

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

Complaint no. : 1151 of
2021
Date of filing complaint: 04.03.2021
First date of hearing : 20.04.2021
Date of decision : 14.10.2021

1. Amit Juneja	Complainants
2. Maneesha Juneja Both R/o: C-2/169, UGF, Janakpuri, New Delhi-110058	
Versus	
M/s Spaze Towers Private Limited R/o: Spazedge, Sector 47, Gurgaon Sohna Road, Gurgaon, Haryana	Respondent

CORAM:	
Shri Samir Kumar	Member
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Sh. Rajesh Yadav (Advocate)	Complainants
Sh. J.K Dang (Advocate)	Respondent

ORDER

1. The present complaint has been filed 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 under the provision of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

2. The particulars of the project, the details of sale consideration, the amount paid by the complainant, 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 privy at 4" Sector-84, village sihi, Gurugram
2.	Project area	10.51 acres
3.	Nature of the project	Group housing complex
4.	DTCP license no. and validity status	26 of 2011 dated 25.03.2011 valid up to 24.03.2019
5.	Name of licensee	Smt. Mohinder Kaur and Ashwini Kumar
6.	RERA Registered/ not registered	Registered vide registration no. 385 of 2017 dated 14.12.20170
	RERA Registration valid up to	31.06.2019
7.	Unit no.	44, 4 th floor, tower A5 [Page 44 of the complaint]
8.	Unit measuring (super area)	1745 sq. ft.
9.	Revised unit	1918 sq. ft [As per offer letter at page 182 of the reply]



10.	Date of approval of building plan	06.06.2012 [Page 92 of the reply]
11.	Date of allotment letter	29.08.2011 [Page 39 of the complaint]
12.	Date of execution of builder buyer agreement	28.12.2011 [Page 41 of the complaint]
13.	Total sale consideration	Rs.72,91,505/- (As per payment plan on page 61 of the complaint)
14.	Total amount paid by the complainants	Rs.73,19,676/- (As per statement of accounts dated 06.07.2021 at page 145 of the reply)
15.	Payment plan	Construction linked payment plan [Page 61 of the complaint]
16.	Due date of delivery of possession <i>Clause 3(a): The developer proposes to hand over the possession of the apartment within a period of thirty six (36) months (excluding a grace period of 6 months) from the date of approval of building plans or date of signing of this agreement whichever is later</i>	06.12.2015 Calculated from the date of approval of building plan being later Grace period of 6 months is allowed
17.	Offer of possession	01.12.2020 [Page 182 of the reply]
18.	Occupation Certificate	11.11.2020 [Page 179 of the complaint]
19.	Delay in delivery of possession till the date of offer of possession plus two months i.e.01.02.2021	5 years 1 month 26 days

B. Facts of the complaint:

3. That after being convinced of the project location and delivery commitment in December 2014, the complainants applied for a 3BHK on 29.07.2011 through application form and paid Rs. 5,00,000/- as registration amount to the respondent.
4. That initially the respondent provisionally allotted unit no. – 044 in tower A5 with super area of 1745 sq. ft. to the complainants in its upcoming 'spaze privy at 4' project for sale consideration of Rs. 72,91,505/- and that on 29.08.2011, the respondent issued pre-printed arbitrary, unilateral allotment letter and a time and construction linked payment plan.
5. That a pre-printed, arbitrary, unilateral buyer's agreement was executed on 28.12.2011 for unit no. – 044 in tower A5 located on 4th floor admeasuring super area of 1745 sq. ft. by the respondent and the complainants. The project/ unit is expected to be delivered in 36 months i.e. by 28.12.2014.
6. That the complainants paid as and when respondent raised the demands for instalments for the booked unit/ flat and various payments were made from 29.07.2011 to 24.11.2016. The complainants have honoured all the demands raised by the respondent till 24.11.2016 and paid respondent a total amount of Rs. 73,19,676/- including taxes of amount Rs. 3,22,638/- towards the unit.
7. That on 12.11.2020, from email id customercell@spaze.in complainants received an email from the respondent with subject line of "occupation certificate received for spaze at 4" and on 22.12.2020 another email was received from email id

customercell2020@gmail.com, where respondent has scandalously raised unjustified demand for payment of Rs. 8,47,760/-, and additional Rs. 2,06,800/- for IFMS.

8. That after enquiries with the respondent, it was learnt that the super area has been increased from 1745 sq. ft. to 1918 sq. ft. but there was no clarity over the increased portion and the reduced portion of super area, also there was no prior communication about this increase in super area to the complainants and now without any justification, respondent is demanding Rs. 8,47,760/- and Rs. 2,06,800/- for IFMS & external electrification, water, sewer, meter charges.
9. That complainants tried to get clarity on the increased super area, unjustified charges of electrification, and miscellaneous charges, however, all his efforts were in vein as the respondent didn't give any convincing reply or answer to the relevant queries and concerns of the complainants. The senior official/ CRM of the respondent's office said that the builder has all justification for changes and that the charges are valid and legal, and offered an immediate discount of 5% saying it valid for just a day in-case the complainants clears the dues on the same day.
10. That there is an apprehension in the minds of the complainants that the respondent party has playing fraud and there is something fishy which respondent party are not disclosing to the complainants just to embezzle the hard earned money of the complainants and other co-owners. It is highly pertinent to mention here that the respondent wants

unjustified enrichment on money of the complainants. A probe needs to initiate to find out the clarity on several irregularities of the respondent.

11. That respondent has illegally charged the complainants for the park facing PLC, as during the site visit, it was observed that all the balconies of the unit No - 044 of tower A5 are either facing the adjacent or next tower or the 'nearby other project'
12. That respondent's charges on account of PLC or preferred location charges is mere a way of charging unnecessarily form complainants. With reference to 'corner PLC', there is no meaning to preferential location as builder is charging 'corner PLC' on almost all the flat owners of the project.
13. That complainants have paid Rs.2,61,750/- for 'corner PLC', Rs. 87,250/- for 'floor PLC', and Rs. 87,250/- for park facing PLC as and when demanded by the respondent. 'Park facing PLC' is also unjustified and should be cancelled as the garden/ park is not seen from any balcony of unit no. - 044 of tower A5, and hence the amount so collected by the respondent should either be adjusted or refunded along with interest to the complainants. The last instalment paid on demand of PLC was on 05.12.2013.
14. That the respondent has failed to give possession in December 2014 as committed in buyer's agreement and didn't oblige his promises and commitments. The respondent has no clarity on increased super area and couldn't signify the enhanced area. The complainants also realize that the corner & park facing PLC is

completely unjustified and additionally seeking profit margins even on electrification, water and sewer connection.

15. That the increase in super area from 1745 sq. ft. to 1918 sq. ft, illegal and overcharging for electrification, water, sewer and other amenities, and unjustified PLC is concurrently increasing the cost of unit/ apartment for complainants and mere a way of self-enrichment of the respondent.

C. Relief sought by the complainants:

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

- i. Direct the respondents to pay interest at prescribed rate from the due date of possession until the physical possession of the flat.
- ii. Direct the respondent to charge as per the standard rates prescribed by Haryana Government, and competent authorities on electrification, water, sewer and other mandatory figures.
- iii. Direct the respondent to handover the physical possession of the flat.
- iv. Pass an appropriate order to investigate the increased super area and applicability of 'park facing PLC' and 'corner PLC' on complainants' unit.
- v. Direct the respondent to refund/adjust the unjustified PLC collected from the complainants, along with the quarterly compounded prescribed interest rate @18% p.a.

D. Reply by respondents

17. That the complainants had been allotted apartment bearing no. 044 on fourth floor located in tower A5 having tentative super area measuring 1745 square feet (hereinafter referred to as "said unit") in the project being developed by the respondent in the project known as privy at 4, sector 84, Gurugram (hereinafter referred to as "said project") as per terms and conditions of the buyer's agreement dated 28.12.2011.
18. That the complainants have completely misinterpreted and misconstrued the terms and conditions of said agreement. So far as alleged non-delivery of physical possession of the apartment is concerned, it is submitted that in terms of clause 3(a) of the aforesaid contract the time period for delivery of possession was 36 months excluding a grace period of 6 months from the date of approval of building plans or date of execution of the buyer's agreement, whichever is later, subject to the allottee(s) having strictly complied with all terms and conditions of the buyer's agreement and not being in default of any provision of the buyer's agreement including remittance of all amounts due and payable by the allottee(s) under the agreement as per the schedule of payment incorporated in the buyer's agreement. It is pertinent to mention that the application for approval of building plans was submitted on 26.08.2011 and the approval for the same was granted on 06.06.2012. Therefore, the time period of 36 months and grace period of 6 months as stipulated in the contract has to

be calculated from 06.06.2012 subject to the provisions of the buyer's agreement.

19. That it was further provided in clause 3 (b) of said agreement that in case any delay occurred on account of delay in sanction of the building/zoning plans by the concerned statutory authority or due to any reason beyond the control of the developer, the period taken by the concerned statutory authority would also be excluded from the time period stipulated in the contract for delivery of physical possession and consequently, the period for delivery of physical possession would be extended accordingly. That for the purpose of promotion, construction and development of the project referred to above, a number of sanctions/permissions were required to be obtained from the concerned statutory authorities. It is respectfully submitted that once an application for grant of any permission/sanction or for that matter building plans/zoning plans etc. are submitted for approval in the office of any statutory authority, the developer ceases to have any control over the same. The grant of sanctions/approvals to any such application/plan is the prerogative of the concerned statutory authority over which the developer cannot exercise any influence.
20. That in accordance with contractual covenants incorporated in said agreement the span of time, which was consumed in obtaining the following approvals/sanctions deserves to be excluded from the period agreed between the parties for delivery of physical possession: -



S. no	Nature of Permission / Approval	Date of submission of application for grant of Approval/sanction	Date of Sanction of permission/grant of approval	Period of time consumed in obtaining permission/approval
1	Environment Clearance	30.05.2012	Re-submitted under ToR (Terms of reference) on 06.05.17	4 years 11 months
2	Environment Clearance re-submitted under ToR	06.05.2017	04.02.2020	2 Years 9 months
3	Zoning Plans submitted with DGTCP	27-04-11	03.10.2011	5 months
4	Building Plans submitted with DTCP	26.08.2011	06.06.2012	9 months
5	Revised Building Plans submitted with DTCP	05.02.2019	25.02.2020	12 months
6	PWD Clearance	08.07.2013	16.08.2013	1 month
7	Approval from Deptt. of Mines & Geology	17.04.2012	22.05.2012	1 month
8	Approval granted by Assistant Divisional Fire Officer acting on behalf of commissioner	18.03.2016	01.07.2016	4 months
9	Clearance from Deputy Conservator of Forest	05.09.2011	15.05.2013	19 months
10	Aravali NOC from DC Gurgaon	05.09.2011	20.06.2013	20 months

21. That from the facts and circumstances mentioned above, it is comprehensively established that the time period mentioned hereinabove, was consumed in obtaining of requisite permissions/sanctions from the concerned statutory authorities. It is respectfully submitted that the said project could not have been constructed, developed and implemented by respondent without obtaining the sanctions referred to above. Thus, respondent has been prevented by circumstances beyond its power and control from undertaking the implementation of the said project during the time period indicated above and therefore the same is liable to be excluded and ought not to be taken into reckoning while computing the period of 36 months and grace period of 6 months as has been explicitly provided in said agreement.
22. That additionally it is submitted that the development and implementation of the said project has been hindered on account of several orders/directions passed by various forums/authorities/courts, as has been delineated hereinbelow: -

S r . N o .	Date of Order	Directions	Period of Restriction/ Prohibition	Days Affected	Comments
1	13.09.2012	The Hon'ble High Court of Punjab & Haryana in CWP No.20032 of 2008 titled as Sunil Singh V/s MoEF& Others vide orders dated 16.07.2012 directed that No building plans for construction shall	13.09.2012 to 12.10.2012	60	Due to ban on usage of underground water, the construction activity was brought to a standstill as there were no arrangements by



		be sanctioned unless the applicant assures the authority that carrying out the construction under-ground water will not be used and also show all the sources from where the water supply will be taken from construction purposes. (Annexure R6)			the State Government to fulfill the demand of water to be used in construction activity. There was and is only 1 Govt. Sewage Treatment Plant at Chandu Budhera which was inadequate to meet the requirements of the developers.
2	7 th of April 2015	National Green Tribunal had directed that old diesel vehicles (heavy or light) more than 10 years old would not be permitted to ply on the roads of NCR, Delhi. It had further been directed by virtue of the aforesaid order that all the registration authorities in the State of Haryana, UP and NCT Delhi would not register any diesel vehicles more than 10 years old and would also file the list of vehicles before the tribunal and provide the same to the police and other concerned authorities. (Annexure R7)	7 th of April 2015 to 6 th of May 2015	30 days	The aforesaid ban affected the supply of raw materials as most of the contractors/ building material suppliers used diesel vehicles more than 10 years old. The order had abruptly stopped movement of diesel vehicles more than 10 years old which are commonly used in construction activity. The order had completely hampered construction activity.
3	19 th of July 2017	National Green Tribunal in O.A. no. 479/2016 had directed that no stone crushers be permitted to operate unless they obtain consent from the State Pollution Control Board, no objection from the concerned authorities and have the Environmental	Till date the order is in force and no relaxation has been given to this effect.	30 Days	The directions of NGT was a big blow to the real estate sector as the construction activity majorly requires gravel produced from the stone crushers. The reduced supply of gravel directly affected the supply & price



		Clearance from the competent authority. (Annexure R8)			of ready-mix concrete required for construction activity.
4	8 th of November 2016	National Green Tribunal had directed all brick kilns operating in NCR, Delhi would be prohibited from working for a period of one week from the date of passing of the order. It had also been directed that no construction activity would be permitted for a period of one week from the date of order. (Annexure R9)	8 th of November 2016 to 15 th of November 2016	7 days	The bar imposed by National Green Tribunal was absolute. The order had completely stopped construction activity.
5	7 th of November 2017	Environment Pollution (Prevention and Control) Authority had directed to closure of all brick kilns, stone crushers, hot mix plants etc. with effect from 7 th of November 2017 till further notice. (Annexure R10)	Till date the order of closure of brick kilns and hot mix plants has not been vacated.	90 days	The bar for closure of stone crushers simply put an end to construction activity as in the absence of crushed stones and bricks carrying on of construction were simply not feasible. The respondent eventually ended up locating alternatives with the intent of expeditiously concluding construction activity, but a precious period of 90 days was consumed in doing so. The said period ought to be excluded, while computing the alleged delay attributed to the respondent by the complainants. It is pertinent to mention that the aforesaid bar



					stands in force regarding brick kilns till date as is evident from orders dated 21 st of December 2019 and 30 th of January 2020.
6	9 th of November 2017 and 17 th of November 2017	National Green Tribunal had passed the said order dated 9 th of November 2017 completely prohibiting the carrying on of construction by any person, private or government authority in the entire NCR till the next date of hearing (17 th of November 2017). By virtue of the said order, National Green Tribunal had only permitted the completion of interior finishing/interior work of projects. The order dated 9 th of November 2017 prohibiting construction activity was vacated vide order dated 17 th of November 2017. (Annexure R11)		9 days	On account of passing of aforesaid order, no construction activity could have been legally carried on by the respondent. Accordingly, construction activity had been completely stopped during this period.
7	29 th of October 2018	Haryana State Pollution Control Board, Panchkula had passed the order dated 29 th of October 2018 in furtherance of directions of Environment Pollution (Prevention and Control) Authority dated 27 th of October 2018. By virtue of order dated 29 th of October 2018 all construction activities involving excavation, civil construction	1 st November 2018 to 10 th November 2018	10 Days	On account of passing of aforesaid order, no construction activity could have been legally carried on by the respondent. Accordingly, construction activity had been completely stopped during this period.



		(excluding internal finishing/work where no construction material was used) were directed to remain closed in Delhi and other NCR Districts from 1 st to 10 th November 2018. (Annexure R12)			
8	24 th of July 2019	National Green Tribunal in O.A. no. 667/2018 & 679/2018 had again directed immediate closure of all illegal stone crushers in Mahendergarh Haryana who have not complied with the siting criteria, ambient air quality, carrying capacity and assessment of health impact. The Tribunal further directed initiation of action by way of prosecution and recovery of compensation relatable to the cost of restoration. (Annexure R13)		30 Days	The directions of the NGT were again a setback for stone crusher operators who had finally succeeded to obtain necessary permissions from the competent authority after the order passed by NGT on July 2017. Resultantly coercive action was taken by the authorities against the stone crusher operators which again was a hit to the real estate sector as the supply of gravel reduced manifolds and there was a sharp increase in prices which consequently affected the pace of construction.
9	11 th of October 2019	Commissioner, Municipal Corporation, Gurugram had passed order dated 11 th of October 2019 whereby construction activity had been prohibited from 11 th of October 2019 to 31 st of December 2019. It was specifically mentioned in the aforesaid order that construction	11 th of October 2019 to 31 st of December 2019	81 days	On account of passing of aforesaid order, no construction activity could have been legally carried on by the respondent. Accordingly, construction activity had been completely stopped during

	activity would be completely stopped during this period. (Annexure R14)			this period.
		Total	347 days	

That from the facts indicated above and documents appended, it is comprehensively established that a period of 347 days was consumed on account of circumstances beyond the power and control of the respondent owing to passing of orders by statutory authorities. Since, the respondent was prevented for the reasons stated above from undertaking construction activity within the periods of time already indicated hereinbefore, the said period is required to be excluded, while computing the period availed by the respondent for the purpose of raising construction.

23. That it is pertinent to mention that it was categorically provided in clause 3(b)(iii) of the said agreement that in case of any default/delay by the allottees in payment as per schedule of payment incorporated in the buyer's agreement, the date of handing over of possession would be extended accordingly, solely on the developer's discretion till the payment of all of the outstanding amounts to the satisfaction of the developer. Since the complainants have defaulted in timely remittance of payments as per schedule of payment, the date of delivery of possession is not liable to be determined in the manner alleged by the complainants.

In fact, the total outstanding amount including interest due to be paid by the complainants to the respondent on the date of dispatch of letter of offer of possession dated 01.12.2020 was Rs.

13,46,639/-. Although, there was no lapse on the part of the respondent, yet an amount of Rs. 4,55,254/- and Rs. 43,625/- GST input credit was credited to the account of the complainants as a gesture of goodwill.

It is submitted that the complainants consciously and maliciously chose to ignore the payment request letters and reminders issued by respondent. That it is pertinent to mention that respondent had submitted an application for grant of environment clearance to the concerned statutory authority in the year 2012. However, for one reason or the other arising out of circumstances beyond the power and control of respondent, the aforesaid clearance was granted by Ministry of Environment, Forest & Climate Change only on 04.02.2020 despite due diligence having been exercised by the respondent in this regard. The issuance of an environment clearance referred to above was a precondition for submission of application for grant of occupation certificate.

24. That it is further submitted that the respondent left no stones unturned to complete the construction activity at the project site but unfortunately due to the outbreak of COVID-19 pandemic and the various restrictions imposed by the governmental authorities, the construction activity and business of the company was significantly and adversely impacted and the functioning of almost all the government functionaries were also brought to a standstill.
25. That since the 3rd week of February 2020 the respondent has also suffered devastatingly because of outbreak, spread and resurgence of COVID-19 in the year 2021. The concerned statutory authorities had earlier imposed a blanket ban on

construction activities in Gurugram. Subsequently, the said embargo had been lifted to a limited extent. However, in the interregnum, large scale migration of labour had occurred and availability of raw material started becoming a major cause of concern. Despite all odds, the respondent was able to resume remaining construction/ development at the project site and obtain necessary approvals and sanctions for submitting the application for grant of occupation certificate.

26. That the Hon'ble Authority was also considerate enough to acknowledge the devastating effect of the pandemic on the real estate industry and resultantly issued order/direction to extend the registration and completion date or the revised completion date or extended completion date by 6 months & also extended the timelines concurrently for all statutory compliances vide order dated 27.03.2020. It has further been reported that Haryana Government has decided to grant moratorium to the realty industry on compliances and interest payments for seven months to September 30, 2020 for all existing projects. It has also been mentioned extensively in press coverage that Moratorium period shall imply that such intervening period from 01.03.2020 to 30.09.2020 will be considered as "zero period".
27. It is submitted that the respondent amidst all the hurdles and difficulties striving hard has completed the construction at the project site and submitted the application for obtaining the occupation certificate with the concerned statutory authority on 16.06.2020 and since then the matter was persistently pursued.

28. It is further submitted that occupation certificate bearing no.20100 dated 11.11.2020 has been issued by Directorate of Town and Country Planning, Haryana, Chandigarh. The respondent has already delivered physical possession to a large number of apartment owners. It needs to be emphasised that once an application for issuance of occupation certificate is submitted before the concerned competent authority the respondent ceases to have any control over the same.
29. That the complainants were offered possession of the unit in question through letter of offer of possession dated 01.12.2020. 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.
30. That the complainants wilfully refrained from obtaining possession of the unit in question. It appears that the complainants did not/do not have adequate funds to remit the balance payments requisite for obtaining possession in terms of the buyer's agreement. It needs to be highlighted that an amount of Rs.13,46,639/- is due and payable by the complainants. The complainants have intentionally refrained from remitting the aforesaid amount to the respondent.
31. 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 refrained from obtaining possession of the unit in question. Consequently, the complainants are liable for the consequences including holding charges, as enumerated in the buyer's agreement, for not obtaining possession.

32. That it needs to be highlighted that the respondent has credited an amount of Rs. 4,55,254/- as a gesture of goodwill. Furthermore, an amount of Rs. 43,625/- has been credited to the account of the complainants by the respondent as GST adjustment.
33. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority:

34. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram district. Therefore, this

authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

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 complainants at a later stage.

F. Findings regarding relief sought by the complainants:

Relief sought by the complainants: Direct the respondent to pay interest for delay possession charges at prevailing rate of interest.

F.1 Admissibility of delay possession charges:

35. In the present complaint, the complainants intends 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

36. 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.
37. The buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builders/promoters and buyers/allottee are protected candidly. The apartment buyer's agreement lays down the terms that govern the sale of different kinds of properties like residential, commercials etc. between the buyer and builder. It is in the interest of both the parties to have a well-drafted apartment 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 apartment 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.

38. 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 agreements 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 allottees 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 apartment 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 allottees are left with no option but to sign on the dotted lines.

39. **Admissibility of grace period:** The respondent promoter has proposed to handover the possession of the unit within a period of 36 months (excluding a grace period of 6 months) from the date of approval and of building plans or date of signing of this agreement whichever is later. In the present case, the promoter is seeking 6 months' time as grace period. But the grace period is unqualified and does not prescribe any preconditions for the grant of grace period of 6 months. The said period of 6 months is allowed to the promoter for the exigencies beyond the control of the promoter. Therefore, the due date of possession comes out to be 06.12.2015
40. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges 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.

41. 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.
42. 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., 14.10.2021 is @ 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
43. The definition of term 'interest' as defined under section 2(z) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation. —For the purpose of this clause—

- (i) *the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default.*
- (ii) *the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

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

44. On consideration of the documents available on record and submissions made by both the parties, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 3(a) of the unit buyer's agreement executed between the parties on 28.12.2011, The developer proposes to hand over the possession of the apartment within a period of thirty six (36) months (excluding a grace period of 6 months) from the date of approval of building plans or date of signing of this agreement whichever is later. The date of approval of building plan is on 06.06.2012 + six months of grace period is allowed, so the possession of the booked unit was to be delivered on or before 06.12.2015. The respondent has been applied for the occupation certificate on 17.06.2020 and the same has been granted by the competent authority on 11.11.2020 and notice for offer of possession was made on 01.12.2020. Copies of the same

have been placed on record. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainants as per the terms and conditions of the buyer's agreement dated 28.12.2011 executed between the parties. It is the failure on part of the promoter to fulfil its obligations and responsibilities as per the flat buyer's agreement dated 28.12.2011 to hand over the possession within the stipulated period.

45. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 11.11.2020 and notice for offer of possession was made on 01.12.2020, so it can be said that the complainants came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainant should be given 2 months' time from the date of offer of possession. This 2 months' of reasonable time is being given to the complainants keeping in mind that even after intimation of possession practically he has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession (calculated from date of approval of building plan+ six months of grace period is allowed) i.e. 06.12.2015 till the expiry of 2 months from the date

of offer of possession (01.12.2020) which comes out to be 01.02.2021.

46. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainants are entitled to delay possession at prescribed rate of interest i.e. 9.30% p.a. w.e.f. 06.12.2015 till the expiry of 2 months from the date of offer of possession (01.12.2020) which comes out to be 01.02.2021 as per provisions of section 18(1) of the Act read with rule 15 of the rules and section 19(10) of the Act of 2016.

G. Directions of the authority:

47. 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 respondent is directed to 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 due date of possession (calculated from date of approval of building plan+ six months of grace period is allowed) i.e. 06.12.2015 till 01.02.2021 i.e. expiry of 2 months from the date of offer of possession (01.12.2020). The arrears of interest accrued so far shall be paid to the complainants



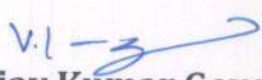
within 90 days from the date of this order as per rule 16(2) of the rules.

- ii. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- iii. The rate of interest chargeable from the complainants/allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delay possession charges as per section 2(za) of the Act.
- iv. The respondent shall not charge anything from the complainants which is not the part of buyer's agreement. The respondent is not entitled to charge holding charges from the complainants/allottees at any point of time even after being part of the builder buyer's agreement as per law settled by Hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 on 14.12.2020.

48. Complaint stands disposed of.

49. File be consigned to registry.


(Samir Kumar)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 14.10.2021