

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

Complaint no.:	539 of 2021
First date of hearing:	08.03.2021
Date of decision:	09.03.2023

Bindu Gera

R/o B 5/403, Tulip Orange, Sector 70, Gurugram

Complainant

Versus

JMS Buildtech Pvt. Ltd.

Office address: 3rd floor, Plot no.-10, Sector-44,
Gurugram

Respondent

CORAM:

Shri Vijay Kumar Goyal

Member

APPEARANCE:

Complainant in person

Complainant

Shri Ravinder Singh (Advocate)

Respondent

ORDER

1. The present complaint dated 29.01.2021 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 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 complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S. No.	Particulars	Details
1.	Name and location of the project	"JMS Crosswalk", Sector 93, Gurugram
2.	Unit no.	Office 0512, 5 th floor. (pg. 32 of complaint)
3.	Unit area admeasuring	381 sq. ft. (pg. 32 of complaint)
4.	Allotment letter	04.06.2015 (pg. 32 of complaint)
5.	Date of execution of buyer's agreement	Not executed
6.	Possession clause	Not on record
7.	Due date of possession	Cannot be ascertained
8.	Total sale consideration as allotment letter dated 04.06.2015 at page 32 of complaint	Rs. 19,52,712.63/-
9.	Amount paid by the complainant as per reminder letter dated 14.03.2018 at pg. 28 of reply	Rs. 4,05,023/-
10.	Occupation certificate	08.03.2022 [pg. 34 of reply]
11.	Offer of possession	Not offered

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12.	Reminder letters	10.05.2016, 16.06.2016, 07.12.2016, 14.03.2018, 23.02.2019 (pg. 22-30 of reply)
13.	Cancellation letter	24.09.2019 (pg. 31 of reply)

B. Facts of the complaint

3. The complainant has pleaded the complaint on the following facts:

- a. That the applicant had given four payments to respondent builder. Allottee booked unit in company, OFFICE 0512 with customer code B0002 on dated 16.9.2014 and respondent builder did not offer buyer agreement for signing or any other document with terms and conditions of same or agreement to sale till June 2019 which is required as per RERA Act 2016 at time of booking.
- b. Respondent builder demanded amount of Rs. 491145/- from applicant on dated 23.02.2019 and it is outstanding in respondent's builder accounts, which related with applicant's commercial unit with builder, while neither respondent builder had executed any legal agreement nor given any legal document by sales team, and respondent builder has not described any product delivery date and possession date. As per RERA Act 2016 the promoter was bound to declare the delivery details of ongoing project to the allottee, when the promoter takes the amount or consideration from the client and all the terms & conditions or parameters must be cleared or elaborated by promoter in such allotment or application or agreement for sale to allottee.
- c. That the respondent had never offered or given any agreement to applicant till 23rd June 2019, and never furnished any details



- related to delivery of his project and possession of applicant on his purchasing unit OFFICE-0512 property in June 2014 which is required by promoter vide Section 13(1) and (2) of RERA Act 2016.
- d. That the respondent promoter did not attempt to comply with statutory obligations as per RERA ACT 2016, and Haryana and Real Estate (Regulation and Development) Rules, 2017 Haryana notifications till June 2019 when buyer agreement was sent by promoter to allottee.
- e. That the allottee made many reminder calls and related and emails with above said commercial unit OFFICE-0512, but respondent builder never furnished any detail of construction and clearances from June 2014 at time of allotment letter till February 2019 and has not mentioned date of commercial unit possession on website of company till date which is required as per Section 11 (3a) and (3b), RERA Act 2016.
- f. That the respondent never provided any legal agreement to sell to applicant and co-applicant against received 25% amount of actual commercial unit OFFICE-0512 in crosswalk commercial project, up to June 2019 as required under Section 13 sub section (1) and (2) of RERA Act 2016.
- g. Whereas the respondent no.1 allotment the commercial unit price is ₹ 19,52,712.63/- only. While the applicant had paid more than 25% amount to respondent builder, they never disclosed about product releasing date or year or completion date / year of the above said project as required under sub section (1), (2) and (3) of section 13 of RERA Act 2016.

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- h. That the promoter has cancelled the allotment of unit OFFICE 0512 with customer code B0002 vide email letter on 24/09/2019 respectively instead of giving date of possession to client. So, it shows complete irresponsibility of the respondent builder as he was bound to deliver all relevant information to the allottee in given allotment letter like possession date, agreement for sale, and complete project information etc.
- i. That the cause of action is arisen with the respondent party because of cancellation. And possession by due date is the time of essence where possession of plot/apartment/commercial/IT/ any other usage (as the case may be), as provided under rule 2 (1) (f) of rules,2017 is the essence of the agreement and the promoter shall not accept a sum of more than ten percent of the cost of the apartment/plot or unit as the case may be, an application fee, from the person without entering into a written agreement for sale with such person and register the said agreement for sale under any law for the time being in force.
- j. That the respondent promoter had taken RERA registration no. in Feb 2019. Now the respondent promoter had sent agreement for sale in June 2019 to the allottee and promoter was compelling to allottee for signing of agreement so that builder can bound allottee for another 48 months from June 2019 for delivery of project.
- k. That the allottee had pointed out about his loss of interest due for delay in deliver from 2014 till date and he is demanding from the respondent promoter, refund of principal with interest from date

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of payment which is his legal rights as per sub section (3) of section 18, RERA Act 2016 but respondent builder is not showing any interest in refunding any amount paid or due.

C. Relief sought by the complainant:

4. The complainant has sought following reliefs:
 - a. Refund the entire amount paid by the complainant along with the prescribed rate of interest.
5. On the date of hearing, the authority explained to the respondents/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 by the respondent.

6. The respondent has contested the complaint on the following grounds:
 - a. That the present complaint, filed by the complainant, is bundle of lies and hence is liable to be dismissed as it is filed without any cause of action. Further the complaint is also not maintainable as it doesn't disclose any cause of action for filing the complaint against the respondent.
 - b. That the present complaint is an abuse of the process of this Hon'ble Authority and is not maintainable. The complainant is trying to suppress material facts relevant to the matter. The complainant is making false, misleading, frivolous, baseless, unsubstantiated allegations against the respondent with malicious intent and the sole purpose is of extracting unlawful gains from the respondent.

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- c. The complainant on 16.09.2014 had expressed his interest and made an application cum expression of Interest, for allotment of a commercial space in project JMS Crosswalk, Sector-93, Gurugram and accordingly opted for construction linked payment plan which the complainant has also stated & accepted in their complaint.
- d. Thereafter the respondent in terms of the aforesaid application submitted by the complainant, allotted commercial space being shop no. OFFICE-0512 in the project JMS Crosswalk sector 93, Gurugram, to the complainant for a basic sale consideration of ₹ 19,52,712.63/- under construction link payment plan opted by the complainant.
- e. That after the enactment of RERA, the respondent got registered project JMS Crosswalk under RERA with the competent authority vide reg. no. RC/REP/HARERA/GGM/313/45/2019/07.
- f. That the complainant failed to make any payment despite repeated reminders & demand and despite the fact that the complainant was required to make the payment as per payment plan. It is also relevant to mention here that the complainant also failed to return the duly signed copies of buyer's agreement so that the same can be got registered with the competent authority as per the HRERA Rules. The respondent due to non-payment of outstanding payments/instalments by the complainant, was constrained to cancel/terminate the allotment and same was conveyed to the complainant vide cancellation letter dated 24.09.2019.

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- g. That on receipt of the cancellation letter, the complainant approached the office of the respondent sought revival of the allotment of unit/shop and agreed to make the payment of amount due along with interest. The complainant at that point of time sought the account statement showing the outstanding amount with interest, so that the payment can be made on the next day, however the complainant failed to clear the outstanding and return the duly signed copies of buyer's agreement.
- h. That thereafter on the allegations made by the complainant regarding non sending of copies of buyer's agreement the respondent has sent/reverted an email dated 28.01.2020 to the complaint and intimated her that copies of buyers agreement had sent to her however the allotment is cancelled due to non-payment after several reminders.
- i. That the cancellation of the Unit is only due to the faults of the complainant as on one side she failed to clear the outstanding payments and on the other side failed to return the duly signed copies of the buyer's agreement, which still is in the custody of the complainant and as such the respondent is not liable to refund the amount along with interest & compensation as demanded in the complaint.
- j. That as the development of the project in question is complete and the occupation certificate has already been received, hence, the complainant can't allege that the respondent has not provided detail of construction of the project to the complainant.

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- k. That the present complaint is not maintainable before this Hon'ble Court because the provisions of the Real Estate (Regulation and Development) Act, 2016 are not applicable to the facts of the present case and the said Act is prospective in nature. It is to be duly noted that the transactions of the concerned/disputed property took place prior to the coming into force of the said Act. Thus, the provisions contained therein, and the reliefs envisaged cannot be applied to the unit in question, which had already commenced prior to coming into force of the said Act. Also, for this same reason, the provisions contained therein and the reliefs envisaged under the said Act, which fully came into force w.e.f. 01.05.2017, cannot be applied to transactions executed prior to the said date i.e. the date on which the provisions of the said Act came into force. The provisions of the said Act cannot operate retrospectively and imposed upon the answering respondent, for any of the actions taken prior to coming into force of the said Act and prior to registration under the said Act. The provisions of the said Act have prospective operation, especially wherein inter-alia seeks to impose new burden. It is well settled law that a statute shall operate prospectively unless retrospective operation is clearly made out in the language of the statute. In the absence of any express legislative intent of the retrospective application of the said Act, and by virtue of the fact that the said Act creates a new liability, the said act cannot be construed to have retrospective effect.
- l. That earlier the complainant had filed the complaint before Ld. adjudicating officer, however, thereafter add new averments in the

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present complaint filed before this Hon'ble authority. Hence, the present complaint is not maintainable and liable to be dismissed.

m. That if the complainant had an issue on non-receipt of buyer's agreement since 2015 then in such an event the present complaint is time barred for filing the same in year 2021 and raising the same after lapse of more than five years itself creates a doubt on the malafide intention of the complainant to harass the respondent by filing present complaint.

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 these 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

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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) 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 as per provisions of section 11(4)(a) of the Act leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.
12. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors.*** SCC Online SC 1044 decided on 11.11.2021 wherein it has been laid down as under:

"B6. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest

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thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. If the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."

13. Furthermore, the said view has been reiterated by the division bench of Hon'ble Punjab and Haryana High Court in ***Ramprastha Promoter and Developers Pvt. Ltd. Vs Union of India and others dated 13.01.2022 in CWP bearing no. 6688 of 2021.*** The relevant paras of the above said judgment reads as under:

"23) The supreme court has already decided on the issue pertaining to the competence/power of the authority to direct refund of the amount, interest on the refund amount and/or directing payment of interest for delayed delivery of possession or penalty and interest thereupon being within the jurisdiction of the authority under Section 31 of the 2016 Act. Hence any provision to the contrary under the Rules would be inconsequential. The Supreme Court having ruled on the competence of the Authority and maintainability of the complaint before the Authority under Section 31 of the Act, there is, thus, no occasion to enter into the scope of submission of the complaint under Rule 28 and/or Rule 29 of the Rules of 2017.

24) The substantive provision of the Act having been interpreted by the Supreme Court; the Rules have to be in tandem with the substantive Act.

25) In light of the pronouncement of the Supreme Court in the matter of M/s Newtech Promoters (supra), the submission of the petitioner to await outcome of the SLP filed against the judgment in CWP No.38144 of 2018, passed by this Court, fails to impress upon us. The counsel representing the parties very fairly concede that the issue in question has already been decided by the Supreme Court. The prayer made in the complaint as extracted in the impugned orders by the Real Estate Regulatory Authority fall within the relief pertaining to refund of the amount; interest on the refund amount or directing payment of interest for delayed delivery of possession. The power of adjudication

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and determination for the said relief is conferred upon the Regulatory Authority itself and not upon the Adjudicating Officer."

14. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the matter of **M/s Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra)**, and the division bench of Hon'ble Punjab and Haryana High Court in "**Ramprastha Promoter and Developers Pvt. Ltd. Vs Union of India and others. (supra)**", the authority has the jurisdiction to entertain a complaint seeking refund of the amount paid by allottee along with interest at the prescribed rate.

F. Findings on the relief sought by the complainant.

F.I. Refund entire amount paid by the complainant along with the interest.

15. In the present complaint, the complainant intends to withdraw from the project and are seeking return of the amount paid by them in respect of subject unit along with interest. Sec. 18(1) of the Act is reproduced below for ready reference:

"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. -

(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

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

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prescribed.
(Emphasis supplied)

16. However, in the present matter no BBA has been executed between the parties therefore the due date of possession cannot be ascertained. A considerate view has already been taken by the Hon'ble Supreme Court in the cases where due date of possession cannot be ascertained then a reasonable time period of 3 years has to be taken into consideration. It was held in matter **Fortune Infrastructure v. Trevor d' lima (2018) 5 SCC 442 : (2018) 3 SCC (civ) 1** and then was reiterated in **Pioneer Urban land & Infrastructure Ltd. V. Govindan Raghavan (2019) SC 725 :-**

"Moreover, a person cannot be made to wait indefinitely for the possession of the flats allotted to them and they are entitled to seek the refund of the amount paid by them, along with compensation. Although we are aware of the fact that when there was no delivery period stipulated in the agreement, a reasonable time has to be taken into consideration. In the facts and circumstances of this case, a time period of 3 years would have been reasonable for completion of the contract i.e., the possession was required to be given by last quarter of 2014. Further there is no dispute as to the fact that until now there is no redevelopment of the property. Hence, in view of the above discussion, which draw us to an irresistible conclusion that there is deficiency of service on the part of the appellants and accordingly the issue is answered."

17. Accordingly, the due date of possession is calculated as 3 years from the date of allotment letter i.e., 04.06.2015. Therefore, the due date of possession comes out to be 04.06.2018. Keeping in view the fact that the allottee complainant vide this complaint dated 29.01.2021 wishes to withdraw from the project and demanding return of the amount received by the promoter in respect of the unit with interest on failure of the promoter to complete or inability to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. The matter is covered under section 18(1)

of the Act of 2016. The due date of possession as mentioned above comes out to be 04.06.2018.

18. Further, the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, states that:

"5. AMOUNT OF EARNEST MONEY

Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment /plot /building as the case may be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer.

19. It is evident from the above-mentioned facts that the complainant had paid a sum of ₹ 4,05,023/- against total sale consideration of ₹ 19,52,712.63/-of the unit allotted to him on 04.06.2015.
20. **Admissibility of refund along with prescribed rate of interest:** The complainant is seeking refund the amount paid by them along with interest. However, the allottee intend to withdraw from the project and is seeking refund of the amount paid by him in respect of the subject unit with interest. 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%.

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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."

21. 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.
22. 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., **09.03.2023** is 8.70%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.70%.
23. Thus, keeping in view the aforesaid factual and legal provisions, the respondent cannot retain the amount paid by the complainant against the allotted unit and is directed to cancel the same in view of cancellation clause of the allotment by forfeiting the earnest money which shall not exceed the 10% of the basic sale consideration of the said unit as per payment schedule and shall return the balance amount along with interest at the rate of 10.70% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017, from the date of cancellation i.e., 24.09.2019 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

G. Directions of the authority

24. 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 promoter as per the functions entrusted to the authority under section 34(f) of the Act:

- i. The respondent is directed to refund the paid-up amount of ₹ 4,05,023/- after retaining 10% of the basic sale consideration of unit i.e., ₹ 19,52,712.63/- and that amount should have been made on the date of cancellation i.e., 24.09.2019. Accordingly, the interest at the prescribed rate i.e., 10.70% is allowed on the balance amount from the date of cancellation till date of actual refund.
- ii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

25. Complaint stands disposed of.

26. File be consigned to registry.


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 09.03.2023