BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 2012 of 2021
Date of decision : 05.05.2022

M/s Duc Toan Medical (I) Pvt. Ltd.
Address:- C-1/713-E, LGF, Palam Extension, Sector-07, Dwarka, New Delhi-110075 **Complainant**

Versus

M3M India Pvt. Ltd.
Registered address: Paras Twin Towers, Tower-B, 6th Floor, Golf course road, Sector-54, Gurugram-122002 **Respondent**

CORAM:
Dr. K.K Khandelwal **Chairman**
Shri Vijay Kumar Goyal **Member**

APPEARANCE:
Shri Sanjay Yadav Advocate for the complainant
Ms. Shriya Takkar Advocate for the respondent

ORDER

1. The present complaint dated 09.04.2021 has been filed by the complainant 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 thereunder or to the allottee as per the agreement for sale executed inter se.

A. Project and unit 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, delay period, if any, have been detailed in the following tabular form:

Sr. No.	Particulars	Details
1.	Name of the project	M3M Cosmopolitan, sector 66
2.	Land area	2.943 acres
3.	Nature of the project	Commercial complex
4	DTCP License no.	43 of 2009 dated 01.08.2009 valid upto
5.	Building Plan approved on	08.10.2011 Page 3 of the Promoter information
6.	Rera registration	N. A
7.	OC received on	18.11.2016 (Page 159 of the reply)
8.	Unit no.	COS-R-GL-BLK-3-01, Ground floor
9.	Unit area	656.6 sq. ft.
10.	Date of allotment	04.02.2015 (Page 96 of the reply)
11.	Date of builder buyer agreement	24.03.2015 [page 104 of the reply]
12.	Possession clause	**15. Possession of the Commercial Unit**

		15.1 The company *based upon its present plans and estimates, and subject to all just exceptions, proposes to hand over possession the said commercial unit within a period of* ***thirty-six*** *36 months from the date of approval of building plans of the commercial complex or the date of execution of this agreement whichever is later. Should the possession of the commercial unit not be given within the committed period due to any reason (except delays mentioned in clause 15.4 below) the allottee agrees to extension of 180 days after the expiry of the commitment period for handing over the commercial unit.* ***(Emphasis supplied)***
13.	Due date of possession	24.03.2018 [The date of approved building plans i.e., 08.10.2011 and the date of BBA i.e., 24.03.2015. So, the due date of possession is calculated from the date of execution of BBA i.e., 24.03.2015 which is later than the date of building plan]
14.	Total sale consideration	Rs. 1,64,26,029/- (As per payment plan at page 79 of the complaint)
15.	Amount paid by the complainant	Rs.47,14,147/- (As per SOA, page 165 of the reply)

16.	Notice of offer of possession	21.11.2016 [Page 163 of the reply]
	Pre cancellation notice	25.11.2015 [page 158 of the reply]
	Pre cancellation notice- II	16.08.2017 [page 171 of the reply]
17.	Intimation of termination	19.11.2018 (Page 172 of the reply)

B. Facts of the complaint

3. The complainant made the following submissions in the complaint:

   i. That the respondent detailed the complainant about the project through a brochure. Under the brochure, the respondent represented to the complainant that the project will provide a unique healthcare experience along with other related facilities. It is submitted that the respondent showed to the complainant that the project will be a one stop destination wherein all the facilities as required in the medical field will be available under one roof. The respondent informed the complainant that the project will have special units for medical practitioners, diagnostic labs, pharmacy etc. the complainant was further informed that the last five floors in a building of 12 floors of the project will be solely dedicated to medical field which will approximately house more than 80 medical suites for medical practitioners.

ii. Since, the complainant is having retail pharmacy stores, the respondent got interested in the project as it was directly related to the business interest of the complainant. Further, the complainant was taken through the layout plans, floor plan and structural design of the project. That in the abovesaid layout plans of the project, on the ground floor, there was a unit/ shop solely dedicated for Pharmacy. Further, the USP of the said unit was that there would be a window which would open towards the atrium/ waiting hall, where the patients would wait for their turn/ appointments with the doctors. Thus, those patients would have easy access to pharmacy shop and get their prescription entertained, through the said window, without having to go through any hassle. It is submitted that subsequent to the representations advanced by the respondent, the complainant before finalizing to invest in the project by buying the unit situated in the ground floor, the complainant inspected the site of the project and discovered that the contours of the unit/ shop were made ready deviated from the layout plans. The complainant was made aware about the area of the unit viz. 656.6 Sq. Ft., which turned out to be a false representation as mentioned below.

iii. It is submitted that pursuant to the representations of the respondent, the complainant, through their authorized signatory, applied in the aforesaid project vide their application for allotment dated 06.01.2015. Further, on 07.01.2015, the complainant paid a sum of Rs. 4,82,123/- via cheque no. 632169, drawn on corporation bank.

iv. The respondent, in response to the complainant's application for allotment dated 06.01.2015, issued provisional allotment letter wherein the respondent provisionally allotted commercial unit no. **COS/R/GL/BLK-3/01, 656.6 sq. ft.** further, the respondent directed the complainant to pay a sum of Rs. 10,68,901/-, by 06.02.2015. The complainant and the respondent, on 24.03.2015, executed a commercial unit buyer's agreement in respect of commercial unit no. **COS/R/GL/BLK-3/01, 656.6 SQ. FT.,** for a total consideration of Rs. 1,64,26,029.80/-. the basic sale price was Rs. 23,040/- per sq. ft., amounting to a total of Rs. 1,51,28,064/-. That the respondent, on 01.07.2015, served a letter to the complainant, inviting the complainant to visit the project site as the project site was nearing its completion stage and further, informed the complainant that the possession will be delivered within next few months. That the respondent served two reminder letters dated 14.07.2015 and 18.08.2015, to the complainant. the respondent, vide the reminder letter dated 14.07.2015, directed the complainant to make a payment of Rs. 1591472/-, and further, vide reminder letter dated 18.08.2015, directed the complainant to make a payment of Rs. 1576344/-, within 15 days from the date of the respective letters.

V. That the despite deviating from the representations, layout plan and brochures of the project, the respondent, pursuant to their aforesaid reminder letters, unabashedly served a pre-cancellation notice dated 25.11.2015, to the complainant directing him to make a payment of Rs. 18,88,044/-, within 15 days from the date

of this letter, otherwise, the respondent shall be constrained to cancel the provisional allotment of the aforesaid unit.

vi. That the complainant was in receipt of a letter notice of possession, dated 21.11.2016, wherein the complainant was informed that the construction of the unit has been completed and is ready for possession. Further, it is submitted that the complainant was informed that the area of the unit has been revised and increased to 913.37 sq. ft. from 656.6 sq. ft. and, the final dues payable was calculated on the revised area of the unit. It is pertinent to mention here that the commercial buyer's agreement was executed for 656.6 sq. ft. and since, the execution till the receipt of the present notice of possession, the complainant was never informed about the arbitrary increase in the area of the unit. Further, before finalizing the unit, the complainant, as mentioned above, inspected the site and found out that the contours of the unit were ready. It is surprising to learn that how the area of a unit, which was already ready, has been increased in such a clandestine manner. There was no communication from the respondent's side for the same. And this act patently proves that the respondent has deviated from the layout plan in a huge manner.

vii. During the course of the abovesaid discourse, the complainant was in receipt of a reminder letter dated 13.02.2017, issued by the respondent wherein the respondent informed the complainant that the present letter is in furtherance of the **possession letter dated 21.11.2016,** under which the complainant was required to take the possession of the unit on or before **20.12.2016,** wherein

the complainant was directed to make the outstanding payment of Rs. 19,952,174/- and of stamp duty charges amounting to Rs. 1,111,700/-, within 15 days from the date of this letter. it is further submitted that the perversity of the respondent is evident from the said letter as the agreement executed in respect of the unit was of 656.6 sq. ft. and in the said letter the demand raised by the respondent was in respect of 913.37 sq. ft. The said act on the part of the respondent is ex-facie mala-fide and the respondent clandestinely raised the area of the unit without intimating the complainant about the same, and the said act, is in clear contravention of the brochures, layout plan and pertinently the commercial buyer's agreement.

viii. That the complainant, as mentioned above, before finalizing the deal visited the unit site, and, subsequently, executed commercial buyer's agreement in respect of the unit, measuring 656.6 sq. ft. to the utter shock of the complainant, the respondent arbitrarily and clandestinely increased the area of the unit from 656.6 sq. ft. to 913.37 sq. ft. and consequently, raised aggravated demands as against those mentioned in the agreement. The complainant represented his grievance to the respondent through his letter dated 21.03.2017. Further, the perversity of the respondent demeanour became patently explicit as the respondent served another pre-cancellation notice dated 16.08.2017, wherein the respondent directed the complainant to make a payment of Rs. 22,78,1,430/, within 15 days from the date of this letter. That the complainant received a blow at the hands of the respondent, on 19.11.2018, wherein the respondent had served a letter

intimation of termination to the complainant, informing him that the provisional allotment of the aforesaid unit has been terminated/ cancelled.

ix. That vide the aforesaid intimidation of termination, the respondent illegally forfeited an amount of Rs. 47,14,147/- which was paid by the complainant. The arbitrary conduct of the respondent is explicit from this act that despite being in violation of the advertisement, brochure and the layout plans, the respondent illegally forfeited the aforesaid amount. that apart, the complainant wrote several letters to the respondent about their deviation in the plan, and the respondent even acknowledging them never acted upon it, rather duped the complainant for their own wrongdoing. That the perversity of the respondent is explicit from their conduct that even after the termination of provisional allotment of the unit, the complainant was served a maintenance bill and electricity bill, dated 07.01.2019 and 19.02.2019 respectively. That the unit which was supposed to be constructed as per the advertisements, brochures and other layout plans, turned out to be a hoax, thus, the sole purpose of buying the unit got defeated, and therefore, the complainant never took the possession of the unit, despite that the complainant was burdened with the said bills'. It is evident that the complainant was cheated from every corner possible. That as the situation turned out to be a complete fiasco as described above, the complainant, while he was pursuing the respondent about their grievances, replied to the respondent's letter intimation of termination dated, 19.11.2018, vide complainant's letter dated

02.03.2019, wherein the complainant informed the respondent that despite countless reminders through written and verbal communication, the respondent has miserably failed to fulfil the representations which were promised at the time of execution of the commercial's buyers agreement.

C. Relief sought by the complainant

4. The complainant is seeking the following relief:

i. Refund the entire amount along with interest.

D. Reply filed by the respondent

5. The respondent had contested the complaint on the following grounds:

i. That the complaint filed by the complainant is baseless, vexatious and is not tenable in the eyes of law and therefore the complaint deserves to be dismissed at the very threshold. That the present complaint is not maintainable as this hon'ble adjudicating officer has no jurisdiction to entertain the present complaint. That the complainants have failed to make out a case under section 12,14,18 and 19 of the RERA Act 2016 and thus the complaint is liable to be dismissed at the very threshold.

ii. The complaint relating to cancellation of allotment by a promoter, is specifically reserved for consideration by the hon'ble authority under Section 11(5) of the RERA Act. That Section 11(5) is reproduced herein below for the ready reference:

> *"11(5) The promoter may cancel the allotment only in terms of the agreement for sale:*
>
> *Provided that the allottee may approach the Authority for relief, if he is aggrieved by such cancellation and such cancellation is not in accordance with the terms of the*

agreement for sale, unilateral and without any sufficient cause."

iii. That the complainant applied for the allotment rights in a commercial unit in the commercial complex m3m cosmopolitan' which has been developed at sector-66, village Maidawas, Gurugram, Haryana vide application form dated 06.01.2015. copy of the application form dated 06.01.2015. That thereafter the complainant was allotted a commercial unit/shop bearing no. COS/R/GL/BLK-3/01 656.6 sq.ft. vide allotment letter dated 04.02.2015. It is submitted that the cost of the property for an area measuring 656.6 sq. ft. was Rs.1,64,26,029.80/- plus taxes and other charges. it is submitted that the respondent vide the said letter dated 04.02.2015 had also requested the complainant to clear the dues payable within 30 days of booking. It is submitted that all the demands were raised strictly in accordance with the payment plan opted by the complainant.

iv. That thereafter the commercial unit buyer's agreement was executed between the parties on 24.03.2015. copy of the commercial unit buyer's agreement dated 24.03.2015. That the complainant company is a chronic defaulter as it has defaulted in making timely payments to the respondent company. That a payment request letter dated 16.06.2015 was issued requesting the complainant to pay the second instalment that was due to be paid within 6 months of booking.

v. That since the complainant failed to make timely payment a reminder letter dated 14.07.2015 was sent to the complainant requesting them to clear its dues. That another reminder letter

dated 18.08.2015 was sent to the complainant for the payment of the above-mentioned dues. That the complainant did not respond to the reminder letter and neither did it make the payment and hence a pre-cancellation notice dated 25.11.2015 was issued to the complainant. That the complainant finally made the payment vide cheque dated 31.12.2015. That the complainant had requested for complete waiver of delayed interest. That accordingly the respondent acceded to the request of the complainant and waived off the delayed interest.

vi. The respondent completed the construction and thereafter applied for the occupancy certificate (OC) on 15.10.2015 with respect to the tower in which the unit was situated with the statutory authorities and the same was granted by the authorities only on 18.11.2016 i.e. after a period of almost 13 months. That this delay of the competent authorities in giving OC cannot be attributed in considering the delay in delivering the possession of the apartment, since on the day on which the OC was applied on, the unit was complete in all respects. It is pertinent to state that the Occupation Certificate with respect to the tower where the unit was situated was only granted after inspections by the relevant authorities and after ascertaining that the construction was completed in all respect in accordance with the approved plans and that the apartment was in a habitable and livable condition. That the construction was complete and the OC for the said project was received on 18.11.2016. It is submitted that the offer of possession was sent to the complainant vide letter dated 21.11.2016.

vii. That thereafter reminder letters dated 13.02.2017 and 24.03.2017 were issued by the respondent to the complainant thereby requesting it to clear its outstanding dues and take possession of the unit. That thereafter Pre-Cancellation notice dated 16.08.2017 was issued to the complainant thereby intimating the complainant that if the outstanding dues are not cleared within 15 days, then the booking of unit will be cancelled. Thus, the respondent being left with no other alternative issued intimation of termination dated 19.11.2018 upon the complainant and accordingly, cancelled the apartment allotted in favour of the complainant.

viii. That the buyer's agreement was entered into between the parties and, as such, the parties are bound by the terms and conditions mentioned in the said agreement. The said agreement was duly signed by complainant after properly understanding each and every clause contained in the agreement. complainant was neither forced nor influenced by the opposite parties to sign the said agreement. It was complainant who after understanding the clauses signed the said agreement in his complete senses.

ix. That it is trite law that the terms of the agreement are binding between the parties. The hon'ble supreme court in the case of **"Bharti Knitting Co. vs. DHL Worldwide Courier (1996) 4 SCC 704"** observed that that a person who signs a document containing contractual terms is normally bound by them even though he has not read them, and even though he is ignorant of their precise legal effect. It is seen that when a person signs a document which contains certain contractual terms, then

normally parties are bound by such contract; it is for the party to establish exception in a suit. When a party to the contract disputes the binding nature of the singed document, it is for him or her to prove the terms in the contract or circumstances in which he or she came to sign the documents. That the hon'ble supreme court in the case of **"Bihar State Electricity Board, Patna and Ors. Vs. Green Rubber Industries and Ors, AIR (1990) SC 699"** held that the contract, which frequently contains many conditions, is presented for acceptance and is not open to discussion. It is settled law that a person who signs a document which contains contractual terms is normally bound by them even though he has not read them, even though he is ignorant of the precise legal effect.

x. That the complainant was duly informed about the schedule a possession as per clause 15.1 and 15.2 of the commercial unit buyers agreement entered between the complaint and the respondent. For the ready references of this honourable adjudicating officer of relevant clauses are reproduced here in below:

"15.1 The Company, based upon its present plans and estimates, and subject to all exceptions, proposes to handover possession of the Commercial Unit within a period of Thirty-Six (36) months from the date of approval of building plans of the commercial complex or the date of execution of this Agreement whichever is later (Commitment Period). Should the possession of the Commercial Unit not be given within the time specified above, the allottee(s) agree/s to provide the Company with an extension of 180 days ("Grace Period") after the expiry of the Commitment Period. In case of failure of the Allottee to make timely payments of any of the instalments as per the payment plan, along with other charges and dues as applicable or

otherwise payable in accordance with the Payment Plan or as per the demands raised by the Company from time to time in this respect, despite acceptance of delayed payment along with interest or any failure on the part of the Allottee to abide by the terms and conditions of this Agreement, the time periods mentioned in this clause shall not be binding upon the Company with respect to the handing over the possession of the commercial Unit.

x. The buyer's agreement was executed between the parties on 24.03.2015 and the due date of possession comes out to be 24.09.2018. The date of approval of the building plans was granted before the commercial unit buyers' agreement was executed between the parties on 24.03.2015 and the possession date became due on 24.09.2018. That the possession of the commercial unit was offered to the complainant vide letter dated 21.11.2016. That the complainant defaulted in making timely payments. That the complainant has failed to comply with the contractual obligations cast upon it under the commercial unit buyer's agreement. That the complainant failed to take the possession of the said unit since November 2016 and no just and valid reason held back its contractual obligations and in fact defaulted in the due and timely performance of its contractual obligations.

It is submitted that the respondent has incurred various losses/damages on account of the breach of the terms of the allotment and agreement by the complainant, which the complainant is liable to pay as per the terms of the agreement. It is submitted that a specific clause for referring disputes to arbitration is included in the said agreement vide clause 48 of the agreement which is extracted hereunder:

"47.1- Any dispute connected or arising out of this Agreement or touching upon or in relation to terms of this Agreement including the interpretation and validity of the terms thereof

and the respective rights and obligations of the Parties hereto shall be resolved through the process of arbitration....."

Hence, both the parties are contractually bound by the above condition. In view of clause 47.1 of the agreement, the captioned complaint is barred.

E. Jurisdiction of the authority

6. 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

7. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana 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

8. Section 11(4)(a) of the Act 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.

9. 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.

10. 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:

"86. 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 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."

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

12. 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. Versus Union of India and others. (supra)***, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

F. Findings on the objections raised by the respondent

F.I objection regarding agreements contains an arbitration clause which refers to the dispute resolution system mentioned in agreement

13. The agreement to sell entered into between the two side on 24.03.2015 contains a clause 47 relating to dispute resolution between the parties. The clause reads as under: -

> *47.1 Any dispute connected or arising out of this agreement or touching upon or in relation to the terms of this agreement including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties hereto shall be resolved through the process of arbitration. The arbitration proceedings shall be governed by the provisions of the arbitration and conciliation act 1996 or any stator amendments/modifications to be appointed by the company, whose decision shall be final and binding upon the parties hereto. .....*

14. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Also, section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts

reliance on 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. Therefore, by applying same analogy the presence of arbitration clause could not be construed to take away the jurisdiction of the authority.

15. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017***, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainant and builders could not circumscribe the jurisdiction of a consumer. The relevant paras are reproduced below:

> *"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act"). Section 79 of the said Act reads as follows: -*
>
> *"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."*
>
> *It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellant Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are*

empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.

...

56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind of Agreements between the Complainant and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."

16. While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the builder buyer agreement, the hon'ble Supreme Court **in case titled as M/s Emaar MGF Land Ltd. V. Aftab Singh in revision petition no. 2629-30/2018 in civil appeal no. 23512-23513 of 2017 decided on 10.12.2018** has upheld the aforesaid judgement of NCDRC 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. The relevant paras are of the judgement passed by the Supreme Court is reproduced below:

"25. This Court in the series of judgments as noticed above considered the provisions of Consumer Protection Act, 1986 as well as Arbitration Act, 1996 and laid down that complaint under Consumer Protection Act being a special remedy, despite there being an arbitration agreement the proceedings before Consumer Forum have to go on and no error committed by Consumer Forum on rejecting the application. There is reason for not interjecting proceedings under Consumer Protection Act on the strength an arbitration agreement by Act, 1996. The remedy under Consumer Protection Act is a remedy provided to a consumer when there is a defect in any goods or services. The complaint means any allegation in writing made by a complainant has also been explained in Section 2(c) of the Act. The remedy under the Consumer Protection Act is confined to complaint by consumer as defined under the Act for defect or deficiencies caused by a service provider, the cheap and a quick remedy has been provided to the consumer which is the object and purpose of the Act as noticed above."

17. Therefore, in view of the above judgements and considering the provision of the Act, the authority is of the view that complainant is well within their rights to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and RERA Act, 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily.

18. **Relief sought by the complainant:**

    i. Refund the entire amount along with interest.

19. In the present complaint, the complainant intends to withdraw from the project and is seeking return of the amount paid by them in respect of subject apartment along with interest at the prescribed rate as provided under section 18(1) of the Act. 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 prescribed." *(Emphasis supplied)*

20. On consideration of the documents available on record and submission by both the parties, the authority is of the view that the allottee has failed to abide by the terms of agreement by not making the payments in timely manner as per the payment plan opted by him, the complainant as per the statement of account paid an amount of Rs. 47,14,147/- out of the total amount of Rs. 1,64,26,029/-. The complainant failed to pay the remaining amount as per the schedule of payment and which led to issuance of notice of termination by the respondent on 19.11.2018. Now the question before the authority is whether this cancellation is valid?

21. As per clause 7.1 of the agreement, the allottee was liable to pay the Installment as per payment plan opted by the complainant. Clause 7.1 of the agreement is reproduced under for ready reference:

> *Clause 7.1 The obligation to make timely payment of every Installment of the total consideration in accordance with the payment plan along with payment of other charges such as applicable stamp duty, registration fee, IFMS and other charges deposits as stipulated under this agreement or that may otherwise be payable on or before the due date or as and when demand by the company as the case may be, and also to discharged all others obligation under this agreement shall be the essence of this agreement.*

22. The respondent had issue various reminders pre-cancellation letter and last and final opportunity letter to the complainant. That the OC for the unit of the complainant was granted on 18.11.2016 that upon receipt of the OC the respondent issued the notice of possession dated 21.11.2016. The respondent was obtained OC from the competent

authority thereafter issuing offer of possession letter dated 21.112016 it is a valid offer of possession in the eyes of law. The respondent cancelled the unit of the complainant with adequate notices. Thus, the cancellation of unit is valid.

23. The counsel for the complainant brought the attention of the authority towards advertisement and also showed brochure pertaining to the said project issued by the respondent showing that M3M Cosmo plus is unique business opportunity for doctors and medical professional and in pursuant to that complainant invested in the project which was shown as a pharmacy in the said project. Further the respondent offered the possession of the said unit which was completely deviated from what was shown and promised. The said unit was built in a routine commercial fashion as the project failed to invite medical practitioners . Also the respondent arbitrarily increased the area of the unit from 656.6 sq.ft. to 913.37 sq.ft. and raised escalated demand pertaining to the unit. When the said devotion was brought to the notice of the respondent, the concerned official of the respondent started to convince the complaint into another deals which was of no use to the complainant. The increase in area is around 39.17 percent. It is not understandable as when the unit was sold , structure was already completed and the area details were already known to the promoter. The promoter can not force the allottee to accept abnormal increase in area and also unit which was sold on different promises then the actual existing on ground.

24. The complainant came to know increase in area and other ground realities only when he received offer of possession dated 21.11.2016 and after this on 21.3.2017 the complainant sent a detailed letter

narrating various acts of omission and commission committed by the respondent. Without responding to the objections of the complainant, the respondent sent pre-cancellation notice on 16.8.2017 and cancellation of the unit on 19.11.2018.

The promoter is willing to offer the unit of the same area and on the same floor as has been mentioned in the allotment letter but the counsel for the complainant has made submission that the complainant is not interested now in taking the unit.

25. 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."*

26. The rule 15 of the rules has determined the prescribed rate of interest and it provides that 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%. 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., 05.05.2022 is 7.40%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.40%.

G. Directions of the authority

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

    i. Keeping in view the aforesaid legal provisions, the respondent is directed to refund the balance amount of the unit by deducting the earnest money which shall not exceed the 10% of the sale consideration of the said unit as per statement of account and shall return the balance amount to the complainant within a period of 90 days from the date of this order. The refund should have been made on the date of termination i.e., 19.11.2018, accordingly the interest at the prescribed rate i.e., 9.40% is allowed on the balance amount from the date of termination to date of actual refund.

28. Complaint stands disposed of.

29. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 05.05.2022