BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 766 of 2018
Date of decision : 05.05.2022

SSG Ispat Pvt. Ltd.
Address:- J97, Mayfield Garden Sector-51, Gurugram-122018 — **Complainant**

Versus

M3M India Pvt. Ltd.
Registered address: - Paras Twin Tower B, 6th floor, Golf Couse Road, Sector-54, Gurugram-122002 — **Respondent**

CORAM:
Dr. K.K Khandelwal — **Chairman**
Shri Vijay Kumar Goyal — **Member**

APPEARANCE:
Shri Rajan Gupta — Advocate for the complainant
Ms. Shriya Takkar — Advocate for the respondent

ORDER

1. The present complaint dated 29.08.2018 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:

Sr. No.	Particulars	Details
1.	Name of the project	M3M Urbana, sector 67
2.	Land area	8.2125 acres
3.	Nature of the project	Commercial complex
4	DTCP License no.	100 of 2010 dated 26.11.2010 valid upto 25.11.2022 101 of 2010 dated 26.11.2010 valid upto 25.11.2022 11 of 2011 dated 28.01.2011 valid upto 27.01.2023
5.	Building Plan approved on	03.08.2016 revised on dated 30.11.2017 as per website of DTCP
6.	Rera registration	35 of 2019 dated 18.06.2019 valid upto 31.12.2021
7.	OC received on	03.07.2020 (Page 127 of the reply)
8.	Unit no.	SB/R/GL/03/025,
9.	Unit area	830.94 sq. ft.
10.	Date of allotment	10.01.2011 (Page 16 of the complaint)

11.	Date of builder buyer agreement	Not executed
12.	Possession clause	**Cannot be ascertained**
13.	Due date of possession	**Cannot be ascertained**
14.	Total sale consideration	Rs.1,39,16,983/- (As per payment plan, page 25 of the complaint)
15.	Amount paid by the complainant	Rs.36,13,909/- (As per receipt information, page 18 to 22 of the complaint)
16.	Notice of offer of possession	Not offered
17.	Intimation of termination	25.03.2016 (Page 29 of the complaint)

B. Facts of the complaint

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

   i. That complainant booked a space, vide allotment letter dated 10/01/2011, the respondent allotted unit bearing no. SB/R/GL/03/025, Size 830.94 Sq. ft. in "M3M Urbana" in Sector-67, Gurugram (hereinafter referred to as said property). That the basic price of the said property was Rs. 88,07,964/- . That despite the fact that the complainant had made the first payment on 27/11/2010 and till August-2011 a total amount of Rs. 36,13,909/- was made to the respondent, the respondent did not enter into builder buyer agreement with the complainant. This clearly shows that the intention of the respondent from the very

beginning was to cheat the complainant. That despite the fact that the complainant had made the first payment on 27/11/2010 and till August-2011 a total amount of Rs. 36,13,909/- as made to the respondent, the respondent did not entered into builder buyer agreement with the complainant. This clearly shows that the intention of the respondent company from the very beginning was to cheat the complainant.

ii. That complainant was assured at the time of booking that the physical possession of the said plot would be handed over to the complainant within 36 months from the date of booking i.e. by 07th November, 2013 and in case of delay respondent will pay late possession charges. That respondent vide letter dated 18/10/12 informed the complainant that super area of unit allotted to the complainant has been revised from 830.94 sq.ft. (77.2 sq. Mtrs.) to 1149.99 sq. ft. (106.84 sq. Mtrs.). That due to increase in super area basic price of the said unit was also increased from Rs. 88,07,964/- to Rs. 1,39,16,983/-. That the above increase in the area of the said unit is approximately 40 % and the same was not acceptable to the complainant. That complainant immediately brings to the notice of the respondent that the complainant will not accept the increased area and also vide its email dated 6 Aug 2013. That complainant again vide email dated 13/02/2014 asked the respondent to revise the layout and payment plan. The complainant again brought to the notice of the respondent that the above act on the part of respondent create mental agony and depression to the

complainant. That the complainant kept on making the request to the respondent to allot the area actually allotted to the complainant or to return the money paid by the complainant, but respondent kept on linger on the matter on one pretext or other. That complainant again having no other option vide its email dated 27/03/2015 bring to the notice of the respondent that despite having so many meetings and assurance the matter is not resolved and finally asked the respondent to refund the entire amount paid by the complainant along with compounding interest @24 % per annum.

iii. That complainant having gone through immense mental agony, stress and harassment has written numerous mails and constantly raising this issue by visiting personally too in the office of the respondent, but the respondent did not return the money paid by the complainant and kept on linger on the matter. That complainant was shocked to receive letter dated 25/03/2016 wherein the respondent had cancelled/terminate the allotment of the said property on the ground of breach of terms on the part of complainant. That in actual it was the respondent who failed to deliver the said unit as per the allotment letter and further it was the respondent only who was lingering on the matter on one pretext or other. That even though it was breach on the part of the respondent, the respondent instead of returning the total amount received from complainant i.e. Rs. 36,13.909/- along with interest at the rate 24% offered to return only Rs. 31,28,151/- after forfeiting an illegal amount of Rs. 4,85,758/-. That complainant

immediately replied to the said letter vide its letter dated 28/03/2016 and brings to the notice of respondent that breach of term of allotment is on the part of respondent and again said that complainant will not accept too much increase area and wants that either the area be reduced as per the allotment letter or asked for refund of the amount along with interest. That complainant also brings to the notice of the respondent that without out any rhyme and reason respondent have raised a demand of Rs. 71,64,162/- and wrongly terminated/cancelled the allotment after wrongly forfeiting Rs.4,85,758/- i.e. the hard earned money of the complainant.

iv. That vide letter dated 31/05/2016 the respondent has send a cheque No. 658412 dated 31/05/2016 amounting Rs. 31,28,151/- after forfeiting Rs. 4,85,758/- but the same was returned by the complainant vide letter dated 13/06/2016 stating that the same is not accepted and again reiterated that complainant will pay as per the provisional area allotted i.e., 830.94 Sq. Ft. and if the respondent unable to do so than respondent is liable to return the money paid by the complainant along with interest at the rate of 24% per annum.

C. Relief sought by the complainant

4. The complainant is seeking the following relief:

   i. Refund the entire amount along with interest.

D. Reply filed by the respondent

5. The respondent-promoter had contested the complaint on the following grounds:

i. That the complaint filed by the complainant is baseless, vexatious and is not tenable in the eyes of law and therefore the complaint deserves to be dismissed at the very threshold. That the present complaint is not maintainable as this hon'ble adjudicating officer has no jurisdiction to entertain the present complaint.

ii. The complainant booked the unit vide application form dated 08.11.2011. As per the said application the respondent was to apply for the occupancy certificate not later than 36 months from the date of approval of building plans or signing of buyer's agreement whichever is later. Admittedly no buyer's agreement was executed in the present case. The building plans have been approved on 29th October 2012. The construction of the project was completed within the agreed time limit itself and the respondent applied for occupancy certificate on 26.06.2016. occupancy certificate for the phase in which the unit is situated was granted by the competent authority on 23.02.2017.

iii. It is relevant to note that the unit admeasuring 830.94 sq. ft. was booked by the complainant. However due to the change in the design of the project, the area of the unit was increased by 319.05 sq. ft. i.e., from 830.94 sq.ft. to 1149.99 sq.ft. which is approximately 38.5% increase of the area. As such intimation dated 10.02.2014 regarding the revision of super area was sent to the complainant along with revised payment schedule.

iv. Since the complainant has not given any accord to the revised area and also failed to make further payments towards the balance consideration on 30.07.2015 an offer was made for alternate unit due to the increase in super area of the unit. Respondent had various meetings with the complainant wherein various options were given to him including shifting of unit to smaller unit to retain him as the customer. However, the complainant did not agree on any of the options offered by the respondent. Further respondent had also sent various communications calling the respondent to clear the outstanding dues.

v. In view of the above circumstances, respondent was constrained to cancel the provisional allotment of the unit as per the terms and conditions of the application form. That the respondent sent a communication dated 31.05.2016 thereby informing the complainant about the cancellation of the allotment of the unit and also sent a cheque No.658412 dated 31.05.2016 for a sum of Rs.31,28,151/- towards the amount refundable to the Complainant after deduction of Rs.4,85,758/- due towards brokerage in full and final settlement of all the claims towards the complainant in relation to the said unit. That the complainant returned the said refund cheque along with a letter to the respondent. On 09.11.2016, respondent issued another communication to the complainant requesting him to communicate with the respondent.

vi. However, the complainant chose not to revert on the same for the reasons best known to him. Instead of sending any reply, now the complainant had preferred to file the present frivolous complaint before this hon'ble adjudicating officer without any bonafide. That the complainant himself has defaulted in making payment towards the consideration amount which forced the respondent to cancel the allotment. That the different offers given to the complainant were openly ignored and neglected by the complainant which is apparent from the face of records. On the contrary, respondent has already spent money towards the construction and development of the project including the said unit and the unit was made ready for occupation. Respondent who after having spent sums of money has been unable to realize the proceeds of the apartment form the complainant and its legitimate dues have been withheld by the complainant and therefore on account of such breaches and defaults of the complainant it is the respondent which is entitled to claim compensation for the complainant. That this hon'ble adjudicating officer has no powers to deal with such cases where the cancellation of the unit has been done on account of default. The present complaint does not fall within the ambit section 12, 14, 18 and 19 of the RERA Act and thus this hon'ble adjudicating officer has no jurisdiction to decide the present complaint.

vii. That the respondent has already offered the possession and has issued notice of possession therefore, if the relief of refund as sought for by the complainant is allowed the same will cause

adverse effect on the project as whole. In this regard, reference is made to the order dated 13.09.2018 passed by Ld. Haryana Real Estate Regulatory Authority, Gurugram in complaint no. 29/2018 titled as **"Sunil Paul Vs Parsvnath Developers Limited"** wherein the Ld. authority has opined that *"keeping in view the progress of the project and the endeavour of the authority to get stalled projects completed in order to hand over the possession to the complainant, the authority is not inclined to order refund of the amount deposited by the complainant....."*. Therefore, in view of the above it is submitted that the complaint filed by the complainant is liable to be dismissed on this ground alone.

viii. Admittedly, in the present case the complainant is a company and the unit in question is commercial unit. It is clear that the unit was booked only for commercial purposes. as such the complainant is not consumer/end user. The complaint is liable to be dismissed on this ground alone. Under these circumstances, it is all the more necessary for the complainant, on whom the burden lies, to show how the complainant is a consumer. That the complainant is a defaulter in making payment on time contrary to the agreed terms. It is submitted that after 2011, the complainant had not made any payment towards the consideration amount even after repeated reminders and communications. Hence, complainant is not entitled to get any reliefs from this hon'ble adjudicating officer. In view of aforementioned facts, it is submitted that the captioned complaint is frivolous, vague and vexatious in nature. The captioned complaint has been made to injure the interest and

reputation of the respondent and therefore, the instant complaint is liable to be dismissed.

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." SCC Online SC 1044 decided on 11.11.2021*** 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. Furthermore, the said view has been reiterated by the Division Bench of Hon'ble Punjab and Haryana High Court in "***Ramprastha Promoter and Developers Pvt. Ltd. Versus Union of India and others dated 13.01.2022 in CWP bearing no. 6688 of 2021***. The relevant paras of the above said judgment reads as under:

"23) The Supreme Court has already decided on the issue pertaining to the competence/power of the Authority to direct refund of the amount, interest on the refund amount and/or directing payment of interest for delayed delivery of possession or penalty and interest thereupon being within the jurisdiction of the Authority under Section 31 of the 2016 Act. Hence any provision to the contrary under the Rules would be inconsequential. The Supreme Court having ruled on the competence of the Authority and maintainability of the complaint before the Authority under Section 31 of the Act, there is, thus, no occasion to enter into the scope of submission of the complaint under Rule 28 and/or Rule 29 of the Rules of 2017.

24) The substantive provision of the Act having been interpreted by the Supreme Court, the Rules have to be in tandem with the substantive Act.

25) In light of the pronouncement of the Supreme Court in the matter of M/s Newtech Promoters (supra), the submission of the petitioner to await outcome of the SLP filed against the judgment in CWP No.38144 of 2018, passed by this Court, fails to impress upon us. The counsel representing the parties very fairly concede that the issue in question has already been decided by the Supreme Court. The prayer made in the complaint as extracted in the impugned orders by the Real Estate Regulatory Authority fall within the relief pertaining to refund of the amount; interest on the refund amount or directing payment of interest for delayed delivery of possession. The power of adjudication and determination for the said relief is conferred upon

the Regulatory Authority itself and not upon the Adjudicating Officer."

12. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the matter of **M/s *Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra),*** and the Division Bench of Hon'ble Punjab and Haryana High Court in ***"Ramprastha Promoter and Developers Pvt. Ltd. Versus Union of India and others. (supra)***, 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.I Objection regarding complainant is not a consumer

13. The respondent has taken a stand that the complainant is the investor and not consumer, therefore, they are not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observed that the respondent is correct in stating 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 & objects of enacting a statute but at the same time the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if it 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 buyers and they have paid a total price of Rs. 36,13,909/- to the promoter towards purchase of a plot 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;"*

In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyer's agreement executed between promoters and complainants, it is crystal clear that the complainant is allottee(s) as the subject unit was allotted to them by the promoters. 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

allottees being investors are not entitled to protection of this Act also stands rejected.

14. **Relief sought by the complainant:**

i. Refund the entire amount along with interest.

15. In the present complaint, the complainant intends to withdraw from the project and is seeking return of the amount paid by them in respect of subject apartment 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."* *(Emphasis supplied)*

16. The deduction towards brokerage is disallowed as the brokerage is paid by the promoter for their marketing and promotion and it is not a

tax paid to the government and non-refundable. The promoter is directed to refund the total amount received as the complainant never agreed for change of unit or increase in super area . It is pertinent to mention here that no building buyer agreement has been executed by the builder. Revision of the area can be done by the promoter only with the consent of the allotee. Even if there is any such terms and condition in the allotment letter and it amounts to unfair trade practice. The complainant returns the cheque i.e., the amount is still lying with the promoter. The promoter is directed to pay interest only on the balance amount i.e., Rs. 4,85,758/- . Accordingly, refund be made within 90 days otherwise interest on the total due amount shall also be payable thereafter.

17. **Directions of the authority**

18. 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 promoter is directed to refund the total amount received as the complainant never agreed for change of unit or increase in super area .

    ii. The complainant returned the cheque and hence the amount is still lying with the promoter. The promoter is directed to pay

interest only on the balance amount i.e., Rs.4,85,758/-. Accordingly, refund be made within 90 days otherwise interest on the total due amount shall also be payable thereafter.

19. Complaint stands disposed of.

20. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman
Haryana Real Estate Regulatory Authority, Gurugram

Dated: 05.05.2022