

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

Date of decision **11.07.2023**

NAME OF THE BUILDER		Elan Buildcon Pvt. Ltd.	
PROJECT NAME		Elan Town Centre	
S. No.	Case No.	Case title	Appearance
1	CR/4851/2020	Madhu Sharma V/S Elan Buildcon Private	Sh. Rajan Kumar Hans Sh. J.K Dang
2	CR/4954/2020	Sumit Dogra V/S Elan Buildcon Private Limited	Sh. Rajan Kumar Hans Sh. J.K Dang
3	CR/4822/2020	Abhey Y Deshmukh V/S Elan Buildcon Private	Sh. Rajan Kumar Hans Sh. J.K Dang
4	CR/4834/2020	Manoj Kumar V/S Elan Buildcon Private Limited	Sh. Rajan Kumar Hans Sh. J.K Dang
5	CR/4848/2020	Manoj Sharma V/S Elan Buildcon Private	Sh. Rajan Kumar Hans Sh. J.K Dang
6	CR/4930/2020	Urvashi Tiwari V/S Elan Buildcon Private	Sh. Rajan Kumar Hans Sh. J.K Dang
7	CR/4852/2020	Sanjeev Kumar Sharma v/S Elan Buildcon	Sh. Rajan Kumar Hans Sh. J.K Dang
8	CR/2166/2021	Dinesh Bisht V/S Elan Buildcon Private Limited	Sh. Rajan Kumar Hans Sh. J.K Dang

CORAM:

Shri Vijay Kumar Goyal

Member

Shri Ashok Sangwan

Member

Shri Sanjeev Kumar Arora

Member

ORDER

1. This order shall dispose of all the 8 complaints titled as above filed before this authority under section 31 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred as "the Act") read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter referred as "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 its obligations, responsibilities and functions to the allottees as per the agreement for sale executed inter se between parties.
2. The core issues emanating from them are similar in nature and the complainant(s) in the above referred matters are allottees of the project, namely, Elan Town Centre (commercial complex) being developed by the same respondent/promoter i.e., Elan Buildcon Pvt. Ltd. The terms and conditions of the buyer's agreements, fulcrum of the issue involved in all these cases pertains to failure on the part of the promoter to deliver timely possession of the units in question, seeking award of refund of the entire amount along with interest.
3. The details of the complaints, reply to status, unit no., date of agreement, possession clause, due date of possession, total sale consideration, total paid amount, and relief sought are given in the table below:

Project Name and Location	Elan Town Centre, Sector 67, Gurugram, Haryana
<p>Possession clause: - 11(a) 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 36 months from the date of this agreement with an extension of further 12 months unless there shall be delay or failure due to govt.</p> <p style="text-align: right;">(Emphasis supplied)</p>	
<p>Occupation certificate: -</p> <p>➤ OC received dated 09.03.2021</p>	
<p>Note: Grace period is included while computing due date of possession.</p>	

Sr. No	Complaint No., Case Title, and Date of filing of complaint	Reply status	Unit No.	Date of apartment buyer agreement	Due date of possession	Total Consideration / Total Amount paid by the complainant(s)	Relief Sought	Date of withdrawal
1.	CR/4851/2020 Madhu Sharma V/S Elan Buildcon Pvt. Ltd. Date of Filing of complaint 15.01.2021	Reply Received on 04.02.2021	KIOSK-0208, 2 nd FLOOR (Page no. 21 of complaint)	20.07.2017 (Page no. 18 of the complaint)	20.07.2021 (Calculated from date of execution of the agreement plus 12 months grace period)	TSC: - Rs.26,47,500/- AP: - Rs. 10,32,732/-	-Refund the entire amount along with interest	05.10.2020 (As per page 59 of complaint)
2.	CR/4954/2020 Sumit Dogra V/S Elan Buildcon Pvt. Ltd. Date of Filing of	Reply Received on 09.02.2021	KIOSK-0212, 2 nd floor (Page no. 11 of complaint)	20.07.2017 (Page no. 16 of the complaint)	20.07.2021 (Calculated from date of execution of the agreement plus 12 months	TSC: - Rs.26,47,500/- AP: - Rs.10,32,732/-	Refund the entire amount along with interest	11.12.2020 (As per page 56 of complaint)

	complaint 19.01.2021				grace period)			
3.	CR/4822/ 2020 Abhey Y Deshmuk h V/S Elan Buildcon Pvt. Ltd. Date of Filing of complaint 14.01.2021	Reply Receive d on 03.02.2 021	KIOSK - 0204, 2 nd floor (On page no. 22 of complain t) (Page no. 22 of complain t)	20.07.2017 (Page no. 18 of the complaint)	20.07.2021 ((Calculated from date of execution of the agreement plus 12 months grace period)	TSC: - Rs.26,47, 500/- AP: - Rs.10,32, 731/-	Refund the entire amount along with interest	06.10. 2020 (As per the facts of the compl aint)
4.	CR/4834/ 2020 Manoj Kumar V/S Elan Buildcon Pvt. Ltd. Date of Filing of complaint 14.01.2021	Reply Receive d on 04.02.2 021	KIOSK- 0206, 2 nd floor (Page no. 21 of complain t)	21.07.2017 (Page no. 18 of the complaint)	21.07.2021 (Calculated from date of execution of the agreement plus 12 months grace period)	TSC: - Rs.26,47, 500/- AP: - Rs.10,32, 732/-	Refund the entire amount along with interest	05.10. 2020 (As per on page 59 of compl aint)
5.	CR/4848/ 2020 Manoj Sharma V/S Elan Buildcon Pvt. Ltd. Date of Filing of complaint 14.01.2021	Reply Receive d on 04.02.2 021	KIOSK- 0207, 2 nd floor (Page no. 20 of complain t)	20.07.2017 (Page no. 17 of the complaint)	20.07.2021 ((Calculated from date of execution of the agreement plus 12 months grace period)	TSC: - Rs.26,47, 500/- AP: - Rs.10,32, 731/-	Refund the entire amount along with interest	05.10. 2020 (As per on page 58 of compl aint)
6.	CR/4930/ 2020 Urvashi Tiwari V/S Elan Buildcon Pvt. Ltd. Date of Filing of complaint 19.01.2021	Reply Receive d on 03.02.2 021	KIOSK- 0211, 2 nd floor (Page no. 18 of complain t)	20.07.2017 (Page no. 15 of the complaint)	20.07.2021 ((Calculated from date of execution of the agreement plus 12 months grace period)	TSC: - Rs.26,47, 500/- AP: - Rs.10,32, 731/-	Refund the entire amount along with interest	06.10. 2020 (As per on page 59 of compl aint)

7.	CR/4852/2020 Sanjeev Kumar Sharma V/S Elan Buildcon Pvt. Ltd. Date of Filing of complaint 14.01.2021	Reply Received on 04.02.2021	KIOSK-0205, 2 nd floor (Page no. 18 of complaint)	20.07.2017 (Page no. 16 of the complaint)	20.07.2021 (Calculated from date of execution of the agreement plus 12 months grace period)	TSC: - Rs.26,47,500/- AP: - Rs.10,32,731/-	Refund the entire amount along with interest	05.10.2020 (As per page 62 of complaint)
8.	CR/2166/2021 Dinesh Bisht V/S Elan Buildcon Pvt. Ltd. Date of Filing of complaint 19.04.2021	Reply Received on 14.06.2021	KIOSK-0210, 2 nd floor (Page no. 20 of complaint)	20.07.2017 (Page no. 17 of the complaint)	20.07.2021 (Calculated from date of execution of the agreement plus 12 months grace period)	TSC: - Rs.26,47,500/- AP: - Rs.10,32,731/-	Refund the entire amount along with interest	15.10.2020 (As per page 60 of complaint)

Note: In the table referred above certain abbreviations have been used. They are elaborated as follows:

Abbreviation Full form

TSC Total Sale consideration

AP Amount paid by the allottee(s)

- The aforesaid complaints were filed by the complainants against the promoter on account of violation of the builder buyer's agreement executed between the parties in respect of the subject units for not handing over the possession by the due date as per the terms of the buyer's agreement, thus, seeking refund of the entire amount paid by the complainant- allottees to the promoter along with interest.
- The Authority has decided to treat the said complaints as an application for non-compliance of statutory obligations on the part of the promoter /respondent in terms of section 34(f) of the Act which mandates the authority to ensure compliance of the obligations cast upon the promoters.

the allottee(s) and the real estate agents under the Act, the rules and the regulations made thereunder.

6. The facts of all the complaints filed by the complainant(s)/allottee(s) are also similar. Out of the above-mentioned cases, the particulars of complaint case bearing no. 4851/2020 titled as Madhu Sharma V/S Elan Buildcon Pvt. Ltd. is being taken as a lead case in order to determine the rights of the allottee(s) qua refund of the entire amount along with interest.

A. Project and unit related details

7. The particulars of the project, the details of sale consideration, the amount paid by the complainant(s), date of proposed handing over of the possession, delay period, if any, have been detailed in the following tabular form:

CR/4851/2020 titled as Madhu Sharma V/S Elan Buildcon Pvt. Ltd.

S. N.	Particulars	Details
1.	Name of the project	"Elan Town Centre" Sector 67, Gurugram, Haryana
2.	Project area	2.00 acres
3.	Nature of the project	Commercial Complex
4.	DTCP license no. and validity status	84 of 2012 dated 28.08.2012 valid upto 27.08.2021
5.	Name of licensee	M/s Elan Buildcon Pvt. Ltd.
6.	RERA Registered/ not registered	Registered dated 02.02.2018
7.	RERA registration valid up to	01.02.2022

8.	Allotment of unit	06.03.2017 (As per page no. 15 of complaint)
9.	Unit no.	KIOSK - 0208, 2 nd floor (On page no. 17 of complaint)
10.	Super area	300 sq. ft. (As per allotment letter on page no. 34 of complaint)
11.	Date of flat buyer's agreement	20.07.2017 (As per page no. 18 of the complaint)
12.	Possession clause	As per Clause 11(a) of the said agreement: 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 36 months from the date of this agreement with an extension of further 12 months unless there shall be delay or failure due to govt.
13.	Due date of possession	20.07.2021 (Calculated from date of execution of the agreement plus 12 months grace period)
14.	Total sale consideration	Rs 26,47,500/-
15.	Amount paid by the complainant	Rs. 10,32,732/- (As alleged by the complainant)
16.	Occupation certificate	09.03.2021
17.	Offer of possession for fit outs	18.09.2020 (Page 52 of complaint)

18.	Surrender Letter	05.10.2020 (Page 59 of complaint)
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B. Facts of the complaint

8. The complainant has made the following submissions in the complaint: -
- I. That the project in question is known as "Elan Town Centre", is situated at Sector 67, Gurgaon. That respondent issued allotment letter in respect of the subject unit on 06.03.2017, the cost of unit was arrived at Rs. 26,47,500/- through which the complainant was allotted food court unit no. 0208 on 2nd floor admeasuring super area of 300 sq. ft.
 - II. That on 25.07.2016, the complainant booked the food court unit by paying Rs. 2,47,500/- through two cheques no. 171277 and second cheque no. 208247 drawn on State Bank of India. The respondent convinced the client by showing the map of the food court unit whereas the unit had the service corridors behind every single unit, which is an essential aspect of running the kitchen of the food court unit, also the complainant could choose the unit as per his wish by seeing the layout plan.
 - III. That even before the issuance of the allotment letter, the complainant had already paid Rs. 10,32,732/- on the demand of the respondent. The respondent accepted 35% of the amount even before the entering into the builder buyer agreement.
 - IV. That on 20.07.2017 a preprinted, one-sided builder buyer agreement was executed between the complainant and respondent. The

complainant had no say and followed the dotted lines as set by the respondent builder in the agreement.

- V. That the payment plan agreed between the parties was 10:25:65, wherein the 65% of the amount was to be paid at the possession. The complainant has already paid 35% of the agreed amount till date to the respondent.
- VI. That as mentioned in the builder buyer agreement, the super area of the food court unit is supposed to be 300 square feet. Whereas the builder failed to annex the exact dimensions of the unit with the builder buyer agreement, and also in due course it did not inform the complainant about the actual carpet area or its dimensions.
- VII. That on 18.09.2020 the respondent sent the intimation of the possession and along with that it sent a demand letter, asking for the payment of Rs. 19,81,280/-.
- VIII. That after receipt of the possession letter, the complainant was quite happy to get the unit which he wanted to make his source of earning and went to check the physical progress on site. The complainant happiness was short-lived, and he noted that delivery of unit was not in line with what was promised on the following counts.
- IX. That the complainant was shocked to find out that the actual carpet area of the unit was just 42 Square feet (Size in LXB as 7X6). Hence the ratio of carpet area to super area is just 14% or in other words, the loading was 86% of the size against the usual 45-50% in the commercial units. The respondent changed the layout plan of the unit and now the food court units are made back-to-back, and no service corridor is being provided in the units, which is an essential aspect of

opening the kitchen in the premises and against the set norms of the units of food courts. The locations of the unit are completely changed as promised and on which the builder convinced the client to buy the unit.

- X. That in response to the aforesaid letter, the complainant sent a letter on 06.10.2020 to the respondent informing about the discrepancies in the promised and actual unit and for the cancelation of the unit due to this high loading, absence of service corridors and change in the layout plan without his consent being unacceptable to the complainant.
- XI. That the various written and verbal reminders to the companies and visit to the office went unanswered by the respondent and complainant is forced to file the complaint before the Hon'ble Authority for the resolution of the matter.
- XII. That as per the clause 1.6 of the builder buyer agreement, the respondent convinced the complainant that the carpet area will be at least 50% of the super area which is in line with the standard practice in the commercial units, and also the service corridors are an essential part of the kiosks and food court units but the respondent has miserably failed to keep its commitment.
- XIII. That the main grievance of the complainant in the present complainant is that the complainant is an end user who wished to open the food chain unit in the premises, but the high loading has rendered this unit as unfit for the usage as the food court, as it becomes impossible to open the kitchen in such as short space.

- XIV. That the other grievance of the complainant is that the builder has changed the layout of the unit and the absence of the service corridors has made this unit a safety hazard and unfit for opening any food outlets. That as per section 12 of the Real Estate (Regulation and Development) Act, 2016, this becomes the matter of the fact that the respondent misled the complainant about the exorbitantly high loading and showed the one layout at the time of booking and changed the layout later on without consent and made these units a safety hazard due to the absence of service corridors.
- XV. That the complainant has cancelled the allotment of the subject unit due to the discrepancies in the promised and actual unit, high loading, absence of service corridors and change in the layout plan without consent of the complainant being unacceptable to the complainant which lead to filing this complaint seeking refund of the deposited amount along with interest as per the provisions of the Act.

C. Relief sought by the complainant: -

9. The complainant has sought following relief(s):
1. Direct the respondent to refund the amount of Rs.10,32,732/- along with interest.

D. Reply by the respondent

10. The respondent has contested the complaint on the following grounds.
1. That the present complaint has been instituted by the complainant in respect of Kiosk bearing number 0208 on second floor admeasuring 300 square feet approximately (super area) located in the project

developed by the respondent known as "Elan Town Centre" located at Sector 67, Gurugram. The complainant had evinced an interest in purchasing a unit/kiosk in the said project and had approached the respondent voluntarily to purchase the same. The complainant had already conducted his due diligence pertaining to the capability of the respondent to develop, construct, market etc. the said project. Only after being satisfied about the ability of the respondent did the complainant proceed to purchase a unit/kiosk in the said project.

- II. That an application form dated 26.07.2016 had been voluntarily filled and signed by the complainant pertaining to purchase of a unit in the said project. Thereafter, allotment letter dated 06.03.2017 had been issued by the respondent to the complainant vide which the said kiosk had been allotted to the complainant.
- III. That the buyer's agreement was executed between the parties on 20.07.2017. It is pertinent to mention that the complainant had executed the aforesaid buyer's agreement voluntarily after carefully going through the terms and conditions incorporated therein. The complainant, without being influenced in any manner by the respondent had executed the buyer's agreement after being satisfied with the contractual covenants contained therein.
- IV. That the complainant has alleged in the complaint filed by him that the respondent had changed the layout of the kiosk. Moreover, the complainant has also alleged that the ratio of carpet area to super area is merely 14%. It would not be out of place to mention that nowhere in the entire complaint has the complainant alleged that there had

been any delay in handing over of possession of said kiosk to the complainant. The respondent had applied to the concerned statutory authority for obtaining the occupation certificate on 20.03.2020.

- V. That refund at this advanced stage of project is not in the interest of the other allottees at large as the same will hamper the completion of the project. It is submitted that the respondent company has invested a huge amount on the construction and development of the said project and in case the refund is allowed to the complainants, it would cause financial loss to the project as well as loss to the genuine customers in the said project.
- VI. That the complainant has admitted in the complaint filed by him that the complainant has made payment of only 35% of total sale consideration amount to the respondent. It is pertinent to mention that as per the payment plan voluntarily chosen by the complainant, the balance 65% of the consideration amount had to be paid to the respondent at the time of offer of possession. However, the complainant for reasons best known to him has failed to do so. As on date, the complainant is liable to make payment of an outstanding amount to the respondent of Rs.17,71,985/- plus applicable GST, plus applicable interest, plus applicable stamp duty and other charges as per the builder buyer's agreement signed by the complainant.
- VII. That the complainant has wrongly alleged that the respondent had failed to provide the exact dimensions of the kiosk in the builder buyer's agreement. The complainant has further alleged that the respondent did not inform the complainant about the carpet area of

the said kiosk. It is pertinent to mention that all the relevant documents had been duly provided to the complainant wherein the carpet area of the said kiosk along with the exact dimensions had been disclosed. Moreover, it had also been conveyed to the complainant that even though all relevant documents had been provided to him, he was more than welcome to visit the office of the respondent to obtain any document as required by him.

- VIII. That the complainant has wrongly stated that the ratio of carpet area to super area with respect to the said unit was just 14%. Furthermore, the complainant has intentionally misinterpreted Clause 1.6 of the buyer's agreement. It is pertinent to mention that as per Clause 1.6 of the buyer's agreement, the covered area in case of a kiosk would also include the area of sitting space as well as service corridor. Moreover, it had never been communicated to the complainant that the carpet area of the kiosk would be at least 50% of the super area. It is pertinent to mention that the complainant has himself admitted that in case of commercial units, it is standard practice that the carpet area is at least 50% of the super area. It is pertinent to mention that the complainant had booked a kiosk and not a full-fledged commercial unit as is sought to be portrayed by him.
- IX. That since the complainant had booked a kiosk which was located in the food court on the 2nd floor in the said project, the complainant cannot contend that he deserves similar advantages and perks as provided to the allottees of full-fledged commercial units. Moreover,

the calculations provided by the complainant in his complaint with respect to the said kiosk are erroneous, flawed and without any basis.

- X. That it would not be out of place to mention that there is no mention of a service corridor in the buyer's agreement. It had never been agreed between the parties that a service corridor was to be provided for the kiosk in question. The complainant has falsely alleged that a service corridor was to be provided for the kiosk in question or that the same is an essential aspect of operating a kiosk in the food court. Moreover, a kitchen is provided to the food court units but not to the kiosks located in the food court.
- XI. That on the one hand the complainant has relied upon various terms and conditions incorporated in the buyer's agreement and the other hand the complainant has entirely ignored certain contractual covenants contained therein. It has been provided in Clause 1.(ii) of the buyer's agreement that the complainant after being fully satisfied and relying upon his own judgment had decided to book the said kiosk, uninfluenced in any manner by the respondent.
- XII. That the complainant has wrongly stated that the layout plans had been changed unilaterally by the respondent. It is pertinent to mention that the location of the said kiosk is in consonance with what had been promised to the complainant and mentioned in the layout plans. It is pertinent to mention that the layout plans for the said project are public documents which are readily available on the official website and with the Hon'ble RERA Authority. Moreover, the complainant has appended a map purportedly showing the location

of the kiosk allegedly handed over to him by the respondent at the time of booking as annexure P6. It is pertinent to mention that the said map does not even contain the kiosk in question. Moreover, the said document had never been handed over to the complainant by the respondent.

XIII. That several allottees, including the complainant, have defaulted in timely remittance of payment of sale consideration amount which was an essential, crucial and an indispensable requirement for conceptualisation and development of the project in question. Furthermore, when the proposed allottees default in their payments as per schedule agreed upon, the failure has a cascading effect on the operations and the cost for proper execution of the project increases exponentially whereas enormous business losses befall upon the respondent. The respondent, despite default of several allottees, has diligently and earnestly pursued the development of the project in question and has constructed the project in question as expeditiously as possible.

11. 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 submission made by the parties.

E. Jurisdiction of the authority

12. 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

13. 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

14. 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.

15. 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 complainant at a later stage.

16. 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. (Supra) 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 junctions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."

17. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the cases 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.1 Direct the respondent to refund the amount of Rs.10,32,732/- along with interest.**

18. In the present case the complainant approached the Hon'ble Adjudicating Officer in year 2021 seeking refund of the amount paid by the complainant along with interest. The same was disposed of vide orders dated 20.08.2021, the Hon'ble Adjudicating Officer directed the respondent to refund the amount paid by the complainant along with interest. Thereafter, the respondent approached the Appellate Tribunal by filing an appeal no. 565 of 2021 against the said order passed by the Hon'ble Adjudicating Officer. The said appeal was allowed vide order dated 25.04.2022 and the order passed by Hon'ble Adjudicating Officer dated 20.08.2021 was set aside stating that the case is remitted for fresh trail in accordance with law to the learned Haryana Real Estate Regulatory Authority, Gurugram. Also, the parties were directed to appear before the authority on 25.05.2022 for further proceedings.
19. Thereafter, the present cases were listed for hearing before the authority and the same were disposed of on 14.03.2023 **wherein the counsel for both the parties had agreed that the cases may be decided in terms of order dated 03.03.2023 passed in CR No. 4829 of 2020 in cases titled as Vinod Kumar Versus Elan Buildcon Pvt. Ltd.** It is observed that the CR no. 4829 of 2020 was decided by the Authority (Bench member Sh. S.K. Arora) with the directions hereof "Refund is allowed (subject to deduction of statutory dues and brokerage i.e 0.5%) after deduction of 10% of the basic sale consideration as unit was offered before the due date of



possession along with prescribed rate of interest i.e 10.70% per annum from the date of surrender”.

20. Thereafter, the above said complaints were listed for re hearing with respect to the issues of deductions of statutory dues and brokerage on 11.07.2023. However, both the counsels for the parties stated at bar that the authority had already deliberated the matter when the concerned cases were disposed off in terms of earlier order and the same cannot be re – opened at this stage as the doctrine of functus officio applies. In view of the above, the present complaints are being disposed of in terms of the order dated 14.03.2023.
21. In the present complaint, the complainant was allotted the subject unit vide allotment letter dated 06.03.2017 for a total sale consideration of Rs. 26,47,500/-. The buyer’s agreement was executed on 20.07.2017 and as per clause 11(a) of the buyer’s agreement, the due date of handing over possession comes out to be 20.07.2021. The possession of the subject unit was offered to the complainant on 18.09.2020 for fit-outs. However, the respondent was not in receipt of the occupation certificate by that time. It is matter of record that the occupation certificate in respect of the present project was granted by the competent authority on 09.03.2021.
22. The case of the complainant is that the after the receipt of the said letter of offer of possession for fit-out dated 18.09.2020, the complainant had visited the project site and found that there are certain discrepancies in the unit being offered to the complainant, the complainant made request for surrender of the unit on 05.10.2020 seeking refund against the allotted unit which is evident from page no. 59 of the complaint.

23. It has been pleaded by counsel for respondent that occupation certificate has already been obtained and it has already made payment of required taxes to the government. The occupation certificate was obtained on 09.03.2021 from the competent authority before due date of handing over of possession i.e., 20.07.2021.
24. Further, the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, 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 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."

25. It is evident from the above mentions facts that the complainant paid a sum of Rs.10,32,732/- against basic sale consideration of Rs. 26,47,500/- in respect of the unit allotted to the complainant on 06.03.2017. The authority is of the view that request for the surrender was made by the complainant on 05.10.2020. However, the occupation certificate was granted by the competent authority on 09.03.2021. The request for surrender as well as the date of occupation certificate is prior to the due date of handing over possession as per the terms of the buyer's agreement.

The respondent was bound to act and respond to the pleas for surrender/withdrawal and refund of the paid-up amount. However, even after the request of the surrender made by the complainant on 05.10.2020, the respondent has not refunded any amount to the complainant-allottees after making permissible deductions.

26. **Admissibility of refund along with prescribed rate of interest:** The complainants are seeking refund the amount paid by them at the prescribed rate interest. However, the allottee intends to withdraw from the project and is seeking refund of the amount paid by it in respect of the subject unit with interest at prescribed rate as provided under rule 15 of the rules. Rule 15 has been reproduced as under:

Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%..

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

27. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.
28. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>. the marginal cost of lending rate (in short, MCLR) as on

date i.e., 11.07.2023 is 8.70%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.70%.

29. Thus, keeping in view the aforesaid factual and legal provisions, the respondent cannot retain the amount paid by the complainant against the allotted unit and is directed to refund the same (subject to deduction of statutory dues and brokerage i.e., 0.5%) in view of the buyer's agreement executed inter se parties by forfeiting the earnest money which shall not exceed 10% of the basic sale consideration of the said unit and shall return the balance amount along with interest at the rate of 10.70% (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 surrender till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid. It is further clarified that the deduction in respect of the statutory dues shall be made only upon furnishing of proof to the complainant-allottee of such payment to the concerned department along with a computation proportionate to the allotted unit. It is also clarified that the statutory dues do not include External Development Charges (EDC) and Internal Development Charges (IDC) which are development charges payable by the licensee to the concerned authority and are recoverable from subsequent allottee as well. On parity, TDS shall not be deducted by the respondent. Similarly, the respondent is required to pass the benefit of input tax credit to the complainant allottee in view of section 171 of HGST/CGST Act, 2017.
30. This is without prejudice to any other remedy available to the allottee including compensation for which allottee may file an application for

adjudging compensation with the adjudicating officer under sections 71 & 72 read with section 31(1) of the Act of 2016.

G. Directions of the authority


31. 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 (subject to deduction of statutory dues and brokerage i.e., to the extent of maximum 0.5%) in view of the buyer's agreement executed inter se parties by forfeiting the earnest money which shall not exceed 10% of the basic sale consideration of the said unit and shall return the balance amount along with interest at the prescribed rate of 10.70% from the date of surrender till the actual date of refund of the amount.
- ii. It is further clarified that the deduction in respect of the statutory dues shall be made only upon furnishing of proof to the complainant-allottee of such payment to the concerned department along with a computation proportionate to the allotted unit. It is also clarified that the statutory dues do not include External Development Charges (EDC) and Internal Development Charges (IDC) which are development charges payable by the licensee to the concerned authority and are recoverable from subsequent allottee as well. On parity, TDS shall not be deducted by the respondent. Similarly, the


respondent is required to pass the benefit of input tax credit to the complainant allottee in view of section 171 of HGST/CGST Act, 2017.

iii. 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.

32. This decision shall mutatis mutandis apply to cases mentioned in para 3 of this order.
33. The complaints stand disposed of. True certified copies of this order be placed on the case file of each matter.
34. Files be consigned to registry.


(Sanjeev Kumar Arora)
Member


(Ashok Sangwan)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 11.07.2023