BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**7369 of 2022**
Date of complaint	:	**09.12.2022**
Date of decision	:	**29.11.2023**

1. Sanjeev K. Nayar,
2. Seema Nayar,

Both R/o: - A-402, Sheetal Vihar,
Plot 10, Sector-23, Dwarka, New Delhi-110075. **Complainants**

Versus

M3M India Private Limited
Regd. Office At: Paras Twin Towers,
Tower-B, 6th Floor, Golf Course Road,
Sector-54, Gurugram, Haryana-122002. **Respondent**

CORAM:
Ashok Sangwan **Member**

APPEARANCE:
Kajal Chandra (Advocate) **Complainants**
Shriya Takkar (Advocate) **Respondent**

ORDER

1. The present complaint has been filed by the complainant/allottees 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 provisions of the Act or the Rules and regulations made there under or to the allottees as per the agreement for sale executed *inter se*.

A. Unit and project related details

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

S. No.	Heads	Information
1.	Project name and location	M3M Woodshire, Dwarka Expressway Sector 107, Gurugram
2.	Project area	18.88125 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	33 of 2012 dated 12.04.2012 valid upto 11.04.2018
5.	Name of licensee	Cogent Realtors Pvt. Ltd.
6.	HRERA registered/ not registered	**Not Registered**
7.	Occupation certificate granted on	**20.04.2017** [Page no. 137-139 of the reply]
8.	Provisional allotment letter dated	25.01.2013 (Page no. 27 of complaint)
9.	Unit no.	MW TW-B-06, 903, 9th floor, Tower-B6
10.	Unit measuring	1943 sq. ft.
11.	Date of execution of buyer's agreement	30.04.2013
12.	Possession clause	**16.1 Possession of the apartment** *"Within 36 months from the date of commencement of construction which shall mean the date of laying of the first plain, cement/mud slab of the tower or date of execution of this agreement whichever is later..."*

13.	Due date of possession	30.04.2016 (Calculated from the date of execution of agreement in absence of document pertaining to the date of construction)
14.	Total consideration	Rs.1,10,70,827/- (As per payment plan page 74 of the complaint)
15.	Total amount paid by the complainants	Rs.42,87,266/- (As per intimation of termination letter dated 02.09.2014) (page 136 of reply)
16.	Date of offer of possession	Not offered
17.	Demand-cum cancellation letter dated	11.03.2014 (Page 133 of reply)
18.	Demand letter	08.04.2014 (Page 134-135 of reply)
19.	Intimation of termination dated	02.09.2014 (Page 136 of reply)

B. Facts of the complaint

3. The complainants have made the following submissions in the complaint:

I. That the complainants were allotted a unit bearing no. MW TW-B06/0903 having super area of 1943 sq.ft., 9th floor, Tower 6 in of the project of respondent named 'M3M Woodshire' at Sector-107, Gurugram vide provisional allotment letter dated 25.01.2013. Thereafter, an apartment buyer agreement dated 30.04.2013 was executed between the parties regarding the said allotment for a total sale consideration of Rs.1,08,76,527/- and the complainant has paid an amount of Rs.42,87,266/- against the same as and when demanded by the respondent in terms of the construction linked payment plan.

II. That from 24.01.2014, the complainants stopped making payments as construction at the site had stopped and the construction was not completed by the respondent in terms of apartment buyer's agreement. Thereafter, the respondent vide termination letter dated 02.09.2014 malafidely and arbitrarily terminated the provisional allotment of the apartment and had wrongly forfeited an amount of Rs.25,69,253/- out of the total amount received without providing any reasoning for forfeiture of the said amount.

III. That the complainant being aggrieved with the same issued a legal notice dated 10.01.2019, calling upon the respondent to refund the amount paid towards the purchase of the apartment along with interest @18% per annum from the date of each payment till realization. However, the respondent till date has neither replied to the said notice nor released the due amount with interest. Aggrieved with the same, the complainants issued another legal notice dated 01.10.2022, requesting the respondent to refund the paid-up amount along with interest, but in vain.

IV. That the respondent company by not completing the project on time and by not refunding the monies of the complainants is guilty of deficiency of services, due to which the complainants have suffered extreme hardships, inconvenience, mental agony, financial loss and loss of property.

C. Relief sought by the complainants:

4. The complainants have sought following relief(s).

I. Direct the respondent to refund the paid-up amount along with prescribed rate of interest.

5. On the date of hearing, the authority explained to the respondent/ promoter about the contraventions as alleged to have been committed

in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent

6. The respondent has contested the complaint vide its reply dated 16.05.2023 on the following grounds: -

i. That the present complaint is barred by the law of limitation as the alleged cause of action arose in September, 2014, when the cancellation letter was issued to the complainants and the complaint with any grievance should have been filed within 3 years i.e. till September, 2017. Further, it is well settled that the correspondences, representations and legal notice do not extend the time of limitation. Thus the present complaint is time barred.

ii. That vide allotment letter dated 25.01.2013, the complainants were allotted an apartment bearing no. MW TW-B06/0903 for a cost of Rs.1,10,70,827/- plus taxes and other charges. Thereafter, an apartment buyer's agreement was executed between the parties on 30.04.2013.

iii. That as per clause 16.1 of the buyer's agreement, the possession of the said apartment was to be handed over within 36 months from the date of commencement of construction which shall mean the date of laying the first plain concrete/mud mat slab of the tower or date of execution of the agreement whichever is later, plus 6 (six) months grace period. The date of execution of the apartment buyer's agreement is 30.04.2013 and the date of laying mud slab was 09.09.2013 and hence, the possession date has to be reckoned from the date of laying the mud slab being later. Thus, the due date of possession comes out to be 09.03.2017 (36 months + 6 months from 09.09.2013). However, the same was subject to force majeure conditions.

iv. That the complainants are chronic defaulters who on various occasions failed to timely pay their outstanding dues as a result of which the respondent issued demand cum pre-cancellation notice dated 06.03.2014 requesting them to clear previous outstanding dues and also pay the demand due on completion of the 4th floor slab, but to no avail. Thereafter, the respondent was constrained to issue intimation for termination dated 02.09.2014 to the complainants cancelling the allotment in accordance with clause 8.2 of the buyer's agreement.

v. That the complainants were well aware with the fact that in the event of termination the earnest money amount along with brokerage other amounts is liable to be forfeited.

vi. That the terms of agreement were 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 acknowledged by the complainants after properly understanding each and every clause contained in the agreement and now at this belated stage is attempting to wriggle out of the contractual obligations by filing this complaint.

vii. That the present complaint is barred in terms of clause 48 of the agreement as the complainants ought to have resorted to arbitration in light of the arbitration clause in the agreement and thus, this Authority does not have the jurisdiction to adjudicate upon the instant complaint and ought to dismissed. Further, the occupation certificate for the tower in which the apartment in question was located has already been granted by the competent authorities on 20.04.2017 after due verification and inspection.

5. Copies of all the relevant documents have been filed and placed on the 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

6. The authority has complete territorial and 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 Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. 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, 2016 provides that the promoter shall be responsible to the allottees 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 leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the objections raised by the respondent.

F.I Objection regarding complaint being barred by limitation.

10. The respondent contended that the present complaint is not maintainable and barred by the law of limitation as the alleged cause of action arose in September, 2014, when the cancellation letter was issued to the complainants and any grievance w.r.t. the said cancellation should have been filed within 3 years i.e. till September, 2017. Further, it submitted that the correspondences, representations and legal notice do not extend the time of limitation. However, the complainants submitted that as per section 22 of the Limitation Act, 1963, in case of continuing breach of contract or continuing tort, a fresh period of limitation begins to run at every moment of time during which the breach or tort continues. They further submitted that vide legal notices dated 10.01.2019 and 03.10.2022 request was made to the respondent to refund the balance amount after the said cancellation, to which no reply was given by it and the respondent has refunded an amount of Rs.17,18,013/- during the pendency of the complaint. Admittedly, in the present case, the respondent after terminating the allotment vide letter dated 02.09.2014, has forfeited an amount of Rs.25,69,253/- and an amount of Rs.17,18,013/- was refundable to the complainants as per the said letter. However, the said refund was made after a lapse of more than 8 years, i.e., on 10.04.2023, after filing of the present complaint and not before, which clearly shows the conduct of the respondent.

11. The respondent should not be allowed to get unfair advantage of its own wrong, as it should have refunded the amount after cancelling the unit

in question, but it failed to do so till filing of this complaint. Allowing the respondent for such practices may set a wrong precedence in the real estate industry. Therefore, in view of the above, the objection of the respondent w.r.t. the complaint being barred by limitation stands rejected.

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

12. The apartment buyer's agreement entered into between the parties dated 30.04.2013 contains a clause 48 relating to dispute resolution between the parties. The clause reads as under: -

> **48. ARBITRATION**
>
> **48.1** *"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 statutory amendments/modifications thereot for the time being in force and shall be conducted by a sole independent arbitrator to be appointed by the Company, whose decision shall be final and binding upon the Parties hereto. The venue of the arbitration proceedings shall be at any place specified by the Company in Gurgaon. The language of the arbitration proceedings shall be English. The provisions related to Arbitration as mentioned herein shall supersede any or all other arbitration agreements/clauses that may exist by and between the Parties. The Parties shall bear their respective costs of the arbitration".*

13. 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.

14. 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 complainants 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 Complainants and the Builder cannot*

circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."

15. 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."*

16. Therefore, in view of the above judgements and considering the provision of the Act, the authority is of the view that complainants are 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.

G. Findings on the relief sought by the complainants.

G.I Direct the respondent to refund the paid-up amount along with prescribed rate of interest.

17. The complainants were allotted a unit bearing no. MW TW-B06/0903 in the project named "M3M Woodshire" at Sector-107 Gurugram vide allotment letter dated 25.01.2013. Thereafter, a buyer's agreement dated 30.04.2013 was executed between the parties regarding the said allotment for a total sale consideration of Rs.1,10,70,827/- and the complainants have paid a sum of Rs.42,87,266/- against the same in all. The respondent company completed the construction and development of the project and got the OC on 20.04.2017. However, the complainants defaulted in making payments and the respondent was to issue reminder letters dated 30.12.2013, 19.02.2014 and demand-cum-pre-cancellation notice dated 06.03.2014 requesting the complainants to comply with their obligation. However, despite repeated follow ups and communications and even after the issuance of the pre-cancellation letter the complainant failed to act further and comply with their contractual obligations and therefore the allotment of the complainants was finally terminated vide letter dated 02.09.2014. However, the complainants submitted that after the said cancellation request was made to the respondent vide legal notices dated 10.01.2019 and 03.10.2022 to refund the balance amount, to which neither any reply was given nor any refund was paid to them and the respondent has only refunded an amount of Rs.17,18,013/- during the pendency of the complaint. Now the question before the authority is whether the cancellation issued vide letter dated 02.09.2014 is valid or not.

18. On consideration of documents available on record and submissions made by both the parties, the authority is of the view that on the basis of provisions of allotment, the complainants have paid Rs.42,87,266/- against the total sale consideration of Rs.1,10,70,827/-. The respondent/builder sent demand letters dated 30.12.2013, 19.02.2014, before issuing a demand-cum-pre-cancellation notice dated 06.03.2014 asking the allottees to make payment of the amount due but the same having no positive results and ultimately leading to cancellation of unit vide letter dated 02.09.2014. Further, section 19(6) of the Act of 2016 casts an obligation on the allottees to make necessary payments in a timely manner. Hence, cancellation of the unit in view of the terms and conditions of the payment plan annexed with the buyer's agreement dated 30.04.2013 is held to be valid. But while cancelling the unit, it was an obligation of the respondent to return the paid-up amount after deducting the amount of earnest money. However, the deductions made from the paid up amount by the respondent are not as per the law of the land laid down by the Hon'ble apex court of the land in cases of ***Maula Bux vs Union of India 1969(2) SCC 554*** **and where in it was held that** a reasonable amount by way of earnest money be deducted on cancellation and the amount so deducted should not be by way of damages to attract the provisions of section 74 of the Indian Contract Act,1972. The same view was followed later on in a number of cases by the various courts. Even keeping in view, the principles laid down those cases, a regulation in the year 2018 was framed known as the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, 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."*

19. Thus, keeping in view the aforesaid legal provisions and the facts detailed above, the respondent is directed to refund the deposited amount of Rs.42,87,266/- after deducting 10% of the sale consideration i.e., 1,08,76,527/- being earnest money along with an interest @10.75% (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 on the refundable amount, from the date of cancellation i.e., 02.09.2014 till actual refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

20. Out of total amount so assessed, the respondent shall deduct the amount already paid to the complainants from the refundable amount.

H. Directions of the Authority:

21. 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/builder is directed to refund the deposited amount of Rs.42,87,266/- after deducting 10% of the sale consideration i.e., 1,08,76,527/- being earnest money along with an interest @10.75% on the refundable amount, from the date of cancellation i.e., 02.09.2014 till the date of realization of payment.

ii. Out of total amount so assessed, the respondent shall deduct the amount already paid to the complainants from the refundable amount.

iii. 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.

22. Complaint stands disposed of.

23. File be consigned to the registry.

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 29.11.2023