

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

Complaint no. :	4924 of 2020
Date of filing complaint:	19.01.2021
First date of hearing:	18.03.2021
Date of decision :	11.07.2023

Amrita Sharma R/O: Tata Primanti Housing, T4-1201, Sector 72, Gurgaon	Complainant
Versus	
Elan Buildcon Pvt. Ltd Regd. Office: 3rd Floor, Golf View Corporate Tower, Golf Course Road, Sector-42, Gurugram	Respondent

CORAM:	
Shri Vijay Kumar Goyal	Member
Shri Ashok Sangwan	Member
Shri Sanjeev Kumar Arora	Member
APPEARANCE:	
Sh. Rajan Kumar Hans (Advocate)	Complainant
Sh. Aishwarya Hooda (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 provision 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 complainant, 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	"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	08.03.2017 (As per page no. 15 of complaint)
9.	Unit no.	KIOSK - 0222, 2 nd floor (On page no. 15 of complaint)
10.	Super area	400 sq. ft. (As per allotment letter on page no. 15 of complaint)
11.	Date of flat buyer's agreement	03.02.2018 (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	03.02.2022 (Calculated from the date of execution of the agreement plus 12 months grace period)
14.	Total sale consideration	Rs. 34,90,000/- (As per the allotment letter on page 15 of the complaint)
15.	Amount paid by the complainant	Rs. 13,62,474/- (As alleged by the complainant)
16.	Occupation certificate	09.03.2021
17.	Offer of possession for fit out	18.09.2020 (Page 55 of complaint)
18.	Surrender Letter	08.10.2020 (Page 59 of complaint)

B. Facts of the complaint:

- That the project in question is known as "Elan Town Centre", at Sector 67, Gurgaon. The respondent issued allotment letter of the unit on 08.03.2017. As per the term of conditions, the cost of unit was arrived at Rs. 34,90,000/-
- That the food court unit in question is unit no. 222. On 29.07.2016, the complainant booked the food court unit by paying Rs. 3,26,000/- through the cheque no.7668 drawn on Citibank.





5. That 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 her wish by seeing the layout plan, The complainant chose the unit as this unit was meeting her budget.

6. That even before issuance of the allotment letter the complainant had already paid Rs. 13,62,474/- on the demand of the respondent. The respondent accepted 35% of the amount even before the entering into builder buyer agreement in contravention of section 13 of the RERA Act,2016.

7. That on 03.02.2018 a pre-printed, 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. The payment plan agreed between was 10:25:65, whereas 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.

8. That as mentioned in the builder buyer agreement, the super area of the food court unit is supposed to be 400 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.

9. That after receipt of the possession letter the complainant was not happy to get the unit as the super area has been increased by 48% and also, she went to check the physical progress on site where she noted that delivery of unit was not in line with what was promised on the following counts. The complainant was shocked to find out that the actual carpet area of the unit was just 112 Square feet (Size in LXB as 12.5X9 Ft.). Hence the ratio of carpet



area to super area is just 19% or in the words the loading was 81% of the size against the usual 45-50% in the commercial units. The respondent increased the super area of the units from 400 sq ft to 593 sq ft and has put tremendous financial burden on the complainant. The locations of the units are completely changed as promised and on which the builder convinced the client to buy the units.

10. That in response to the aforesaid letter, the complainant sent a letter on 08.10.2020 to the respondent informing about the discrepancies in the promised and actual unit and for the cancelation of the unit as this high loading, increase in super area and change in the layout plan without consent was unacceptable to the complainant and for refunding back the amount paid.

11. 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 take the complainant to the honourable authority.

12. 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 the 50% of the super area which is in line with the standard practise in the commercial units, and also the service corridors are an essential part of the kiosks and food court units but has miserably failed to keep its commitment. As per the clause 10 of the builder buyer agreement the respondent the respondent cannot increase the super area beyond 15% but in this case the respondent has increased the super area by 48.%

13. That the main grievance of the complainant in the present complainant from respondent the builder, 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 , also the respondent

has exorbitant increased the super area and the complainant is not in a position to afford any additional financial burden and the builder has changed the layout of the unit and deprived the complainant to choose the unit as per her wish.

14. That 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 increased the super area without any consent.

15. That the respondent acted in contravention to section 11(4) of the said act and in spite of convincing the complainant as per clause (1.6) in builder buyer agreement that the loading is expected to be 50% of the super area it has delivered the unit on 81% loading, which is quite high by any set standard in the market

16. That the respondent acted in contravention to section 12 of the said act and has caused the damage to the complainant by providing incorrect and false statements in the prospectus, layout plan and the builder buyer agreement.

C. Relief sought by the complainant:

17. The complainant has sought following relief(s):

- i. Direct the respondent to refund the amount of Rs.13,62,474/- along with interest per annum.

D. Reply by respondent:

The respondent by way of written reply made the following submissions

18. That the present complaint has been instituted by the complainant in respect of Kiosk bearing number 222 on 2nd floor admeasuring 400 sq. ft.



located at sector 67 , Gurugram That it needs to be mentioned that application form dated 01.08.2016 had been voluntarily filed and signed by the complainant pertaining to purchase of a unit in the said project .Thereafter , allotment letter dated 08.03.2017 had been issued by the respondent to the complainant vide which the said kiosk had been allotted to the complainant .

19. That the buyer's agreement was executed between the parties on 03.02.2018. 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.

20. That the complainant has wrongly stated that the ratio of carpet area to super area with respect to the said unit was just 19%. The complainants have alleged in the complaint that service corridor has not been provided and the Kiosk and Food Court unit made back-to-back. That the respondent had applied to the concerned authority for obtaining the occupation certificate vide letter dated 20.03. 2020.

21. 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. The all the relevant documents had been fully 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 her , he was more than welcome to visit the office of the respondent to obtain any document as required by her.

22. The That the complainant has wrongly stated that the ratio of carpet area to super area with respect to the said unit was just 19%. Furthermore,

the complainant has intentionally misinterpreted clause 1.6 of the buyer's agreement in order to bias the mind of the honourable adjudicating officer. 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 herself admitted that in case of commercial units, it is standard practice that the carpet area is approximately 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 her.

23. 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 she 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. 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 kiosks located in the food court. The complainant in order to bias the mind of this Honourable Authority has portrayed as if both the food court units and the kiosks located in the food court are one and the same thing.

24. 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 L(i) of the buyer's agreement that the complainant after being fully satisfied and relying upon her own judgment had decided to book the said kiosk, uninfluenced in any manner by the respondent. It is pertinent to mention that at the time of booking itself, the complainant had been provided with all the relevant documents and drawings with respect to the said kiosk. The complainant had not raised any objection at the relevant point in time.

25. That the super area in the project including the commercial unit in question has been calculated strictly in accordance with the Annexure II of buyers agreement dated 03.02.2018. The complainants are conscious of this fact and have raised frivolous allegations pertaining to alleged wrongful computation of super area. The super area has, thus, been computed on the basis of accepted norms of computation of super area as incorporated in the voluntarily and consciously executed buyers agreement, referred to above. The allegations pertaining to alleged wrongful and unauthorized increase in super area is without any basis and has not been substantiated by the complainants.

26. 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 Honourable RERA Authority. Moreover, the complainant has appended a map purportedly showing the location of the kiosk allegedly handed over to her 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. Even at the time of arguments, the counsel for the complainant was unable to point out the exact location of the kiosk in the map in question.

27. That the respondent has duly discharged its legal obligations towards the complainant as per the buyer's agreement executed between the parties. Moreover, the location and size of the said kiosk is in conformity with the contractual covenants contained in the buyer's agreement. The complainant in order to gain wrongfully at the expense of the respondent has illegally claimed at this highly belated stage that the dimensions and measurement of the said kiosk are not in conformity with what had been allegedly promised to her by the respondent.

28. Copies of all the relevant documents have been filed and placed on 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:

29. 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.1 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

30. 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.

31. 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.

32. 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 judgements passed by the Hon'ble Apex Court in *Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2020-2021 (1) RCR (c) 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."

33. 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.13,62,474/- along with interest per annum.

34. 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.

35. Thereafter, the present case was listed for hearing before the authority and the same was disposed off on 14.03.2023 wherein the counsel for both the parties had agreed that the case may be decided in terms of order dated 03.03.2023 passed in CR No. 4890 of 2020 in case titled as Amrita Sharma Versus Elan Buildcon Pvt. Ltd. It is observed that the CR no. 4890 of 2020 was decided by the Authority with the directions hereof "Refund is allowed with interest at the rate of 10.70% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the deposited amount".

36. The present case was listed for re-hearing on 11.07.2023 with respect to the issue of grace period which was not calculated to the due date of handing over of possession in the proceeding dated 03.03.2023. However, to have a consistent view the present case was listed for re-hearing on 11.07.2023 wherein 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.


G. Directions of the authority

37. 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/promoter is directed to refund the amount received by it from the complainant along with interest at the rate of 10.70% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment 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.

38. Complaint stands disposed of.

39. File be consigned to the registry.


(Sanjeev Kumar Arora)
Member


(Ashok Sangwan)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 11.07.2023