


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

Complaint no. :	541/2019
Date of filing complaint:	05.02.2019
First date of hearing:	16.09.2019
Date of decision :	17.02.2023

1. Goutam Mitra 2. Debopriya Mitra R/O: A-30/A, Chittaranjan Park, New Delhi-110019	Complainants
 Versus	
M three m India Pvt Ltd R/O: M3m India Pvt. Ltd., Paras Twin Towers, Tower- B, 6th Floor, Golf Course Road, Gurugram-122002, Haryana	Respondent

CORAM:	
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Sh. Amit Kumar (Advocate)	Complainants
Sh. Shriya Takkar (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 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 provisions of

the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

2. The particulars of the project, the details of sale consideration, the amount paid by the complainants, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Name of the project	"M3M The Marina", sector 68 , Gurugram , Haryana
2.	Nature of the project	Residential group housing colony
3.	DTCP license no. and validity status	93 of 2014 dated 31.07.2012 valid up to 30.07.2020
4.	RERA Registered/ not registered	Registered vide no. 57 a of 2017
5.	RERA registration valid up to	30.11.2022
6.	Allotment letter	02.05.2015 (Page 88 of complaint)
7.	Unit no.	MR TW-03/1901 (Page no. 16 of complaint)
8.	Unit measuring	1304 sq. ft. (Page no. 16 of complaint)
9.	Date of execution of apartment buyer agreement	Not executed
10.	Possession clause	46. To handover the possession of the apartment within a period of 48 months from the date of commencement of construction or

		date of execution whichever is later. (Page 48 of the reply).
11.	Due date	02.05.2019 Calculated by 48 months from the date of allotment letter being later. (Inadvertently mentioned in the proceedings of the day as 11.01.2021)
12.	Total sale consideration	Rs. 1,13,83,060/- (Page 88 of the complaint)
13.	Amount paid	Rs.5,00,000/-
14.	Occupation Certificate	14.09.2020
15.	Offer of possession	Not offered
16.	Payment plan	Construction linked payment plan (Page 15 of complaint)
17.	Reminder letter	08.07.2015, 25.08.2015, 11.02.2017, 16.03.2017, 15.06.2017, 29.08.2017 09.04.2018
18.	Pre cancellation	08.09.2015, 04.10.2016, 11.01.2017, 15.07.2017, 09.04.2018
19.	Termination letter	30.04.2018

B. Facts of the complaint:

3. That in the year 2015 the complainant no. 1 was desirous of purchasing Two properties in a gated society in Gurugram for his son and daughter and approached the respondent to explore their offered options through its channel partner, Brick By Brick, having its office at suite No. 18, INHWA business Centre, Iris Tech Park,

Sohna Road, Gurugram Haryana, in their Housing Project namely M3M The Marina' located in Sector-68, Gurugram, Haryana, India.

4. That the complainants thereafter booked a unit no. MR TW-03/1901 with the respondent in the "M3M the Marina" in Sector 68, Gurugram, Haryana consisting of super area of 1304 square feet wide their application form dated 25.04.2015. It is submitted that at the time of booking the above said unit, the complainants paid an amount of Rs. 5,00,000/- vide Cheque dated 25.04.2015 drawn on HDFC bank to the respondent towards the provisional booking of the said unit.
5. That it is submitted that the said application form contained some broad terms and conditions of the agreement to be executed between the parties. On being enquired by the complainants, the respondent's officials informed the complainant that these are terms and condition of the agreement, which will be executed between the parties and the respondent would provide the copy of the said application form to the complainant once the cheque given by the complainants is encashed presentation for the perusal and they can deliberate upon the same only thereafter, to which the complainants agreed.
6. That the said cheque was duly encashed by the respondent. However, the copy of the application form which was got signed at the time of accepting the cheque from the complainants, was not supplied to the complainants for their perusal of the terms and conditions contained in the said application form till date. That thereafter in the month of June 2015 the respondent sent an office copy of apartment buyer's agreement to be signed by the

complainants and asked the complainants handover the same to the respondent.

7. That on going through the terms and conditions contained in the said agreement, the complainants found some of the clauses are not agreeable and communicated the same to the respondent vide email dated 21.05.2015 sent by the complainant number 1. The complainant number 2 specifically put some queries regarding the subvention scheme to the respondent as detailed in the said email dated 21.05.2015.
8. That the respondent vide their email dated 27.05.2015 sent an email w.r.t. the queries of the complainants, However the respondent remained evasive regarding the few queries sent to the respondent in the email dated 21.05. 2015. It is submitted that the respondent also did not provide the copies of the documents asked for, by the complainants whereas the respondent mentioned in the said email that documents are attached in the email sent by the respondent.
9. That the respondent informed the complainants that they may clarify the query with the TATA Capital Housing Finance and provided a contact name by the name of Mr. Jitendra Bhatia from the office of the Financier. The complainants contacted the said contact person from the financier and also visited their office for better understanding of their queries as the same were not answered by the respondent to their satisfaction.
10. That shockingly, the financier's response to the queries of the complainants was contrary to the response received by the complainants from the respondent and also the queries which were to be addressed by the respondent were still remained unanswered and evasive form the side of the respondent. It is submitted that the

complainants herein duly informed the response received by the complainant from the financier and again put the queries to the respondent for clarification through an email.

11. That upon major disagreement w.r.t. the response of the respondent and non-clarity of the terms and conditions of the proposed BBA the complainants informed the respondent to cancel the apartment that had been booked by the complainants under the subvention scheme i.e. the said unit being MR TW-03/1901 and requested the respondent to adjust the said amount paid at the time of booking of the said unit to the other apartment booked by the complainants under the possession linked plan, vide email dated 18.06.2015.
12. That the respondent did not send any response to the said email dated 18.06.2015., However sent a demand notice to the complainants demanding the outstanding dues to which the complainants sent an email dated 19.10.2016 reminding them of outstanding issues which were not addressed by the respondent and their request for refund and adjusting the amount paid for the said unit by the complainant.
13. That the respondent kept the said issue pending on one pretext or the other only to send the letter dated 30.04.2018, with the subject intimation of termination, was sent to the complainant number 2. It is submitted that vide said impugned letter dated 30.04.018 the respondent chose to dishonestly forfeit the amount paid by the complainants at the time of booking the said unit.
14. That till date for the want of agreeability of both the parties with regard to clauses contained in the said agreement and also no concluded contract has been executed between the parties and therefore no amount whatsoever can be forfeited by the respondent

as the respondent cannot force the complainants herein to sign the apartment buyer's agreement containing the clauses not acceptable to the complainants and which was duly communicated to the respondent herein.

15. That without prejudice to the rights of the complainants as there is no concluding contract between the complainant and the respondent. It is submitted with regard to Earnest Money that it must be given at the moment at which the contract is concluded and that it represents a guarantee that the contract will be fulfilled, or, in other words, 'earnest' is given to bind the contract. The Complainant only paid Rs. 5,00,000 / - towards Booking Amount on 25.04.2015 vide Cheque No. 179135 drawn on HDFC Bank.
16. That it is further submitted by the Complainant that the underlying principle enshrined in Section 74 is that a mere breach of contract by a defaulting party would not entitle other side to claim damages unless said party has in fact suffered damages because of such breach and has further pleaded them and has proved them. Once there is no pleading of loss suffered by a seller under an agreement to sell, then large amounts cannot be forfeited though so entitled to a seller under a clause of an agreement to sell/contract entitling forfeiture of 'earnest money because what is forfeited is towards loss caused, and that except a nominal amount being allowed to be forfeited as earnest money, any forfeiture of any amount, which is not a nominal amount, can only be towards loss if suffered by the seller.
17. It is submitted that the terms & conditions pertaining to Forfeiture and Earnest Money as mentioned in the application form signed by the complainants, were first supplied to thr Complainants only after

accepting a large sum of Rs. 5,00,000/- (Rupees Twelve Lacs Only) and that it is unrealistic to expect a middle class man to forgo his claim to the aforesaid amount even when he is faced with a contract with suspect and uneasy stipulations.

18. That the respondent therefore, is liable to refund the an amount of Rs. 5,00,000/- along with prescribed rate of interest per annum from the receipt till the date of realisation. The interest is also being claimed by way of damages, since the complainant has used and enjoyed the monies which legally belong to the complainant and has either earned interest thereon or has saved interest and has additionally denied the complainant its opportunity to earn interest on the said amount and has exposed the complainant to interest loss to that extent. Thus, the complainant is entitled in the manner stated above, to the interest on the amount till the date of realisation of the amount claim.

C. Relief sought by the complainant:

19. The complainant has sought the following relief(s):

- i. Direct the respondent to refund the amount of Rs. 5,00,000/- to the complainants along with interest at the prescribed rate.

D. Reply by respondent:

The respondent-builder by way of written reply made the following submissions:

20. That the complainant no.1 i.e. Mr. Goutam Mitra is not the allottee of the unit- MR TW-03/1901. That the application form and the allotment letter nowhere state the name of complainant no. 1 i.e. Goutam Mitra as an Allottee. That the unit- MR TW-03/1901 had

been booked by the complainant No. 2 i.e. Debopriya Mitra. That the application form for the booking of the unit stands solely in the name of complainant No. 2 i.e. Debopriya Mitra and further the allotment of the unit was also solely in the name of Ms. Debopriya Mitra, which has never been objected to by the complainant No. 1, i.e. Goutam Mitra. That in lieu of the cooking amount paid, the respondent issued receipt in the name of complainant No. 2 solely.

21. That it is thus submitted that a perusal of Section 11(5) of the RERA Act does not pose any difficulty as it empowers a promoter to cancel an allotment in terms of the agreement for sale and at the same time leaves no ambiguity that an allottee who seeks the setting aside of an order of cancellation of allotment has to approach "the Authority", which alone shall have the power to adjudicate a complaint/application alleging cancellation of an allotment.
22. That the present complaint has been filed with malafide intentions to wriggle out of contractual obligations as there is no cause of action for the relief sought has been made out in the present Complaint. It is submitted that the complainant No.2 had submitted an application for allotment dated 25.04.2015 for booking / allotment of a unit having super area 1304 sq. ft. in the project M3M Marina, a residential project of the respondent company. It is submitted that the complainant no.2 had signed and submitted the application form after duly understanding all the clauses stipulated under the application form. The complainant No. 2 along with the application form also tendered a sum of Rs. 5,00,000/- towards the confirmation of her booking vide cheque dated 28.04.2015, accordingly a receipt dated 28.04.2015 was issued by the respondent to complainant No.2 . That in due consideration of the complainant no. 2's commitment

to make timely payments, unit no. MR TW-03/1901 in M3M Marina, situated in Sector 68, Gurugram was provisionally allotted to complainant No.2 vide allotment letter dated 02.05.2015. It is submitted that the complainant no.2 being an allottee, on her own free will and after due understanding of the legal import and effect had opted for a specific payment plan.

23. That it is submitted that in furtherance of the allotment, the respondent company had sent the apartment buyers agreement to complainant no.2 for due execution at her end along with covering letter dated 03.06.2015. It is submitted that the terms and conditions contained in the application form dated 25.04.2015 were the indicative terms and conditions of the agreement to be executed between the parties. It is pertinent to state that the complainant no.2 for the reasons best known to her did not perform her contractual obligation and did not execute the apartment buyer's agreement and the respondent was constrained to issue reminders requesting the complainant no.2 to comply her obligation and execute the agreement and make further payments. It is submitted that despite repeated follow ups and communications by the respondent to complainant no.2, she never came forward and complied further with her obligations and therefore the respondent was constrained to issue a pre-cancellation notice dated 09.04.2018. Even after the issuance of the pre-cancellation notice, the complainant never came forward to clear her outstanding dues and execute the Agreement, pursuant to which the respondent was constrained to issue the termination letter dated 30.04.2018.

24. That the complainant is falsely claiming refund of the amount paid.

It is pertinent to mention that instead of performing her obligations

to come forward to execute the buyer's agreement and make further payments and execute all requisite documents, the complainant chose to raise false and frivolous allegations. It is pertinent to mention herein that the complainant No. 2 was well aware about the fact that in the event of failure on her part to comply with the terms and conditions of allotment pursuant to the application form, the respondent is entitled to terminate the provisional allotment and forfeit the amount paid by the complainant.

25. That the prayer as sought for by the complainant is directly contrary to the application form and the allotment Letter. It is further submitted that if refund is allowed, other home-buyers/ customers who have invested their hard earned money in the project will suffer irreparable losses, if such an approach continues.
26. That the complainant no.2 defaulted in making timely payments contrary to the agreed terms. It is submitted that various reminders were issued to and follow ups were made with the complainant for complying with her obligations to sign, execute and register apartment buyers' agreement and make further payments. Even after repeated demands complainant no.2 was not ready to come forward and comply with her obligations and sign, execute and deliver the apartment buyers agreement and make payments.
27. Copies of all the relevant do have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority:

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

E. I Territorial jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram district. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

29. 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.

30. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

31. 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. 2021-2022(1) RCR (c) 357*** and reiterated in case of ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*** 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."

32. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the cases mentioned above, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

F. Findings on the reliefs sought by the complainants:

F.1 D Direct the respondent to refund the amount of Rs. 5,00,000/- to the complainants along with interest at the prescribed rate.

33. The subject unit was allotted to the complainants on 02.05.2015. The complainants have paid an amount of Rs. 5,00,000 towards total sale consideration of Rs. 1,13,83,060/- which constitutes 4.39% of total consideration. No buyer's agreement was signed between the parties. The due date is calculated from 48 months from the date of allotment letter being later which comes out to be 02.05.2019.

34. It is an admitted fact that after multiple reminders were sent to the complainants on 08.07.2015, 25.08.2015, 11.02.2017, 16.03.2017, 15.06.2017, 29.08.2017, 09.04.2018 following which the respondent has sent the pre termination letter on 08.09.2015, 04.10.2016, 11.01.2017, 15.07.2017, 09.04.2018. the respondent then cancelled the unit on 30.04.2018. However, the complainants have paid an amount of Rs. 5,00,000/- against a total consideration of Rs.1,13,83,060/- constituting 4.39% of total consideration, which is less than 10% of total consideration.

35. The issue with regard to deduction of earnest money on cancellation of a contract arose in cases of *Maula Bux VS. Union of India, (1970) 1 SCR 928* and *Sirdar K.B. Ram Chandra Raj Urs.*

*VS. Sarah C. Urs., (2015) 4 SCC 136, and wherein it was held that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in the nature of penalty, then provisions of section 74 of Contract Act, 1872 are attached and the party so forfeiting must prove actual damages.. After cancellation of allotment, the flat remains with the builder as such there is hardly any actual damage. National Consumer Disputes Redressal Commissions in CC/435/2019 **Ramesh Malhotra VS. Emaar MGF Land Limited** (decided on 29.06.2020) and **Mr. Saurav Sanyal VS. M/s IREO Private Limited** (decided on 12.04.2022) and followed in CC/2766/2017 in case titled as **Jayant Singhal and Anr. VS. M3M India Limited** decided on 26.07.2022, held that 10% of basic sale price is reasonable amount to be forfeited in the name of "earnest money".*

36. Keeping in view the principles laid down in the first two cases, a regulation known as the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, was framed providing as under

"5. AMOUNT OF EARNEST MONEY

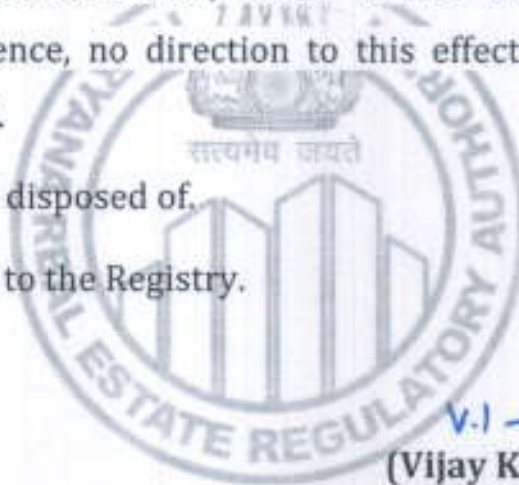
Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission 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"

37. In view of aforesaid circumstances, the respondent is required to refund the amount paid by the complainants after deducting 10% of the sale consideration of the unit being earnest money as per regulation Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018. However, the complainants have paid an amount of Rs. 5,00,000/- only against a total consideration of Rs. 1,13,83,060/- constituting 4.39% of total consideration, which is less than 10% of total consideration. Hence, no direction to this effect can be given to refund of amount.

38. Complaint stands disposed of.

39. File be consigned to the Registry.



V.I - 3
(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 17.02.2023

HARERA
GURUGRAM