BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**4728 of 2020**
Date of filing complaint:	**12.01.2021**
First date of hearing :	**03.03.2021**
Date of decision :	**15.03.2022**

	Chander Kanta Nandwani R/o: Flat B 71, Plot 1, Sector 10, Dwarka New Delhi	**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. Kuldeep Kumar Kohli (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, 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 25.03.2011valid 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	20.05.2011 (page 57 of complaint)
8.	Unit no.	Unit no. 113, floor 11, tower A 4 admeasuring 1745 sq.ft. (page 57 of complaint)
9.	New area	1918sq.ft. (annexure R16, page 126 of reply)

10.	Date of approval of building plan	06.06.2012 [annexure R5, page 78 of the reply]
11.	Date of execution of builder buyer agreement	28.12.2011 [Page 63 of the complaint]
12.	Total sale consideration	Rs. 82,96,746/- (as per statement of account dated 31.03.2021 at page 85 of reply)
13.	Total amount paid by the complainant	Rs. 74,78,391/- (as per statement of account dated 31.03.2021 at page 87 of reply)
14.	Payment plan	Construction linked payment plan (Page 84 of the complaint)
15.	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 plans **(Grace period is allowed)**
16.	Offer of possession	01.12.2020 (annexure P16, page 126 of complaint)
17.	Occupation Certificate	11.11.2020 [annexure R15, Page 123 of the reply]
18.	Delay in delivery of possession from the due date till the date of offer of possession plus two months i.e.,01.12.2020 + 2 months (01.02.2021)	5 years 01 months 26 days
19.	Amount already paid by the respondent in terms of the buyer's agreement as per offer of possession dated 01.12.2020	Rs. 4,55,254/- towards compensation for delay in possession.

B. Facts of the complaint:

3. In the year 2011, the complainant, was searching for a suitable flat as per his standards and budget. While searching for a home he visited the office of the respondent company, and the agents of the respondent company told him about the moonshine reputation of the company and made huge presentations about the project namely 'Spaze Privy At4" in Sector 84, Gurugram, and also assured that they have delivered several projects in the National Capital Region. The respondent handed over one brochure to him which portrayed the project like heaven and tried to hold his interest in every possible way and incited him for payments. He was trapped in the hands of the agents of the respondent company like a fish.
4. That on 26.04.2011, the complainant who was caught in the web of false promises of the agents of the respondent company, paid an initial amount of Rs. 5,00,000/- on 26.04.2011 and it was acknowledged by the respondent and accordingly filled an application form for the unit no. 113 at floor, 11 tower A4 measuring 1745.00 Sq.ft and opted for construction linked payment plan.
5. The respondent company issued a provisional allotment letter no. dated 20.05.2011 allotting a flat bearing unit no. 113, 11th floor, tower A4, Sector 84, Gurugram tentatively measuring 1745 Sq. Ft in the aforesaid project of the developer for a total sale consideration of Rs. 73,78,755/- which included basic sale price of Rs. 58,89,375/-, plus EDC of Rs. 5,51,542/-plus right to use car park Rs. 3,00,000/- plus green facing PLC 2,61,750/- plus IDC of Rs. 64,338/-, club membership charges of Rs. 50,000/- plus corner PLC

of Rs. 2,61,750/- in the project called "Spaze Privy At4". A total amount of Rs. 67,92,445/- was paid till November 2014 as per the statement of account of the respondent dated 01.10.2015.

6. A buyer's agreement was signed between the complainant and the respondent on 28.12.2011. A payment of Rs. 18,12,311/- was made before even the buyer agreement was sent to the complainant by the respondent. The complainant having dreams of his own one residential flat signed the agreement in the hope that he shall be delivered the flat within the time period mentioned in the buyer agreement i.e. by 28.01.2015. The complainant was also handed over one detailed payment plan i.e., construction linked plan, which was a part of the buyer's agreement and a copy of the same is attached with the buyer's agreement.

7. That the possession was to be handed over by 28.12.2015. As per clause 3(a) of the agreement, respondent proposed to hand over the possession of the unit within 3 years from the date of approval of building plans or date of signing of the agreement, whichever is later (excluding a grace period of 6 months). The building plans were approved prior to signing of the buyer's agreement. As per clause 3 (f) of the buyers agreement, the approvals were obtained on 03.10.2011 whereas the agreement was signed on 28.12.2011. Hence the later date being 28.12.2011, the possession was to be handed over by 28.12.2015.

8. The complainant visited the site and was shocked to see the status of the project as the construction on the site was not at all in consonance with the construction plan based on which the payments were collected. On many occasions he complained about

this to the respondent and objected to the payment being collected with no relevance to the actual construction as per the construction link plan provided to him.

9. That an unjustified and illegal demand was raised by the respondent towards HVAT which as per the Act is payable by the respondent by the complainant, sill paid a sum of Rs. 1,27,582/- without prejudice to their right to claim back the same.

10. The complainant contacted the respondent on several occasions and regularly in touch with the respondent, but the respondent was never able to give any satisfactory response to him regarding the status of the construction and was never definite about the delivery of the possession, which had now become a cause of worry as the delivery was promised by 28.12.2015 and in spite of the complainant having paid Rs. 67, 92,445/- till November 2014 as per the statement of account of the respondent dated 01.10.2015. Against a total price of Rs. 73,78,755/- but looking at the actual status on the ground, it was evident that the delivery is not to be seen in the near future.

11. The complainant was not being allowed to visit the site at all to find out the actual status on ground and this was being refused through the guards posted on the site who would not let the complainant see my flat.

12. The complainant kept on pursuing the matter with the representatives of the respondent as to when would they deliver the project and why construction is going on at such a slow pace, but to no avail. Some or the other reason was being given in terms of some dispute with the landowners and shortage of labor etc. He

visited the office of the respondent and personally informed the customer relations division about the progress at the site not at all proportionate to the money being collected as specified in the construction linked plan. But apart from being assured that the construction would be speeded up no actual action was taken on the ground.

13. That after payment of each and every demand letter, the complainant was in hope that he would get possession of his flat soon. But the dreams of the complainant shattered and scattered as the respondent left no stone unturned to cheat him and excavate money from his pocket showing that flat is complete and ready to handover possession.

14. The complainant received an offer of possession dated 1.12.20020 on 8.12.2020 through which the respondent informed him the construction of the residential group housing complex known as "PrivyAT4" having been completed and the apartments are ready for possession. It nowhere made a mention of the respondent having received the occupation certificate. The said offer of possession letter dated 01.12.2020 also specified that the area of the flat has been increased to 1918 sq.ft. from the originally 1745 sq.ft. booked by him, without any previous approval and without any sanction of the plans for the revised increased area. The said increase in the area lead to the increase in cost, the increase in EDC, the increase in IDC, GST, the cost of conveyance deed and on the top of it perpetual increase in the monthly maintenance cost.

15. The complainant immediately wrote a letter wherein informed the respondent that though he wishes to take the possession

immediately but this is subject to the complainant not being asked to pay the charges as raised through the offer of possession which are not a part of the buyer's agreement including increased cost because of increase in the super area, external electrification charges to the tune of Rs. 2,74,127/-, increase in cost because of the increase in super area, miscellaneous charges of Rs.17700/-, labor cess of Rs. 22,460/- PLC with GST of Rs. 58,128/-, pre-paid electric meter Rs. 15,000/- and not giving the proper appropriate compensation as is payable as per the HRERA Act 2012 and Rules 2017.

16. By now the complainant had realized that the delivery has already been delayed by more than 5 years and since the respondent has not responded to the letter of the complainant asking for the possession and removal of the charges which are not a part of the buyers agreement and that the respondent is in violation of the terms and conditions of the agreement. It was felt that the only hope of getting the possession is to approach the honorable Haryana Real Estate Regulatory Authority, Gurugram.

C. Relief sought by the complainant:

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

    i. Direct the respondent to pay interest at the prescribed rate for every month of delay from due date of possession till the actual handing over the possession on amount paid by complainant and handover the possession.

    ii. Direct the respondent, not to cancel the allotment of the unit.

iii. Direct the respondent not to raise any fresh demand with respect to the project.

iv. Direct the respondent to delete all the demand which are not a part of the BBA, as pointed by the complainant in reply to the offer of possession dated 01.12.2020.

v. Direct the respondent not to charge anything irrelevant which has not been agreed to between the parties, detailed provided in annexure C6 in the letter of the complainant dated 01.12.2020.

vi. Direct the respondent to adjust the entire amount of interest due to the complainant from the date of the delivery period as per the buyer's agreement to the actual delivery of possession against the just and legal demands from the complainant, if any, as per the buyer's agreement and as per guidelines laid in the RERA, 2016.

vii. Direct the respondent not to ask for the maintenance charges for a period of 12 months or more in advance as the same is not as per the buyer's agreement.

viii. Direct the respondent not to force the complainant to sign any indemnity cum undertaking indemnifying the builder from anything legal as a precondition for signing the conveyance deed or forcing the complainant through the undertaking to abide by the illegal terms and conditions of the buyer's agreement which is not in consonance with the guidelines laid in ACT, 2016.

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.

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 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 11th of September 2014 as is evident from the submissions made in the following paras of the present reply.

iii. The complainant had been allotted apartment bearing no. A4-113 on 11th floor located in tower A4 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 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 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 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. 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 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
k4	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 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.8,57,280/-. 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 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 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 resulted 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 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 establishes 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.

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 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 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. 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 complainant. However, all these crucial and important facts have been deliberately concealed by the complainant 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 complainant 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.

22. 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 Cancellation of the allotted unit

23. The complainant had paid an amount of Rs. 74,78,391/- against the total sale consideration of Rs. 82,96,746/-, which shows that he had paid 90% of the total sale consideration as is evident from the statement of account dated 31.03.2021. Moreover, neither the complainant nor the respondent has contended anything in the regard of cancellation of the allotted unit. Also, there is nothing on record to show the allotted unit of the complainant is cancelled.

G.II Advance maintenance charges

24. The respondent has a right in demanding maintenance charges at the rates prescribed in the BBA at the time of offer of possession. However, the respondent shall not demand advance maintenance charges for more than one year from the allottee even in those cases wherein no specific clause has been prescribed in the agreement or where the maintenance charges has been demanded for more than a year.

G.III Indemnity cum Undertaking

25. The authority has observed that no document has been placed on record by the respondent on the name of indemnity bond. Even if any such document has been executed by the parties, the respondent has not clarified as to why a need arose for the complainant to sign any such affidavit or indemnity cum undertaking and as to why he has agreed to surrender his legal rights which were available or had accrued in favour of the original allottee. It is not the case of the respondent that the complainant had executed this affidavit out of his free will and concern. Such an undertaking/indemnity bond given by a person thereby giving up his valuable rights must be shown to have been executed in a free atmosphere and should not give rise to a suspicion. If even a slightest of doubt arises in the mind of the adjudicator that such an agreement was not executed in an atmosphere free of doubts and suspicious, the same would be deemed to be against public policy and would also amount to unfair trade practices. Therefore, this authority does not place reliance on the said affidavit/ indemnity cum undertaking in view of order dated 03.01.2020 in case titled as ***Capital Greens Flat Buyer Association and Ors. V. DLF***

Universal Ltd., Consumer case no. 351 of 2015, wherein, it was held that the execution of indemnity-cum-undertaking would defeat the provisions of section 23 and 28 of the Indian Contract Act, 1872 and therefore would be against public policy, besides being an unfair trade practice. The relevant portion is reproduced below:

> *"**Indemnity-cum-undertaking***
>
> *30. The developer, while offering possession of the allotted flats insisted upon execution of the indemnity-cum-undertaking before it would give possession of the allotted flats to the concerned allottee. Clause 13 of the said indemnity-cum-undertaking required the allottee to confirm and acknowledge that by accepting the offer of possession, he would have no further demands/claims against the company of any nature, whatsoever.*
>
> *It is an admitted position that the execution of the undertaking in the format prescribed by the developer was a pre-requisite condition, for the delivery of the possession. The opposite party, in my opinion, could not have insisted upon clause 13 of the Indemnity-cum-undertaking. The obvious purpose behind such an undertaking was to deter the allottee from making any claim against the developer, including the claim on account of the delay in delivery of possession and the claim on account of any latent defect which the allottee may find in the apartment. The execution of such an undertaking would defeat the provisions of Section 23 and 28 of the Indian Contract Act, 1872 and therefore would be against public policy, besides being an unfair trade practice. Any delay solely on account of the allottee not executing such an undertaking would be attributable to the developer and would entitle the allottee to compensation for the period the possession is delayed solely on account of his having not executed the said undertaking-cum-indemnity."*

G. IV Irrelevant demands at the time of offer of possession dated 01.12.2020.

- **Labour cess**

26. The complainant pleaded 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 is not tenable in the eyes of law. It further further stated that he approached the office of the respondent for rectification of the alleged illegal and unjustifiable demand it outrightly refused to do the same. But the respondent submitted that all the final demands raised by him are justifiable and complainant choose to ignore and not to pay the same. It is pertinent to mention here that the respondent vide offer of possession 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 and 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 raised by the respondent. Moreover, this issue has already been dealt with by the authority in complaint titled as ***Mr. Sumit Kumar Gupta and Anr. Vs. Supset Properties Private Limited (962 of 2019)*** decided on 12.03.2020, where it was held that since labour cess is to be paid by the respondent, as such no labour cess should be charges by the respondent. The respondent is directed to withdraw the unjustified demand of the pretext of labour cess. The builder is supposed to pay a cess forthe welfare of the labour employed at the site of construction and which goes to welfare boards to undertake social security schemes

and welfare measures for building and other construction workers. So, the respondent is not liable to charge the labour cess.

- **External electrification charges**

27. 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 the allottee is liable to pay that amount.

28. 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. 73,78,755 /- (Rupees Rupees Seventy Three Lakhs Seventy Eight Thousand Seven Hundred Fifty Five 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."*

29. A perusal of clause 1.2 of the above-mentioned agreement shows the total sale price of the allotted unit as Rs. 73,78,755/- 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 as being demanded by the respondent/builder in the heading detailed above. However, there is sub clause (viii) 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."*

31. 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 power meter, the allottee is liable to pay as per the norm's setup by the electricity department.

- **Miscellaneous charges**

The complainants pleaded in the complaint that the respondent/builder has demand a charge of Rs. 17,700/- on pretext of miscellaneous charges vide notice of possession dated 01.12.2020 which is illegal and unjustifiable and not tenable in the eyes of law. In reply to this the respondent submitted that all the final demand raised by him are justifiable. The respondent has charged an amount of Rs 17,700/- on pretext of miscellaneous charges but neither the respondent has provided any bifurcation of these expenses nor has provided any clause under which such expenses are being charged, therefore, the same cannot be allowed.

G.V Delayed possession charges

30. In the present complaint, the complainant 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*

31. 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.*

32. 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 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.

33. 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.

34. 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.

35. **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 06.12.2015.

36. **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.*

37. 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.

38. 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%.

39. 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;"*

40. 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.

41. 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 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 approval of building plans being later, the due date of handing over of possession is reckoned from the date of approval of building plans 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 06.12.2015.

42. It is pleaded on behalf of the respondent that 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 complainant was 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 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.

43. 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.

44. 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 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.

45. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 11.11.2020, 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.

46. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the 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.

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:

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

i. The respondent is directed to pay the interest at the prescribed rate i.e. 9.30% per annum for every month of delay on the amount paid by the 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. The respondent is directed to provide the calculations 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

48. Complaint stands disposed of.

49. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman
Haryana Real Estate Regulatory Authority, Gurugram

Dated: 15.03.2022

HARERA
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