

PROCEEDINGS OF THE DAY

Day and Date	Thursday and 10.01.2019
Complaint No.	194/2018 Case titled as Mr. Hari Kishan Goenka Vs. M/s Spaze Towers Pvt. Ltd.
Complainant	Mr. Hari Kishan Goenka
Represented through	Shri Sukhbir Yadav Advocate for the complainant.
Respondent	M/s Spaze Towers Pvt. Ltd.
Respondent Represented through	S/Shri J.K.Dang and Ishaan Dang Advocates for the respondent.
Last date of hearing	29.11.2018
Proceeding Recorded by	Naresh Kumari & S.L.Chanana

Proceedings

Project is not registered with the authority.

Since the project is not registered, as such notice under section 59 of the Real Estate (Regulation & Development) Act, 2016 for violation of section 3(1) of the Act be issued to the respondent. Registration branch is directed to do the needful.

Occupation certificate has not yet been received by the respondent on account of environment clearance. Counsel for the respondent submits that they shall hand over the possession to the complainant by 31.10.2019.

As per clause 3 (a) of the Builder Buyer Agreement dated 17.12.2012 for unit No.63, 6th floor, tower No.A2, PRIVY AT4 Sector 84, Gurugram, possession was to be handed over to the complainant within a period of 36

months (with no grace period) which comes out to be **17.12.2015**. However, the respondent has not delivered the unit in time. Complainant has already paid Rs.72,74,481/- to the respondent against a total sale consideration of Rs.73,57,815/-. As such, complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f **17.12.2015** as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016 till handing over possession failing which the complainant is entitled to seek refund of the amount.

The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order and thereafter monthly payment of interest till handing over the possession shall be paid before 10th of subsequent month.

Complaint is disposed of accordingly. Detailed order will follow. File be consigned to the registry.

Samir Kumar
(Member)
10.1.2019

Subhash Chander Kush
(Member)

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

Complaint no. : 194 of 2018
Date of first hearing: 29.05.2018
Date of decision : 10.01.2018

Mr. Hari Kishan Goenka and Sons HUF
H.no. 394, Bhera Enclave, Paschim Vihar,
Delhi-110078

Complainants

Versus

M/S. Spaze Towers Pvt. Ltd.
Spazedge, Sector-47, Sohna Road,
Gurugram-122002

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Sukhbir Yadav Advocate for the complainants

Shri J K Dang and Shri Ishaan Dang Advocate for the respondent



ORDER

1. A complaint dated 24.04.2018 was filed under section 31 of the Real Estate (Regulation and Development) Act, 2016 read

with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 by the complainants Mr. Hari Kishan Goenka and Sons HUF, against the promoters M/S. Spaze Towers Private Limited, on account of violation of the builder-buyer's agreement executed on 17.12.2012 for unit no.63 on 6th floor of tower no. A2 in the project "SPAZE PRIVY AT4" for not giving possession on the due date which is an obligation of the promoter under section 11 (4) (a) of the Act ibid.

- * The collaborators had executed power of attorney dated 23.08.2010 in favour of the developer. Collaboration took place between Smt. M.K Sachdeva, Ashwani Sachdeva, Dharmendra Sachdeva and the promoter (Spaze Tower Pvt. Ltd)

2. The particulars of the complaint are as under: -

1.	Name and location of the project	"SPAZE PRIVY AT4" in Sector 84, Gurugram
2.	Unit No.	No.63 on 6 th floor of tower no. A2
3.	Unit area	1745 sq. ft.
4.	Nature of project	Group housing project



5.	DTCP licence	26 of 2011 in respect of land measuring 10.512 acres
6.	PWD clearance	16.08.2013
7.	Registered/ Not Registered	Not registered
8.	Date of booking	08.02.2010
9.	Date of builder buyer agreement	17.12.2012
10.	Date of approval of building plan	06.06.2012
11.	Payment plan	Construction linked instalment plan
12.	Total consideration	Rs. 73,57,815/-
13.	Total amount paid by the complainant	Rs.72,74,481 /-
14.	Date of delivery of possession. As per clause 3(a) is 36 months from approval of building plans or from the date of signing of builder buyer agreement whichever is later plus grace period of 6 months	17.12.2015
15.	Delay of number of months/ years upto 13.09.2018	3 years 24 days approx.
16.	Penalty as per builder buyer agreement clause 3(a)(iv)	Rs.5/- per sq. ft. per month of the super area



3. The details provided above have been checked on the basis of the record available in the case file which have been provided by the complainants and the respondent. A builder buyer's agreement was executed between the parties for unit no.63 on 6th +/16floor of tower no. A2 according to which the possession of the aforesaid unit was to be delivered by 17.12.2016.

Further, the promoter has failed to deliver the possession of the said unit to the complainants. Therefore, the promoter has not fulfilled his committed liability as on date.

4. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. Accordingly, the respondent appeared on 29.05.2018. The case came up for hearing on 11.07.2018, 23.08.2018, 27.09.2018, 22.10.2018, 26.10.2018, 29.11.2018 and 10.01.2019. The reply has been filed on behalf of the respondent.

Facts of the complaint

5. That the respondent Spaze Towers Private Limited, party is a company incorporated under the Companies Act, 1956 having registered office at: A-307, Ansal Chambers -I, 3, Bikaji Cama Place, New Delhi - 110066, corporate office: SPAZEDGE, Sector - 47, Sohna Road, Gurugram - 122002(hereinafter called the developer/ builder / respondent) and the project in question is known as Spaze Privy AT4, at Sector -84, Gurugram, Haryana (hereinafter called the Project)



6. That the complainant along with their family members visited the Gurugram office and project site of respondent. The location was excellent and they consulted the local representative of the developer. The local representative / marketing staff gave him a brochure and price list etc. and allure him with shady picture of project. Marketing staff of builder assured to complainant that possession of flat will be handover within 36 months, as construction was already been started.
7. That the complainant had purchased a flat in above said project, bearing no. 63 on 6th floor of tower no. – A2 (3 Bed rooms, one drawing / dining, one kitchen, 3 toilets, area admeasuring 1745 sq. ft.) in the project i.e. PRIVY AT4, sector – 84 Gurugram, constructed / developed by the respondent party for sale consideration of Rs. 73,57,815 /- (seventy three lakhs fifty seven thousand eight hundred and fifteen) with one covered car parking.
8. That thereafter complainant continued to pay the remaining installment as per the payment schedule and have already paid the more than 95% amount i.e. Rs. 72,74,481/- (seventy two



lakhs, seventy four thousand four hundred and eighty one) along with interest and other charges of actual purchase price.

9. That the main grievance of the complainant in the present complaint is that in spite of the fact that complainant paid more than 95% of the actual amounts of flat and ready and willing to pay the remaining amount, the respondent party has failed to deliver the possession of flat on promised time
10. That the complainants has also served multiple grievances emails to the respondent party at their office address and personally requested to executive / office bearer of respondent party, before filing this complaint.
11. That the cause of action for the present complaint arose in or around 2012 when a preprinted buyer's agreement containing unfair and unreasonable terms was, for the first time, forced upon the allottees. The cause of action further arose in 2015-2016, when the respondent party failed to handover the possession of the flat as per the buyer agreement. The cause of action again arose on various occasions, including on: a) Dec. 2015; b) May 2016; c) June, 2016, d) April, 2017; e) Feb.



2018, f) April, 2018 and on many time till date, when the protests were lodged with the respondent party about its failure to deliver the project and the assurances were given by it that the possession would be delivered by a certain time. The cause of action is alive and continuing and will continue to subsist till such time as this hon'ble authority restrains the respondent party by an order of injunction and/or passes the necessary orders.

12. The complainants submitted that as per section 18, RERA Act read with rule 28 of the Haryana Real Estate (Regulations and Development) Rules, 2017, the respondents are liable to pay the entire amount with interest and compensation.

Issues raised by the complainants

- i. Whether the developer has violated the terms and conditions of builder buyer's agreement?
- ii. Whether there is any reasonable justification for delay to give possession of flat?



- iii. Whether there has been deliberate or otherwise, misrepresentation on the part of the developer for delay in giving possession?
- iv. Whether complainant(s) are entitled for refund of all money paid to respondent?

Relief sought by complainant

- i. Pass an appropriate award directing the respondent parties to refund the paid amount i.e. Rs. 72,74,481/- (seventy two lakhs, seventy four thousand four hundred and eighty one) and compensate with interest @18% from February 2012 to date of refund on paid amount by the complainant to the respondent party. (Justification: - Refer to term / condition no. 1.2 (k) of flat buyer's agreement and respondent levied Rs. 1,08,663 (one lakh, eight thousand, six hundred and sixty three) on complainant @ 18% per annum on delay payments).
- ii. Respondent party may kindly be directed to pay an amount of Rs.10,00,000/- (ten lakhs) for deficiency in service;(Justification:- because as per the agreement, the



respondent required to hand over the possession within 36 months and complainant(s) are suffering huge financial loss on their investment).

- iii. Respondent party may kindly be directed to pay an amount of Rs. 10,00,000/ (ten lakhs) on account of causing mental agony/torture and physical harassment caused to the complainant; due to negligence and unfair trade practice of the respondent parties. (Justification:- despite adhering to the payment plan and its timeline for clearing the payments of the respondents, the possession of the apartment has yet not been given to complainants and each time the respondent(s) are approached, they set a new deadline for completion of the project and handing over of the possession of the apartment since 2015).
- iv. Respondent party may kindly be directed to pay an amount of Rs.5,00,000/- (five lakhs) as litigation expenses; (Justification:- cost of litigation).
- v. Respondent party may kindly be directed to refrain from giving effect to the unfair clauses unilaterally incorporated in the builder buyer's agreement.



- vi. Any other relief / direction which the hon'ble authority deems fit and proper in the facts and circumstances of the present complaint.
- vii. That in the interest of justice, this authority should pass strict and stringent orders against errant promoters and developers who take huge investments from innocent investors and then deny them the right to take possession as agreed at the time of sale. The purpose and legislative intent behind setting up this authority should also be kept into consideration while deciding the present complaint as the respondent has not only treated the complainant unfairly but many other such buyers.

Respondent's reply

13. The respondent submitted that the complaint filed by the complainants is not maintainable and this hon'ble regulatory authority has no jurisdiction whatsoever to entertain the present complaint. The complaints pertaining to compensation and interest for a grievance under sections 12, 14, 18 and section 19 of the Real Estate (Regulation and Development) Act, 2016 are required to be filed before the



adjudicating officer under rule-29 of the Haryana Real Estate (Regulation and Development) Act, 2017 read with section 31 and section 71 of the said Act and not before this hon'ble authority under rule 28.

14. The respondent submitted that the complainants have not come to this authority with clean hands and has concealed the material fact that they have been wilful defaulters, having deliberately failed to make the payment of various instalments as and when it became due or the demand raised. The complainants have been negligent since beginning in payment of the instalments.
15. That it was further provided in clause 3 (b) of buyer's agreement that in case the delay occurred on account of according of sanction to the building plans by the concerned statutory authority or due to any reason beyond the control of the developer, the said period would also be excluded from the time period stipulated above for delivery of physical possession and the period for delivery of possession would be extended.



16. It is submitted that once an application for grant of any permission/ sanction of for that matter building plans etc, are submitted for approval in the office of any statutory authority, the respondent ceases to have any control over the same.
17. While computing the period of 36 months made available to the respondent for undertaking the construction and development of the project as well as the grace period of 6 months, the period of time by which payment of instalments has been delayed by the complainant also is to be excluded.
18. The respondent submitted that one reason or the other arising out of circumstances beyond the power and control of the respondent, the aforesaid clearance has not been granted till date, despite due diligence exercised by the respondent in this regard. No lapse whatsoever can be attributed to the respondent insofar non-issuance of environment clearance is concerned.
19. That the building in question has been completed at the spot in all respects and is very much eligible for forthwith grant of occupation certificate. However, for reasons already stated



above, application for issuance of occupation certificate cannot be submitted with the concerned statutory authority by the respondent. Thus, the allegation of delay against the respondent is not based on facts.

Determination of the issues

20. Regarding the **first and second issues** raised by the complainants, as per clause 3(a) of the agreement, the respondent company was bound to deliver the possession of the said unit within 36 months with a grace period of 6 months of the date of execution of the agreement to the complainant which comes to 17.12.2015 but the respondent has not delivered the possession of the said flat till date thereby delaying the possession by 3 years and 24 days.

“3. Possession and holding charges

3(a) ...the company proposes to offer the possession of the said apartment to the allottee within a period of 36 months from the date of execution of builder buyer agreement (commitment period)...The allottee further agrees and understands that the company shall additionally be entitled to a period of 6 months (grace period), after the expiry of the said commitment period to allow for unforeseen delays beyond the reasonable control of the company.”



The respondent is in breach of the terms of the agreement as the respondent did not deliver the possession of the said unit within the stipulated time.

21. with respect to **third issue**, the complainant has only made on an assertion without substantiating the same in material particulars. As such the issue cannot be decided.

22. With respect to **fourth issue** raised by the complainant, counsel for respondent submits that they shall hand over the possession to the complainants by 31.10.2019, therefore, the authority is of the view that in case refund is allowed in the present complaint, it will have adverse effect on the interest other allottees who wish to continue in the project. Therefore, the refund cannot be allowed in the present complaint. Accordingly, the due date of possession was 17.12.2015 and the possession has been delayed by three years and twenty-four days till the date of decision. The delay compensation payable by the respondent @ Rs.5/- per sq. ft. of the super area for every month of delay until the actual date fixed by the company for handing over of possession of the said apartment to the allottee as per clause (3)(a)(c)(iii) of apartment buyer's



agreement is held to be very nominal and unjust. The terms of the agreement have been drafted mischievously by the respondent and are completely one sided as also held in para 181 of **Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and ors. (W.P 2737 of 2017)**, wherein the Bombay HC bench held that:

“...Agreements entered into with individual purchasers were invariably one sided, standard-format agreements prepared by the builders/developers and which were overwhelmingly in their favour with unjust clauses on delayed delivery, time for conveyance to the society, obligations to obtain occupation/completion certificate etc. Individual purchasers had no scope or power to negotiate and had to accept these one-sided agreements.”

FINDINGS OF THE AUTHORITY:

23. The preliminary objections raised by the respondent regarding jurisdiction of the authority stands rejected. The authority has complete jurisdiction to decide the complaint in regard to non-compliance of obligations by the promoter as held in **Simmi Sikka V/s M/s EMAAR MGF Land Ltd.** leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.



24. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Department of Town and Country Planning, 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.

25. The complainants made a submission before the authority under section 34(f) to ensure compliance of the obligations cast upon the promoter.

26. The complainants requested that necessary directions be issued by the authority under section 37 of the Act ibid to the promoter to comply with the provisions of the Act and to fulfil its obligations.

27. Since the project is not registered, as such notice under section 59 of the Real Estate (Regulation and Development) Act, 2016 for violation of section 3(1) of the Act be issued to the respondent. Registration branch is directed to do the needful.



28. Occupation certificate has not yet been received by the respondent on account of environment clearance. Counsel for the respondent submits that they shall hand over the possession to the complainant by 31.10.2019.

29. As per clause 3 (a) of the builder buyer's agreement dated 17.12.2012 for unit no.63, 6th floor, tower no. A2, SPAZE PRIVY AT4 Sector 84, Gurugram, possession was to be handed over to the complainant within a period of 36 months (with no grace period) which comes out to be 17.12.2015. However, the respondent has not delivered the unit in time. Complainant has already paid Rs.72,74,481/- to the respondent against a total sale consideration of Rs.73,57,815/-. As such, complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f 17.12.2015 as per the provisions of section 18 (1) of the Real Estate (Regulation and Development) Act, 2016 till handing over possession failing which the complainant is entitled to seek refund of the amount.



DECISION AND DIRECTIONS OF THE AUTHORITY:

30. After taking into consideration all the material facts as adduced and produced by both the parties, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issue the following directions in the interest of justice and fair play:

- i. The project is not registered, as such notice under section 59 of the Real Estate (Regulation and Development) Act, 2016 for violation of section 3(1) of the Act be issued to the respondent. Registration branch is directed to do the needful.
- ii. Complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f 17.12.2015 as per the provisions of section 18 (1) of the Real Estate (Regulation and Development) Act, 2016 till handing over possession failing which the complainant is entitled to seek refund of the amount.



- iii. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order and thereafter monthly payment of interest till handing over the possession shall be paid before 10th of subsequent month.

31. The order is pronounced.

32. Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Dated: 10.01.2019

Judgement Uploaded on 29.01.2019

HARERA
GURUGRAM

