BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**3615 of 2021**
Date of complaint :	**14.09.2021**
Order pronounced on	**05.12.2023**

1. Shashi Saha,
2. Nilendu Indu Saha,

Both R/o: - Flat 2C, Block 22, Diamond City North, 68 Jessore Road, Kolkata, West Bengal-700055. **Complainants**

Versus

M/s Martial Buildcon Private Limited.
Regd. Office at: Paras Twin Towers, Tower-B, 6th Floor, golf Course Road, Sector-54, Gurugram-122002.
M/s M3M India Private Limited **Respondent**
Regd. Office at: Unit No. SB/C/SL/Office/008, M3M Urbana, Sector-67, Gurugram, M

CORAM:	
Shri Vijay Kumar Goyal	**Member**
Shri Ashok Sangwan	**Member**
Shri Sanjeev Kmar Arora	**Member**

APPEARANCE:

Aditya (Advocate)	Complainants
Garvit Gupta (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottees in Form CRA 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 to the allottees as per the agreement for sale executed *inter se* them.

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.N.	Particulars	Details
1.	Name of the project	"M3M URBANA PREMIUM", Sector- 67, Gurugram
2.	Nature of project	Commercial Unit
3.	**RERA registered/not registered**	Registered 348 Of 2017 Dated 09.11.2017
4.	**DTPC License no.**	89 of 2010 dated 28.10.2010
	Validity status	27.10.2022
	Name of licensee	MARTIAL BUILDCON PVT LTD
	Licensed area	2.91 acres
5	Date of approval of building plan	(As per page no. 71 of reply)
6	Date of environment clearance	(as per page no. 75 of reply)
7	Date of allotment	06.02.2019 (As per page no. 46 of reply)
8	Unit no.	MUP/C/5L/Office/03 B

		[As per BBA on page no. 35 of complaint]
9	Unit measuring	420.87 Sq. ft. (Carpet area) 880.48 Sq. ft. (Super area) [As per BBA on page no. 39 of complaint]
10	Date of execution of Floor buyer's agreement	13.06.2019 (Page no. 31 of complaint)
11	Possession clause	**7. Possession of the unit.** **7.1 Schedule for possession of the unit-** MIPL agrees and understands that timely delivery of possession of the Unit along with the car parking space (s), if any, to the Allottee and the Common Areas to the Association of Allottees or the Competent Authority, as the case may be, as provided under the Act and Rule 2[1][F) of the Rules ,2017, is the essence of the Agreement . It is further agreed between the Parties that the Allottee shall not raise any objection , or refuse to take possession of the Unit on any pretext whatsoever , if the possession of the same is being offered duly completed with all Specifications, Amenities, Facilities as mentioned in " Schedule D' hereto , any time prior to the Commitment Period. MIPL assures to offer the handover of possession of the Unit along with the parking (if applicable) if any as per the agreed terms and conditions, unless there is a delay due to Force Majeure, court orders, Government Policy guidelines , policy guidelines of Competent Authorities, decisions affecting the regular development of

		the Project or any other event reason of delay recognized or allowed in this regard by the Authority, duly completed with all Specifications, Amenities, Facilities as mentioned in Schedule D hereto, prior to the expiry of the Commitment Period. If , the completion of the Project is delayed due any of to the above conditions, then the Allottee agrees that MIPL shall be entitled to the extension of time for delivery of possession of the Unit , provided the above conditions are not of the nature which makes it impossible for this Agreement to be performed.
12.	Due date of possession	Cannot be ascertained
13.	Total sale consideration	Rs. 1,05,43,742/- [As per page no. 122 of reply]
14.	Total amount paid by the complainant	Rs. 52,07,764/- (As alleged by complainant on page no. 08 of complaint and admitted by the respondent on Page 86 of reply)
15.	Occupation certificate dated	24.02.2021 (as per page no. 117 of reply)
16.	Offer of possession	25.02.2021 (As per page no. 120 of reply)
17	Pre-cancellation Notice	26.04.2021 (as per page no. 126 of reply)
18	Termination Letter	21.06.2021 (as per page no. 127 of reply)

B. Facts of the complaint

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

I. The Complainant, in November 2018, booked a Commercial unit in the Project named "M3M URBANA PREMIUM" (Gurgaon, Haryana) of the Respondent at Village Maidawas, Sector 67, Gurgaon, Haryana by making a payment of INR 5,00,000/- (Rupees Five Lakhs Only) as booking amount acknowledged by the Respondent vide Receipt bearing no. 67442 dated 15.11.2018.

II. That the respondent issued the allotment letter dated 06.02.2019. The complainants was allotted commercial unit admeasuring 880.48 sq. ft. super area, bearing Unit no. MUP/C/5L/Office/03B, 5th Floor Office, Tower Commercial, in "M3M URBANA PREMIUM" project at Village Maidawas Sector 67, Gurgaon, Haryana.

III. That the respondent executed the agreement for sale dated 13.06.2019. The agreement contained various one-sided and arbitrary clauses, yet the complainant could not negotiate on any of the terms, since the respondent had already collected significant amount of money from the complainant.

IV. That the agreement to sell did not state any specific date for possession and the respondent verbally assured that the possession of the unit would be offered in and around May 2020 and when the same was not adhered to, the complainants sent multiple communications to the respondent seeking possession to no avail and despite the same the complainants made a total payment of Rs. 52,07,764/- to the respondent and since no possession was offered, the complainants did not make any further payments.

V. That the respondent issued the notice of offer of possession dated 25.02.2021 wherein the respondent requested the complainants to clear the pending dues and pay stamp duty charges totaling to Rs

58,95,278/- on or before 26.03.2021 and take possession of the unit and subsequently further issued a reminder letter dated 30.03.2021. It is reiterated here that since possession was not offered as verbally assured in and around May 2020, the complainants did not make any further payments.

VI. That the respondent issued the pre-cancellation notice dated 26.04.2021 as a final opportunity to clear the pending payments and further issued the cancellation notice dated 21.06.2021 wherein the respondent has arbitrarily stated that "the amount paid by you stands forfeited on account of your default, and no amounts are due to be refunded to you by the company.

VII. That as per clause 9.3 of the agreement for sale dated 13.06.2019, in case the complainant fails to adhere to the terms of the notice for offer of possession, as has taken place in the present case, the respondent has the right to cancel the booking of the unit and refund the total amount deposited by the complainant after deducting the earnest money of 10% of total sale consideration and the interest on delayed payments.

VIII. That the complainants were left with no other option and therefore issued a legal notice to the respondent requesting the respondent adhere to the conditions under clause 9.3 of the agreement for sale and refund the total amount deposited by the complainants after making the requisite deductibles as per the clause to no avail as no further action was even taken by the respondent in this regard.

C. Relief sought by the complainants:

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

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

II. Direct respondent to pay a sum of Rs. 1,00,00/- to complainants as reimbursement of legal expenses

D. Reply by the respondent

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

i. That in due consideration of the complainant's commitment to make timely payments, unit bearing no. MUP/C/5L/Office/03B (hereinafter referred to as Unit) in M3M Urbana Premium for a total sale consideration of Rs. 1,03,54,447/- plus other charges was provisionally allotted to the complainants vide allotment letter dated 06.02.2019. **(Allotment letter dated 06.02.2019 @ Annexure-R/3 @ page no. 46-54 of reply)**. It is submitted that the complainants on their own free will and understanding of the legal import and effect had opted for specific payment plan.

ii. That it is submitted that in furtherance of the allotment, the respondent company had sent copy of buyers agreement to the complainants vide letter dated 07.02.2019 for due execution at their end. The buyer's agreement was executed between the parties on 13.06.2019. It is pertinent to mention that the buyer's agreement duly covers all the liabilities and rights of both the parties (Buyers Agreement @ **Annexure-R/5 @ page no. 56-110 of reply)**. It is submitted that all the demands were raised as per the payment plan opted by the complainants.

iii. It is submitted that the occupation certificate was granted by the competent authorities after due verification and inspection on 24.02.2021 and the respondent herein vide letter dated 25.02.2021 offered possession to the complainants herein and requested the complainants to remit the outstanding amount towards the

remaining basic sale price, service tax, cess, stamp duty charges etc. before 26.03.2021.

iv. That the complainants in violation of their agreed obligations failed to remit any amount towards the dues communicated vide the offer of possession dated 25.02.2021, therefore the respondent issued a reminder letter dated 30.03.2021, but to no avail.. It is submitted that the complainants even after the issuance of the reminder letter failed to clear their outstanding dues and take the possession, consequent to this, the respondents were forced to issue a pre-cancellation notice dated 26.04.2021, vide which it was requested to the complainants to clear the outstanding dues and take the possession.

v. It is submitted that in spite of various communications and reminders issued to the complainants, the complainants did not come forward to clear their dues and take over the possession of the unit, therefore the respondents were constrained to issue a termination letter dated 21.06.2021 forfeiting the amount as per the agreed terms and cancelling the allotment of the complainants. It is submitted that the Complainants have till date made a payment of Rs. 52,07,764/- against the total dues of Rs.1,05,43,742/- (as mentioned in the notice of offer of possession) as raised by the respondents in accordance with the payment plan and terms of the buyers agreement.

6. All other averments made in the complaint were denied in toto.

7. 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

8. The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

9. 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

10. Section 11(4)(a) of the Act, 2016 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.*

11. 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.

12. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2021-2022 (1) RCR (Civil), 357*** *and reiterated in case of* ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022***wherein it has been laid down as under:

> *"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. if the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."*

13. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the case mentioned above, the authority has the

jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

F. Findings on the relief sought by the complainant.

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

14. The present matter was heard and disposed of vide order dated 17.05.2023 wherein the Authority had directed the respondent to refund the deposited amount to the complainant after deduction of 10% and pre-hand over amount alongwith prescribed rate of interest i.e. 10.70% per annum from the date of each deposit till its realization. The authority observes that section 39 deals with the *rectification of orders* which empowers the authority to make rectification within a period of 2 years from the date of order made under this Act. Under the above provision, the authority may rectify any mistake apparent from the record and make such amendment, if the mistake is brought to its notice by the parties. The relevant portion of said section is reproduced below.

> ***Section 39: Rectification of orders***
>
> *"The Authority may, at any time within a period of two years from the date of the order made under this Act, with a view to rectifying any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties:*
>
> *Provided that no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act:*
>
> *Provided further that the Authority shall not, while rectifying any mistake apparent from record, amend substantive part of its order passed under the provisions of this Act."*

It is observed that there is an inadvertent error in the proceeding of day dated 17.05.2023 where deduction was allowed from the date of each deposit instead of from the date of cancellation as it is a case of valid

cancellation. Therefore, the authority observes that said error is inadvertent in nature and hence, the said rectification ordered to be effected.

15. The complainant was allotted unit no MUP/C/5L/Office/03 B in the project "M3M URBANA PREMIUM" by the respondent builder for a total consideration of Rs. 1,05,43,742/- and he paid a sum of Rs. 52,07,764/- which is approx.. 50% of the total sale consideration. It is pertinent to mention here that the respondent builder has obtained occupation certificate on 24.02.2021 and offered possession on 25.02.2021. Thereafter the respondent had sent reminder letter dated 30.03.2021 to clear the outstanding dues. The complainant continued with their default and again failed to make payment even after receipt of reminder letter dated 30.03.2021 and pre-termination letter dated 26.04.2021.

16. The complainant received cancellation notice dated 21.06.2021 but there is nothing on record which shows that the respondent builder refunded the balance amount after deduction of earnest money.

17. On considering the documents available on record as well as submissions made by the parties, it can be ascertained that the complainant has failed to abide by the terms of the agreement executed inter-se parties by defaulting in making payments in a time bound manner as per payment schedule. Accordingly, the respondent after giving reminder dated 30.03.2021 and pre-cancellation letter dated 26.04.2021, cancelled the unit of the complainant vide letter dated 21.06.2021. The respondent has given sufficient opportunities to the complainant before proceeding with

termination of allotted unit and the same is held to be valid as per the terms and conditions of buyer's agreement dated 13.06.2019. But while cancelling the unit, it was an obligation of the respondent to return the paid up amount after forfeiting the amount of earnest money. As per clauses 9.3 (iii) of the agreement to sell, the respondent /promoter has a right to cancel the unit in case the allottees breached the agreement to sell executed between both the parties. Clauses 9.3 (iii) of the agreement to sell is reproduced as under for a ready reference:

> ***9.3(iii)***
> *In cases: (a) Default by the Allottee continues for a period of 90 (ninety) days after notice from MIPL in this regard, or (b) If the allotment of the Unit has been obtained bydhe Allottee through fraud, misrepresentation, misstatement of facts, or concealment suppression of any material fact, or the Allottee is not competent to enter into this Agreement for reasons of insolvency or due to operation of any regulation or law; (c) the Allottee fails to comply with the conditions under the Notice for Offer of Possession, including taking over of possession of the Unit, providing necessary indemnities, undertakings, maintenance agreement and other documentation; and such failure continues for a period of more than 90 (ninety) days after receipt of a notice from MIPL in this regard; in all of the above cases MIPL may cancel the allotment of the Unit along with the parking (if applicable) if any, in favour of the Allottee and refund the money paid by the Allottee after forfeiting the Earnest Money (being 10% of the Total Consideration) and interest component on delayed payment (payable by the Allottee for breach and non- payment of any due payable to MIPL in terms of Clause 1.14 herein before) and any rebates availed earlier and brokerage/ margin/ incentive paid to a "Indian Property Associate" ("IPA") / "Channel Partner") in case booking is made through a "Indian Property Associate" ("IPA") / "Channel Partner"). The balance amount of money paid by the Allottee shall be returned by MIPL to the Allottee, without interest or compensation within 90 (ninety) days of such cancellation. On such default and subsequent cancellation, the Agreement and any liability of MIPL arising out of the same shall thereupon, stand terminated. Provided that, MIPL shall intimate the Allottee about such termination at least 30 (thirty) days prior to such termination.*

18. 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, (1970) 1***

SCR 928 and Sirdar K.B. Ram Chandra Raj Urs. VS. Sarah C. Urs., (2015) 4 SCC 136, *and wherein it was held that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in the nature of penalty, then provisions of section 74 of Contract Act, 1872 are attached and the party so forfeiting must prove actual damages. After cancellation of allotment, the flat remains with the builder as such there is hardly any actual damage. National Consumer Disputes Redressal Commissions in CC/435/2019* ***Ramesh Malhotra VS. Emaar MGF Land Limited*** (decided on 29.06.2020) *and* ***Mr. Saurav Sanyal VS. M/s IREO Private Limited*** (decided on 12.04.2022) ***and followed in CC/2766/2017 in case titled as Jayant Singhal and Anr. VS. M3M India Limited decided on 26.07.2022,*** *held that 10% of basic sale price is reasonable amount to be forfeited in the name of "earnest money".* Keeping in view the principles laid down in the first two cases, a regulation known as the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, was farmed 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 paid-up amount of the complainant i.e. Rs.52,07,764 after deducting 10% of the sale consideration being earnest money along with interest at the prescribed rate i.e., 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, from the date of termination/cancellation i.e., 21.06.2021, till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

F.II Compensation

20. The complainant in the aforesaid relief is seeking relief w.r.t compensation. Hon'ble Supreme Court of India in civil appeal titled as ***M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors.*** (Civil appeal nos. 6745-6749 of 2021, decided on 11.11.2021), has held that an allottee is entitled to claim compensation under sections 12, 14, 18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation.

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 is directed to refund the paid-up amount of Rs. 52,07,764/- after deducting 10% of the sale consideration being earnest money along with interest at the prescribed rate i.e., 10.75% on the refundable amount, from the date of termination/cancellation i.e., 21.06.2021 till date of actual refund.

ii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

22. Complaint stands disposed of.

23. File be consigned to registry.

Sanjeev Kumar Arora
Member

Ashok Sangwan
Member

Vijay Kumar Goyal
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 05.12.2023