

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

Complaint no. : 1240 of 2019
First date of hearing : 02.07.2019
Date of decision : 04.09.2019

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

Registered office: LGF, F-22, Sushant

Shopping Arcade. Sushant Lok, Phase-1,
Gurugram- 122002, Haryana, India

Complainants

Versus

Swan Travels

Registered office: Singals House No. 123A,
Street C-8, Central Avenue, Sainik Farms,
Defence Service Encave, New Delhi-110062

Respondent

CORAM:

Dr K.K. Khandelwal

Shri Samir Kumar

Shri Subhash Chander Kush

Chairman

Member

Member

APPEARANCE

Ms Shriya Takkar

Ms Shreshth Nanda

Advocate for the complainants

Advocate for the respondent

ORDER

1. A complaint dated 27.03.2019 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 M3M India Private Limited and Cogent Realtors Private Limited, against the respondent allottee Swan Travels, in respect of the apartment buyer's agreement dated 20.06.2013 for apartment no. MW TW-B09/1002, 10th floor, tower B09 admeasuring super area of 1943 sq. ft. in the project "M3M Woodshire", located at sector-107, Gurugram, executed in favour of the respondent for not taking possession of the said unit and for non- payment of due instalments as per the payment schedule, by the allottee which is in violation of section 19(6), (7) and section (10) of the Act ibid.

2. Since, the apartment buyer's agreement has been executed on 20.06.2013 i.e. prior to the commencement of the Act ibid, therefore, the 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 allottees 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", Sector-107, Gurugram
2.	Nature of the project	Group housing colony

3.	Project Area	18.88125 acres
4.	Current status of project	Occupation certificate received on 20.04.2017(page no. 107 of the complaint) and possession offered on 28.04.2017(pg. 109 of the complaint)
5.	RERA registration status	Not registered
6.	DTCP License no.	33 of 2012 dated 12.04.2012
7.	Unit no.	MW TW B09/1002, 10 th floor
8.	Unit area	1943 sq. ft.
9.	Date of provisional allotment letter	13.02.2013
10.	Date of execution of apartment buyer's agreement-(Annexure C) page no. 52 of the complaint	20.06.2013
11.	Payment plan	Construction linked plan
12.	Total sale consideration	Rs 1,05,92,849/- (as per payment plan, page no- 98 of the complaint) Rs. 1,09,40,397/- (as stipulated in SOA page no. 111 of the complaint)
13.	Total amount paid by allottees	Rs 1,01,31,500/-(as stipulated in SOA page

		no. 111 of the complaint)
14.	<p>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/mudmat slab of the tower or the date of execution of agreement whichever is later plus 180 days grace period)</p> <p>(As per admission by the complainants in the present complaint, the first mud slab was laid on 20.07.2013, pg. 8 of the complaint)</p>	20.01.2017
15.	<p>Delay in handing over possession till date of offer of possession i.e. 28.04.2017</p>	3 months and 8 days
16.	<p>Penalty (as per clause 16.6 of the said apartment buyer's agreement)</p>	Rs.10/- per sq. ft. per month calculated on the super area for every month of delay

4. The 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 20.06.2013 is available on record. As per clause 16.1 of the said agreement, the possession was to be handed over to the respondent on 20.01.2017 and the same was offered on 28.04.2017. In the present case, respondent allottees have failed to take possession of the said unit upon notice of offer of possession and have failed to pay outstanding dues which is in violation of obligation of respondent under section 19(6), (7) and section 19(10) of the Act *ibid*.
5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and appearance. The respondent appeared on 02.07.2019. The reply was filed by the respondent on 16.04.2019 and the same has been perused.

FACTS OF THE COMPLAINT

6. The complainant no. 1 submitted that they have developed and planned in a phased manner over a period of time, on the 'land' situated in Village Dharampur, Gurugram, Sector 65, Haryana, India a group housing colony under the name and style as "M3M Woodshire" comprising of various buildings and units therein, with suitable infrastructural facilities including multi-

level basement parking. The said development has been carried out in planned and phased manner over a period of all in accordance with the licenses and the building plans as approved by DGTCP from time to time. In accordance with the sanctioned building plans, the said complainant has already developed the project with suitable infrastructural facilities.

7. The complainants submitted that 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, Haryana, India and has obtained license no. 33 of 2012 dated 12.04.2012 from the DGTCP/DTCP under the provisions of the Haryana Development and Regulation of Urban Areas Act, 1975. That complainant no. 1 has been vested by complainant no. 2 with complete authority and all appropriate and requisite rights and powers, inter alia, for undertaking the construction and development of the group housing colony on the land and every part or portion thereof and for all activities and functions in relation thereto, vide definitive agreements.
8. The complainants submitted that the respondent approached the complainant-developer for booking of an apartment in the project of the complainant no.1 and accordingly signed and submitted a booking application dated 03.12.2012. In due

consideration of the commitment by the respondents to make timely payments, the complainant-developer allotted the apartment in favour of the respondent vide the allotment letter dated 13.02.2013.

9. The complainants submitted that the complainant developer vide letter dated 22.03.2013 sent copies of the agreement for execution. A reminder dated 7.05.2013 was issued to the respondent for execution of the apartment buyer agreement. Subsequently the respondent did not return all signed copies of the apartment buyer agreement and the complainant developer resent the copies of the apartment buyer agreement vide letter dated 13.06.2013. The apartment buyer agreement dated 20.06.2013 was executed between the complainants and the respondent.
10. The complainants submitted that the respondent had committed defaults in making payment of the instalments, various demand letters, reminders and pre-cancellation notices were issued to him.
11. The complainants submitted that upon completion of the construction of the apartment in terms of the apartment buyer agreement, an application for the receipt of the occupation certificate was applied for on 12.09.2016 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 20.04.2017 i.e. after a period of almost 7 months.

12. The complainants submitted that the complainant no. 1 company, vide letter dated 28.04.2017 offered the possession of the said apartment to the respondent and requested the respondent to take possession of the said apartment buyer agreement after clearing the outstanding dues in terms of the apartment buyer agreement.
13. The complainants submitted that 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 respondent. The respondent intentionally breached the terms of the agreement without any just cause and with malafide intentions to wriggle out of his contractual obligations.
14. The complainants submitted that the respondent was not taking the possession of the apartment after clearing the outstanding dues, the complainant sent reminder 1 dated 15.06.2017. Since even after issuance of reminder 1 the respondent neither approached the complainants to take the possession of the apartment nor cleared the outstanding dues,

the complainant was forced to send pre -cancellation notice dated 27.11.2017 to the respondent.

15. The complainants submitted that respondent in an effort to wriggle out of his contractual obligations and earn unjust enrichment, filed a consumer complaint before the Hon'ble National Consumer Dispute Redressal Commission bearing No. 3163/2017.
16. The complainants submitted that the respondent has severely committed defaults in making payment of the consideration amount in accordance with the agreed payment plan. Therefore, it is the complainant developer who after having spent enormous sums of money and has been unable to realize the proceeds of the apartment from the respondent-allottee and the legitimate dues of the complainant developer have been withheld by the respondent-allottee and therefore, on account of such breaches and defaults of the respondent-allottee it is the complainant developer who are entitled to claim compensation from the respondent-allottee.
17. The complainants submitted that the project "M3M Woodshire" consists of total 995 apartments out of which 754 apartments have already been sold and possession offered to the eligible allottees. The project is very much habitable and

already the possession of approx. 465 apartments have been taken over by the respective allottees and approx. 200 families are already staying in the project as of now and the said figure is increasing day by day with more possessions being taken over and more families moving into the project and enjoying the various facilities and amenities therein. Further, the respective allottees are enjoying and making use of the various facilities and amenities as provisioned for their comfort.

18. The complainants in their complaint relied on the judgement: That the Hon'ble High Court of Bombay in the matter titled *Neelkamal Realtors Suburban Pvt. Ltd. and Anr vs. Union of India* has already held that RERA strikes the balance between the promoter and allottees.
19. The complainants submitted that this hon'ble authority has jurisdiction to entertain the present complaint since the project is situated in Gurugram within the jurisdiction of this hon'ble authority.
20. The complainants submitted that they have not filed any other complaint or suit of similar nature in any court of law.

ISSUES TO BE DECIDED:

21. The complainants have raised the following issues:

1. Whether the respondent-allottee has violated the terms and conditions of apartment buyer's agreement?
2. Whether the respondent-allottee has violated his duty under section 19(6) read with section 19(7) of the real estate (regulation and development) Act, 2016?
3. Whether the respondent-allottee has violated his 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?
4. Whether the respondent is liable to pay holding charges as per the terms and conditions of the apartment buyers' agreement?
5. Whether the respondent is liable to pay maintenance charges to the maintenance agency?
6. Whether the respondent is liable to be directed by this hon'ble real estate regulatory 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

22. The complainants are seeking the following reliefs:

- (i) Direct the respondent to take the possession of the said apartment which is ready and in the state of being occupied after the 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) The respondent also be directed to pay holding charges as per the terms and conditions of the apartment buyers' agreement;
- (iv) The respondent also be directed to pay the outstanding maintenance dues of the maintenance agency;
- (v) Any other relief/direction which the hon'ble authority deem fit and proper in the facts and circumstances of the present complaint.

RESPONDNET'S REPLY

23. The respondent submitted that the complaint is deeply rooted in false hood and the complainants are not only guilty of suppressio veri and suggestio falsi but have willfully and with

malafide intentions and in order to mislead this hon'ble authority and on this ground alone, the present complaint is liable to be dismissed with exemplary costs in favour of the defendant.

24. The respondent submitted that the complaint is not maintainable on the grounds that the said respondent has already filed a case before the Hon'ble National Dispute Redressal Commission under section 21 read with section 12(B) of the Consumer Protection Act, 1985 on grounds such as unfair trade practice and deficiency in service and the same is pending adjudication. It is respectfully submitted that two different authorities cannot adjudicate/entertain grievances cannot entertain the present complaint filed by the complainant to harass and pressurize the respondent.

25. The respondent further submitted that he has filed the complaint before the Hon'ble NCDRC on the ground that complainants have failed to provide occupation and completion certificate to the respondent. Further the complainants while replying to complaint of the respondent have failed to mention anything relating to the occupation

certificate dated 20.04.2017. It is most respectfully submitted that if the occupation certificate was granted to the complainant on 20.04.2017 then why did the complainant concealed the same while replying to the emails and also in reply to the complainant filed before the Hon'ble NCDRC. The above-mentioned facts also raises concerns as to the genuineness of the occupation certificate dated 20.04.2017.

26. The respondent submitted that as per clause 16.7 of the apartment buyer agreement states that in the event of delay by the company in handing the possession of the apartment beyond a period of 12 months from the end of grace period, the allottee shall become entitled to opt for cancellation/termination of allotment of the apartment and shall also be entitled to full amount paid against the apartment after adjusting any interest/penalty on delayed payments. That relevant part of clause 16.7 of the apartment buyer's agreement is reproduced herein:

" In the event of delay by the company in handing over the possession of the apartment beyond a period of 12 months from the end of grace period. For the reasons other than mentioned herein, (hereinafter referred to as the " extended delay period") and the allottee not being in default in of any of the terms of his agreement, the allottee shall

additionally become entitled to opt for cancellation/termination of allotment of the apartment/ this apartment and full refund of the actual amounts paid against the apartment after adjusting any interest or penalty on delayed payments.”

It is most respectfully submitted that the grace period ended on June 2016 and a further period of 12 months from the grace period ended on June, 2017 and the opposite party failed to deliver the possession of the apartment to the complainant. That within 90 days from expiry of the extended delay period, complainant sent a legal notice dated 06.07.2017 to the opposite party to produce various documents and to reimburse it an amount to the tune of Rs. 27,35,505/-. It is further submitted that complainant is entitled for refund of the entire sum of money paid by him to the opposite party.

DETERMINATION OF ISSUES

27. 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:
28. In respect of **first and second issue**, the authority has observed that the complainants have already received the occupancy certificate dated 20.04.2017 and offered possession of the booked unit to the respondents vide letter

dated 28.04.2017. However, the respondent allottees have 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.

29. With respect to **third issue**, as per section 19(10) of the said Act, the allottees shall take physical possession of the unit within a period of two months of the issuance of occupation certificate of the unit in question. In the present case, the occupation certificate was received on 20.04.2017 and the possession was offered on 28.04.2017 as the due date of possession was 20.01.2017. Hence, there is delay on the part of complainants for handing over possession i.e. 3 months and 8 days. However, the respondent-allottee failed in taking possession thereby violating section 19(10) of the said Act.

Thus, keeping in view the circumstances of the case, the respondent-allottee is hereby directed to take possession of the allotted apartment after clearing all dues pending along with delayed interest at the prescribed rate of 10.45% per annum.

30. With respect to **fourth issue**, as per clause 16.2 of the said agreement, the allottee is liable to 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/ complainants are levying the interest on delay payments at the prescribed rate of 10.60% per annum, so they cannot levy the holding charges. No party can be allowed to get unjustifiable riches as it will be against the principles of natural justice.
31. With respect to **fifth issue**, as per clause 18.1," the allottee undertakes to abide by the terms and conditions of such maintenance agreement as may be and to promptly pay all demands, bill, charges as may be raised by the maintenance agency." Thus, the respondent/allottees are under liability to pay such charges. However, as the maintenance agreement is not annexed with the paper book. This issue cannot be determined due to lack of documentary evidence.

FINDINGS OF THE AUTHORITY:

32. The authority has complete jurisdiction to decide the complaint in regard to non-compliance of obligations by the promoter as held in *Simmi Sikka 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.

33. Argument heard. Counsel for the complainant/promoter has brought to the notice of the authority that occupation certificate has been obtained and offer of possession has been made to the respondent/allottee. As per provisions of the Act, the allottee is bound to take possession of the allotted unit within 2 months after obtaining occupation certificate by the promoter and issuance of possession letter to the allottee. Copy of the occupation certificate is already available on the record. The allottee is directed to take possession within two

months after settling the account as per the BBA and provisions of the Act.


34. The due date of possession as per terms and conditions of the apartment buyer's agreement is 20.01.2017. Although the complainant/promoter applied for occupation certificate on 12.09.2016 and received the occupation certificate on 20.04.2017. The offer of possession was also sent on 28.04.2017. Surprisingly after receiving letter of offer of possession allottee moved to NCDRC for refund. It is very peculiar situation when the project is complete and possession has been offered, the allottee has approached the NCDRC for refund of deposited amount. It seems that the allottee is not a genuine consumer. The counsel for the allottee made a statement before the authority that cause of action in the case filed before NCDRC is with regard to mal-practice adopted by the promoter whereas here the limited issue is whether the offer of possession was given to the allottee and the allottee failed to take possession within the stipulated period as per provisions of the Act.

DIRECTIONS OF THE AUTHORITY:

35. 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 allottee is directed to take possession of the allotted unit within a period of one month from the date of issuance of this order on account of his failure to comply with provisions of section 19(10) and, in case, possession is not taken over within the specified time, the allottee shall be liable to penal proceedings.
- (ii) The allottee/respondent is directed to pay the outstanding dues, if any, on his part.
- (iii) Counsel for the respondent/allottee is directed to submit list of property(s) and their addresses owned by the allottee on an affidavit to the authority within a period of one week.
35. The order is pronounced.
36. Case file be consigned to the registry.
37. Copy of this order be endorsed to registration branch.


(Samir Kumar)
Member


(Subhash Chander Kush)
Member


(Dr K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 04.09.2019