

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

Complaint no.	:	4650 of 2020
Date of filing complaint:		15.12.2020
First date of hearing	:	11.01.2021
Date of decision	:	15.03.2022

1. Rita Gupta 2. Avinash Kumar Gupta Both RR/o: 298, Deerwood Chase Nirvana Country, South City-II, Gurgaon-122018	Complainants
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. Amarjeet Kumar (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 allottees 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 complainants, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S.no	Heads	Information
1.	Project name and location	"Spaze privy at 4" Sector-84, village sihi, Gurugram, Haryana.
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 25.03.2011 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 14.12.2017
	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	25.05.2011 (page 40 of complaint)
8.	Unit no.	063, 6 th floor, tower B3



		[Page 40 of the complaint]
9.	Unit measuring (super area)	2070 sq. ft.
10.	New area as per notice for offer of possession	2275 sq.ft. (page 113 of reply)
11.	Date of approval of building plan	06.06.2012 [Page 66 of the reply]
12.	Date of execution of builder buyer agreement	22.01.2014 [Page 47 of the complaint]
13.	Total sale consideration	Rs.94,43,486/- as per SOA dated 31.03.2021(page 72 of reply)
14.	Total amount paid by the complainants	Rs.86,90,278/- as per SOA dated 31.03.2021(page 72 of reply)
15.	Payment plan	Construction linked payment plan (Page 41 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>	22.07.2017 Calculated from date of execution of agreement (Grace period is allowed)
17.	Offer of possession	01.12.2020 (page 113 of reply)
18.	Occupation Certificate	11.11.2020 [Page 110 of the reply]
19.	Delay in delivery of possession from due date i.e., 22.07.2017 till the date of offer of possession plus two months i.e.,01.12.2020 + 2 months (01.02.2021)	3 years 6 months 10 days
20.	Amount already paid by the respondent in terms of the buyer's agreement as per offer of	Rs. 1,41,753/- towards compensation for delay in possession

possession dated 01.12.2020	Rs. 51,750/- towards GST input credit details
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B. Facts of the complaint:

3. The complainants have submitted that respondent, in the year 2011, launched one of their housing projects in India, Gurgaon, by the name of "Spaze Privy At 4" at Sector-84, Gurgaon. The said project was launched with much fervour and fanfare and was marketed with boastful claims and propaganda of having world-class amenities and space, which are unheard of in India. They were also contacted by their marketing team who marketed the project of the respondent and made boastful claims of having world-class amenities and space, which are unheard of in India. Believing that the representations made by respondent to be true and further upon reading the newspaper advertisements and other publicity materials, got induced to buy the apartment in the said property.
4. The complainants were induced into buying the said property and accordingly applied for the property vide application dated 30.03.2011 believing the promise of timely delivery of property and upon assurance that the property shall be developed within a period of 3 years and the possession shall be given to each of the applicants by 2014. It is pertinent to mention here that the respondent was neither having the zonal plan approval or the building plan approval on the said date, however despite that had sold the unit to the complainants representing that they had all the requisite approvals for the said complex. That inviting application for the said project itself was illegal in nature since on

- the day of inviting application for the said project, the respondent was not having the building plan approval.
5. The complainants within 5 months of the booking were allotted a unit no. 063 on the floor 6, tower B-3 tentatively measuring 2070 sq.ft. in the project "Spaze Privy At 4". The total consideration as per the allotment letter was Rs. 86,89,906/-. It is pertinent to mention here that on the date of allotment made to the complainants, the respondent was neither having the zonal plan approval or the building plan approval on the said date, however despite that had allotted the unit to the complainants representing that they had all the requisite approvals for the said complex.
 6. The respondent, thereafter in the month of November 2011 send across the buyer's agreement vide letter dated 19.11.2011 asking the complainants to send across the signed copy within a period of 1 month from the date of receipt of the same. That it was categorically mentioned in the said letter that upon failure to do the same, the allotment will be treated to be cancelled. The complainants accordingly signed the copy of the buyer agreement and delivered the signed copy of the same at the respondent office within a period of 1 month and sometime in the month of December 2011. Thus, in the present case the date of execution of agreement is deemed to be 19th December 2011 and not as fraudulently put across by the respondent in the agreement.
 7. That it is pertinent to mention here that the respondent has fraudulently put across the date as 22.01.2014, as the date of signing of agreement which is categorically disputed and denied herein. The respondent being aware that the date of agreement is necessary to determine the date of handing over the possession

has fraudulently put across a date of January 2014, so as to save the liability of 2 years delay, which cannot be allowed. That the agreement was of year 2011 is also evident from the fact that stamp embossed on the said agreement, which is of November 2011. As per clause no.3(a) of the builder buyer agreement, the respondent had agreed to deliver the possession of the flat within 36 months from the date of approval of the building plan or from the date of signing of the buyer's agreement whichever is later. That in the present case since the BBA was of year 2011 and thus the date of building plan becomes relevant for calculating the date the possession and 36 months has to be calculated from the date of building plan approval.

8. As already stated in the present case the date of handing over the possession has to be taken from the date of approval of building plan i.e., 06.06.2012 and thus the respondent was supposed to handover the possession on or before 06.06.2015. Even considering the 6 months grace period, the respondent was supposed to handover the possession of the unit by 06.12.2015. It is pertinent to mention here that even as per the contract act, the date of acceptance of the offer made by the respondent is deemed to be on the date when the complainants signed the agreement and sent it across to the respondent. One of the assurances given by the respondent which infact was the reason to buy this property was that the property shall be developed within the stipulated time and the delivery/possession shall be given to each of the applicants by July 2014. Though the apartment buyer agreement confirms that the delivery schedule of the apartment would be within 36 months from signing the agreement or the

date of building plan approval. The respondent has failed to handover the possession even as per the buyer agreement and the same expired on 06.12.2015 (including 6 months grace period). The total consideration of the apartment as per the BBA was 86, 89, 906/-. It is pertinent to mention here that the complainants had already made a payment of Rs 86,90,278/- as on date and had paid the installment of "On completion of flooring within the apartment" which was last raised in the year 2015 and the notice of possession (through denied) has been raised after a lapse of more than 5 years thereafter. That several demands were raised by the respondent on account of stage wise construction of the project, though they were not entitled to the same and the complainants continued to pay as per the said demands taking that the construction must be in full swing as claimed by the respondent.

9. That from the demands as raised by respondent, the complainants were under the bonafide belief that the construction was in full swing and the respondent will be able to handover the possession in time, since the payments were being made as per construction linked plan and the phone calls from the builder had always painted a very rosy picture, hence the complainants continued to make the payments. That the complainants had as on date had made a payment of Rs 86, 90, 278/- being more than almost 100 % of the basic sale consideration amount.
10. That the complainants sometimes in January, 2016 out of curiosity visited the site of the respondent to check the development of the site and was taken aback and shocked to see the development stage therein and realized that the demands raised by the

respondent were not as per the construction and respondent had cheated the complainants by the raising such illegal demand intimations. The stage of the construction was much delayed as shown or claimed in the demand letters.

11. That after seeing the stage of a construction of the site, the complainants raised his concerns to the opposite party about the possession of his apartment. That the complainants, after having paid considerable sum was anxious for the development of his site and kept on calling representatives of the respondent. However, on each of these occasions the representatives of the respondent continued to give the complainants a false picture and made representations which were incorrect and false. The complainants kept on questioning the logic of collecting payments by making false representation of the construction without actual work and in response the representative of the respondent kept harping that the group had never failed on its commitment and the respondent continued to give the complainants false hopes and representations. It is pertinent to mention here that the timeline of July, 2015 for delivery and handing over of possession of the property in question was of prime importance and based on such representation and assurances, the complainants applied for allotment and upon allotment continued to make the payment in a timely manner, which the respondent continued to receive. The time thus was the essence in this agreement.
12. That the complainants are made to understand that such an act on the part of builders collecting money showing the wrong stage of construction is illegal. The promoter/developer of the property cannot take money from buyers merely based on such false

representations, when there is no development work actually to that level on site. That despite several protests and objections, the respondent being in a dominant position continued to collect payments from the complainants, by giving threats of cancellation and forfeiture, and threatening to levy heavy interest on all delayed payments. Under duress and coercion, the complainants continued to make all payments.

13. That the complainants visited the site again in the first week of September 2019, i.e., after having paid more than 100% of the total sale consideration. The complainants were shocked to see that the actual work for the construction of his apartment was far away from completion even though possession was supposed to be handed over in 2015. That the flat that had been partly constructed by the respondent, was not in conformity to the standards and plans as provided in the brochure, various publicity material or the representations made by respondent at the time of collection of payment in 2011. Despite the project not being complete in all respect, the respondent issued a notice of possession vide email dated 05th December 2020, whereby the respondent has now demanded an illegal demand of Rs.17,64,667/- in addition to Rs. 2,42,500 as Pre- serve demand bifurcation. That it is pertinent to mention here that the demands raised by the respondent as per said notice of possession is totally illegal and untenable in the eyes of Law. That as per the terms of the payment plan opted by the complainants, they were just supposed to pay a sum of Rs. 3,49,416/- on the final notice of possession, however the respondent in order to extract more money is demanding exorbitant money which was never agreed

upon by the complainants. The notice of possession issued by the respondent is also against the RERA Act and not in conformity with the model agreement as provide under the Haryana RERA rule 2017. That at the outset the respondent cannot change the layout plan or in the present case the area subject to the approval of the complainants. That no approval or consent was taken from the complainants. That in addition it is pertinent to mention here that that thought the respondent has provided the delay compensation to the complainants, however the same is again illegal since the same has been as per the BBA and not in conformity with the RERA Act and Rules. That in addition it is further submitted that the date relevant for the calculation of delay compensation as per law has to be as per the date of building plan approval and not the date illegally put across by the respondent.

14. The respondent did not have a sanctioned site plan and necessary permissions especially environmental approval etc. as on the date of allotment or at the time of signing of the agreement. That notwithstanding above, the fact of the matter is that the respondent has completely failed in its promises and has been acting in an unfair and unjust manner. The respondent was fully aware of the issues plaguing the project and despite knowing fully well of such issues and realizing that it could not meet the timely delivery deadlines and hence the representations and assurances that were given by them were false, only to malafide collect money on the basis of threat of cancellation of allotment and levy of interest at exorbitant rates. Such an act of the respondent is unfair

and amounts to cheating the allottees apart from being an unfair trade practices & deficiency in services.

15. That the respondent had given false promises and assurances to the complainants and had with malafide intentions and a motive to cheat and extract money from the very inception, resulting into harassment and mental agony to the complainants and respondent has further also committed breach of trust. The above acts/omissions and neglects only show that respondent is good in making false promises and pressurized its customers so that all money they receive can be diverted to other projects or misappropriated. Such malpractices, failure to perform the obligations, besides being criminally intended are purposively misconducts of the respondent. That at the time of sale of the flats, respondent had given all rosy pictures and had made false promises to the complainants and cheated complainants by not giving possession as agreed in the agreement. The respondent has miserably failed to comply with their contractual obligations of handing over possession as per the time frame and even after several years, they have not completed the entire construction work and the possession offered is mere on papers.
16. The complainants deposited his hard-earned money, in the hope that he will have a bigger house to live in. The respondent has failed to deliver possession within stipulated period of 36 months. On account of non-delivery of possession of the unit, in question, by the respondent, to the complainants, complete in all respects, within stipulated period, the complainants have certainly suffered harassment and mental agony at their hands, for which, they need

to be suitably compensated by this hon'ble authority on account of delay in handing over the possession of the apartment.

C. Relief sought by the complainants:

17. The complainants have 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 issues a fresh notice of possession as per the BBA and to consider the date of building plan approval as the date of calculating the delayed possession charges.

D. Reply by respondent

- i. That the 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. The complaint is liable to be dismissed
- 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. An application for extension for registration of the said project submitted by the respondent has been appended as annexure R2. The complainants have no locus standi or cause of action to file the present complaint. 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 22nd of January 2014 as is evident from the submissions made in the following paras of the present reply.

- iii. The complainants had been allotted apartment bearing no. 063, having tentative super area measuring 2070 sq.ft. on 6th floor located in tower B3 in the project being developed by the respondent in the project known as Privy AT4, Sector 84, Gurgaon. It is respectfully submitted that the contractual relationship between the complainants and respondent is governed by the terms and conditions of the said agreement. The said agreement was voluntarily and consciously executed by the complainants. Hence, the complainants are bound by the terms and conditions incorporated in the said agreement 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 right of any nature at variance with the terms and conditions incorporated in the contract.

iv. 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. 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 the date of execution of the buyer's agreement, i.e., 22nd January 2014, 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 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 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 was 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. Since, the complainants 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 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.14,30,120/-. Although, there was no lapse on the part of the respondent, yet the amount of Rs.2,82,797/- was credited to the account of the complainants. The statement of account dated 31st of March 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. The interest ledger dated 02.04.2021 depicting periods of delay in remittance of outstanding payments by the complainants as per schedule of payment incorporated in the buyer's agreement has been annexed as annexure R7. Thus, it is comprehensively established that the complainants have 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 complainants



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 complainants of his contractual and financial obligations. The complainants 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 resulted in causing of substantial losses to the developer. The complainants 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 complainants 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 complainants, 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 stone 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 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 the 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 27th of March 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 March 1, 2020, to September 30, 2020, will be considered as "zero period".
- xii. That it is pertinent to note that all construction activities involving excavation, civil construction were stopped in Delhi and NCR districts from 1st November 2018 to 10th November 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. The 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 occupation certificate 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 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.

- xiii. The allegation of delay against the respondent is not based on correct and true facts. The photographs comprehensively establish the completion of construction/development activity at the spot and 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. Possession of the unit was offered vide offer of possession letter dated 01.12.2020 whereby the complainants were called upon to clear outstanding dues and take possession of the unit but the same has been ignored by the complainants and instead of taking possession, the complainants have failed the present false and frivolous complaint.

- xiv. That 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 of the agreement and who have not defaulted in payment as per the payment plan incorporated in the agreement. The complainants, 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 occupation certificate or any other permission/sanction from the competent authorities, no compensation shall be payable being part of circumstances beyond the power and control of the developer. Nevertheless, the respondent has credited an amount of Rs. 2,82,797/- as delay compensation at the time of offer of possession. 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 circumstances 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 complainants. However, all these crucial and important facts have been deliberately concealed by the complainants from this honourable authority.
18. 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 submissions made by the parties.

E. Jurisdiction of the authority:

19. 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

20. 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 on the objection raised by the respondent:

F.I Objection regarding maintainability of the complaint.

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

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 complainants

G.I Issue fresh notice of possession as per the BBA and to consider the date of building plan approval as the date of calculating the DPC.

22. In the present complaint the building plan was approved on 06.06.2012 and the builder buyer agreement was executed on 22.01.2014. As per the possession clause 3(a) of the agreement the developer proposes to handover the possession of the apartment within a period of 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 execution

of BBA is later than the date of approval of building plan. Therefore, the due date is calculated from the date of execution of builder buyer agreement i.e., 22.01.2014. Moreover, the respondent has not charge anything which is not the part of BBA.

G.IV Delay possession charges

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

Section 18: - Return of amount and compensation

If the promoter fails to complete or is unable to give possession of an apartment, plot or building, -

*.....
Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed*

24. 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 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.

25. 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.
26. 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.

27. 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 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.

28. **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 one and does not prescribe any precondition 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 22.07.2017.
29. **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.

30. 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.
31. 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%.
32. 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;"*
33. 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.

34. 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 22.01.2014, The developer proposed 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 execution of buyer's agreement being later, the due date of handing over of possession is reckoned from the date of buyers' agreement and the grace period of 6 months is also allowed being unqualified/unconditional. Therefore, the due date of handing over of possession comes out to be 22.07.2017.
35. 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.
36. 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 22.07.2017. The respondent applied for the occupation certificate on 17.06.2020 and the same was 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 complainants as per the terms and conditions of the buyer's agreement dated 22.01.2014 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 22.01.2014 to hand over the possession within the stipulated period.
37. 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 complainants

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 + six months of grace period is allowed i.e. 22.07.2017 till the expiry of 2 months from the date of offer of possession (01.12.2020) which comes out to be 01.02.2021.

38. 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. 22.07.2017 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.
39. Also, the amount of Rs.2,82,797/-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:

40. 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 + six months of grace period is allowed i.e. 22.07.2017 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.2,82,797/- 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 complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- iv. 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.

v. 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

41. Complaint stands disposed of.

42. File be consigned to registry.

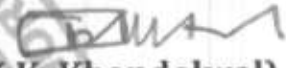

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 15.03.2022



सत्यमेव जयते


(Dr. K.K. Khandelwal)
Chairman

HARERA
GURUGRAM