BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 435 of 2021
First date of hearing: 20.04.2021
Date of decision : 14.09.2021

Ravinder Kumar Bhadani and Sons HUF **Resident of:** - G-5, Ground Floor, Lajpat Nagar III, New Delhi	**Complainant**
Versus	
Spaze Towers Pvt. Ltd. **Regd. Office:** - Spaze Tower C, Sector 47, Sohna Road, Gurugram	**Respondent**

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

APPEARANCE:	
Shri Sourav Sharma	Advocate for the complainant
Shri. J K Dang and Ishaan Dang	Advocates for the respondents

ORDER

1. The present complaint has been filed on 15.02.2021 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 to the allottee as per the builder buyer agreement executed inter-se them.

A. Unit and Project related details:

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

S. No.	Heads	Information
1.	Project name and location	Spaze Buziness park Sector-66, Gurugram
2.	Project area	2.481 acres
3.	Nature of the project	Commercial Complex
4.	DTCP license no. and validity status	27 of 2009 dated 15.06.209 valid up to 14.06.2013
5.	Name of licensee	M/s Kay Kay Designers Towers Pvt ltd.
6.	RERA Registered/ not registered	**Unregistered**
7.	Unit no.	A-109, First Floor, Block A [Page 34 of the complaint]
8.	Unit measuring (super area)	913 sq. ft.
9.	Date of allotment letter	22.01.2010 [Page 31 of the complaint]
10.	Date of execution of builder buyer agreement	28.04.2012 [Page 32 of the complaint]
11.	Payment plan	Construction linked payment plan [Page 54 of the complaint]
12.	Total sale consideration	Rs.48,63,092/- (As per payment plan on page-54 of the complaint)
13.	Total amount paid by the complainant	Rs.53,84,280/- (as per statement of accounts dated 9.7.2021 at page 82-83 of the reply)

14.	Due date of delivery of possession as per buyer's agreement *Clause 14: "That the possession of the said premises is proposed to be delivered by the Developer to the Allottees within three years from the date of this Agreement."*	28.04.2015 (As per clause 14 of the BBA annexed with the complaint at page no.39)
15.	Offer of permissive possession	26.08.2017 [Page 65 of the complaint]
16.	Occupation certificate	30.04.2019 [Page 178 of the reply] Note: Occupation certificate was initially applied on 23.01.2017 and later on 30.01.2019 but granted on 30.04.2019 treating the period of (23.01.2017 to 13.09.2018 date of decision given by Sh. A.K Singh, Principal Secretary to Government of Haryana, Town and Country Planning Department, Chandigarh) as interregnum period.
17.	Delay in delivery of possession till the date of occupation certificate+ 2 months i.e. 30.06.2019	2 years 6 months 13 days [28.04.2015 to 23.01.2017= 1 year 8 months 26 days] [13.09.2018 to 30.06.2019= 9 months 17 days]

B. Facts of the complaint:

3. The complainant has booked a unit bearing no. 109, 1st Floor, Block-A, admeasuring 946 sq. ft. in the project being developed by the respondent, namely, "SPAZE BUZINESS PARK" located at Sector-66, Gurgaon, Haryana. based on the elaborate representations and promises made by the respondent about the project including the quality, standard and the exquisite facilities that would be offered, the complainant booked the unit on 05.09.2009.

4. Thereafter, the respondent issued an allotment letter dated 22.01.2010 to the complainant allotting the Unit and the sale consideration of the unit was Rs. 48,63,092/-. The complainant had anticipated that the respondent would soon also execute the detailed buyer's agreement for purchasing the unit. However, the complainant continued to chase the respondent and eventually after a delay of almost three years from the date of booking, the respondent executed a buyer's agreement dated 28.04.2012. It is submitted that the agreement was filled with one-sided and arbitrary terms and conditions. For instance, as per clause 10 of the agreement, in the event the complainant failed to make payment of any installment or delayed any installment, the respondent, at its sole and absolute discretion, was entitled to charge interest at an enormous rate of 18% per annum for the period of delay; whereas there is no clause in the agreement specifying the obligations of the respondent in case it failed to deliver possession of the Unit within the time promised. However, the complainant could not negotiate or dispute any of them since any dispute or disagreement thereof would have led to cancellation of the unit and forfeiture of the earnest money i.e. 15% of the allotment price.
5. As per clause 14 of the agreement, the possession of the unit was to be offered within 3 years from the date of execution of the agreement. Hence, the respondent was obligated to offer possession of the unit by April 2015. For the ease of reference, clause 14 of the agreement have been reproduced hereinbelow:

> *"Clause 14*
> *That the possession of the said premises is proposed to be delivered by the DEVELOPER to the ALLOTTEE(S) within three years from the date of this Agreement."*

6. The complainant diligently paid each instalment as per the demands raised by the respondent and was led to believe that the project was also progressing as per the demands being raised by the respondent under the construction linked payment plan. However, to the utter shock and dismay of the complainant, the respondent failed to offer possession of the unit within the time promised i.e. by April 2015. Nonetheless, the complainant eagerly awaited the possession of the unit and continued to follow up with the respondent, but no satisfactory response was received. Till date, the complainant has paid an amount of Rs. 53,84,280/- to the respondent towards the sale consideration of the unit and nothing remains outstanding.
7. Thereafter, the respondent vide letter dated 26.08.2017 offered permissive possession of the unit stating that the project was ready for interior work in the unit and also raised another demand which was duly paid by the complainant. In addition to this, the respondent also sent an undertaking to be signed by the complainant wherein it was stated that it was based on the request of the complainant to carry out the interior work in order to save time in making the premises fit for use immediately upon handover of the actual physical possession of the Unit that such permission was being offered. Besides, it was also stated that on signing the undertaking, the complainant unconditionally releases and forever discharges the respondent of its obligation in respect of compensation for delay in grant of possession of the unit. Since there were several one-sided clauses which would absolve the respondent of all liabilities and it was unwilling to modify or amend the undertaking, the complainant did not agree to sign the undertaking. In light of having received the offer of permissive possession, the complainant anticipated

that the actual physical possession of the unit, complete in all respects, would also be delivered to it soon; however, the actual physical possession of the unit was not offered thereafter. In this regard, it is pertinent to note that this Hon'ble Authority against the same respondent in Privvy 93 Owners Association v. M/s Spaze Towers Pvt. Ltd. [Complaint No. 279 of 2018 decided on 11.04.2019] it was observed and held that possession offered without receipt of occupation certificate is no possession in the eyes of the law and any such letter issued prior to the occupation certificate would be considered as void, the offer of possession can be given only after obtaining the occupation certificate. For ready reference, the relevant portion of the said decision has been reproduced hereinbelow:

> *"24. In regard to the third issue raised by the complainant, the occupation certificate was received on 20.07.2018 and permissive possession was offered on 06.11.2017. The possession offered without OC is no possession in the eyes of law, if any letter for offer of possession has been issued that will be considered void. Offer of possession can be given only after obtaining the OC."*

8. Despite having collected an amount of Rs. 53,84,280/- for the unit from the complainant, the respondent has failed to offer physical possession of the unit to the complainant within the time promised i.e. by April 2015 and has merely issued a letter offering permissive possession in 2017. It is submitted that the respondent received the occupation certificate for the project only on 30.04.2019 and the letter offering permissive possession of the unit was issued in August 2017 i.e. 2 years before the issuance of the occupation certificate. As per the observations made by this Hon'ble Authority, any offer of possession without the occupation certificate is void and possession can be offered only after

receipt of the occupation certificate. It is stated that since the receipt of the occupation certificate, no letter offering possession has been issued to the complainant.

9. The complainant relentlessly chased the respondent inquiring about the status of the completion of the project and handover of physical possession of the unit, but no satisfactory response was provided. Thereafter, on 02.05.2019 the respondent issued a letter providing an advance notice of registration of the unit and on 09.08.2019, another letter was issued for the unit intimating the complainant to execute the conveyance deed and register the unit. After receipt of the notice for registration, the complainant inquired about the delay that had been caused in completing the project and as to how the respondent was going to compensate the complainant for the gross delay of about 4 years, but no response was provided. It was only on 11.07.2019 that the respondent reverted with a copy of the occupation certificate received for the project. Thereafter, on 22.10.2019 the complainant had even attempted requesting for a copy of the possession letter along with the latest statement of account, however, nothing was forthcoming from the respondent. It is submitted that since the occupation certificate was received on 30.04.2019 and only thereafter, the respondent had issued a letter intimating the complainant for execution of the conveyance deed and further that despite having sought for a copy of the possession letter, no such letter has been provided by the respondent; hence, it is submitted that the date of offer of possession of the unit would have to be the date on which the complainant received the letter intimating him of the registration of the unit i.e. 09.08.2019. It is further submitted that the complainant is willing to take actual physical possession of the unit,

subject to the respondent compensating it for the inordinate delay that has been caused in completion of the project.

10. It is stated that till date the complainant has paid an enormous amount of Rs. 53,84,280/-to the respondent towards the sale consideration of the unit. It is submitted that the respondent was required to offer possession of the unit by April 2015; however, the respondent miserably failed to complete the project and offer possession of the unit within the time promised under the agreement. As stated in the foregoing paragraphs in the absence of any letter formally offering possession of the unit, it is stated that the possession can be said to have been offered on 09.08.2019 whereby notice for registration of the unit was given to the complainant after receipt of the occupation certificate. In the circumstances, it is submitted that there has been a delay of more than 4 years from the promised date of possession and despite the miserable delay that has been caused by the respondent in delivering the project.

11. It is submitted that the respondent has failed to offer possession of the unit to the complainant within the time promised under the agreement i.e. by April 2015. It is furthermore submitted that none of the circumstances that have resulted in this inordinate delay, were and are, beyond the control of the respondent. The complainant has been facing irreparable loss and damage as it has already paid an amount of Rs. 53,84,280/- till date for the unit and even after having complied with each demand of the respondent, it has failed to offer possession of the unit to the complainant within the time promised.

C. Relief sought by the complainant:

12. The complainant has sought following reliefs:

(a) Direct the respondent to handover possession of the unit to the complainant, complete in all respects and in conformity with the buyer's agreement and for consideration mentioned therein, with all additional facilities, warranties and as per the quality standards promised and to execute all necessary and required documents in respect of the unit in favour of the complainant.

(b) Direct the respondent to pay interest @ 9.30% per annum on the amount deposited by the complainant with the respondent with effect from the date of delivery of the unit promised in the buyer's agreement, till the date the actual possession is handed over by the respondent.

13. On the date of hearing, the authority explained to the respondent/promoter about the contravention 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:

14. That It is pertinent to mention that the buyer's agreement in 2009 was executed only after the allottee has completed all the formalities. It was specifically mentioned in clause 14 of buyer's agreement dated 28.04.2012 that physical possession of the property agreed to be purchased by the complainant would be delivered within a period of 3 years from the date of execution of the said agreement subject to certain terms and conditions. It was further specified that in case the delivery of physical possession was delayed on account of circumstances including departmental delay or non-availability of construction/

building material, in that event the respondent would be entitled to extension of time for delivery of physical possession of the property in question.

15. It is submitted that the complainant had regularly defaulted in the timely payments of demands raised by respondent. The latest statement of account dated 15.07.2021 maintained correctly by the respondent has been appended It is pertinent to mention that till date, the complainant has made a total payment of Rs.53,74,373/- to the respondent.

16. It is a matter of record that letter dated 26.08.2017offering permissive possession of the said unit had been issued by the respondent to the complainant for carrying out interior work in the said unit. It is pertinent to mention that the application for issuance of occupation certificate in respect of the project in question was made on 23.01.2017. Thereafter, the respondent had received the Occupation certificate for the said project on 30.04.2019. Thereafter, advance notice for registration of said unit dated 02.05.2019 had been issued by the respondent to the complainant and the same was a formal offer of possession. Pursuant to issuance of the aforesaid letter, reminder letter dated 25.06.2019 had been issued by the respondent to the complainant wherein it had been called amount to make payment of the outstanding amount and complete other formalities in order to enable the builder to hand over possession of the said unit to the complainant.

17. It is submitted that the complainant has made a payment of Rs.53,74,373/- to the respondent till date. It is submitted that the complainant was called upon to complete the procedure including the documentation for amenities pertaining to registration of the

conveyance deed vide letter dated 02.05.2019 and the same is to be construed as a formal offer of possession.

18. It is pertinent to mention that the respondent had always kept the allottees in the said project duly informed about the status of the completion of the project. The letters dated 2.05.2019and 9.08.2019 issued by the respondent to the complainant pertaining to registration of the unit and execution of the conveyance deed are a matter of record.

19. It is pertinent to mention that the complainant already had a copy of the possession letter and statement of account. Even as per the own admission of the complainant, since the occupation certificate had been received on 30.04.2019, the letter dated 2.05.2019 sent by the respondent to the complainant with respect to registration of the said unit and execution of the conveyance deed ought to be considered as the offer of possession letter. Therefore, 2.05.2019 is to be construed to be the date when a formal offer of possession had been made by the respondent to the complainant. It is submitted that the complainant can approach the respondent as far as handover of physical possession of the said unit is concerned.

20. In the present case, the application for obtaining sanction of building plans was submitted by the respondent in the office of Directorate of Town & Country Planning, Haryana, Chandigarh on 20th September 2010. The building plans were eventually sanctioned on 25th May 2011 i.e after a period of approximately 8 months from the date of submission of the application by the respondent.

21. That in the meantime, since the respondent was fully aware of the fact that the building plans had been duly sanctioned project, it had commenced construction at the spot. The construction was rapidly

raised by the respondent and eventually application for grant of occupation certificate had been submitted by the respondent with Directorate of Town & Country Planning, Haryana, Chandigarh on 23rd of January 2017. It is pertinent to mention that respondent has received the Occupation certificate for the said project on 30.04.2019. Moreover, the matter pertaining to grant of licenses in commercial zone forming part of residential sector was subject matter of litigation before the Hon'ble High Court of Punjab and Haryana. Eventually, decision in this regard had been given by the Hon'ble High Court of Punjab and Haryana at Chandigarh vide judgment dated 19th of October 2015 passed in CWP bearing number 11911 of 2011. In the meantime, the respondent had earnestly pursued the matter with Directorate of Town & Country Planning, Haryana, Chandigarh. Eventually, the respondent had been called upon by officials of Directorate of Town & Country Planning, Haryana, Chandigarh to furnish an undertaking for release of sanctioned building plans. Accordingly, letter dated 29th of July 2017 was issued by the respondent to Directorate of Town & Country Planning, Haryana, Chandigarh along with the undertaking.

22. That eventually, after inordinate delay the duly approved building plans had been handed over to the respondent by Directorate of Town & Country Planning, Haryana, Chandigarh on 31st of July 2017 along with covering memo bearing number 18440 dated 31st of July 2017. A scrutiny of the aforesaid memo shall comprehensively establish that it was admitted and acknowledged by Directorate of Town & Country Planning, Haryana, Chandigarh therein that the duly approved building plans dated 25th of May 2011 had been called back by the department

as there was some issue with regard to grant of license beyond, 50% limit.

23. That the National green tribunal had also banned construction activity in national capital region for a period of seven days to bring the smog situation in the capital under control. The said order was passed on 08.11.2016.It is pertinent to mention that as and when disruption of construction/ development activity of a project of such a large magnitude is brought about, the same ipso facto results in completely de-railing the same. Consequently, even after removal of the embargo/ bar pertaining to stoppage of construction, a period of two weeks is ordinarily required by the developer to remobilize human resources/ infrastructure to commence construction.

24. The permissive possession of the property had been offered by the respondent to the complainant vide letter dated 26.08.2017. The advance notice for registration of said unit dated 02.05.2019 had been duly sent to the complainant and has been appended.

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

E. Written submission by the respondents:

26. The respondents have submitted the reasons for common delay in the written submission which are as under:

Sanction in scheme of amalgamation:

(i) That order dated 08.10.2010 had been passed by Hon'ble Justice Sudershan Kumar Misra, of the Hon'ble High Court of New Delhi in company petition bearing no.199/2010 whereby scheme of

amalgamation of M/s. Kay Kay Designer Towers Pvt. Ltd. with the respondent had been duly sanctioned. By virtue of passing of the aforesaid order, the respondent had become full-fledged and lawful owner in physical possession of the land described hereinbefore over which the commercial project has been implemented at the spot by the respondent.

(ii) That however, the passing of order of amalgamation referred to above has been construed to be a 'change in beneficial interest' by the concerned statutory authority. Consequently, the issuance of occupation certificate in respect of the commercial project has been needlessly delayed without there being any fault whatsoever on the part of the respondent. The Directorate of Town & Country Planning, Haryana, Chandigarh directed the respondent to make payment of substantial sum of money towards alleged 'change in beneficial interest'. In order to avoid needless controversy, the same has also been done by

Delay in sanction of building plans:

(iii) That the key technical requirements for grant of occupation permission to a building situated in a licensed colony in Haryana are:

a) Building Plans approval
b) Service Estimates Design Statement and plans
c) Fire Scheme Approval
d) Fire Scheme NOC
e) Environment Clearance

(iv) That in the present case, the application for obtaining sanction of building plans was submitted by the respondent in the office of Directorate of Town & Country Planning, Haryana, Chandigarh on 20th

September 2010. The building plans were eventually sanctioned on 25th May 2011 that is after a period of approximately 8 months from the date of submission of the application by the respondent. However, the fact that building plans had been sanctioned had been communicated to the officials of the respondent and even at one point of time, the duly sanctioned building plans were dispatched to the respondent. That without any right or justification, the officials of Directorate of Town & Country Planning, Haryana, had orally taken back the aforesaid duly sanctioned building plans. The officials of the respondent had tried their level best and had diligently pursued the matter with concerned officials of Directorate of Town & Country Planning. Haryana, Chandigarh for delivery of the duly sanctioned building plans referred to above in original.

(v) That however, all efforts put in by the officials of respondent in this direction had proved futile. It was orally communicated to the officials of the respondent by officers of Directorate of Town & Country. Planning, Haryana, Chandigarh that there was controversy pertaining to sanction of licenses in commercial belt wherein the project in question was located. However, no official information in this regard was made available to the respondent in writing by Directorate of Town & Country Planning, Haryana, Chandigarh. That in the meantime, since the respondent was fully aware of the fact that the building plans had been duly sanctioned and there was no written correspondence/document issued by the Directorate of Town & Country Planning, Haryana, Chandigarh withdrawing the same, the respondent had commenced construction at the spot.

(vi) That it is pertinent to mention that the matter pertaining to grant of licenses in commercial zone forming part of residential sector was subject matter of litigation before the Honorable High Court of Punjab and Haryana. Eventually, decision in this regard had been given by the Honorable High Court of Punjab and Haryana at Chandigarh vide judgment dated 19th of October 2015 passed in CWP bearing number 11911 of 2011. That in the meantime the respondent had earnestly pursued the matter with Directorate of Town & Country Planning, Haryana, Chandigarh. Eventually, the respondent had been called upon by officials of Directorate of Town & Country Planning, Haryana, Chandigarh to furnish an undertaking for release of sanctioned building plans. Accordingly, letter dated 29th of July 2017 was issued by the respondent to Directorate of Town & Country Planning, Haryana, Chandigarh along with the undertaking.

(vii) That the undertaking referred to above, irrationally demanded by officials of Directorate of Town & Country Planning, Haryana, Chandigarh had been duly furnished by the respondent on 29th of July 2017. That eventually, after inordinate delay the duly approved building plans had been handed over to the respondent by Directorate of Town & Country Planning, Haryana, Chandigarh on 31" of July 2017 along with covering memo bearing number 18440 dated 31st of July 2017. Thus, it took about six years three months for the concerned statutory authorities to re-issue the approved building plans. Scrutiny of the aforesaid memo shall comprehensively establish that it was admitted and acknowledged by Directorate of Town & Country Planning, Haryana, Chandigarh therein that the duly approved building plans

dated 25th of May 2011 had been called back by the Department as there was some issue with regard to grant of license beyond, 50% limit. Thus, it is comprehensively established that no default of any nature can be attributed to the respondent in the entire sequence of events.

(viii) That eventually application for grant of occupation certificate had been submitted by the respondent with Directorate of Town & Country Planning, Haryana, Chandigarh on 23.01.2017. Since the approved building plans had been taken back in original by Directorate of Town & Country Planning, Haryana, Chandigarh, the respondent could not procure the aforesaid essential approvals. Once the building plans had been released vide letter dated 31.07.2017, the respondent had applied for approval of fire scheme and service estimates, and the following required approvals were granted: -

- Fire scheme was approved on 09.03.2018
- Services estimates, and plans were approved on 25.01.2019

(ix) That reminder dated 03.04.2018 had been given by the respondent to Directorate of Town & Country Planning, Haryana, Chandigarh to expeditiously grant the occupation certificate. Furthermore, due to conducting of enquiry by Central Bureau of Investigation in the matter of civil appeal number 8977 of 2014 with regard to land situated in sectors 58 to 63 and 65 to 68, the approvals were slowed down. That in a grossly unauthorised manner, while dealing with the case of approval of building plans and issuance of occupation certificate, Directorate of Town & Country Planning, Haryana, Chandigarh issued memo dated 21.06.2018 whereby the sum respondent had been called upon to

deposit a of Rs. 7,29,70,768/- for composition of alleged unauthorised construction of the entire building with basement.

(x) That the aforesaid demand was absolutely illegal, unjust, void ab initio, non-est, nullity and was not sustainable both legally as well as factually and therefore an appeal bearing number 36 of 2018 was preferred by the respondent to Appellate Authority, Principal Secretary, Department of Town & Country Planning, Government of Haryana, Chandigarh. The said appeal was decided by the aforesaid honourable appellate authority vide judgment dated 31.10.2018 whereby the aforesaid demand dated 21.06.2018 was set aside. That only when order referred to above had been passed by the honourable appellate authority were the service plans submitted by the respondent for the project approved. The respondent has received the occupation certificate for the said project on 30.04.2019.

(xi) That in response to the said application, copy of office noting dated 07.07.2012 duly signed by then Director General, Town & Country Planning Department, Haryana, Chandigarh has been made available to the respondent wherein the withholding of duly sanctioned building plans by the department has been categorically and explicitly admitted. That scrutiny of the aforesaid office noting shall further establish beyond any shadow of doubt that the department was conscious of the fact that it was doing tremendous injustice to the respondent by withholding the building plans. That however, instead of taking a decisive stand in the matter, Directorate of Town & Country Planning, Haryana, Chandigarh simply proceeded to withhold the duly sanctioned building plans. It is extremely relevant to mention that till date

Directorate of Town & Country Planning, Haryana, Chandigarh has not passed any order whereby it had withdrawn the sanction accorded to the building plans.

(xii) That thus, no lapse can be attributed to the respondent in so far delay in issuance of occupation certificate is concerned. The aforesaid delay has occurred during the following reasons:

- Delay in release of building plans by Directorate of Town & Country Planning, Haryana, Chandigarh.
- Raising of illegal, illogical, irrational, void and unsustainable demand of composition fee amounting to Rs. 7,29,70,768/ towards alleged raising of unauthorised construction, thereby compelling the respondent to challenge the same by filing appeal.
- Delay on the part of Directorate of Town & Country Planning, Haryana, Chandigarh in releasing approvals, for instance, service estimate and subsequently occupation certificate arising out of its own flawed functioning.

Litigation filed by Mr. Sunil Gupta

(xiii) That Mr. Sunil Gupta had proceeded to institute suit for mandatory injunction titled "Sunil Gupta Versus M/s. Spaze Towers Pvt. Ltd." The respondent had appeared in the aforesaid litigation and had filed detailed written statement highlighting the fact, the entire construction activity stood duly completed the spot. An application for grant of occupation certificate had already been submitted by respondent with the concerned statutory authority. That it had further been demonstrated by respondent in the said litigation that all

lifts/escalators in the project were duly operational. It was also submitted by respondent that it was incurring an extremely substantial expenditure, each month in providing security, electricity supply, maintenance of generators sets, insurance, horticulture and on payment of salaries etc.

(xiv) That it had been stated by respondent that no lapse or negligence of any nature can be attributed to respondent. It had been specifically highlighted by respondent that so far as delivery of physical possession of units in the aforesaid project to the plaintiff of that litigation and other prospective purchasers of commercial spaces in the project, the same had not been done by respondent only on account of non-issuance of commission certificate and environmental clearance by the concerned statutory authority.

(xv) That the arguments on injunction application had been addressed at length before the honourable court of Mr. Ashok Kumar, the then Civil Judge, Gurugram. It had been submitted by respondent before the honourable court that once a duly completed application for grant of occupation certificate or for that matter for environmental clearance had been submitted by respondent in the office of the concerned statutory authorities, respondent ceases to have any control over the same. That the aforesaid application for grant of ad interim injunction filed by Sunil Gupta had been allowed by Mr. Ashok Kumar, the then Civil Judge, Gurugram vide order dated 04.07.2017.

Offering of possession by the respondent without obtaining occupation certificate

(xvi) That permissive possession was offered by the respondent to the complainant vide letter dated 26th of August 2017 .That rule 47 of Punjab Scheduled Roads And Controlled Areas Restriction Of Unregulated Development Rules, 1965 provides that no person shall occupy or allow any other person to occupy any new building or part of a new building for any purpose whatsoever until such building or part thereof has been certified by the director or by any person authorised by him in this way of as having been completed in accordance with the permission granted and occupation certificate has been issued in his favour in form BR-VI. That however, no penalty has been prescribed in the statute book for violation or infraction of the statutory provision.

F. Jurisdiction of the authority

27. The plea of the respondents 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:

I Territorial Jurisdiction:

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

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;

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.

G. Findings on the relief sought filed by the complainant:

Relief sought by the complainant: Direct the respondents to make the payment of prescribed rate of interest to the complainants from the promised date of delivery until the execution of the conveyance deed.

G.1 Admissibility of delay possession charges:

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

Section 18: - Return of amount and compensation

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

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

30. The buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builders/promoters and buyers/allottees are protected candidly. The buyer's agreement lays down the terms that govern the sale of different kinds of properties like residentials, commercials etc. between the buyer and builder. It is in the interest of both the parties to have a well-drafted buyer's agreement

which would thereby protect the rights of both the builder and buyer in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision with regard to stipulated time of delivery of possession of the apartment, plot or building, as the case may be and the right of the buyer/allottee in case of delay in possession of the unit. In pre-RERA period it was a general practice among the promoters/developers to invariably draft the terms of the buyer's agreement in a manner that benefited only the promoters/developers. It had arbitrary, unilateral, and unclear clauses that either blatantly favoured the promoters/developers or gave them the benefit of doubt because of the total absence of clarity over the matter.

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

is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

Admissibility of delay possession charges at prescribed rate of interest:

32. The complainant is seeking delay possession charges at the rate of 18% p.a. however, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

> ***Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
>
> *(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:*
> *Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.*

33. 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.

34. Consequently, as per website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as on date i.e., 14.09.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

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

> *"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.*
> *Explanation. —For the purpose of this clause—*
> *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 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;"*

Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 9.30% by the respondents/promoters which is the same as is being granted to the complainant in case of delayed possession charges.

36. On consideration of the documents available on record and submissions made by both the parties, the authority is satisfied that the respondents are in contravention of the provisions of the Act. The complainant booked a unit in 'Spaze Buziness Park' on 05.09.2009. In pursuance of above, the complainant and the respondent have executed

the buyer's agreement on 28.04.2012 in respect of unit no. A-110, first floor admeasuring 922 sq. ft.

37. By virtue of clause 14 of the dwelling unit buyer's agreement executed between the parties on 28.04.2012, possession of the booked unit was to be delivered within a period of 3 years from the date of the agreement which comes out to be 28.04.2015. Since, the respondents have not offered the possession of the subject unit to the complainants so far, it is the failure on the part of the respondent-promoter to fulfil its obligations and responsibilities as per the dwelling unit buyer's agreement dated 28.04.2012 to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) of the Act on the part of the respondents are established.

38. The respondent has submitted written arguments which are quite in detail explaining the circumstances under which there is delay in getting the occupation certificate on account of certain inevitable circumstances which were beyond the control of the respondent. However, the respondent has offered them permissive possession in the year 2017 the semblance of which is quite clear from the court judgment dated 04.07.2017 passed in case titled as Sunil Gupta versus Spaze Towers Pvt. Ltd. the relevant para of this judgment is re-produced as under:

> ***"During the course of arguments, it is also stated by the learned counsel for the plaintiff that plaintiff is ready to make the payment of the amount which is due against the defendant as per rules.***
>
> ***The defendant has already applied for occupation certificate to the concerned authority and construction of project has also been completed. Therefore, it appears that where plaintiff is ready to make the payment of balance payment, defendant is also having up***

objections to deliver the possession of the units to the plaintiff as the project is complete in all respects. In the above said circumstances, balance of convenience shall be met at this stage if defendant is directed to hand over the physical possession of the suit property to the plaintiff within one month from today after payment of balance sale consideration/outstanding amount payable by the plaintiff to the answering defendant. Application is disposed of accordingly".

39. The counsel for the respondent has also submitted various reasons on account of which the occupation certificate has been obtained in the year 2019 whereas the possession for fit-out (permissive possession) has already been offered to the commercial unit in the year 2017.

40. In view of the arguments advanced by the respondent's counsel which are in detail, and the submissions advanced on behalf of complainants the delayed possession charges be given to the unit buyers from the due date of possession till the actual date of receipt of occupation certificate i.e. 30.04.2019.

41. Usually delayed possession charges are granted till valid occupation certificate is received i.e. 30.04.2019. However there are certain inevitable circumstances beyond the actual control of the builder/respondent on account of which he was not in a position to apply for occupation certificate which has been corroborated by the decision of Shri A.K. Singh, Principal Secretary to Government of Haryana, Town and Country Planning Department, Chandigarh which is re-produced as below:

"In the interim, the approved plans sent vide memo no. 2P563/JDCBS/2011/6935 to 6940 dated 25.05.2011 were never recalled from any of the offices nor was the enforcement or planning wings in Gurugram directed to check and stop the construction on site. The then silence on this account operates as estoppel for the department now. Further the due report of compliance qua construction, sale etc. sent by the licensee were also accepted and put

on record and this leads to drawing conclusion of notification of the same by the department. The Department even internally proposed to release the building plans with a condition to not create 3 party rights vide proposal dated 06.04.2012 and 03.06.2012 but it was also never communicated. The reticence on the part of the department amounts to ratification of the stand of the appellant who was complying with all rules and sending periodical reports of compliances as required by 1976 Rules. Further, the opinion of LR regarding the absolute right of the State to rectify a bonafide mistake is non-est as there was no mistake which was rectified or correct as the exact same building plans as approved by BPAC and circulated on 25.05.2011, were only issued to the builder in 2017. Thus, the same old approved plans were handed over again to the builder thus settling the issue which had been hanging since 2011 on the same lines as approved in 2011.

Thus, all the actions and inactions of the department amount to ratification and validation by the department of the actions qua construction by the Licensee as per building plans. The demand notice qua compounding/composition charges is thus held to the arbitrary beyond law and clearly an afterthought liable to be set aside and is hereby set aside."

42. In this case, BBA was executed on 28.04.2012 and possession of the allotted unit was to be offered within 3 years from the date of this agreement which comes out to be 28.04.2015.However, the matter remained under consideration with the DTCP and the respondent has applied for grant of occupation certificate on 23.01.2017 which was finally received on 30.04.2019 after the appeal was decided on 31.10.2018. As such, no delayed possession charges can be granted to the unit buyer for the period i.e. 23.01.2017 to 31.10.2018 mentioned above as this period was not beyond the control of the respondent on account of which the building plans were with-held and vide order dated 31.10.2018, the same was passed retrospectively without imposing any penalty, rather, the penalty was allowed to be waived off. All this entailed into delay in issuance of occupation certificate, for no fault of the respondent. So,the delayed possession charges period are to be

reduced for the interregnum period from 23.01.2017 to 13.9.2018 (the date when OC was applied till the decision of appeal).

Hence the complainant is entitled for delayed possession charges for the period from 28.04.2015 to 23.01.2017 and 13.9.2018 to 30.04.2019 as per the proviso of section 18 (1) of the Act at the prescribed rate of interest i.e. 9.30% per annum for every month of delay on the amount paid by the complainant to the respondent from 28.04.2015 to 23.01.2017 and 13.9.2018 to 30.04.2019 plus two months i.e 30.06.2019 as per section 19(10) of the Act of 2016.

H. Directions of the authority:

43. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligation cast upon the promoter as per the function entrusted to the authority under section 34(f) of the Act of 2016:

(i) The respondents shall pay the interest at the prescribed rate i.e. 9.30% per annum for every month of delay on the amount paid by the complainants from 28.04.2015 to 23.01.2017 and 13.9.2018 to 30.04.2019 plus two months i.e 30.06.2019 as per section 18(1) of the Act read with the rule 15 of the rules and section 19(10) of the Act of 2016.

(ii) The respondents are directed to pay interest accrued from 28.04.2015 to 23.01.2017 and 13.9.2018 to 30.04.2019 plus two months i.e 30.06.2019 within 90 days from the date of order and subsequent interest to be paid till the date of handing over possession on or before the 10th of each succeeding month;

(iii) The respondents are directed to refund excess amount outstanding, if any, after adjustment of interest for the delayed period.

(iv) The respondents shall not charge anything from the complainants which is not the part of buyer's agreement.

44. Complaint stands disposed of.

45. File be consigned to registry.

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 14.09.2021

Judgement uploaded on 22.11.2021