

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

Complaint no. : **1749 of 2018**
Order reserved on: **09.12.2022**
Date of pronouncement
of order: **10.03.2023**

Shashi Sadh
Address:- 52/12, Pocket 52 CR Park
New Delhi-110019

Complainant

Versus

M Three M India Private Limited
Address:- Flat No. 103B, The Aralias DLF Golf Links
Golf Course Road Galleria, DLF-IV, Gurugram

Respondent

CORAM:
Shri Ashok Sangwan
Shri Sanjeev Kumar Arora

Member
Member

APPEARANCE:
None
Ms. Shriya Takkar

Advocate for the complainant
Advocate for the respondent

ORDER

1. The present complaint dated 20.11.2018 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:

S. No.	Heads	Information
1.	Name and location of the project	"M3M Golf Estate-Polo Suites", Sector-65, Gurugram
2.	Project area	63 acres (35.05 acres as per OC)
5.	License No. & validity status	234 of 2007 dated 16.10.2007 valid upto 15.10.2017 52 of 2009 dated 28.08.209 valid upto 27.08.2024 35 of 2010 dated 06.05.2010 valid upto 05.05.2020
6.	Name of licensee	Manglam Multiplex Pvt. Ltd.
7.	Unit no.	MGE TW-09/32C, level 32
8.	Super area	3888 sq. ft.
9.	Date of execution of apartment agreement buyer's	10.12.2012
10.	Payment plan	Construction linked payment plan
11.	Total sales consideration	Rs.4,56,40,928/- (As per payment plan)
12.	Total amount paid by allottee	Rs.1,40,33,788/- (As per additional documents submitted by the respondent at page 8-15)
13.	Due date of delivery of possession as per Clause 16.1- 36 months from the date of	10.12.2015 [Calculated from the date of execution of this agreement in the absence of the date of laying first mud is later]

	commencement of construction or from the date of execution of agreement whichever is later, plus 180 days grace period	[Grace period not allowed]
14.	Date of offer of possession	Not offered
15	OC received on	25.07.2017 [page 135 of the complaint]
16	Demand cum pre cancellation notice	06.12.2014
17	Demand cum pre cancellation notice	09.08.2015
18	Last and final opportunity letter	03.09.2015
19	Intimation for termination	14.06.2017

B. Facts of the complaint

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

- i. That in 2010, complainant booked a residential flat in the project which were to be located at Apartment No. MGE TW-09/32C, Located on Level 32 in Golf Estate Tower 9 ,in (M3M Golf Estate Fareway west), having area of 3888 sq. ft. for a total consideration of Rs.4,56,40,928/-.
- ii. That the apartment buyer agreement was executed between the promoter and allottee on 10.12.2012. That the complainant has paid total amount of rs. 1,84,65,543/-. That due to demise of Co-applicant i.e, Late Umesh Prakash Sadh who was husband of complainant, the complainant is facing financial crisis.

- iii. That as per clause 16.1 of the aforesaid agreement, the promoter stated that the possession of the aforementioned flat shall be delivered to the complainant by 10.06.2016 year from the date of the execution of the agreement.
- iv. That the expected delivery of possession of the flat was in the month of June 2016. But till date the Promoter has not given possession. That the complainant repeatedly tried to contact the promoter time and again but there was no response. On the contrary, the promoter has threatened the complainant. That in any case the complainant has not been given possession of the Flat booked so far.

C. The complainant is seeking the following relief:

4. The complainant has sought following relief(s):

- (i) Direct the promoter/respondent to provide immediate refund of the paid amount of Rs. 1,84,65,543/- along with delay penalty.

D. Reply filed by the respondent

5. The respondent had contested the complaint on the following grounds:
 - i. That the respondent i.e. M3M India Private Limited (formerly known as "M3M India Ltd.") is engaged in the business of construction and development of real estate projects.
 - ii. That it is pertinent to mention here that Section 18 of the RERA Act categorically provides that "*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.* That agreement to sale as referred under Section 18 has to be construed

in terms of the definition provided under Section 2 (c) of the RERA Act, which clearly means that the agreement to sale referred under Section 18 is categorically for the project registered under the RERA Act or upon any project which falls under the definition of an ongoing project.

- iii. That the occupancy certificate was granted by the competent authority on 12.04.2017, however the possession letter could not have offered to the complainant because of the pending dues of the complainant towards the respondent.
- iv. That clause 8.1 of the apartment buyer's agreement clearly states that the allottee was under the obligation to make timely payment of every instalment. That the respondent raised various demands as per the agreed payment plan and construction milestones achieved. However, the complainant failed to make timely payments and was a serial and chronic defaulter. It is submitted that various reminders letters dated 16.11.2011, 16.12.2011, 01.02.2012, 14.02.2012, 05.03.2012, 06.12.2012, 24.12.2012, 10.01.2013, 28.01.2013, 06.04.2013, 03.05.2013, 10.06.2013, 15.07.2013, 09.09.2013, 12.12.2013, 20.02.2014, 06.12.2014, 28.01.2015, 09.08.2015, 03.09.2015 were issued to clear her outstanding dues.
- v. That the respondent has already spent enormous amount of money towards the due construction and development of the various blocks / segments / constituents / parts / phases of the group housing colony of which occupation certificate(s) have been granted and more particularly 'M3m Golf estate- Fairway West'

and including the tower in which the apartment of the complainant is situated and the same being ready for occupation.

- vi. Therefore, it is the respondent, who after having spent enormous sums of money (including funds borrowed from banks and financial institutions and other entities) has been unable to realize the proceeds of the apartment from the complainant and thus the legitimate dues of the respondent have been withheld by the complainant.
- vii. The respondent was faced with certain other force majeure events, including but not limited to the non-availability of raw material due to various orders of the Hon'ble Punjab & Haryana High Court and the National Green Tribunal thereby regulating the mining activities, brick kilns, regulation of the construction and development activities by the judicial authorities in NCR on account of the environmental conditions, restrictions on usage of water, etc. It is pertinent to state that the National Green Tribunal in several cases related to Punjab and Haryana had stayed mining operations including in O.A No. 171/2013, wherein vide order dated 2.11.2015 mining activities by the newly allotted mining contracts by the state of Haryana was stayed on the Yamuna River bed. These orders in-fact inter-alia continued till the year 2018. Similar orders staying the mining operations were also passed by the Hon'ble High Court and the National Green Tribunal in Punjab and Uttar Pradesh as well.
- viii. That the construction of the complex and more particularly the tower /phase in which the apartment is situated has already been completed. The competent authority has already granted

occupancy certificate(s) for the various developments undertaken in the complex. As per the apartment buyer agreement (executed between parties on 10.12.2012), possession of the apartment was agreed to be handed over within a period of thirty six (36) months plus one hundred eighty (180) days grace period, from the date of commencement of construction which mean the date of laying of the first plain cement concrete/ mud-mat slab of the tower or the date of execution of the apartment buyer's agreement, whichever is later. The first plain cement concrete was laid on 20.08.2011 and the apartment buyer's agreement was executed on 10.12.2012, accordingly the date of possession is to be calculated from the date of execution of the apartment buyer's agreement.

- ix. That, within the said prescribed time, the construction has been undertaken and the construction of the tower was completed, and the respondent applied for the grant of occupancy certificate on 12.09.2016. The competent authority after due consideration and examination of every aspect, granted the occupancy certificate on 12.04.2017. This very fact substantiates and proves that the construction of the complex and more particularly of the apartment was undertaken and completed as per the specifications mentioned in the sanctioned plan and the complex is/was ready for occupancy.
- x. That the timeline for possession is a part of apartment buyer's agreement executed between the parties and it is very clear from the terms therein that the timeline for possession was not concrete and was subject to certain contingencies, and just and fair exceptions including timely payments by the complainant. It is

matter of record that the complainant has been a chronic defaulter in making payments and several reminders have been sent to the complainant.

- xi. That the complainant is not a genuine buyer, since she had booked the apartment in question purely for commercial purpose as a speculative investor and to make profits and gains. Furthermore, the complainant has invested in many projects of different companies which proves that the complainant is not a genuine buyer but only an investor. Thus, it is clear 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 and to earn premium thereon. Since the investment has been made for the aforesaid purpose, it is for commercial purpose and as such the complainant is not a genuine buyer / end user.
- xii. That vide the instant complaint, the complainant has sought for refund of the consideration amount paid qua the subject apartment. it is stated that the dispute and differences, if any, between the parties involves various questions of facts and law. The issues raised by the complainant cannot be addressed before the ld. adjudicating officer and the subject matter cannot be adjudicated without going into the facts of the case which requires elaborate evidence to be led and which cannot be adjudicated upon under the summary jurisdiction of the Ld. adjudicating officer. The complaint is liable to be dismissed on this ground alone.

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.* 2021-2022(1) RCR(Civil), 357 and reiterated in case of *M/s Sana Realtors Pvt. Ltd. and other Vs. Union of India and other 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."

11. 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 objections raised by the respondent**F.1 Objection regarding complainant is investors not consumer**

12. The respondent submitted that the complainant is investor and not consumer/allottee, thus, the complainant is not entitled to the protection of the Act and thus, the present complaint is not maintainable.
13. The authority observes that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims and objects of enacting a statute but at the same time preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that under section 31 of the Act, any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the buyer's agreement, it is revealed that the complainant is an allottee/buyer, and he has paid total price of Rs. 1,40,33,788/- to the promoter towards purchase of the said unit in the project of the promoter. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"

14. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the buyer's agreement executed between respondent and complainant, it is crystal clear that the complainant are allottee as the

subject unit was allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as *M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.* has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the complainant/allottee being investors is not entitled to protection of this Act stands rejected.

G. Findings on the relief sought by the complainant/allottee.

G. 1 Direct the promoter/respondent to provide immediate refund of the paid amount of Rs. 1,84,65,543/- along with delay penalty.

15. In the present complaint, the complainant intends to withdraw from the project and is seeking return of the amount paid by it in respect of subject unit 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."

16. As per clause 16 of the flat buyer agreement dated 10.12.2012 provides for handing over of possession and is reproduced below:

16. POSSESSION OF THE APARTMENT

16.1 *The Company, based upon its present plans and estimates, and subject to all exceptions, proposes to handover possession of the Apartment within a period of Thirty Six (36) months From the date of commencement of construction which shall mean the date of laying of the first plain cement concrete/mudmat slab of the Tower which shall be communicated to the Allottee (s) or the date of the execution of this Agreement, whichever is later ("Commitment Period"). Should the possession of the Apartment not be given within the Commitment Period, the Allottee agrees to an extension of One Hundred and Eighty (180) days ("Grace Period") after 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 any of 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 of the possession of the Apartment.*

17. At the outset, it is relevant to comment on the present possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement, and the complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and

documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment time period for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

18. As per clause 8 of the agreement, the allottee was liable to pay the instalment as per payment plan opted by the complainant. Clause 8 of the agreement is reproduced under for ready reference:

Clause 8.1 The obligation to make timely payment of every instalment 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.

19. The respondent had issue pre-cancellation letter i.e., 06.12.2014, thereafter, issue cancellation letter to the complainant on 14.06.2017. The OC for the project of the allotted unit was granted on 25.07.2017. The respondent cancelled the unit of the complainant with adequate notices. Thus, the cancellation of unit is valid.
20. 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."

21. Keeping in view, the aforesaid legal provision, the respondent/promotor directed to refund the paid-up amount after deducting 10% of the basic sale consideration and shall return the 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., 14.06.2017, till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

H. Directions of the authority

22. 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. The respondent is directed to refund the paid-up amount of Rs. 1,40,33,788/- after deducting 10% of the basic sale consideration of Rs. 4,56,40,928/- with interest at the prescribed rate i.e., 10.70%

is allowed on the balance amount from the date of cancellation i.e., 14.06.2017 till the 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.

23. Complaint stands disposed of.

24. File be consigned to registry.


Sanjeev Kumar Arora
Member


Ashok Sangwan
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 10.03.2023


HARERA
GURUGRAM