

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

Complaint no. : 1635 of
2021
First date of hearing: 20.04.2021
Date of decision : 14.09.2021

1.Rajiv Kohli 2.Sangeeta Kohli Both RR/o: - B-38, Ashoka Avenue, Sainik Farms, Khanpur, Delhi-110062	Complainants
Versus	
1.Spaze Towers Pvt. Ltd. Regd. Office: - UG-39, Upper Ground Floor, Somdutt Chamber-II,9, Bhikaji Cama Place, New Delhi South West Delhi 2.Preserve Faciliteez Pvt. Ltd. Regd. Office: -UG-39, Upper Ground Floor, Somdutt Chamber-II,9, Bhikaji Cama Place, New Delhi South West Delhi	Respondents
CORAM:	
Shri Samir Kumar	Member
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Shri Rit Arora	Advocate for the complainants
Shri J K Dang & Ishaan Dang	Advocates for the respondents

ORDER

1. The present complaint has been filed on 25.03.2021 by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in

short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions 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 complainants, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Project name and location	Spaze business 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 15.06.2009 valid upto 14.06.2013
5.	Name of licensee	M/s Kay Kay Designers Towers Pvt ltd.
6.	RERA Registered/ not registered	Unregistered
7.	Unit no.	ATM-1, ground floor, block A [Page no. 31 of the complaint]
8.	Unit measuring (super area)	179 sq. ft.
9.	Date of allotment letter	10.10.2013 [Page no. 28 of the complaint]
10.	Date of execution of builder buyer agreement	22.04.2015 [Page no. 29 of the complaint]
11.	Payment Plan	Construction linked payment

		plan [Page no. 50 of the complaint]
12.	Total sale consideration	TC- Rs.36,69,489/- (As per payment plan at page 50 of the complaint)
13.	Total amount paid by the complainants	Rs. 40,03,959/- (As per statement of account dated 13.07.2021 at page 206 of the reply)
14.	Due date of delivery of possession as per buyer's agreement <i>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."</i>	22.04.2018 [As per clause 14 of the BBA annexed with the complaint at page no.54]
15.	Offer of permissive possession	16.08.2017 [Page no. 204 of the reply]
16.	Occupation certificate	30.04.2019 [Page no. 52 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	9 months and 7 days

B. Facts of the complainant:

3. The complainants had booked a commercial space in the project of the respondents namely, "Spaze business park". It is submitted that the complainants have been made to pay for the area of 179 sq. ft. whereas the actual area allotted to the complainants is only 55 sq. ft. It is submitted that at the time of booking in the project they were assured that their unit shall be preferentially located. It is submitted that in lieu of the same, the respondents had charged PLC (Prime Location Charges) from the complainants and assured that they would be allotted the unit with prime location.

4. It is submitted that on the application being made by the complainants on 10.10.2013 along with the booking amount of Rs. 7,42,550/- the respondents accepted the application and made allotment wide letter dated 19.10.2013 with a total sale consideration of Rs.36,69,489/-.The allotment letter was issued to the complainants in the year 2013 and after that they had to wait and chase the respondents to enter into buyer's agreement for more than 2 ½ years.

5. The delay in execution of the buyer's agreement by the respondents were just because to hide and evade away from their incompetency and inability of timely delivery of the possession. If it would have been executed in the year 2013 just after the allotment, then the respondents would had been under an obligation to deliver the possession within 3 years. It was very well known to the company that it is not in the capacity and position to complete and deliver the possession. Therefore, to wriggle out of its liability and incompetency, the respondents delayed for almost 2 and half years in executing the

buyer's agreement. It is submitted that finally after a long gap of 2½ years the parties entered into buyer's agreement on 22.04.2015.

6. It is submitted that the respondents had assured the complainants that as per clause 14 of the buyer's agreement, the possession of the unit would be delivered within a period of 3 years from the date of execution of buyer's agreement.

Clause 14 is reproduced hereunder: -

"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."

7. It is submitted that the reasons for the delay in executing the buyer's agreement can be very well seen and made clear from the bare reading of the above clause as the respondents wanted time in completing the project and deliver the same and for that it has delayed the execution of the buyer's agreement as the respondents were in default from the very starting. That as per the buyer's agreement dated 22.04.2015, the possession of the unit ought to have been delivered by 22.04.2018.

8. It is submitted that the complainants had made the payment of complete consideration of Rs. 54,94,335/-to the respondents up to whereas the total sale price of the unit is Rs 36,69,489/-. The complainants had made the above payments in excess of the total sale price inadvertently as the demands were raised by the respondents under the guise of instalments.

9. It is submitted that finally after a long gap the respondents on 10th Aug 2017 offered the complainants to take the permissive

possession of the unit to carry out the interior work and interior adaptations. That on 27.02.2018 the complainants received the permissive possession from the respondents.

10. That under the garb of the permissive possession delivery, the respondents intended to free itself of the responsibility to complete the construction and deliver the unit after completion. The fact of the matter is that till date the complainants have not been offered possession of the unit. The project even today has not received the occupancy/completion certificate.

11. That after the complainants entered into the premises for interior adaptation, they were shocked to find out that the actual area allotted was contrary to booking made. That the complainants had made the booking for an area admeasuring 179 sq. ft. and payments made by the complainants were also for the said area whereas the area allotted on possession to the complainants is 55 sq. ft. This is in clear violation of the terms of the agreement entered between the parties.

12. That either the mentioned unit was never intended to be of 179 sq. ft. and the complainants were misled from the day one or else, the respondents has made unilateral changes to the sanction and layout plans without receiving the consent of the complainants. The complainants are aggrieved because there is a vast difference between the area booked by the complainants and the carpet area of the unit. Not only this, the complainants were assured that their unit shall be preferentially located but contrary to this the unit of the complainants was in fact located at a miserable location to the complainants just below the pillars of the building. The front/entrance of the shop of the

complainants were located in such a manner that the same is hidden from the view and it appeared miserable for any intending customer. The complainants complained that the entrance to the shop is completely hidden from view and that is bad for business and far from preferential location. That no person shall take the unit on rent as no customer shall have any visible view of the shop.

13. That as per the original plans, the door of the shop/unit was supposed to be on the front, but, deliberately and with malafide intentions the door was shifted on the sides and the respondents were thus using the front of the complainants unit for advertisement of the mall. It has come to the knowledge of the complainants that the respondents have entered into an agreement with a third party for advertisement without receiving any consent from the complainants.

14. It is submitted that the respondents had duped the complainants by charging PLC (Preference location Charges) which was approximately Rs.10,000/- extra charged from other allottees per sq. ft. Despite of charging PLC the respondents did not allot any preferential area to the complainants. The shops allotted to the complainants are not front facing and the location of the same was not what was promised at the time of booking.

15. It is submitted that after obtaining the possession the complainants many a time requested the respondents to return the money charged for PLC and also to refund the extra amount paid for the difference in the unit. Further, the complainants were prevented from putting up a board on the front portion as the respondents intends to monetize the same without sharing any profit with the

complainants. The front of the shop also belongs to the complainants as they have purchased the entire unit in the nature of super area and not merely the space inside the walls of the unit.

C. Relief sought by the complainants:

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

- a) Direct the respondents to deliver the possession of the unit after the receipt of the occupancy certificate and/or completion certificate and further execute the conveyance deed in the favour of the complainants.
- b) 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.
- c) Direct the respondents to provide the copy of the sanctioned plans of the project to the complainants for perusal.
- d) Direct the respondents to provide a frontal entrance to the Shop/Allotted unit of the complainants as shown earlier at the time of the booking instead of the sideways entrance.
- e) Pass an order appointing a "Local Commissioner" who is a qualified professional to assess the actual carpet area, built up area and super area of the unit no. ATM-1, on the ground floor of the project.
- f) Direct the respondents to refund the amount received in excess from the complainants with respect to the allotted area of the unit with prescribed rate of interest from the date of payment until realisation.

- g) Pass an order restraining the respondents from charging any maintenance charges from the complainants until the receipt of the occupancy certificate/completion certificate.
- h) Direct the respondents to refund the amount paid in form of PLC (Preferential location charges) to the complainants as the respondents failed to provide any prime location.

17. On the date of hearing, the authority explained to the respondents/promoters 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 respondents:

18. That the complainants have been allotted unit bearing no. ATM-1 on ground floor located in block A having tentative super area measuring 179 sq. ft. in the project being developed by respondent no. 1 in the project known as "Spaze Buziness Park", Sector 66, Gurugram wide application form dated 27.09.2013 and allotment letter dated 10.10.2013.

19. That it is respectfully submitted that the contractual relationship between the complainants and respondents are governed by the terms and conditions of the said agreement. The said agreement was voluntarily and consciously executed by the complainants. Once a contract is executed between the parties, the rights and obligations of the parties are determined entirely by the covenants incorporated in the said contract. No party to a contract can be permitted to assert any right of any nature at variance with the terms and conditions incorporated in the contract. It is respectfully submitted that a large

number of permissions/ sanctions are required to be obtained from the concerned statutory authorities for the purpose of undertaking the implementation of commercial project of the huge magnitude as the instant one. Respondent no. 1 can only proceed to submit the requisite application, complete in all respects, in the office of the concerned statutory authorities for obtaining required sanctions/permissions.

20. That, however, respondent no. 1 cannot exercise any control over the functioning of the said statutory authorities. In the present case, the application for obtaining sanction of building plans was submitted by respondent no. 1 in the office of Directorate of Town & Country Planning, Haryana, Chandigarh on 20.09.2010. The building plans were eventually sanctioned on 25.05.2011 that is after a period of approximately 8 months from the date of submission of the application by respondent no. 1.

21. The building plans for the project had been sanctioned by Directorate of Town & Country Planning, Haryana, Chandigarh vide memo dated 25.05.2011 bearing number 6935. However, the fact that building plans had been sanctioned had been communicated to the officials of respondent no. 1 and even at one point of time, the duly sanctioned building plans were dispatched to respondent no. 1. It was orally communicated to the officials of respondent no. 1 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 respondent no. 1 in

writing by Directorate of Town & Country Planning, Haryana, Chandigarh.

22. That in the meantime, since respondent no. 1 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 respondent no. 1 and eventually an application for grant of occupation certificate had been submitted by respondent no. 1 with Directorate of Town & Country Planning, Haryana, Chandigarh on 23.01.2017. It is pertinent to mention that respondents have received the occupation certificate for the said project on 30.04.2019. 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 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, Chandigarh vide judgment dated 19.10.2015 passed in CWP bearing number 11911 of 2011.

23. That eventually, after inordinate delay the duly approved building plans had been handed over to respondent no. 1 by Directorate of Town & Country Planning, Haryana, Chandigarh on 31.07.2017 along with covering memo bearing number 18440 dated 31.07.2017. The 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 25.05.2011 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 respondent no. 1 in the entire sequence of events.

24. 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. That so far as respondent no. 1 is concerned, delay in implementation of the project would have had devastating consequences for it. Moreover, respondent no. 1 kept the department abreast with the development at the spot and the same is evident from the fact that in January 2017, respondent no. 1 had even submitted application for grant of occupation certificate to Directorate of Town & Country Planning, Haryana, Chandigarh, and had brought it specifically to the attention of the aforesaid Department that construction work stood duly completed at the spot.

25. That without any right or justification and illegally, the grant of occupation certificate was also unreasonably delayed on this account. respondent no. 1 is extremely optimistic that the occupation certificate shall be issued by the concerned statutory authority in a reasonable span of time. However, since the obligation of respondent no. 1 of constructing/developing/implementing the project had been duly completed and in light of orders passed by court of law, permissive possession of units/apartments in the project had been offered by respondent no. 1 to all the allottee/purchasers including the

complainants. That additionally it is pertinent to note that the Hon'ble High Court of Punjab and Haryana at Chandigarh had directed that no construction activity would be permitted unless an undertaking was given by the concerned developer that no ground water would be used for raising of construction. The said embargo was imposed on 24.07.2012 and it resulted in bringing to a standstill the construction activity at the spot for a period of three weeks.

26. 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.

27. That it is precisely for this reason that it was recited in clause 14 of the buyer's agreement that in case the delay in implementation of the project occurred on account of belated according of sanctions/ permissions to building/ zoning plans (departmental delay), in that event respondent no. 1 would be entitled to extension of time for handing over possession of the said unit/space. That the complainants had defaulted in making timely payments of instalments which was an essential, crucial and indispensable requirement under

the buyer's agreement. The complainants chose to ignore all these aspects and wilfully defaulted in making timely payments.

28. It needs to be emphasised that once an application for issuance of occupation certificate is submitted before the concerned competent authority respondent no. 1 ceases to have any control over the same. The grant of occupation certificate is the prerogative of the concerned statutory authority and respondent no. 1 does not exercise any control over the matter. Therefore, the time period utilised by the concerned statutory authority for granting the occupation certificate needs to be necessarily excluded from the computation of the time period utilised in the implementation of the project in terms of the buyer's agreement. As far as respondent is concerned, it has diligently and sincerely pursued the development and completion of the project in question. That it had further been demonstrated by respondent no. 1 in the said litigation that all lifts/escalators in the project were duly operational. It was also submitted by respondent no. 1 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.

29. That accordingly the complainants were offered possession of the unit in question through letter of offer of possession dated 16.08.2017. The complainants were called upon to remit balance payment including delayed payment charges and to complete the necessary formalities/documentation necessary for handover of the unit in question to them. However, the complainants intentionally refrained from completing their duties and obligations as enumerated in the

buyer's agreement as well as the Act. It is pertinent to note that an offer for possession marks termination of the period of delay, if any. The complainants are not entitled to contend that the alleged period of delay continued even after receipt of offer for possession. The complainants have consciously and maliciously delayed obtaining possession of the unit in question.

30. That it is submitted that pursuant to the aforesaid letter dated 16.08.2017, physical possession of the unit has been obtained by the complainants on 27.10.2017 after duly satisfying themselves with regard to all aspects of the unit in question including the area of the unit in question, its location, amenities in the project etc. The complainants are, therefore, barred from disputing/impugning any aspect of the unit in question at this belated stage. The liabilities and obligations of respondent no. 1 as enumerated in the allotment letter or the buyer's agreement stood satisfied after obtaining possession of the unit in question by the complainants. The complainants have preferred the instant complaint in order to wriggle out of the contractual obligations wilfully assumed by them under the buyer's agreement and to evade their duty of paying maintenance charges to M/s Preserve Faciliteez Pvt. Ltd.

31. The permissive possession of the property had been offered by respondent no. 1 to the complainants vide letter dated 16.08.2017. The advance notice for registration of said unit dated 02.05.2019 had been duly sent to the complainants.

E. Written submission by the respondents:

32. 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 31st 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

33. 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 complainants:

Relief sought by the complainants: 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:

34. 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

35. 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.

36. 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.

37. 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:

38. The complainants are 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.

39. 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.

40. 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%.

41. 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;"

42. Therefore, interest on the delay payments from the complainants 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 complainants in case of delayed possession charges.

43. 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. Vide application form dated 27.09.2013, the complainants booked a unit in 'Spaze Buziness Park'. In pursuance of aforesaid application form, the complainants and the respondents have executed the buyer's agreement on 22.04.2015 in respect of unit no. ATM-1, ground floor, block A, admeasuring 179 sq. ft.

44. By virtue of clause 14 of the dwelling unit buyer's agreement executed between the parties on 22.04.2015, 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 22.04.2018. 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 22.04.2015 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.

45. The counsel for the respondents 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".

46. The counsel for the respondents have 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.

47. In view of the arguments extended by the respondent's counsel which are in detail, the delayed possession charges be given to the commercial unit buyers from the due date of possession till the actual date of receipt of occupation certificate i.e 30.04.2019. Delayed possession charges granted till valid occupation certificate is received i.e. 30.04.2019. However there were 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 ZP563/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 3rd 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, was 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 are thus held to be arbitrary beyond law and clearly an afterthought liable to be set aside and are hereby set aside".

48. In this case, BBA was executed on 22.04.2015 and possession was to be offered within 3 years from the date of this agreement which comes out to be 22.04.2018 but 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 be granted to the unit buyer for the period mentioned above as this period was not beyond the control of the respondents on account of which the building plans were withheld and vide order dated 31.10.2018, the same were passed retrospectively without imposing any penalty and rather, the penalty was allowed to be waived off. All this entailed into delay in issuance of occupation certificate, for no fault of the respondents, the delayed possession charges period shall be reduced for the interregnum period from 23.01.2017 to 31.10.2018 (the date when OC was applied till the decision of appeal). Therefore, the due date shall be computed from the date of decision of appeal dated 13.09.2018 by the decision of Shri A.K.

Singh, Principal Secretary to Government of Haryana, Town and Country Planning Department, Chandigarh.

49. Hence in view of reasons given above and detailed discussions the complainants are entitled for delayed possession charges for the period from 13.9.2018 to 30.04.2019 as per the proviso of section 18 (1) of the Act read with the rule 15 of the rules at the prescribed rate of interest i.e. 9.30% per annum for every month of delay on the amount paid by them to the respondents from 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:

50. 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 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 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.
51. Complaint stands disposed of.
52. 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