

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

Complaint no. : 1598 of 2019
First date of hearing: 05.09.2019
Date of decision : 05.09.2019

1. M3M India Private Limited
Registered Office : Unit no.
SB/C/5L/Office/008, M3M Urbana, Sector
67, Gurugram-122102.
2. Cogent Realtors Private Limited,
Office at: LGF, F-22, Sushant Shopping
Arcade, Sushant Lok, Phase-1,
Gurugram (Haryana)-122002.

Complainants

Versus

Mrs. Sushila Bhartiya,
R/o 271/2, Forest Lane (XL2-04),
Neb Sarai Extension, New Delhi: 110068.

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE

Ms. Shriya Takkar along Ms. Unnati Anand
Mrs. Sushila Bhartiya

Advocates for complainants
Allottee in person

ORDER

1. A complaint dated 15.04.2019 was filed under section 31 of the Real Estate (Regulation and Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 by the complainants M/s M3M India Private Limited and M/s Cogent Realtors Private



Limited, against the respondent - allottee Mrs. Sushila Bhartiya, in respect of apartment buyer's agreement dated 10.10.2013 for allotted unit no. MW TW-A03/0303, 3rd floor, tower A3, measuring 2762 sq. ft. super area in the project "M3M Woodshire", Sector 107, Gurugram in favour of the respondent, for not taking possession of the said apartment upon notice of offer of possession and for non-payment of due instalments by the allottees which is in violation of section 19 of the said Act.

2. Since, the apartment buyer's agreement has been executed on 10.10.2013 i.e. prior to the commencement of the Act ibid, therefore, penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non-compliance of statutory obligations on the part of the allottee in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016.
3. The particulars of the complaint case are as under:

1.	Name and location of the project	"M3M Woodshire", Dwarka Expressway, Sector-107, Gurugram
2.	Nature of the project	Group housing colony
3.	Project of area	18.88125 acres
4.	Current status of project	Occupation certificate received on 24.07.2017
5.	RERA registration status	Not registered
6.	DTCP license no.	33 of 2012 dated 12.04.2012
7.	Apartment/unit no.	MW TW-A03/0303, 3 rd floor, tower A3

8.	Unit area	2762 sq. ft.
9.	Date of execution of apartment buyer's agreement	10.10.2013
10.	Payment plan	Construction linked payment plan
11.	Total sales consideration	Rs. 2,12,55,896/- (as per statement of accounts cum invoice attached on page 122 of the complaint)
12.	Total amount paid by allottees	Rs. 81,41,346 /- (as per statement of accounts cum invoice attached on page 122 of the complaint)
13.	Due date of delivery of possession as per clause 16.1 of apartment buyer's agreement: Within 36 months from the date of commencement of construction which shall mean the date of laying of the first plain cement concrete/mud slab of the tower or the date of execution of agreement whichever is later plus 180 days grace period	27.05.2017 (Note: -As per admission by the complainants in the present complaint, the first mud slab was laid on 27.11.2013)
14.	Delay in handing over possession till date	2 years 5 months 15 days
15.	Notice of possession (page 120 of complaint)	10.11.2017
16.	Pre cancellation notice issued on	20.04.2018

4. Details provided above have been checked on the basis of record available in the case file which has been provided by the complainants and the respondent. An apartment buyer's

agreement dated 10.10.2013 for the aforesaid apartment is available on record as per which the possession of the said apartment was to be delivered by 27.05.2017. the possession was offered to the respondent-allottee vide letter dated 10.11.2017 after the receipt of OC dated 24.07.2017. However, the respondent- allottee has failed to take possession and to pay outstanding dues which is in violation of obligation of allottee under section 19 of the said Act.

5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and appearance. The case came up for hearing on 05.09.2019. The reply filed on behalf of the respondent on 24.06.2019 has been perused by the authority. Written submission on behalf of the respondent was submitted on 26.08.2019 and the same has been perused by the authority.

FACTS OF THE COMPLAINT:

6. The complainant no.1 has developed, in a planned and phased manner over a period of time, on the 'land' situated in revenue estate of village Dharampur, Sector 107, Gurugram a group housing colony under the name & style as "M3M Woodshire" inter alia comprising of various buildings and units therein, with suitable infrastructural facilities including multi-level basement parking.
7. Complainant no. 2 herein is the absolute owner of the project land, which is situated in the revenue estate of village Dharampur, Sector 107, Gurugram Manesar Urban Complex,

Gurugram, Haryana, India and has obtained license no. 33 of 2012 dated 12.04.2012 from the DGTCP / DTCP for construction and development of the said group housing colony.

8. Being impressed by the project, the respondent approached the complainant developer for booking of an apartment in the project of the complainant and accordingly signed and submitted a booking application dated 03.12.2012. In due consideration of the commitment by the respondent to make timely payments, the complainant developer allotted the apartment in favour of the respondent vide the allotment letter dated 23.02.2013.
9. Subsequently, the apartment buyer's agreement dated 10.10.2013 was executed between the complainants and the respondent. While executing the apartment buyer's agreement, it was agreed by the complainants and the respondent that they would be bound by the terms and conditions of the agreement. The relevant clauses of the agreement are as follows:
 - I. Clause 8.1 of the apartment buyer's agreement states that the obligation to make timely payments of every instalment of the total consideration in accordance with the payment plan along with the 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 demanded by the company,

as the case may be, and also to discharge all other obligations under this agreement shall be the essence of this agreement.

- II. As per clause 16.1, the complainant no. 1 proposed to handover the possession of the apartment within 36 months from the date of laying of the first plain cement concrete/mud slab of the tower or the date of this agreement, whichever is later is only a proposed period based on estimates, and is not a period which is absolute, fixed or cast in stone (commitment period). It is pertinent to mention here that the first mud slab was laid on 27.11.2013 and the apartment buyer's agreement has been executed between the parties on 10.10.2013. Further, a grace period of 180 days is also provided over and above the proposed/estimated "commitment period". The time taken by the complainant no. 1 to develop the project is the usual time taken to develop such a large scale project.
- III. Clause 16 also contemplates and fully provides for scenarios wherein the delivery of possession is beyond the grace period. Under clause 16.4, the parties have agreed that if the delay is on account of force majeure conditions, the time for delivery of possession will be appropriately extended beyond the grace period.
- IV. Further the parties have agreed in clause 16.6 that in the event of delay for reason other than 'force majeure', the allottee shall be entitled to compensation of Rs.10/- per



sq. ft. per month, which shall be adjusted at the time of handing over of possession/execution of conveyance deed provided the allottee not being in default under the terms of the agreement.

10. It is further submitted that clause 16.7 has to be read along with clause 16.1, which specifically provided that "In case of failure of the allottees 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 allottees 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. In the present case, the allottee has been a chronic defaulter.
11. Since, the respondent has committed defaults in making payment of the instalments, various demand letters, reminders and pre-cancellation notices were issued to him.
12. The construction of the project was affected on account of unforeseen circumstances beyond the control of the complainant developer. In the year 2012 on the directions of the Hon'ble Supreme Court of India, the mining activities of minor minerals (which includes sand) was regulated. The Hon'ble Supreme Court directed framing of modern mineral concession rules. Reference in this regard may be had to the

judgment of "*Deepak Kumar v. State of Haryana, (2012) 4 SCC 629*". The competent authorities took substantial time in framing the rules and in the process the availability of building materials including sand which was an important raw material for development of the said project became scarce. Further, developer was faced with certain other force majeure events including but not limited to non-availability of raw material due to various orders of Hon'ble Punjab & Haryana High Court and 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 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. The stopping of mining activity not only made procurement of material difficult but also raised the prices of sand/gravel exponentially. It was almost 2 years that the scarcity as detailed in the para aforesaid continued, despite which all efforts were made and materials were procured at 3-4 times

the rate and the construction continued without shifting any extra burden to the customer.

13. Despite the aforementioned circumstances, the complainant developer completed the construction of the project diligently and timely, without imposing any cost implications of the aforementioned circumstances on the allottee. Upon completion of the construction of the apartment in terms of the apartment buyer's agreement an application for the receipt of the occupation certificate was applied for on 23.12.2016 with respect to the tower in which the apartment is situated with the statutory authorities and the same was granted by the authorities only on 24.07.2017 i.e. after a period of almost 7 months. 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 the complainant applied for OC, the apartment was complete in all respect.
14. It is pertinent to state that the occupation certificate with respect to the tower where the apartment is 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 liveable condition.
15. The respondent in order to wriggle out her contractual obligations and earn unjust enrichment filed a consumer complaint before NCDRC bearing no. CC/1665/2017.

16. The complainant no. 1 company vide letter dated 10.11.2017 offered the possession of the said apartment to the respondent and requested the respondent to take possession of the said apartment after clearing the outstanding dues in terms of the agreement.
17. The respondent did not pay any heed to the requests of complainant no. 1 company and pertinently did not even respond to the above communication by the complainant. The respondent intentionally breached the terms of the agreement without any just cause and with malafide intentions to wriggle out of her contractual obligations.

ISSUES TO BE DECIDED:

18. The complainants have raised the following issues:
- Whether the respondent-allottee has violated the terms and conditions of apartment buyers agreement?
 - Whether the respondent-allottee has violated her duty under sec 19(6) read with section 19(7) of the Real Estate (Regulation and Development) Act, 2016?
 - Whether the respondent-allottee has violated her duty to take the physical possession of the apartment within a period of two months of the issuance of the occupancy certificate for the said building, apartment under section 19(10) of the Real Estate (Regulation and Development) Act, 2016?

- iv. Whether the respondent is liable to pay holding charges as per the terms and conditions of the apartment buyers agreement?
- v. Whether the respondent is liable to pay maintenance charges to the maintenance agency?
- vi. Whether the respondent is liable to be directed by this authority to forthwith take possession of the allotted apartment after clearing all dues pending qua the same with delayed interest in the interest of justice and fair play?

RELIEFS SOUGHT:

19. The complainant is seeking the following reliefs:

- i. The respondent may kindly be directed to take the possession of the said apartment after completion of the requisite formalities by the respondent including payment of all the outstanding dues.
- ii. Direct the respondent to pay the balance consideration and delayed interest as per Section 19 of the Real Estate (Regulation and Development) Act, 2016.
- iii. Direct the respondent to pay holding charges as per the terms and conditions of the apartment buyer's agreement.
- iv. Direct the respondent to pay the outstanding maintenance dues of the maintenance agency.

RESPONDENTS' REPLY:

20. The respondent submitted that the present complaint is not maintainable as it is a counter blast to cover up the fraudulent acts of the complainantS and to frustrate the proceedings pendings before NCDRC between the answering respondent and the complainant being CC no. 1665/2017 in respect of the same subject matter. Since the NCDRC has already seized the matter, this hon'ble authority cannot entertain the same.
21. The answering respondent denied all the allegations contained in the complaint under reply unless specifically admitted by the answering respondent in the aforementioned complaint pending before NCDRC.
22. The respondent submitted that paragraphs 1-25 of the complaint under reply are in so far are inconsistent with the averments made in the aforesaid complaint pending before NCDRC are specifically denied. The respondent submitted that all averments made in the complaint pending before NCDRC are reaffirmed as correct.

DETERMINATION OF ISSUES:

After considering the facts submitted by the complainants, reply by the respondent and perusal of record on file, the issue wise findings of the Authority are as under-

23. With respect to **first, second, third and sixth issue** raised by the complainant, the authority has observed that the complainants have already received the occupancy certificate of the tower A3 where the respondent's allotted unit is located in the project on 24.07.2017 and offered possession of the

booked unit to the respondent vide letter dated 10.11.2017 (**Annexure F**). However, the respondent allottee has failed to make balance payment of the total agreed sale consideration and complete other formalities necessary for execution of conveyance deed of the apartment. Therefore, the respondent allottees have failed to perform its obligation under section 19 (6) (7) and (10) of the Act.

24. With respect to **third and fourth issues** raised by the complainants, it is evident from perusal of records that as per clause 16.2 of the said agreement, the allottee shall pay holding charges @ Rs. 10 per sq. ft. per month of the super area of the apartment on account of failure in taking possession within stipulated time period of 60 days from notice of possession. However, as the promoter/ complainant is levying the interest on delay payments at the prescribed rate of 10.45% per annum, so he cannot levy the holding charges. No party can be allowed to get unjustifiable riches as it will be against the principles of natural justice.

FINDINGS OF THE AUTHORITY:

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



stage. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Department of Town and Country Planning, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District. 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.

22. By virtue of clause 16.1 of the apartment buyer's agreement dated 10.10.2013 for unit no. MW-TW-A03/0303, third floor, tower 3, in project M3M Woodshire, Sector 107, Gurugram, possession was to be handed over to the respondent within a period of 36 months from the date of commencement of construction which shall mean the date of laying of the first plain cement concrete/mud slab of the tower or the date of execution of agreement whichever is later plus 180 days grace period i.e. 27.1..2013 which comes out to be 27.05.2017. The respondent has failed to deliver the possession of the unit in time. The promoter has offered the possession to the buyer on 10.11.2017. As such the respondent is entitled for delayed possession charges at the prescribed rate of interest i.e.

10.45% per annum w.e.f. 27.05.2017 to 10.11.2017 as per the provisions of section 18(1) of the Act *ibid*.

23. In view of the fact that the possession was offered to the buyer on 10.11.2017, as such, as per clause 19(10) of the Act which reads as under:

“Every allottee shall take physical possession of the apartment, plot or building as the case may be, within a period of two months of the occupancy certificate issued for the said apartment, plot or building as the case may be”

Since the offer of possession was issued on 10.11.2017 as such the allottee was obligated to take possession within two months after making full payment to the promoters. The complainants have attached complete photographs of the apartment which are being placed on record (Annexure C) and which indicate that the flat/unit has been complete in all respects. However the respondent/allottee has stated that they have gone to NCDRC and the case is pending before the National Commission and the next date of hearing is 05.11.2019. As per the prevailing circumstances/events on record, it seems that the provisions of the Real Estate (Regulation and Development) ACT,2016 as well as provisions of Consumer Protection Act,2005 are at logger head and are contrary to that extent. However, the rights of both the builder and buyer are the prime concern of the RERA Authority. As such as per the provisions of the Act the respondent is directed

to take possession of the allotted unit within two months from the issuance of this order.

DIRECTIONS OF THE AUTHORITY:

24. After taking into consideration all the material facts adduced by both the parties, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issues the following directions:

- i. The respondent is directed to take over the possession of the offered unit within a period of two months from the date of issuance of this order.
- ii. The respondent is directed to pay outstanding dues, if any, after adjustment of interest awarded for the delayed period of possession.
- iii. The promoters shall not charge any amount/charge from the respondent which is not a part of the agreement.
- iv. Interest on due payments from the respondent shall be charged at the prescribed rate of interest i.e. 10.45% by the promoters which is the same as being granted to the respondent in case of delayed possession.

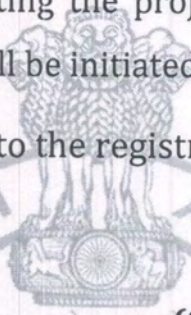
v. The arrears of interest accrued so far shall be reimbursed to the respondent within 90 days from the date of this order.


39. The order is pronounced.

26. As the project is registerable and has not been registered by the promoters, the authority has decided to take suo-moto cognizance for not getting the project registered and for that separate proceeding will be initiated against the complainants.

40. Case file be consigned to the registry.


(Samir Kumar)
Member


सत्यमेव जयते


(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 28.08.2019

Judgement uploaded on 26.09.2019

HARERA
GURUGRAM