

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

Complaint no. :	4688 of 2020
Date of filing complaint:	14.01.2021
First date of hearing:	18.03.2021
Date of decision :	25.08.2022

Ms. Vandana Vais R/o: House no 20, ground floor, sector 41.	<b>Complainant</b>
Versus	
M/s Elan Limited R/o: 3 <sup>rd</sup> floor, golf view corporate tower, Golf Course Road, sector 42, Gurugram.	<b>Respondent</b>

<b>CORAM:</b>	
Dr. KK Khandelwal	<b>Chairman</b>
Shri Vijay Kumar Goyal	<b>Member</b>
<b>APPEARANCE:</b>	
Shri Abhishek Sharma Advocate	Complainant
Shri Ganesh Kamath Advocate	Respondent

**ORDER**

1. The present complaint has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 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 provisions of



the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

**A. Unit and project related details**

2. The particulars of the project, the details of sale consideration, the amount paid by the complainants, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Name of the project	"Mercado" , sector - 80 , Gurugram.
2.	Nature of the project	Residential Unit
3.	DTCP License no. & validity status	82 of 2009 dated 08.12.2009
4.	RERA Registered / not registered	Registered bearing no. 189 OF 2017 dated 14.09.2017
5.	Unit no.	FS-54, 3 <sup>rd</sup> floor
6.	Unit admeasuring	278 sq. ft.
7.	Date of execution of Flat buyer agreement	17.05.2018
8.	Possession clause	11.possession of unit <i>The Developer based on its project planning and estimates and subject to all just exceptions endeavours to complete construction of the Said Building/Said Unit within a period of 48 months with an extension of further twelve (12) months from the date of this agreement unless there shall be delay or failure due to Govt. department delay or due to any circumstances beyond the power and control of the Developer or Force Majeure conditions including but not limited to reasons mentioned in clause</i>



		<i>11 (b) and 11(c) or due to failure of the Allottee(s) to pay in time the Total Consideration and other charges and dues/payments mentioned in this Agreement or any failure on the part of the Allottee(s) to abide by all or any of the terms and conditions of this Agreement. In case there is any delay on the part of the Allottee(s) in making of payments to the Developer then notwithstanding rights available to the Developer elsewhere in this contract, the period for implementation of the project shall also be extended by a span of time equivalent to each delay on the part of the Allottee (s) in remitting payment(s) to the Developer.</i>
9.	Due date of delivery of possession	17.05.2023 (Calculated from the date of execution of this Agreement which is still pending)
10.	Total sale consideration	Rs 42,31,836 /-
11.	Total amount paid by the complainant	Rs 15,54,332/-
12.	Occupation certificate	Not obtained
13.	Offer of possession	offered on 07.03.2020 (it is not a valid offer as he has offered prior obtaining the OC.)

**B. Facts of the complaint:**

3. That Complainants were approached by the Respondent to purchase a commercial space/retail shop in the said Project. The Respondent assured the Complainants that the possession of the said unit would be handed over expeditiously and on time, and also assured to the Complainants of complete transparency and honesty in all their dealings.



4. That the Complainant booked a commercial space/retail shop, in the said project, by making a payment of Rs. 25000/-
5. That Builder Buyer Agreement for the said unit was signed on 17.05.2018 by the complainants and a Mr. Siddharth Kumar, authorized signatory for the developer/promoter. as per Interpretation Clause 11(a) of the agreement the possession of the said unit was to be delivered within 48 months of the from the date of signing of the agreement by the parties , the said unit had a super area of approximately 278 Sq. ft. and a net base price of Rs. 9000/- per sq. ft. making the total consideration of the said unit at Rs. 26,67,688/
6. The payment of the total amount for the unit was to be made according to "Special Fixed Return Payment Plan" as opted by the complainants. According to the payment plan chosen ,50% of the Basic Sale Price and 100% of the EDC/IDC Charges were to be paid within Six months of booking of the unit and the rest of the payment was to be made on the offer of possession.
7. It is around 60% of the total consideration for the unit, that clearly shows the payment made by the complainant were ahead of schedule
8. That a letter dated 07.03.2020 was received by the complainant titled "Demand on Offer of Possession for Fit-Out", the contents of this letter left the complainant deeply appalled, the letter informed the complainant that the final measurement of the super area of the said unit stood revised without prior consent of the complainants, from 278 sq. ft. to a new measurement of 441 sq. ft.,





and making an additional demand of Rs. 32,53,228/- thereby increasing the total consideration for the unit to an astounding sum of Rs. 48,15,839/-

**C. Relief sought by the complainants:**

9. The complainants have sought the following relief(s):
  - i. Direct the respondent to refund the amount of Rs. 15,54,332/- along with 18% interest.
  - ii. Direct the respondent to pay cost of litigation Rs.1,00,000/-

**D. Reply by respondent:**

The respondent-builder by way of written reply made the following submissions:

10. That the present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the Builder Buyer's Agreement signed between the parties as shall be evident from the submissions made in the following paragraphs of the present reply.
11. That the Complainants have got the unit withing timelines as mentioned in the BBA and there is no delay. Further, the Complainants solely relied upon their own judgment of investments. In this regard, para E under Land. Details is reproduced for the convenience of this Hon'ble Tribunal.

*"E. The Allottee(s) acknowledges that the Developer has readily provided all the*





*information and clarifications as required by the Allottee(s) and the Allottee(s) has not relied upon and/or is not influenced by any architect's plans, sales plans, sale brochures, advertisements, representations, warranties, statements or estimates of any nature whatsoever whether written or oral made by the Developer, its selling agents/brokers or otherwise including but not limited to any representations relating to the description or physical condition of the said Complex or the size or dimensions of the Said Retail/Commercial unit/ Serviced Apartments therein or any other physical characteristics thereof, the services, if any, to be provided to the Allottee(s), the estimated facilities / amenities to be made available to the Allottee(s) or any other data except as specifically represented in this Agreement and Application. The Allottee(s) has relied solely on the Allottee's own judgment and investigation in deciding to enter into this Agreement and to purchase the Said Retail/Commercial Unit/ Serviced Apartments (having the specifications as set out in this Agreement). No oral or written representations or statements shall be considered to be a part of this Agreement and this Agreement is self-contained and complete in itself in all respects.*

12. That the payments of expression of interest were made on their own decision and the same is clearly mentioned in Buyers agreement and was admitted by the complainant.
13. That the terms and conditions here, clause has been misinterpreted by the Complainants as per their own whims and fancies to suit their own needs. As per clause 11(A) of the BBA, the deadline for offering the possession of the unit falls on 17th May 2023 and not on 17th May 2022, (48 months plus extension of 12 months from the date of BA), However the possession was offered 3 years 2 months prior to the deadline i.e. on 07th March 2020, and accepted by the complainant in para 12 of their complaint
14. That the complainants have deposited an amount of Rs 15,54,332/- and not 15,62,611/- as falsely alleged by the Complainant. That the complainants have mistakenly added an



amount of Rs 8279/- which was paid by them towards BBA Registration charges on 02.09.2019.

15. That the issuance of fixed amount cheques were stopped only after applying for Occupancy Certificate on 14.01.2020. That all the acts of Respondent were strictly as per the documents executed by and between the parties. Further, a letter of intimation of applying of Occupation Certificate as well as stopping the fixed amount was also sent to the Complainants on 15.01.2020. That it is further most humbly submitted that the Complainants had failed to adhere to their reciprocal obligations and failed to make timely payments and are a defaulter as of date. Hence they cannot claim any returns otherwise also.
16. That the contents of para under reply is highly misleading hence denied. The complainants were always short of money and has filed the present petition to hide their own wrongs. That on applying of O/C as per clauses of BBA, on final measurement, the Super Area of the Unit has been increased to 441 sqft. The Respondent has charged the increase area on the same Basic Sales Price, as was agreed during the time of signing the agreement. However, in case of objection to the above, the Respondent have the provision of offering an alternative unit with approximately equivalent area of the existing unit. Clause No 1.5 of the BBA is reproduced herein for the convenience of this Hon'ble Tribunal:

*"1.5 The Allottee(s) agrees and acknowledges that any change in the sanction of the building plan, from time to time and Allottee(s) acknowledges that in such an eventuality, the dimensions of the Said Unit allotted to the Allottee(s) can*



*change. In case of such eventuality, alternative unit shall be provided for allotment to the allottee (s) by the developer”*

17. That The provision of opting an alternative unit was always given to the client. All the calls and queries during meetings were clarified. Moreover, the above said option is clearly mentioned in Point 1.5 of the BBA, which shows clear intentions and transparency in dealing of the Respondent.
18. That It is proved beyond any iota of doubt that the complainants are short of funds and are not in a position to even pay and clear the possession charges and demand due on possession as per the payment plan opted in BBA i.e. 50% balance, which inability they are accepting in this para no. 15 of their complaint. The present complaint is nothing else but a feeble attempt to escape their own admitted liability

**E. Jurisdiction of the authority:**

19. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

**E. I Territorial jurisdiction**

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, 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**

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)(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.

20. 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.

### **F. Findings on the relief sought by the complainants:**

- F.1 Direct the respondent to refund the amount of Rs. 15,62,211/- along with 18% interest.**



21. The complainant booked the commercial unit in the above-mentioned project of the respondent in 07.03.2018 for sale consideration of Rs.42,31,836/- a buyer's agreement was executed between parties in this regard on 17.05.2018. the complainants started depositing various amounts and paid a total sum of Rs.15,54,332 /- against the allotted unit. The due date for completion of the project and offer of possession of the unit was fixed as fit - outs if the unit and raised demand for remaining dues vide letter dated 07.03.2020. but instead of paying the amount due and taking possession, the complainants send a legal notice through their counsel challenging the increase in super area of the unit, offering them the allotted unit of the unit, offering them the allotted unit of the area mentioned in buyers' agreement or in the alternative seeking refund besides compensation. But the case of respondent is that after completion of the project and applying for O.C, possession for fit - outs of the allotted unit was offered to the allottees prior to the date fixed. Though there is an increase in the super area of allotted unit from 278 sq. ft. to 441 sq. ft. but that is as per clause 10. Of the buyer's agreement. even otherwise, the respondent is in position to offer alternative unit of the allotted size as per clause 1.5 of buyer's agreement.
22. Keeping in view of the above said facts and submission made by complainant, the authority observes that the complainant surrendered the unit by sending a letter w.r.t. refund. The deduction should be made as per the Haryana Real Estate



Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, which states that-

*"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 amount of the real estate i.e .apartment/plot/building as the case may be in all case 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."*

23. The due date for offer of possession of the allotted unit has not yet expired. though possession for fit outs has been offered but the same is not valid in the eyes of law. The complainant wants to withdraw from the project and are seeking refund of amount beside interest. But the claim of refund is not covered under section 18 (1) as due date is not yet over and refund can be sought only after deducted of 10 % earnest money
24. Keeping in view the law down by the Honble apex court of the land in cases of **Maula Bux V/s union of India. 1969 (2) supreme court 554, Rajbir singh & anr. V/s Jaswant singh, 2018, SCC online Delhi 9042** wherein it was held that deduction of 10 % of sale price as earnest money is reasonable one. Even keeping in view, the law laid down above the authority framed



regulation 11 in 2018 wherein it was provided that deducted of 10% of the sale price as earnest money is reasonable.

25. The promoter is directed to return the balance amount after deducting 10% of the basic sale price alongwith interest at the prescribed rate i.e. 10% per annum within a period of 90 days from the date of this order. The respondent is directed to adjust the assured return, if any, already paid to the complainant.

### **F.2 Cost of litigation**

26. The complainants are claiming compensation under the present relief. The Authority is of the view that it is important to understand that the Act has clearly provided interest and compensation as separate entitlement/rights which the allottee(s) can claim. For claiming compensation under sections 12,14,18 and Section 19 of the Act, the complainants may file a separate complaint before the adjudicating officer under Section 31 read with Section 71 of the Act and rule 29 of the rules.

### **H. Directions issued the Authority:**

27. Hence, the Authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the functions entrusted to the Authority under section 34(f) of the Act of 2016:
- The respondent/ promoter is directed to refund the amount of Rs.15,54,332/-, received by it from the complainants after deducting 10% of earnest money along with interest at the





rate of 10% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules 2017 from the date of order till the actual date of refund of the deposited amount.

- 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.

28. Complaint stands disposed of.

29. File be consigned to the Registry.

v.i- 3  
(Vijay Kumar Goyal)  
Member

(Dr. KK Khandelwal)  
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 25.08.2022

**HARERA**  
GURUGRAM

