BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**35 of 2021**
Date of filing complaint:		**13.01.2021**
First date of hearing	**:**	**03.03.2021**
Date of decision	**:**	**15.03.2022**

Tinki Jain
R/o: Flat No: A-231, First Floor, Today Blossom-1, Sector 47, Gurugram — **Complainant**

Versus

M/s Spaze Towers Private Limited
R/o: Spazedge, Sector 47,
Gurgaon Sohna Road, Gurgaon, Haryana — **Respondent**

CORAM:

Dr. K.K. Khandelwal	Chairman
Shri Vijay Kumar Goyal	Member

APPEARANCE:

Sh. Sukhbir Yadav (Advocate)	Complainant
Sh. J.K Dang (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions 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	10.812 acres (licensed area as per agreement 10.51 acres)
3.	Nature of the project	Group housing complex
4.	DTCP license no. and validity status	26 of 2011 dated 25.03.2011valid 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 14.12.2017**
	RERA Registration valid up to	**31.06.2019**
	Extended vide extension no.	**06 of 2020 dated 11.06.2020**
	Extension no. valid up to	**30.12.2020**
7.	Allotment letter	06.09.2011 (annexure P3, page 34 of complaint)
8.	Unit no.	044, 4th floor, Tower A3 (annexure P3, page 34 of complaint)
9.	Unit measuring (super area)	1745 sq. ft.
10.	New area	1918 sq. ft. (annexure R16, page 120 of reply)
11.	Date of approval of building plan	06.06.2012 [annexure R5, page 70 of the reply]

12.	Date of execution of builder buyer agreement	28.12.2011 [annexure P4, Page 37 of the complaint]
13.	Total sale consideration	Rs.85,74,856/- as per SOA dated 31.03.2021(annexure R6, page 76 of reply)
14.	Total amount paid by the complainant	Rs.77,15,590/- as per SOA dated 31.03.2021(annexure R6, page 79 of reply)
15.	Payment plan	Construction linked payment plan (Page 35 of the complaint)
16.	Due date of delivery of possession *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*	06.12.2015 Calculated from date of approval of building plan **(Grace period is allowed)**
17.	Offer of possession	01.12.2020 (annexure R16, page 120 of reply)
18.	Occupation Certificate	11.11.2020 [annexure R15, page 117 of the reply]
19.	Delay in delivery of possession till the date of offer of possession plus two months i.e.,01.12.2020 + 2 months (01.02.2021)	5 years 1 month 26 days
20.	Amount already paid by the respondent in terms of the buyer's agreement as per offer of possession page no. 121 of reply.	Rs. 4,55,254/- towards compensation for delay in possession. Rs. 43,625/- towards GST input credit details.

B. Facts of the complaint:

3. That the complainant booked an apartment bearing no. – 044 on 4th floor of tower no. – A3 for tentative size admeasuring 1745 sq. ft. on 06.06.2011 and issued one cheque of Rs. 5,00,000/- as booking amount & the respondent issued payment receipt for the same on 07.06.2011. The unit was purchased under the construction linked plan for a sale consideration of Rs. 76,31,780/-. On 06.09 .2011, the respondent issued an allotment letter and payment schedule in name of Ms. Tinki Jain, confirming to allotment of apartment no. 044 on the 4th floor of tower no. A3 for tentative size admeasuring 1745 sq. ft.

4. After a long follow-up on 28.12.2011, a pre-printed, unilateral, arbitrary flat buyer agreem^nt was executed inter-se the respondent and the complainant. According to clause 3(a) of the flat buyer agreement, the respondent has to give possession of the said flat within 36 months from the date of approval of building plans or from the date of signing of this agreement whichever is later. It is germane that the building plans were approved on 06.06.2012, hence the due date of possession was 06.06.2015. As per the statement of account issued by the respondent the complainant has paid Rs. 70,89,286/- till 22.09.2014. Thereafter on 20.06.2015, the respondent sent a demand letter cum service tax invoice to the complainant and stated that till 20.06.2015 the complainant has paid a total of Rs. 70,99,619/- and also demanded Rs. 4,88,843/- thereafter, the complainant has paid the said demand. Thereafter, the complainant asked for a fresh statement of account many times from the respondent, but the respondent failed to provide the same. That as per the calculation's pf the complainant till 20.06.2015 the complainant has paid Rs.

75,88,462/-. On 04.07.2015, the complainant sent a mail to the respondent and stated that a TDS of Rs. 4,889/- has been deposited on 16.06.2015 and also shared a TDS certificate with the respondent. It is pertinent to mention here that till date the respondent did not acknowledge the said TDS-payment and did not issue a payment receipt.

5. The respondent sent a letter, "notice for offer of possession and for payment of outstanding dues" and asked for payment of Rs. 9,03,720/- in favour of "Spaze Towers Pvt. Ltd. a/c. Privy AT4 collection" and demanded unreasonable demand under various heads i.e. Rs. 2,74,127/- as external electrification (including 33KV), water, sewer & meter charges with GST & Rs. 22,460/- as labour cess @Rs. 11.71 sq. ft. and also an extra demand of Rs. 2,06,800/- in favour of "Preserve Faciliteez Pvt. Ltd. A/c Privy AT4". It is pertinent to mention here that the respondent has revised the super area of the apartment by 173 sq. ft. without any justification and calculation. It is again pertinent to mention here that the notice for possession contains illegal and unjustifiable demands, therefore not tenable in the eyes of the law. On 06.12.2020, the complainant sent a grievance email to the respondent and raised several issues about an increase in super area and exorbitant demands under different heads and further asked for delayed possession interest. Thereafter, on 14.12.2020, the respondent replied without any justification and calculation.

6. On 25.12.2020, the complainant along with other allottees visited the office of the respondent for rectification of final demand and delayed possession interest as per RERA, but the builder/respondent outrightly refused the demand of the

complainant. Thereafter, the complainant and other allottees protested in front of the office of the respondent, but the same causes no effect on the deaf ear of the respondent.

7. Since 2015 the complainant is regularly visiting the office of the respondent party, as well as on the construction site, and making efforts to get possession of allotted flats but all in vain. Despite several visits and requests by the complainant, the respondent did not give possession of the flat. The complainant has never been able to understand the actual state of construction. Though the towers seem to be built up, and there was no progress was observed on finishing and landscaping work and amenities for a long time.

8. The complainant along with other allottees visited several times to the Gurgaon office of the respondent and met with the staff and officer bearers of the respondent to get the area calculation of the flat, delayed possession interest as per RERA and requested to complete the project as per specifications and amenities as per BBA and brochure, the complainant further requested to withdraw the unjustified demand on the pretext of labour cess and external electrification charges, but all went in vain. The respondent outrightly refused to accord the demands of the complainant. The main grievance of the complainant in the present complaint is that despite the complainant paid more than 99% of the actual cost of flat and ready and willing to pay the remaining amount the respondent party has failed to deliver the possession of flat on promised time and till date project is without amenities. The complainant had purchased the flat with the intention that after purchase, he would be able to stay in a better

environment. Moreover, it was promised by the respondent party at the time of receiving payment for the flat that the possession of a fully constructed flat and developed project shall be handed over to the complainant as soon as construction completes i.e. 36 months from the approval of building plans i.e. on or before 06.06.2015.

9. The facts and circumstances as enumerated above would lead to the only conclusion that there is a deficiency of service on the part of the respondent party and as such, he is liable to be punished and compensate the complainant. Due to the acts of the above and the terms and conditions of the builder buyer agreement, the complainant has been unnecessarily harassed mentally as well as financially, therefore the opposite party is liable to compensate the complainant on account of the aforesaid act of unfair trade practice.

10. The cause of action for the present complaint arose in June 2015, when the respondent failed to handover the possession of the flat as per the buyer agreement. The cause of action again arose on various occasions, including on a) August 2016; b) Oct. 2017; c) January 2018, d) May 2018; e) April 2019, f) January 2020 and on many times till date, when the protests were lodged with the respondent about its failure to deliver the project and the assurances were given by it that the possession would be delivered by a certain time. The cause of action is alive and continuing and will continue to subsist till such time as this hon'ble authority restrains the respondent by an order of injunction and/or passes the necessary orders.

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

11. The complainant has sought following relief(s):

    i. Direct the respondent to give possession of the fully developer/constructed apartment with all amenities.

    ii. Direct the respondent to pay the delayed possession interest on the amount paid by the allottee, at the prescribed rate from the due date of possession to till the actual possession of the flat is handed over as per the proviso to section 18(1) of the Real Estate Regulation and Development) Act, 2016.

    iii. Direct the respondent to provide area calculation.

    iv. Direct the respondent not to charge labour cess.

    v. Direct the respondent not to charge external electrification charge.

D. Reply by respondent

i. That the present complaint is not maintainable in law or on facts. It is submitted that no violation of provisions of the Real Estate (Regulation and Development) Act, 2016 read with rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017, has been committed by the respondent. The institution of the present complaint constitutes gross misuse of process of law.

ii. That the project of the respondent is an "ongoing project" under RERA and the same has been registered under the Act, 2016 and rules, 2017. Registration certificate bearing no. 385 of 2017 granted by the Haryana Real Estate Regulatory Authority vide memo no. HRERA-179/2017/2320 dated 14.12.2017 has been appended with this reply as annexure R1.

It is submitted that the registration was valid till 31.06.2019. Application for extension for registration of the said project submitted by the respondent has been appended as annexure R2. The complainant is estopped by her own acts, admissions, omissions, acquiescence, laches etc. from filing the present complaint. The complainant is not an "allottee" but an investor who has booked the apartment in question as a speculative investment in order to earn rental income/profit from its resale. The apartment in question has been booked by the complainant as a speculative investment and not for the purpose of her own use as a residence. The present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the buyer's agreement dated 28.12.2011, as shall be evident from the submissions made in the following paras of the present reply. The buyer's agreement dated 28th of December 2011 has hereinafter been referred to as "said agreement".

iii. The apartment bearing no. A3-044, situated on 4th floor, admeasuring 1745 sq. ft. of super area approx., of the residential group housing society known as Privy At4, situated in Sector 84, Gurugram, Haryana, was provisionally allotted in favour of the complainants. It is respectfully submitted that the contractual relationship between the complainant and respondent is governed by the terms and conditions of the said agreement. The said agreement was voluntarily and consciously executed by the complainant. Hence, the complainant is bound by the terms and conditions incorporated in the said apartment in respect of the said unit. 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 rights of any nature at variance with the terms and conditions incorporated in the contract.

iv. That the complainant has 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 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 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. 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. It was further expressed therein that the allottee would not be entitled to claim compensation of any nature whatsoever for the said period extended in the manner stated above.

v. 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. is submitted for approval in the office of any statutory authority, the developer ceases to have any control over the same. The grant of sanction/approval to any such application/plan is the prerogative of the concerned statutory authority over which the developer cannot exercise any influence. As far as respondent is concerned, it has diligently and sincerely pursued the matter with the concerned statutory authorities for obtaining of various permissions/sanctions.

vi. 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

vii. 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. 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 complainant has 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 complainant. In fact, the total outstanding amount including interest due to be paid by the complainant to the respondent on the date of dispatch of letter of offer of possession dated 01.12.2020 was Rs.9,03,720/-. Although, there was no lapse on the part of the respondent, yet the amount of Rs.4,55,254/- was credited to the account of the complainant. The statement of account dated 31.03.2021 is appended herewith as annexure R6.

viii. It is submitted that there is no default on part of respondent in delivery of possession in the facts and circumstances of the case. Interest ledger dated 02.04.2021 depicting periods of delay in remittance of outstanding payments by the complainant as per schedule of payment incorporated in the buyer's agreement has been annexed as annexure R7. Thus, it is comprehensively established that the complainant has defaulted in payment of amounts demanded by respondent under the buyer's agreement and therefore the time for delivery of possession deserves to be extended as provided in the buyer's agreement. It is submitted that the complainant consciously and maliciously chose to ignore the payment request letters and reminders issued by respondent. It needs to be appreciated that the respondent was under no obligation to keep reminding the complainant of his contractual and financial obligations. The complainant had defaulted in making timely payments of instalments which was an essential, crucial and indispensable requirement under the buyer's agreement. Furthermore, when the proposed allottees default in making timely payments as per schedule of payments agreed upon, the failure has a cascading effect on the operations and the cost of execution of the project increases exponentially. The same also results in causing of substantial losses to the developer. The complainant chose to ignore all these aspects and wilfully defaulted in making timely payments. It is submitted that respondent despite defaults committed by several allottees earnestly fulfilled its obligations under the buyer's agreement and completed the project as expeditiously as possible in the facts and circumstances of the case.

ix. That without admitting or acknowledging in any manner the truth or legality of the allegations put forth by the complainant and without prejudice to any of the contentions of the respondent, it is submitted that only such allottees, who have complied with all the terms and conditions of the buyer's agreement including making timely payment of instalments are entitled to receive compensation under the buyer's agreement. In the case of the complainant, he had delayed payment of instalments and consequently, he was/is not eligible to receive any compensation from the respondent as alleged. 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. No lapse whatsoever can be attributed to respondent insofar the delay in issuance of environment clearance is concerned. The issuance of an environment clearance referred to above was a precondition for submission of application for grant of occupation certificate.

x. 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. Since the 3rd week of February 2020, the respondents have 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.

xi. 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 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".

xii. It is pertinent to note that all construction activities involving excavation, civil construction were stopped in Delhi and NCR districts from 01.11.2018 to 10.11.2018 vide directions issued by Environment Pollution (Prevention & Control) Authority for the National Capital Region. The said circular was applicable to the project in question and consequently respondent had to suspend its construction activities for the said period. Respondent cannot be held liable for any delay caused due to this fact as well. The aforesaid circular dated 29.10.2018 is appended herewith as annexure R9. The building in question had been completed in all respects and was very much eligible for grant of occupation certificate. However, for reasons already stated above, application for issuance of OC could not be submitted with the concerned statutory authority by the respondent. It is submitted that the respondent amidst all the hurdles and difficulties striving hard has complete the construction at the project site and submitted the application for obtaining the OC with the concerned statutory authority on 16.06.2020 and since then the matter was persistently pursued. The copy of application submitted for grant of OC is appended with this reply as annexure R9.

xiii. The allegation of delay against the respondent is not based on correct and true facts. The photographs comprehensively establishing the completion of construction/development activity at the spot have been appended with this reply as annexure R10 to annexure R14. 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. Buyer's agreement further provides that compensation for any delay in delivery of possession shall only be given to such allottees who are not in default in payment as per the payment plan incorporated in the agreement. The complainant, having defaulted in payment of instalments, is not entitled to any compensation under the buyer's agreement. Furthermore, in case of delay caused due to non-receipt of OC or any other permission/sanction from the competent authorities, no compensation shall be payable being part of circumstance beyond the power and control of the developer

xiv. It is further submitted that despite there being a number of defaulters in the project, the respondent itself infused funds into the project, earnestly fulfilled its obligations under the buyer's agreement and completed the project as expeditiously as possible in the facts and circumstance of the case. Therefore, cumulatively considering the facts and circumstances of the present case, no delay whatsoever can be attributed to the respondent by the complainant. However, all these crucial and important facts have been deliberately concealed by the complainant from this honourable authority.

xv. The complaint has been preferred on absolutely baseless, unfounded and legally and factually unsustainable surmises which can never inspire the confidence of this honourable authority. The accusations levelled by the complainant is completely devoid of merit. The complaint filed by the complainant deserves to be dismissed.

12. 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:

13. 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

14. 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.

F. Findings on the objection raised by the respondent:

F.I Objection regarding maintainability of the complaint.

15. The respondent contended that the present complaint is not maintainable as it has not violated any provision of the Act.

16. The authority, in the succeeding paras of the order, has observed that the respondent is in contravention of the section 11(4)(a) read with proviso to section 18(1) of the Act by not handing over possession by the due date as per the agreement. Therefore, the complaint is maintainable.

G. Findings on the relief sought by the complainant

G.I Calculation for super area

17. The complainant in the complaint has submitted that the allottee booked a unit admeasuring 1745 sq. ft. in the project "Spaze Privy At4. The area of the said unit was increased to 1918 sq. ft. vide letter of offer of possession dated 01.12.2020 without giving any prior intimation to, or by taking any written consent from the allottee. The said fact has not been denied by the respondent in its reply. The allottee in the said complaint prayed inter alia for directing the respondent to provide area calculation. Clause 1.2(d) is reproduced hereunder:

> *"1.2(d) Super Area*
>
> *The consideration of the Apartment is calculated on the basis of Super Area, and it has been made clear to the Apartment Allottee(s) by the Developer that the Super Area of the Apartment as defined in Annexure-I is tentative and subject to change.*

18. From the bare perusal of clause 1.2(d) of the agreement, there is evidence on the record to show that the respondent has allotted an approximate super area of 1918 sq. ft. and the areas were tentative and were subject to change till the time of construction of the group housing complex. Clause 1.1 provides description of the property which mentions about sale of super and the buyer has signed the agreement. Also, by virtue of allotment letter dated 06.09.2011, the complainant had been made to understand and had agreed that the super area mentioned in the agreement was only a tentative area which was subject to the alteration till the time of construction of the complex. The respondent in its defence submitted that as per the terms and conditions of the builder

buyer's agreement, the builder was not bound to inform the allottee with regards to the increase in super area.

19. Relevant clauses of the agreement are reproduced hereunder:

> ***"Clause 1(1.2) (e) (ii) Alterations in the lay out plan and design***
>
> *ii) That in case of any major alteration/modification resulting in excess of 10% change in the super area of the Apartment in the sole opinion of the DEVELOPER any time prior to and upon the grant of occupation certificate, The DEVELOPER shall intimate the APARTMENT ALLOTTEE(s) in writing the changes thereof and the resultant change, if any, in the Sale Price of the APARTMENT to be paid by him/her and the APARTMENT ALLOTTEE(S) agrees to deliver to the DEVELOPER in writing his/her consent or objections to the changes within fifteen (15) days from the date of dispatch by the DEVELOPER of such notice failing which the APARTMENT ALLOTTEE(s) shall be deemed to have given his/her full consent to all such alteration/modification and for payments, if any, to be paid in consequence thereof. If the wr'tten notice of the APARTMNET ALLOTTEE(S) shall be deemed to have given his/her full consent to all such alterations/modification and for payments, is any, to be paid in consequence thereof. If the written notice of the APARTMENT ALLOTTEE(s) is received by the DEVELOPER within fifteen (15) days of intimation in writing by the DEVELOPER indicating his/her/its non-consent/objection to such alterations/modifications as intimated by the DEVELOPER to the APARTMENT ALLOTTEE(s), then in such case, the Agreement shall be cancelled without further notice and the DEVELOPER shall refund the money received from the APARTMEN ALLOTTEE(s) after deducting Earnest Money within ninety(90) days from the date of initimation received by the DEVELOPER from the APARTMENT ALLOTTEE(s). On payment of the money after making deductions as stated above the DEVELOPER and/or the APARTMENT ALLOTTEE(S)shall be released and discharged from all its obligation and liabilities under this Agreement. In such a situation, the DEVELOPER shall have an absolute and unfettered right to allot, transfer, sell and assign the APARTMENT and all attendant rights and liabilities to a third party. It being specifically agreed that irrespective of any outstanding amount payable by the DEVELOPER to the APARTMENT ALLOTTEE(s), the APARTMENT ALLOTTEE(S) shall have no right, lien or charge on the APARTMENT in respect of which refund as contemplated by this clause is payable."*

20. As per clause 1(1.2) (e)(ii) of the agreement, it is evident that the respondent has agreed to intimate the allottee in case of any major alteration/modification resulting in excess of 10% change

in the super area of the apartment as per the policy guidelines of DGTCP as may be applicable from time to time and any changes approved by the competent authority shall automatically supersede the present approved layout plan/building plans of the commercial complex. The authority observes that the building plans for the project in question were approved by the competent authority on 06.06.2012 vide memo. No. ZP-699/JD(BS)/2012/9678. Subsequently, he buyer's agreement was executed inter se parties on 21.07.2014. Thereafter, the revised sanction plan was obtained by the respondent on 09.01.2020. A copy of the same has been annexed in the file. The super area once defined in the agreement would not undergo any change if there were no change in the building plan. If there was a revision in the building plan, then also allottee should have been informed about the increase/decrease in the super area on account of revision of building plans supported with due justification in writing.

21. Therefore, the authority is of the opinion that unless and until, the allottee is informed about the increase/decrease of the super area, the promoter is not entitled to burden the allottee with the liability to pay for an increase in the super area. The authority is of the opinion that each and every minute detail must be apprised, schooled and provided to the allotee regarding the increase/decrease in the super area and he should never be kept in dark or made to remain oblivious about such an important fact i.e., the exact super area till the receipt of the offer of possession letter in respect of the unit.

G.II Labour cess

22. The complainant pleaded in the complaint that the respondent/builder has demanded a charge of Rs 22,460/- on pretext of labour cess vide notice of possession dated 01.12.2020 which is illegal and unjustifiable and not tenable in the eyes of law. Complainant further stated that he approached the office of the respondent for rectification of the alleged illegal and unjustifiable demand by the respondent;/builder but the respondent outrightly refused to do the same. In reply to this the respondent submitted that all the final demand raised by him are justifiable and complainant choose to ignore and not pay the same. It is pertinent to mention here that the respondent vide offer of possession letter raised labour cess charge @11.71 sq.ft. totalling to the amount of Rs 22,460/- on perusal of the BBA signed between both the parties it can be inferred that the agreement contains no such clause as to payment of labour cess charges whereas other charges/demands raised by the respondent /builder are clearly outlined in the BBA therefore, the complainant is not liable to pay the labour cess charges as the demand of labour cess charges raised by the respondent is unjustifiable from the allottee and the respondent/builder is himself liable to pay the labour cess charges. The respondent be directed to withdraw the unjustified demand of the pretext of labour cess. The builder is supposed to pay a cess from the welfare of the labour employed at the site of construction and which goes to welfare boards to undertake social security schemes and welfare measure for building and other construction workers. So, the respondent is not liable to charge the labour cess.

G.III External electrification charges

23. While issuing offer of possession of the allotted unit vide letter dated 01.12.2020, besides asking for payment of amount due, the respondent/builder also raised a demand of Rs. 2,74,127/- for external electrification (including 33KV) water, sewer and meter charges with GST. It is pleaded by the respondent that as per buyer's agreement dated 28.12.2011 the allottee is liable to pay that amount.

24. Clause 1.2 of the buyer's agreement is reproduced below:

> "***1.2. Consideration***
> ***a) Sale Price***
> *The Sale Price of the APARTMENT ("Sale Price") payable by the APARTMENT ALLOTTEE(s) to the DEVELOPER inclusive of External Development Charges, infrastructure development Charges Preferential Location Charges (whenever applicable) is Rs. 76,31,780/- (Rupees Seventy Six Lakhs Thirty One Thousand Seven Hundred Eight Only) payable by the Apartment Allottee(s) as per the Payment Plan annexed herewith as Annexure-1. In addition the Apartment Allottee agrees and undertakes to pay Service Tax or any other tax as, may be demanded by the Developer in terms of applicable laws/guidelines."*

25. A perusal of clause 1.2 of the above-mentioned agreement shows the total sale price of the allotted unit as Rs. 76,31,780/- in addition to service tax or any other tax as per the demand raised in terms of applicable laws/guidelines. The payment plan does not mention separately the charges no being demanded by the respondent/builder in the heading detailed above. However, there is sub clause (vii) to clause 5 of that agreement providing the liability of the allottee to pay the extra charges on account of external electrification as demanded by HUDA. The relevant clause reproduced hereunder:

> "***5. Electricity***

> *vii. That the Apartment Allottee(s) undertakes to pay extra charges on account of external electrification as demanded by HUDA."*

26. There is nothing no record that any demand in this regard has been raised by HUDA against the developer. So, the demand raised with regard to external electrification by the respondent/builder cannot said to be justified in any manner. Similarly, it is not evident from a perusal of builder agreement that the allottee is liable to pay separately for water, sewer and meter charges with GST. No doubt for availing and using those services, the allottee is liable to pay but not for setting up sewage treatment plant. However, for getting power connection through electric meter, the allottee is liable to pay as per the norm's setup by the electricity department.

G.IV Delayed possession charges

27. In the present complaint, the complainant 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*

28. The clause 3(a) of the apartment buyer agreement (in short, agreement) provides the time period of handing over of possession and is reproduced below:

3. Possession

a) Offer of possession.

That subject to terms of this clause and subject to the APARTMENT ALLOTTEE(S) having complied with all the terms and conditions of this Agreement and not being in default under any of the provisions of this Agreement and further subject to compliance with all provisions, formalities, registration of sale deed, documentation, payment of all amount due and payable to the DEVELOPER by the APARTMENT ALLOTTEES) under this agreement etc., as prescribed by the DEVELOPER, the DEVELOPER proposes to hand over the possession of the APARTMENT within a period of thirty-Six (36) months (excluding a grace period of six months) from the date of approval of building plans or date of signing of this Agreement whichever is later. It is however understood between the parties that the possession of various Blocks/Towers comprised in the Complex as also the various common facilities planned therein shall be ready & completed in phases and will be handed over to the allottees of different Block/Towers as and when completed and in a phased manner.

29. 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 complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning.

30. The buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builders/promoters and buyers/allottee are protected candidly. The apartment 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 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.

31. The authority has gone through the possession clause of the agreement. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainant 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 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 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 allottee is left with no option but to sign on the dotted lines.

32. **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 for the exigencies beyond the control of the promoter. Therefore, the due date of possession comes out to be 06.12.2015.

33. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is 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.

34. 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.

35. 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., 15.03.2022 is @ 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

36. 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—

(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;"*

37. Therefore, interest on the delay payments from the complainant 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 complainant in case of delayed possession charges.

38. 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 plans being later, the due of handing over of possession is reckoned from the date of approval of building plans and the grave period of 6 months is also allowed being unqualified/unconditional. Therefore, the due date of handing over of possession comes out to be 06.12.2015.

39. It is pleaded on behalf of the respondent that in complaint bearing no. ***1464 of 2019*** titled as ***Deepak Trikha Vs. Spaze Towers Pvt. Ltd.*** pertaining to the project "Spaze Privy at4" also subject matter of the complaint disposed on 29.01.2020, the hon'ble authority allowed 139 days to be treated as zero period while

calculating delayed possession charges. So, in this case also though the respondent has explained that the delay in completing the project was due to reasons such as the time taken for environment clearance, zoning plans, building plans approval from department of mines, zoology fire NOC, clearance from forest department and Aravli NOC from which comes to be considerable period but in view of earlier decision of the authority, it be allowed grace of 139 days while calculating delay possession charges.

40. Though the respondent took a plea w.r.t giving 139 days of grace period for handing over possession of the allotted unit, the authority is of the view that the grace period of 6 months has already been allowed to the respondent being unqualified and the period of 139 days declared as zero period in the aforesaid complaint is already included in the grace period of 6 months. The respondent cannot be allowed grace period for two time. Therefore, the due date of handing over of possession 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. 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 complainant 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 buyer's agreement dated 28.12.2011 to hand over the possession within the stipulated period.

41. 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, 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 complainant 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 + 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.

42. 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 complainant is 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.

43. Also, the amount of Rs. 4,55,254/- (as per offer of possession dated 01.12.2020) so paid by the respondent to the complainant towards compensation for delay in handing over possession shall

be adjusted towards the delay possession charges to be paid by the respondent in terms of proviso to section 18(1) of the Act

G. Directions of the authority:

44. 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 complainant from due date of possession + 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 The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order as per rule 16(2) of the rules.

    ii. Also, the amount of Rs. 4,55,254/- so paid by the respondent towards compensation for delay in handing over possession shall be adjusted towards the delay possession charges to be paid by the respondent in terms of proviso to section 18(1) of the Act

    iii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.

    iv. The rate of interest chargeable from the complainant/allottee 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.

v. Direct the respondent to provide the calculation of super area of the project as well as of the allotted unit within a period of 30 days.

vi. The respondent shall not charge anything from the complainant which is not the part of buyer's agreement. The respondent is not entitled to charge holding charges from the complainant/allottee 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

45. Complaint stands disposed of.

46. File be consigned to registry.

V.l—

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 15.03.2022