

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

Complaint No. : 747 of 2018
Date of first hearing : 19.12.2018
Date of Decision : 12.03.2019

M/s Ananjay Realtech Pvt. Ltd. (through its
Directors)

Address: Flat no.20, Karishma Apartment,
I.P. Extension, New Delhi

...Complainant

Versus

M3M India Limited (through its Managing
Directors and other Directors)

Office at: Paras Twin Towers, Tower-B,
6th Floor, Golf Course Road,
Sector 54, Gurugram

...Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

**Member
Member**

APPEARANCE:

Shri Anup Gupta Advocate for the complainant
Shri Amarjeet Kumar and Smt. Advocate for the respondent
Shriya Takkar

ORDER

1. A complaint dated 23.08.2018 was filed under section 31 of the Real Estate (Regulation and Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 by the complainant M/s Ananjay

Realtech Pvt. Ltd. (through its Directors), against the promoter M3M India Limited (through its managing directors and other Directors) in respect of unit no. MW TW-B12/1403 on 14th floor, tower B12, admeasuring super area 1366 sq. ft. approximately, in the project “M3M Woodshire” for non-fulfilment of obligations of the promoter under section 11(4)(a) of the Act *ibid.*

2. The particulars of the complaint are as under: -

1.	Name and location of the project	“M3M Woodshire” in Sector 107, Gurugram
2.	Nature of real estate project	Group housing colony
3.	Unit no.	MW TW-B12/1403, 14 th floor, tower B12
4.	Project area	18.88125 acres
5.	Registered/ not registered	Not registered
6.	DTCP license	33 of 2012 dated 12.04.2012
7.	Date of booking	04.12.2012 (as per annexure- ‘A’ payment plan, pg 79 of the complaint)
8.	Date of apartment buyer’s agreement	29.05.2013
9.	Total consideration	Rs. 95,37,738/- (as per annexure- ‘A’ payment plan, pg 79 of the complaint)
10.	Total amount paid by the complainant	Rs. 30,53,476/- (as per the complaint)
11.	Payment plan	Deferred payment plan

		(as per addendum to agreement, pg 74 of the complaint)
12.	Due date of delivery of possession as per agreement	Clause 16.1- 36 months from date of commencement of construction, i.e. 14.12.2013(laying down of first plain cement concrete, as per respondent's reply, pg 6 of the reply) + 180 days grace period i.e. 14.06.2017
13.	Delay of number of months/ years upto 28.08.2017	2 months (approx.)
14.	Offer of possession	28.08.2017
15.	Occupation certificate received on	24.07.2017
16.	Date of termination /cancelling of allotment	23.03.2018
17.	Penalty clause as per apartment buyer agreement dated 29.05.2013	Clause 16.6- Rs. 10/- per sq. ft. per month of the super area

3. The details provided above have been checked on the basis of the record available in the case file which have been provided by the complainant and the respondent. An apartment buyer's agreement dated 29.05.2013 is available on record for unit no. MW TW-B12/1403 on 14th floor, tower B12, admeasuring super area 1366 sq. ft. approximately, according to which the possession of the aforesaid unit was to be

delivered by 14.06.2017. However, the unit was offered to the complainant for possession vide letter dated 28.08.2017.

4. Taking cognizance of the complaint, the authority issued notice to the respondents for filing reply and for appearance. The case came up for hearing on 19.12.2018, 31.01.2019 and 12.03.2019. The reply has been filed by the respondent and the same has been perused. A rejoinder has been filed by the complainant wherein he reiterated all the averments contained in the complaint and refuted those contained in the respondent's reply.

Facts of the complaint

5. The complainant submitted that upon the representations of the respondent, on 04.12.2012, the complainant booked a unit in the project named "M3M Woodshire", by paying an advance amount of Rs 12,56,686/- to the respondent. Accordingly, the complainant was allotted a unit bearing no. MW TW-B12/1403 on 14th floor, tower B12.
6. The complainant submitted on 29.05.2013, the complainant was induced to enter into an apartment buyer's agreement wherein as per clause 16.1, the possession should have been offered within 36 months from date of commencement of construction+ 180 days grace period i.e. by 14.06.2017. The

complainant made payments of all instalments demanded by the respondents amounting to a total of Rs 30,53,476/-.

7. The complainant submitted that they were further influenced by the respondent to sign addendum to buyer's agreement dated 29.05.2013. As per the said addendum, the complainant was, *inter-alia*, required to pay additional charges of Rs.19,12,400/- apart from total consideration. Since, the complainant had already paid huge amount of Rs.28,98,810/- and therefore, the complainant was forced to sign the said addendum, wherein the respondent had inserted unilateral terms. The said addendum was signed on 09.12.2014, whereby the complainant was to pay balance consideration at the time of notice of possession of the said apartment with an additional amount of Rs.19,12,400/-.
8. The complainant further submitted that the said agreement and addendum are totally one sided which impose completely biased terms and conditions upon the complainant, thereby tilting the balance of power in favour of the respondent.
9. The complainant submitted that the Complainant also visited at the site and observed that there are serious qualities issues with respect to the construction carried out by respondents.

The apartments/flats were sold by representing that the same will be luxurious apartment however, all such representations seem to have been made in order to lure complainant to purchase the flats at extremely high prices. The respondent have compromised with levels of quality and are guilty of mis-selling. There are various deviations from the initial representations. The respondent marketed luxury high end apartments, but, they have compromised even with the basic features, designs and quality to save costs. The structure, which has been constructed, on face of it is of extremely poor quality. The construction is totally unplanned, with sub-standard low grade defective and despicable construction quality.

10. The complainant submitted that the respondent has sold the project stating that it will be next landmark in luxury housing and will redefine the meaning of luxury, but the respondent has converted the project into a concrete jungle. There are no visible signs of alleged luxuries.
11. It is further submitted that the respondent has breached the fundamental term of the contract by inordinately delaying in delivery of the possession. The complainant was made to make advance deposit on the basis of information contained

in the brochure, which is false on face of it as is evident from the construction done at site so far.

12. The complainant submitted that the project is question did not match the specification as assured by the respondent and also poor quality of work was executed at site. The project and allied facilities was far away from completion and also cheated the complainant by concealing several facts and therefore, the complainant was constrained to withdraw from the said project vide email dated 22.07.2017 sent by the complainant to the respondent. The complainant had withdrawn from the said project and also cancelled the booking of said allotment with immediate effect and also requested to the respondent to refund the paid amount of Rs.29.89 lakhs along with interest.

13. The complainant submitted that the respondent had cancelled the allotment w.e.f. 23.03.2018 and also forfeited an amount of Rs.30,53,476/- paid by the complainant towards allotment of said apartment. It is stated that the complainant paid approx. 40% of the total sale consideration towards allotment of said apartment and the respondent had forfeited entire paid amount of Rs.30,53,476/- in violation of provisions/norms of The Real Estate (Regulation and

Development) Act, 2016 (“RERA”) and Haryana Real Estate (Regulation and Development) Rules, 2017 (“HRERA”).

14. Issues raised by the complainant

- I. Whether the respondent/ promoter made false representations about the project in question in order to induce the complainant to make a booking?
- II. Whether the respondent/ promoter is liable for unjustifiable delay in construction and development of the project in question?
- III. Whether the respondent/ promoter is liable to refund the amount deposited by the complainant along with interest @18% p.a.?
- IV. Whether the respondent has wrongfully forfeited the entire amounts of Rs.30,53,476/- paid by the complainant in violation of provisions “RERA” and “HRERA”?

15. Relief sought

- I. Direct the respondents to refund a sum of Rs. 30,53,476/- along with interest @ 18% per annum from the date when payments were made till realization of the amount in full.

Respondent's reply

16. The respondent submitted that the complaint filed by the complainant is baseless, vexatious and is untenable in the eyes of law, therefore the complaint deserves to be dismissed at the threshold.
17. The respondent submitted that the complainant, who is an allottee of apartment no. MW TW-B/12/1403 in the project 'M3M Woodshire' which has been developed at Sector-107, Gurugram Manesar Urban Complex, Gurugram, Haryana, is not entitled to seek and get any refund of the money from the answering respondent no. 1 for the following reasons:
- (a) The construction of the project was completed within the agreed time limit itself and possession of the apartment was offered to the complainant on 28th August, 2017.
 - (b) Occupancy certificate for the phase in which the apartment is situated was granted by the competent authority on 24th July, 2017.
 - (c) Possession of the apartment was offered to the complainant vide notice of offer of possession dated 28th August, 2017.

In view of the above reasons, as per the agreed contract in between the parties (apartment buyer agreement), it was the

contractual obligation of the complainant to come forward and take possession of the apartment after completing the possession related formalities. Instead of clearing the outstanding dues and other paper work to take possession of the apartment in terms of notice of offer of possession dated 28th August 2017 and perform its contractual obligations, the complainant had chosen to approach this hon'ble authority with a frivolous complaint only with a malafide intention to illegally enrich itself. Hence, the complainant is not entitled to get any reliefs as sought for from this hon'ble authority.

18. The respondent submitted that it is pertinent to mention here that as per section 19(10) of the RERA Act, it is the duty of the allottee to take physical possession within a period of two months of the issue of the occupation certificate, however, in the present case the complainant has not come forward to take physical possession of the apartment even after issuance of notice of possession. Thus, the complainant is not entitled to get any reliefs as sought for from this hon'ble authority.
19. The respondent submitted that the construction of the project and more particularly the tower/phase in which the apartment is situated has already been completed. Thus,

there was no delay in completing the project and hence, the complainant is not entitled for any reliefs.

20. The respondent submitted that even after the receipt of the offer of possession dated 28th August, 2017, the complainant was not ready and willing to take the possession of the apartment or clear the overdue payments and complete the possession formalities. Since the complainant failed to turn up and perform his contractual obligations by making the balance payment and also completing the possession related formalities, the answering respondent no. 1 issued a reminder letter dated 02nd November, 2017 again calling the complainant and advising the complainant to clear the overdue. Thereafter, inspite of follow ups since the complainant did not turn up, the answering respondent no. 1 issued a pre-cancellation notice again calling the complainant to clear the overdue and to take over the possession of the apartment.

21. The respondent submitted that even after the lapse of months of receiving the above communications/notices, complainant failed to comply with its obligations. In view of the above, finally the answering respondent no. 1 was constrained to issue an intimation of termination dated 23rd

March, 2018 to the complainant on account of the continued lapses, breaches and delays on part of the complainant thereby cancelling the allotment of the apartment in favour of the complainant and forfeited the earnest amount in exercise of the powers vested under the mutually agreed terms and conditions of the binding and enforceable apartment buyer's agreement.

22. The respondent submitted that the complainant is not a consumer. Complainant is a company registered under the Companies Act, 1956 and it had booked the apartment in question purely for commercial purpose as a speculative investor. Infact, the complainant is not an end user of the apartment. In view of the above reasons, the present complaint is not maintainable before this hon'ble authority. It is submitted that the complainant has invested in the apartment in question for commercial gains, i.e. to earn income by way of rent and/or re-sale of the property at an appreciated value. Since the investment has been made for the aforesaid purpose, it is for commercial purpose and as such the complainant is not consumer / end user. The complaint is liable to be dismissed on this ground alone.

23. The respondent submitted that the complainant is a chronic defaulter in making payment on time contrary to the agreed terms. It is submitted that on many occasions repeated demand letters and reminders were issued to the complainant for payment. It is submitted that as on date of the offer for possession, the complainant was liable to pay an amount of Rs.78,58,626/-. Till the date of offer for possession i.e. 28th August 2017, the complainant had paid Rs. 30,53,476/- out of total payable amount of Rs 75,07,626/-, which in other words means that the complainant was in default of 71.09 % of total amount payable even when the apartment was ready for occupation and possession. Even after repeated demands complainant was not ready to make the payment. On the contrary, the answering respondent no. 1 has already spent money towards the construction and development of the project including the apartment and the apartment was made ready for occupation and the offer for possession was issued to the complainant thereby calling upon the complainant to pay the outstanding amount and clear the possession related formalities.
24. The respondent submitted that a specific clause for referring disputes to arbitration is included in the said agreement vide clause 48 of the agreement. Hence, both the parties are

contractually bound by the above condition. In view of clause 48.1 of the agreement, the captioned complaint is barred. The complainant ought to have resorted to arbitration instead of having approached this hon'ble authority with the captioned complaint.

Determination of issues

After considering the facts submitted by the complainant, reply by the respondent and perusal of record on file, the authority decides seriatim the issues raised by the parties as under:

25. In respect of the **first issue** raised by the complainant, the authority is of the view that the complainant has failed to prove that the promoters made false representations about the project. No concrete proof in support of this contention has been furnished by the complainant.
26. In respect of **second third and fourth issue** raised by the complainant, an amount of Rs.30,53,476/- against a total sale consideration of Rs.95,37,738/- was deposited by the buyer-complainant under construction linked payment plan. However, before the occupation certificate was received on 24.07.2017, the respondent came out with the proposal w.r.t. signing of an addendum agreement and as per clause Recital G-1, nature of amendment, insertion between Recital-G and

H, it was decided to change over the payment plan from construction linked to deferred payment plan, vide which it was decided that in case of change over, an additional amount of Rs.19,12,400/- towards the financial charges for deferment of payment at the time of notice of possession of the apartment shall be paid and shall form a part of total consideration of apartment and the parties have agreed to the above. Later on, on 22.07.2017 the complainant-company came out for the cancellation/withdrawal from the project. However, if we go deep into the matter and agreement signed inter-se both the parties which have been signed voluntarily and of their own volition, no party can wriggle out at a later date on the exigency of their contractual obligations. Since the buyer company/complainant have withdrawn from the project only two days before the date of receipt of OC when the possession was to be delivered, as such, it cannot wriggle out of its lawful obligation in any manner. Besides this, amount has been forfeited by the respondent, as per terms and conditions of agreement, as such, at this juncture, no refund can be allowed.

27. The complainant made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above.

The complainant requested that necessary directions be issued to the promoter to comply with the provisions and fulfil obligation under section 37 of the Act.

28. The complainant reserves his right to seek compensation from the promoter for which he shall make separate application to the adjudicating officer, if required.

Findings and decision of the authority

29. **Jurisdiction of the authority-** The project “M3M Woodshire” is located in Sector 107, Gurugram. As the project in question is situated in planning area of Gurugram, therefore the authority has complete territorial jurisdiction vide notification no.1/92/2017-1TCP issued by Principal Secretary (Town and Country Planning) dated 14.12.2017 to entertain the present complaint. As the nature of the real estate project is commercial in nature so the authority has subject matter jurisdiction along with territorial jurisdiction.

The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as held in ***Simmi Sikka V/s M/s EMAAR MGF Land Ltd.*** leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

The authority is of the considered opinion that it has been held in a catena of judgments of the Hon'ble Supreme Court, particularly in National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause.

Further, in Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015, it was held that the arbitration clause in agreements between the complainants and builders could not circumscribe jurisdiction of a consumer. This view has been upheld by the Supreme Court ---in civil appeal no.23512-23513 of 2017 and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view.

30. An amount of Rs.30,53,476/- against a total sale consideration of Rs.95,37,738/- was deposited by the buyer-complainant under construction linked payment plan.

However, before the occupation certificate was received on 24.07.2017, the respondent came out with the proposal w.r.t. signing of an addendum agreement and as per clause Recital G-1, nature of amendment, insertion between Recital-G and H, it was decided to change over the payment plan from construction linked deferred payment plan, vide which it was decided that in case of change over, an additional amount of Rs.19,12,400/- towards the financial charges for deferment of payment at the time of notice of possession of the apartment shall be paid and shall form a part of total consideration of apartment and the parties have agreed to the above. Later on, on 22.07.2017 the complainant-company came out for the cancellation/withdrawal from the project. However, if we go deep into the matter and agreement signed inter-se both the parties which have been signed voluntarily and of their own volition, no party can wriggle out at a later date on the exigency of their contractual obligations. Since the buyer company/complainant have withdrawn from the project only two days before the date of receipt of OC when the possession was to be delivered, as such, it cannot wriggle out of its lawful

obligation in any manner. Besides this, amount has been forfeited by the respondent, as per terms and conditions of agreement, as such, at this juncture, no refund can be allowed.

31. The complaint is disposed of accordingly.
32. The order is pronounced.
33. Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 12.03.2019

Judgement Uploaded on 29.05.2019

HARERA
GURUGRAM