Authority, Gurugram, and the respondent/builder can't retain more than 10% of sale consideration as earnest money on cancellation but that was not done. So, the respondent/builder is directed to refund the amount received from the complainants after deducting 10% of the sale consideration and return the remaining amount along with interest at the rate of 11.10% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of cancellation letter i.e. 11.06.2021 till its realization within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

**H. Directions of the authority.**

24. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

    i. The respondent is directed to refund the paid-up amount i.e. Rs.70,27,815/- to the complainants after deducting 10% of the sale consideration as earnest money along with interest on such balance amount at the prescribed rate i.e., 11.10%, from the date of cancellation letter i.e. 11.06.2021 till its actual realization.

    ii. The respondent is further directed not to create any third-party rights against the subject unit before full realization of the above-mentioned amount to the complainant and even if, any transfer is initiated with respect to subject unit, the receivables shall be first utilized for clearing dues of complainant-allottee.

    iii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

25. Complaint stands disposed of.

26. File be consigned to the registry.

**Dated: 10.10.2024**

**(Vijay Kumar Goyal)**
Member
Haryana Real Estate Regulatory Authority, Gurugram