# NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
# NEW DELHI

## CONSUMER CASE NO. 2724 OF 2017

1. SAURABH SHARMA
S/o. Late Mr. Rajesh Sharma, R/o. 96, Samachar Apartments,
Mayur Vihar, Phase-I
NEW DELHI - 110 091
2. SUMAN SHARMA
W/o. Late Mr. Rajesh Sharma, R/o. 96, Samachar Apartments,
Mayur Vihar, Phase-I
NEW DELHI - 110 091 .....Complainant(s)

Versus

1. M3M INDIA PVT. LTD.
THROUGH ITS MD, PARAS TWIN TOWERS, TOWER B,
6TH FLOOR, GOLF COURSE ROAD, SECTOR-54,
GURUGRAM-122002, HARYANA .....Opp.Party(s)

**BEFORE:**
**HON'BLE MR. SUBHASH CHANDRA,PRESIDING MEMBER**

FOR THE COMPLAINANT : MR OSAMA SUHAIL, ADVOCATE WITH
MS PUJA KESARWANI, ADVOCATE
FOR THE OPP. PARTY : MR JATIN SEHGAL, MR VIREN BANSAL AND
MR HARSHIT KAPOOR, ADVOCATES

**Dated : 04 October 2023**

**ORDER**

**1.** This consumer complaint under section 21(a)(i) of the Consumer Protection Act, 1986 (in short, the 'Act') alleges unfair trade practice and deficiency in service in delay in handing over possession of a flat booked in a project promoted and executed by the opposite party within the promised time and seeking refund of the amount deposited with compensation and other costs.

**2.** The complainant states that on 19.07.2011 he booked flat no. MM TW-C09/0701 on 7$^{th}$ Floor, Merlin Tower C09, Sector 67, Gurgaon, Haryana admeasuring 2660 sq ft for a sale consideration of Rs 2,00,09,940/-. A Builder Buyers Agreement (BBA) was signed on 17.01.2012. Rs 2,03,11,475/- has been paid by him towards sale consideration though opposite party admits receipt of Rs 2,02,75,940/-. As per clause 16.1 of the BBA, possession was to be handed over by April 2015. However, offer of possession was made by the opposite party on 06.04.2017 even though the flat was not ready or inhabitable. As complainant was entitled to a Timely Payment Rebate (TPR), a revised offer was made on 03.05.2017 on representation. Complainant made the final payment on 12.05.2017 but found that the opposite party had made drastic changes in the plans of the flat without intimation or approval. The living and dining area was reduced from 548 sq ft to 356 sq ft (by 192 sq ft) and a servant room of 75 sq ft was incorporated though it was not the complainant's

requirement. Change in layout plans *inter alia* altered light and ventilation in the bedroom and kitchen and was unacceptable to the complainant as it was arbitrary and unjustifiable.

**3.** The opposite party's reliance on clauses 13.3 and 13.4 of the BBA to make changes in the plans is stated to be against the law laid down by the Hon'ble Supreme Court in ***Geetu Gidwani Verma & Anr. Vs. Pioneer Urban Land & Infrastructure Ltd.*** (2018) SCC Online NCDRC 1164 dated 23.10.2018 and ***Pioneer Urban Land & Infrastructure Ltd. Vs. Govindan Raghavan*** (2019) 5 SCC 725 that allottees being forced to agree to onerous conditions in agreements after receiving substantial payment constituted an unfair trade practice.

**4.** Complainant also contends that the opposite party failed to provide an exclusive approach road to the project as promised as per the BBA and the flat was itself uninhabitable and lacked electricity and water supply connection. A single approach road had been assessed to be a security risk by an agency whose report had been obtained by the complainant and which had not been challenged. An Indemnity Bond was insisted upon by the opposite party as a precondition to taking over possession which was protested by the complainant by email on 06.07.2017. Such a precondition has been held to be illegal in this Commission's order in ***Narender Gupta Vs. DLF Ltd.,*** CC No. 1036 of 2018 dated 20.01.2020. Financial loss on account of house building loan from ICICI Bank involving interest @10.5% and cost of rented accommodation is also claimed. Opposite party's contention that he is not a 'consumer' as he has invested in several properties is denied.

**5.** Complainant prays for directions to opposite party to (i) refund Rs 1,97,74,037/- with 24% interest; (ii) pay Rs 36,57,500/- as compensation for the un-necessary interest on bank loan due to delay of 2.2 years attributable to opposite party; (iii) pay Rs 2,00,00,000/- compensation for mental harassment; and (iv) and for any other orders deemed fit.

**6.** Resisting the complaint by way of a reply, opposite party denied all averments and raised preliminary objections that (i) the complaint was liable to be dismissed on grounds of *'suggestio falsi, suppression veri'* in selectively relying on the BBA to mislead; (ii) the complainant is not a 'consumer' under section 2(1)(d) being an investor who has deliberately not taken possession of the flat; (iii) this Commission lacks jurisdiction to consider the case being a civil suit and the matter should be adjudicated before an Arbitrator; (iv) complainants being signatories to the BBA, under clause 48, the provisions of the Contract Act, 1872 apply; (v) the complainants have no cause of action since the opposite party had adhered to the BBA and has obtained the Occupancy Certificate; and (vi) the complaint is bad for non-joinder of parties as the co applicant, Suman Sharma, complainant's mother, is not impleaded.

**7.** The opposite party contends that as per BBA, which was delayed by the complainant as it was sent on 10.12.2011 but signed only on 17.01.2012, the date of possession was 26.05.2016 reckoned from 26.11.2012 the date of the mud slab, i.e. 36 months plus 6 months grace period. The Occupation Certificate was obtained on 24.03.2017 and possession was offered on 24.03.2017. However, delayed possession charges of Rs 1,97,432/- for 9 months and 26 days had been adjusted in the consideration and admitted by the complainant. It is also contended that the complainant is guilty of delayed payments and that as a goodwill TPR of Rs 6,67,000/- was extended. It is denied that there is no approach road or that an

exclusive road was planned. The opposite party had been restrained by an order dated 03.05.2017 in *Ram Nath Vs. Consolidate Realtor Pvt. Ltd. & Anr*. in CS No. 1268 of 2017 to undertake construction on the area proposed for the road. The complainant had approached the Haryana RERA in HRR/GGm/CRN/1468/2018 in *Saurabh Sharma Vs. M3M India Limited* with a similar complaint which he withdrew subsequently.

**8.** On the issue of unilateral alteration of the layout of the apartment, it is stated that the super area of the flat has marginally changed from 2660 sq ft at the time of booking to 2668 sq ft at the time of offer and a servant room and a yard has been added. It is denied that sub-standard and inferior quality material of construction material had been used since the complainant made payments after inspections. The delay in possession is stated to be of only 9 months and 26 days as per the ABA for which compensation as delayed payment charges of Rs 1,97,432/- had been adjusted and accepted by the complainant. Since there were over 500 families inhabiting the project, the charge of uninhabitability is denied. Application for electricity has been made and water supply arrangement through overhead tanks is made.

**9.** Parties led their evidence and filed rejoinder, affidavit, and evidence as well as short synopsis of arguments. I have heard the learned counsel for the parties and carefully considered the material on record.

**10.** The preliminary objections of the opposite party have been considered. The contention that the complainant is not a 'consumer' is a bald statement that has not been supported by any evidence, the onus of which is on the opposite party to show that the complainant was in the business of buying and selling flats, in terms of this Commission's orders in ***Kavita Ahuja Vs. Shipra Estates,*** I (2016) CPJ 31 and ***Sanjay Rastogi Vs. BPTP Limited & Anr.***, CC No. 3580 of 2017 dated 18.06.2020. This argument cannot be sustained. As regards jurisdiction, the contention of the opposite party cannot be accepted since the Hon'ble Supreme Court has laid down in ***M/s EMAAR MGF Land Ltd. Vs. Aftab Singh,*** I (2019) CPJ 5 (SC) that the arbitration clause in the agreement does not bar the jurisdiction of the Consumer *fora* and in ***M/s Imperia Structures Ltd. Vs. Anil Patni & Anr.,*** (2020) 10 SCC 783 that the provisions of the Consumer Act are in addition to and not in derogation of any other law in force. As for the cause of action, the Hon'ble Supreme Court laid down in ***Meerut Development Authority Vs. Mukesh Kumar Gupta,*** IV (2012) CPJ 12 on 09.05.2012 that failure to deliver possession constitutes a recurrent cause of action and therefore this contention of the opposite party is not valid.

**11.** On merits, it is admitted by the opposite party that there was a change in the layout plans of the flat in question. Opposite party states that as per clauses 13.3 and 13.4 of the BBA it was entitled to make changes unilaterally without notice to the allottee. It is also admitted that the electricity has been applied for and water supply is through overhead tanks, though no connection is available. It is also admitted that there was delay of over 9 months in the offer of possession for which compensation had been adjusted in the consideration.

**12.** From the foregoing, it is apparent that the opposite party made changes in the layout plans of the apartment without consent of the complainant. The recourse to the provisions under the BBA cannot be accepted since the document has imposed onerous and unfair terms. It cannot be denied that a primary consideration for choosing a flat is the layout plan

and the promise of amenities such as electricity and regular (treated) water supply. Admittedly, these two facilities are still absent.

**13.** The complainant has relied upon ***Geetu Gidwani Verma*** (supra) and ***Govindan Raghavan*** (supra) to argue that an agreement that is one-sided and imposes conditions that are biased in favour of the builder/opposite party is an unfair trade practice. A change in the layout of a flat without any inputs or intimation to the allottee/buyer certainly constitutes an unfair trade practice as substantial payments already stand made by the complainant/allottee. It is not denied by the opposite party that intimation regarding the alteration of plans was not provided to the complainant. It is rather asserted that the BBA entitled it to do so. It would also constitute a deficiency in service as it alters the quality of accommodation that persuaded the complainant to book the flat now stands altered permanently and results in a change in the spatial arrangement of the rooms. Therefore, both deficiency in service and unfair trade practice are writ large in the instant case.

**14.** In case of delay in handing over possession, the Hon'ble Supreme Court in ***Geetu Gidwani Verma*** (supra) has laid down that a buyer cannot be compelled to take possession of a flat when there is delay in delivery of possession by the builder and the buyer is entitled to refund along with compensation/interest for such delay. I am inclined to concur with this argument urged by the complainant considering the fact that the BBA has included clauses that have adversely affected the complainant in terms of the flat booked by him through unilateral and arbitrary actions of the opposite party. In view of the foregoing, the complaint is liable to succeed.

**15.** The claim of the complainant for compensation in the form of interest @ 24% p.a. has been considered. In ***Experion Developers Pvt. Ltd. Vs. Sushma Ashok Shiroor,*** CA No. 6044 of 2019 decided on 07.04.2022 and in ***DLF Homes Panchkula Pvt. Ltd. Vs. D.S. Dhanda,*** CA Nos. 4910-4941 of 2019 decided on 10.05.2019 the Hon'ble Supreme Court laid down that interest payable should be restitutionary and also compensatory and paid from the date of deposit. In ***Sushma Ashok Shiroor*** (supra) it was also held that interest of 9% is fair and just.

**16.** In the facts and circumstances of this case, for the aforesaid reasons, this complaint is allowed partially and disposed of with the following directions:

(i) opposite party no. 1 shall repay the complainants the sum of Rs 2,03,11,475/- with interest @ 9% p.a. compensation for the delay in possession from the respective dates of deposit till the date of payment after adjusting Rs.1,97,432/- paid for delay in the offer of possession;

(ii) this order shall be complied within 2 months from the date of this order failing which the rate of interest will be 12% p.a.;

(iii) opposite party shall also pay the complainant litigation cost of Rs 50,000/-.

All pending IAs shall stand disposed of with this order.

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**SUBHASH CHANDRA**
**PRESIDING MEMBER**