

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

Complaint no.:	559 of 2020
First date of hearing:	11.03.2020
Date of decision:	13.04.2023

1. Mr. Rakesh Mittal
2. Mrs. Nimmi Mittal

R/o D-2021, Devinder Vihar, Sector 56, Gurugram,
Haryana-122003

Complainants

Versus

M/s JMD Ltd.

Office address: 3rd floor, JMD regent square, M.G. Road,
Gurugram, Haryana-122001.

Respondent

CORAM:

Shri Vijay Kumar Goyal

Member

APPEARANCE:

Mr. Gaurav Rawat (Advocate)

Mr. Venkat Rao & Pankaj Chandola (Advocate)

Complainants

Respondent

ORDER

1. The present complaint dated 04.02.2020 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 as provided 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 unit details, sale consideration, the amount paid by the complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S. N.	Particulars	Details
1.	Name and location of the project	"JMD Suburbia - I", Sector-102, Gurugram
2.	Project area	4.24 acres
3.	Nature of the project	Commercial
4.	DTCP license no. and validity status	291 of 2017 dated 31.12.2007 valid up to 30.12.2024
5.	RERA registered/ not registered and validity status	Registered vide no. 30 of 2022 dated 25.04.2022 valid up to 30.12.2024
6.	Unit no.	CW-148, First floor (Page no. 34 of complaint)
7.	Unit size	375 sq. ft. (Page 34 of complaint)
8.	Date of apartment buyer's agreement	11.09.2010 (page 33 of complaint)
9.	Total sale consideration	Rs.27,98,178 /- (Page 38 of complaint) Rs. 31,61,920/- (Page 5 of complaint)
10.	Amount paid by the complainants	Rs.31,61,919/- (Page 5 of complaint)
11.	Possession clause	15. <i>That the possession of the said premises is proposed to be delivered by the company to the unit allottee within 3 years from the date of sanction of</i>

		<i>revised building plan or further extended period of 6 months after the expiry of 36 months as agreed above except the force majeure circumstances. (Emphasis supplied)</i>
12.	Date of building plan approval	13.11.2013 [pg. 4 of written submission by respondent]
13.	Due date of Delivery of possession	13.05.2017 [Note: due date calculated from date of building plan approvals i.e., 13.11.2013 plus 6 months of grace period allowed being unqualified.]
14.	Occupation certificate	18.10.2018 (As per reply)
15.	Offer of possession	03.12.2018 (As per reply)

B. Facts of the complaint

3. The complainants have pleaded the complaint on the following facts:
- That the complainants are a law-abiding citizen, women and consumer who have been cheated by the malpractices adopted by the respondent being a developer and promoter of real estate, since long time. Based on the advertisement, complainant showed interest in purchasing a commercial space in project "JMD Suburbio-1", Sector-67, Village- Badshahpur, Gurugram, Haryana and being developed by M/S JMD Limited.
 - That based on promises and commitment made by the respondent, complainant booked a shop unit no.-CW-148 on First floor admeasuring 377.52 sq. ft, in the commercial project "JMD Suburbio-1", Sector-67, Village-Badshahpur, Gurugram. The initial booking amount of ₹ 3,82,339/- was paid through cheque dated 13.08.2010 & 09.09.2010.

- c. That the respondent to dupe the complainants in their nefarious net even executed commercial premises buyer's agreement signed between complainants and M/S JMD Limited on dated 11.09.2010, and just to create a false belief that the project shall be completed in time bound manner and in the garb of this agreement persistently raised demands due to which they were able to extract huge amount of money from the complainant.
- d. That the total cost of the said unit is ₹ 31,61,920/- inclusive Parking, EDC IDC, IFMS, Contingency, ECC, Air Conditioning Cost, HVAT and Taxes as per premises buyer' agreement out of this a sum of ₹ 31,61,919/- (inclusive delay interest @ 18% (₹ 9,026/-)) paid by complainant this is 100% of total cost of unit.
- e. That the respondent imposed two particulars in total cost of unit one is IFMS (Interest free maintenance security) @ ₹ 125/ sq. ft. and imposed cost for contingency @ ₹ 70/- sq. ft. both are contradict to each other this is show malicious intention of builder extract more and more money from buyer pocket and both charges are illegal and unilateral and arbitrary.
- f. That respondent charges IFMS (Interest free maintenance security), this is security deposit and builder will get interest on amount but not passed the complainant is illegal, arbitrary and unilateral. That respondent was liable to hand over the possession of a developed unit before 11.09.2013As per FBA clause no. 15 however respondent sent the offer of possession letter on 03.12.2018, According to offer of possession complainant had paid last demand in time bound manner but builder have not given to him physical possession.

- g. Complainants paid the final demand amount ₹ 2,82,748/- through cheque on 31.12.2018 but after paying the final demand, complainants eagerly wait for the physical possession of the allotted unit, but builder have not given the possession of property till date. This is illegal arbitrary and unilateral.
- h. That the complainant has repeatedly been seeking an update on the progress in the development of the project. However, the queries of the complainant were never replied to, and the respondent was always vague and evasive to such requests. Finding his repeated efforts being thwarted and dashed, the complainant became suspicious of the motives and intentions of the respondent and decided to visit the site himself and assess the state of development. The complainants, as a result, visited the site many times (2010 to 2018) to ascertain the status of the project site.
- i. That as per section 19 (6) the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as the Act) complainants has fulfilled his responsibility in regard to making the necessary payments in the manner and within the time specified in the said agreement. Therefore, the complainants herein are not in breach of any of its terms of the agreement.
- j. That such an inordinate delay in the delivery of possession to the allottee is an outright violation of the rights of the allottee under the provisions of RERA act as well the agreement executed between complainant and respondent. The complainants demand delay penalty in terms of Section 18(1) read with Section 18(3) of the Act, along with principles of justice, equity and good conscience.

C. Relief sought by the complainants:

4. The complainants have sought following reliefs:
 - a. Direct the respondent to pay delay possession charges at prescribed rate of interest from the due date of possession till the actual date of handing over of possession.
 - b. Direct the respondent to handover the possession of the unit.
 - c. Direct the respondent to quash the contingency cost.
 - d. Direct the respondent to pay interest on maintenance security.
5. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply filed by the respondent.

6. The respondent has contested the complaint on the following grounds:
 - a. That the complainant booked the said unit in the project vide premise buyer's agreement dated 11.09.2010 That as per clause 15 of the said agreement the due date of handing over of possession of the unit is within 3 years from the date of sanction of revised building plan. It is most humbly submitted that the revised building plans have been sanctioned on 13.11.2013 by the competent authority.
 - b. Further, as per the said clause 15 the due date of possession of the unit comes out to be 13.05.2017 including grace period of six months. The same has already been held by this Ld. Authority in the judgment dated 22.01.2020 in complaint bearing no 1182/2019 titled as "Mr. Sunder Lal. vs JMD Ltd."
 - c. It is most humbly submitted that the complainant has already offered the possession of the unit to the complainant on 03.12.2018, after obtaining the occupation certificate on 18.10.2018. Thereafter, the

following reminders have been sent to the complainants to take possession and payment of dues letter dated 08.03.2021, 06.08.2021, 18.08.2021, 25.02.2022, 24.12.2022, 27.12.2022 However, till date the complainant has failed to take over the possession of the unit.

- d. It is submitted that the complainant deliberately and intentionally failed to take over the physical possession of the unit in the project with a malafide intention, despite of the possession being offered by the respondent on 03.12.2018.
 - e. It is also submitted that from the date of handing over of the possession i.e., 03.12.2018, maintenance charges as per the terms and conditions of the agreement has accrued. Therefore, over the years the respondent has duly been maintaining the unit on behalf of the complainant. That the total due amount from the date of handing over of possession of the unit till 01.04.2023 an amount of ₹ 1,92,689/- along with delayed interest of ₹ 92,499/- which cumulatively comes out to be ₹ 2,85,188/-, is pending payment by the complainant.
 - f. That on the basis of the aforesaid submissions, it is pertinent to note that the complainant is himself in default and have failed to take over possession of the unit even after a lapse of more than 4 years.
7. Copies of all the documents have been filed and placed on record. The authenticity is not in dispute. Hence, the complaint can be decided on the basis of theses undisputed documents.

E. Jurisdiction of the authority

8. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I. Territorial jurisdiction

9. 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

10. 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)

Section 11

.....

(4) The promoter shall-

(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.

11. 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 relief sought by the complainants.

F.I. Direct the respondent to pay delay possession charges at prescribed rate of interest from the due date of possession till the actual date of handing over of possession.

12. In the present complaint, the complainants intend to continue with the project and is seeking delay possession charges interest on the amount paid. 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.

"Section 18: - Return of amount and compensation

18(1). 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."

13. Clause 15 of the agreement to sell provides for handing over of possession and is reproduced below:

*"That the possession of the said premises is proposed to be delivered by the company to the unit allottee **within 3 years from the date of sanction of revised building plan or further extended period of 6 months after the expiry of 36 months** as agreed above except the force majeure circumstances."*

14. 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 application, 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 promoters. 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 promoters 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 flat buyer agreement by the promoters are just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

Admissibility of grace period: The promoter has proposed to hand over the possession of the apartment within 3 years from the date of sanction of revised building plan or further extended period of 6 months after the expiry of 36 months as agreed above except the force majeure circumstances. The authority calculated due date of possession according to clause 15 of the agreement dated 11.09.2010 i.e., within 36 months from date of building plan approval i.e., 13.11.2013. Since in the present matter the BBA incorporates unqualified reason for grace period/extended period of 6 months in the possession clause subject to force majeure circumstances. Accordingly, this grace period of 6 months shall be allowed to the promoter at this stage.

15. **Admissibility of delay possession charges at prescribed rate of interest:** 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."

16. 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.
17. 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., **13.04.2023** is 8.70%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.70%.
18. 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;"*

19. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., **10.70%** by the respondent/promoter which is the same as is being granted to the complainants in case of delayed possession charges.
20. On consideration of the documents available on record and submissions made regarding contravention of provisions of the Act, 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 15 of the agreement executed between the parties on 11.09.2010, the possession of the subject apartment was to be delivered within 36 months from date of building plan approval i.e., 13.11.2013. The period of 36 months expired on 13.11.2016. As far as grace period is concerned, the same is allowed for the reasons quoted above. Therefore, the due date of handing over possession is 13.05.2017. The respondent has not yet offered the possession of the subject apartment. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such the allottee shall be paid, by the promoter, interest

for every month of delay from due date of possession i.e., 13.05.2017 till 03.02.2019 i.e., after expiry of 2 months from the date of offer of possession (03.12.2018), at prescribed rate i.e., 10.70 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

F. II. Direct the respondent to quash the contingency cost.

21. The complainant in the present matter states that the respondent has charged ₹ 70 per sq. ft. The respondent in its reply has not stated anything with regard to this cost. Since, contingency cost and maintenance security are the same things therefore the respondent cannot charge it under different heads. Accordingly, the respondent is directed to refund the amount collected under head of contingency cost.

F.III. Direct the respondent to pay interest on maintenance security.

22. This issue has already been dealt by the authority in complaint bearing no. **CR/4031/2019 titled as Varun Gupta Vs. Emaar MGF Land Limited wherein** it is held that the promoter may be allowed to collect a reasonable amount from the allottees under the head "IFMS". However, the authority directs that the promoter must always keep the amount collected under this head in a separate bank account and shall maintain that account regularly in a very transparent manner. If any allottee of the project requires the promoter to give the details regarding the availability of IFMS amount and the interest accrued thereon, the promoter must provide details to the allottee. It is further clarified that out of this IFMS/IBMS, no amount can be spent by the promoter for the expenditure it is liable to incur to discharge its liability and obligations as per the provisions of section 14 of the Act.

G. Directions of the authority



23. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations casted upon the promoters as per the functions entrusted to the authority under section 34(f):

- i. The respondent is directed to pay interest at the prescribed rate of 10.70% p.a. for every month of delay from the due date of possession i.e., 13.05.2017 till 03.02.2019 i.e., after expiry of 2 months from the date of offer of possession (03.12.2018). The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order as per rule 16(2) of the rules.
- ii. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period. If there is no amount outstanding against the allottees or less amount outstanding against the allottees then the balance delay possession charges shall be paid after adjustment of the outstanding against the allottees.
- iii. The respondent is directed to handover the physical possession of the unit to the complainant after clearing the outstanding dues, if any including maintenance charges within 2 weeks from the date of this order.
- iv. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.70% by the respondent/promoter which is the same rate of interest which the promoters shall be liable to pay the allottee, in case of default i.e., the delayed 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 the agreement. However, holding charges

shall not be charged by the promoters at any point of time even after being part of agreement as per law settled by Hon'ble Supreme Court in civil appeal no. 3864-3889/2020.

24. Complaint stands disposed of.
25. File be consigned to registry.

V.I - G
(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 13.04.2023