

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

Complaint no.: 2991 of 2023
Date of filing:- 04.07.2023
Date of Decision:- 15.11.2023

Mrs. Manju Yadav

R/o H. no. 122, Village-Jauri Khurd,
Tehsil-Pataudi, Gurugram, Haryana-123305

Complainant

Versus

Elan Buildcon Private Limited
Registered Office at: 1A, 8th Ave Bandh Rd, Junapur
Village, Juanapur, New Delhi, Delhi 11004.
Corporate office: 15th Floor, Two Horizon Centre,
DLF Phase 5, Sector - 43, Golf Course Road, Gurugram,
Pin Code -122002

Respondent

CORAM:

Shri Ashok Sangwan

Member

APPEARANCE:

Shri Gaurav Rawat
Shri J.K. Dang

Advocate for the complainant
Advocate for the respondent

ORDER

1. The present complaint has been filed by the complainant under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with Rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the

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

A. Project and unit 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, delay period, if any, have been detailed in the following tabular form:

S.no.	Particulars	Details
1	Name of the project	Elan Miracle, Sector-84, Gurugram
2	Nature of project	Commercial colony
3	RERA registered/not registered	Registered Registration no. 190 of 2017 dated 14.09.2017
	Validity status	13.09.2023
4	DTPC License no.	34 of 2014 dated 12.06.2014
	Validity status	11.06.2019
	Name of licensee	Bajaj Motors Ltd. & others
5	Provisional booking dated	31.12.2017
6	Request for transfer of unit in favour of Manju Yadav.	09.06.2020
7	Unit no.	K10SK-01-A, Second floor

8	Unit area admeasuring	300 sq. ft.
9	Date of apartment buyer agreement	09.06.2020 (Page 129 of reply)
10	Possession clause	<p>7. Possession of the premises/unit</p> <p>7.1 schedule for possession of the said premises/unit</p> <p><i>The Promoter agrees and understands that timely delivery of possession of the said premises / unit to the allottee(s) and the common areas to the association of allottee(s) or the competent authority, as the case may be, is the essence of the Agreement. The Promoter assures to hand over possession of the said premises / unit along with ready and complete common areas with all specifications, amenities and facilities of the project in place within a period of 48 (forty eight) months from the date of this Agreement with an extension of further twelve months, unless there is delay or failure due to war, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature affecting the regular development of the real estate project ("Force Majeure"). If, however, the completion of the Project is delayed due to the Force Majeure conditions then the Allottee agrees that the Promoter shall be entitled to the extension of time for delivery of possession of the said premises/ unit, provided that such Force Majeure conditions are not of a nature which make it impossible for the contract to be implemented. The Allottee agrees and confirms that, in the event it becomes impossible for the Promoter to implement the project due to Force Majeure conditions, then this allotment shall</i></p>

		<i>stand terminated and the Promoter shall refund to the Allottee the entire amount received by the Promoter from the allottee (s) subject to deduction of non-refundable amounts including but not limited to return on investments paid / payable by the Promoter to the Allottee(s).</i>
11	Due date of possession	09.12.2024 (Grace period of 6 months allowed as per HARERA notification no. 9/3-2020 dated 26.05.2020 for the project having completion date on or after 25.03.2020)
12	Total sale consideration	Rs. 29,83,000/- (As per payment plan on 161 of reply)
13	Amount paid by the complainant	Rs. 24,35,837/- (As per the cancellation letter dated 09.06.2023 at page 197 of reply)
14	The complainant has already conveyed her consent to revision in building plan as well as resultant increase in the area and dimension of the unit on	15.03.2021 (As stated by the respondent on Annexure R9 of the reply)
15	Offer of possession	24.06.2022 (Page 172 of reply)
16	Occupation certificate	15.03.2023 (Page 187 of reply)

17	Intimation regarding grant of OC w.r.t the commercial project on	22.03.2023 (Page 190 of reply)
18	Final reminder dated	14.04.2023 (Page 195 of reply)
19	Pre-cancellation dated	16.05.2023 (Page 196 of reply)
20	Cancellation letter dated	09.06.2023 (Page 197 of reply)

B. Facts of the complaint

3. The complainant made the following submissions in the complaint:

- i. That the respondent company and on belief of such assurances, husband of the complainant namely Mr. Mukesh Kumar, booked a unit (kiosk) in the project by paying a booking amount towards the booking of the said unit bearing no. 01-A, Second Floor, in Sector 84, having super area measuring 300 sq. ft. to the respondent dated 31.12.2017 and the same was acknowledged by the respondent.
- ii. That respondent sent an allotment letter dated 10.03.2018 to the husband of the complainant confirming the booking of the unit dated 31.12.2017, allotting a unit no. 01-A, Second Floor (hereinafter referred to as 'unit') measuring 300 Sq. Ft (super built up area) in the aforesaid project of the developer for a total sale consideration of the unit i.e. Rs. 29,83,000.00, which includes

- basic price Plus EDC and IDC, Car parking charges, PLC, IFMS and other Specifications of the allotted unit and providing the time frame within which the next instalment was to be paid.
- iii. That after repeated reminders and follow ups with the respondent. Respondent finally after delay of almost four months sent terms and conditions for fixed amount on provisional booking as the said unit was booked under special fixed return payment plan to the husband of the complainant namely Mr. Mukesh Kumar. It is pertinent to note here that as per said letter respondent undertook to pay fixed amount per month on the total amount paid till completion of the construction of the building.
 - iv. That the respondent paid the said amount till May,2021. Thereafter failed to pay the said amount till date despite the repeated request and reminders by the complainant and even has failed to obtain the OC till date from the concerned department.
 - v. The original allottees i.e., husband of the complainant subsequently transferred / endorsed the property in favour of the Complainant vide affidavit dated 09.06.2020.
 - vi. Accordingly, now the captioned property stands in the name of Complainant. That respondent acknowledging/ confirming the acceptance of documents for the said unit for purpose of endorsement in favour of the complainant. As per the demands raised by the respondent, based on the payment plan, the Complainant to buy the captioned unit already paid a total sum of Rs. 24,35,837.00, towards the said unit against total sale consideration of Rs. 29,83,000.00.

- vii. That after repeated request, emails and reminders respondent on 09.06.2020, got the buyers agreement executed with the complainant. As per clause 7.1 of the agreement respondent undertook to complete the construction of the unit within 48 months from the date of the agreement. It is pertinent to mention here that booking of the said unit was done on 31.12.2017, allotment letter was issued on 10.03.2018 and the agreement was executed on 09.06.2020 after delay of almost more than 2 years. Therefore, the due date of possession to be calculated from the date of the allotment letter i.e. 10.03.2018. hence the due date of possession comes out to be 10.03.2022.
- viii. That respondent sent an email dated 09.06.2021 to the complainant, stating that occupation certificate has been applied for the commercial project namely "Elan Miracle" on 09.06.2021. Further, to this significant milestone, you shall not be entitled to get the fixed amount/delay penalty/down payment rebate (if applicable) with effect from the date of application of the OC.
- ix. That respondent sent letter of offer of possession for fit-outs dated 24.06.2022 to the complainant, mentioning that the construction of the said unit has been completed and the occupation certificate for said project has been applied. The unit is ready for the possession for the purpose of commencing the fit-outs and interior work and the same can be legitimately offered by the developer to you.
- x. Further stating that the super area of your unit stands revised from earlier communicated 300 Sq. Ft. to 414 Sq. Ft. and that all

the sums payable as mentioned herein below have been calculated on the basis of the super area of your unit i.e. 414 Sq. Ft. It is pertinent to note here that along with the above said letter of offer of possession respondent raised several illegal demands on account of electricity connection and pre-paid meter charges of Rs. 9,854.00, external electrification charges and HUDA water connection charges of Rs.60,088/-, Labour Cess of Rs. 11,799.00, which was never the part of the payment plan provided along with allotment letter. Furthermore, respondent had an arbitrarily increased the super area also from 300 Sq. Ft. to 414 Sq. Ft. Therefore, the total demand raised by the respondent in aforesaid mentioned letter is of Rs. 20,58,992.00/-

- xi. That offering possession by the Respondent on payment of charges which the buyer is not contractually bound to pay, cannot be considered to be a valid offer of possession. It would be noticed from the details provided above that those charges were never payable by the Complainant as per the allotment, by the complainant and hence the offer of possession.
- xii. That it has been held by the Honourable NCDRC, New Delhi in many cases that offering of possession on the payment of charges which the unit buyer is not contractually bound to pay, cannot be considered to be a valid offer of possession. In the present case asking for charges as elaborated above, which the allottees are not contractually bound to pay is illegal and unjustified and therefore not a valid offer of possession. In fact it is a letter for demand of money rather than being an offer of possession.

- xiii. That it is pertinent to mention here that allotment of the unit was made on 10.03.2018, after coming into force of the RERA Act,2016 and as per the Act the respondent can charge only on the carpet of the unit not on the super area of the unit. In the present case, respondent has charge the complainant on the super area i.e. 300 Sq. Ft. now revised to 414 Sq. Ft. @ Rs. 7,500 per Sq. Ft. which is against the provisions of the RERA Act,2016 and the rules,2017 made thereof. Hence, in accordance to the provisions of the RERA Act, necessary penal action to be taken against the respondent and direction may kindly be passed to the respondent to charge on the carpet area instead of the super area of the unit.
- xiv. In the present case respondent has collected approx Rs. 17,93,841.00 till date without executing the builder buyer agreement. That complainant sent an email dated 29.01.2021 to the respondent stating that respondent has failed to pay the fixed return from April,2021 and it has been seven months but you have failed to obtain the OC. Further, challenging the letter of offer of possession. Thereafter, on 13.10.2022 complainant again sent an email asking for the copy of the OC but respondent failed to provide the same.
- xv. Furthermore, complainant repeatedly request the respondent to provide justification for increase in area and to withdraw the offer of possession letter for fit outs and issue fresh offer of possession after adjustment and without illegal demands but respondent failed to do so till date. That Complainant after

receiving the aforesaid demand on account of raised/ challenged the aforesaid demand letter on account of non-adjustment of the amount, non-payment of assured return change in payment plan, price and raising the concern/objection that on ground reality status of construction of is not the same as the demand of money raised. Furthermore, requested for the inspection of the unit as per the agreement. That thereafter Complainant sent several reminder through telephone and emails to the respondents company but they were never able to give any satisfactory response regarding the aforesaid issues raised by the Complainant.

- xvi. That the respondent instead of complying as per the provisions of the Act, and obtaining the OC, payment of the Fixed return sent cancellation letter dated 09.06.2023 to the complainant forfeiting an amount of Rs. 13,95,528/- without providing any justification to same and against the spirit of the RERA Act,2016.

C. The complainant is seeking the following relief:

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

- i. Direct the respondent to hand over the possession of the said unit with all amenities and specification as promised in all completeness without any further delay.
- ii. Restrain the respondent from raising fresh demand for payment under any head.
- iii. Quash the illegal demand of respondent raised along with offer of possession for fit outdated 26.06.2022 and increase super area.
- iv. Direct the respondent to set aside cancellation letter dated 09.06.2023.

D. Reply filed by the respondent

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

- i. That the Complainant has misinterpreted and misconstrued the provisions of the Real Estate (Regulation and Development) Act, 2016 , hereinafter referred to as RERA and the Rules and Regulations made thereunder as well as the provisions of the Buyer's Agreement dated 09.06.2020, willingly and consciously executed by the parties.
- ii. That the present complaint raises several such issues which cannot be decided in summary proceedings. The said issues require extensive evidence to be led by both the parties and examination and cross-examination of witnesses for proper adjudication. Therefore, the disputes raised in the present complaint can only be adjudicated by the Civil Court. The present complaint deserves to be dismissed on this ground alone.
- iii. All averments, claims, allegations and contentions raised in the complaint of the Complainant are denied as false and incorrect unless specifically admitted to be true by the Respondent. The contents of the complaint that are not being specifically admitted may be deemed to have been denied and traversed. It is submitted that the complaint filed under the Act is liable to be summarily dismissed on the ground that it is not only false, frivolous and lacks factual and legal basis for institution but also reeks of malicious and *malafide* intent and nefarious purpose and design of the Complainant as would also be abundantly manifest from the present reply. That the Complainant has not come before

this Authority with clean hands and have concealed the real and true facts, which are set out in the succeeding paras of the present reply.

- iv. That the Complainant's husband, Mr Mukesh Kumar (hereinafter referred to as the Original Allottee) had approached the Respondent through property dealer, A & A Infratech, expressing an interest in the purchase of a Commercial Unit in the Commercial Complex being developed by the Respondent known as "ELAN MIRACLE" (the Project) , situated in Sector -84, Gurugram. The Original allottee had approached the Respondent after making independent enquiries and duly satisfying himself regarding the viability and suitability of the aforesaid project as per his needs and requirements as well as the capability of the Respondent to undertake the project.
- v. That thereafter, the Original allottee was allotted a Commercial Space /Unit tentatively ad measuring 300 sq. ft. super area bearing Unit No. 01-A on the Second Floor of the Project by the Respondent, subject, *inter alia*, to increase or decrease on basis of variation in calculation of actual Super Area of the Premises which were to be determined at the time of offer of possession of the Premises. The terms and conditions forming part of the application form were duly understood and accepted by the Original allottee. The application form dated 31.12.2017 executed and submitted by the Original allottee.
- vi. That the Respondent issued letter dated 24.04.2018 whereby the Respondent agreed to pay to the complainants a fixed amount of

Rs 14,286/- per month in accordance with the terms and conditions set out therein. It was clarified that offer of possession shall not be dependent upon grant of completion certificate and/or occupation certificate and that the Respondent shall stand discharged of its liabilities after offer of possession.

- vii. That the buyer's agreement was forwarded to the Original allottee on 26.04.2018 for execution. Thereafter reminder dated 06.06.2019 and email dated 29.06.2019 were sent by the respondent calling upon the Original allottee to execute the buyer's agreement. The original allottee approached the respondent sometime in June and requested that the allotment be transferred in favour of his wife, the complainant herein. The original allottee and the complainant were called upon to execute transfer documents. On the basis of the transfer documents executed by the complainant and the original allottee and upon the complainant agreeing and undertaking to abide by the terms and conditions of allotment and the applicable payment plan, the allotment was transferred/endorsed in the name of the complainant on 09.06.2020.
- viii. That thereafter the Complainant and the Respondent had entered into the Buyer's Agreement dated 09.06.2020. Copy of the Buyer's Agreement dated 09.06.2020 bearing vasika no 2393 and registered on 05.11.2020. It is pertinent to mention herein that the Buyer's Agreement dated 09.06.2020 was willingly and voluntarily executed by the Complainant without raising any

objections and the terms and conditions thereof are binding upon the Complainant with full force and effect.

- ix. That the Complainant vide letter dated 15.03.2021 conveyed her consent to revision in building plans as well as resultant increase in the area and dimensions of the Unit. That the Respondent duly completed construction of the project and made an application to the competent authority on 09.06.2021 for issuance of the Occupation Certificate. That vide letter dated 19.06.2021 the Respondent informed the Complainant that the Occupation Certificate for the project in question has been applied by the Respondent on 09.06.2021. The complainant was also informed that the complainant would no longer be entitled to get the fixed amount with effect from the date of application for the occupation certificate.
- x. That the complainant sent an email dated 29.01.2022 for payment of fixed amount. The Respondent replied vide email dated 31.01.2022 informing the complainant clarifying that the complainant was not entitled to any fixed amount with effect from the date of application for occupation certificate. That vide letter dated 24.06.2022 the Respondent sent Offer of Possession for Fit-outs to the Complainants whereby the Respondent requested the Complainant to take possession of unit after clearing their outstanding clear dues as per the attached statement. The Complainant was informed that there was an increase in the super area of the Unit allotted, from 300 sq ft to 414 sq ft. Consequently, the payments to be made by the Complainant stood

revised due to the increase in super area. It is pertinent to mention that Respondent has offered the possession of the Units in the project for fit outs at their end so that as and when the Occupation certificate was issued by the Town and Country Planning Department, Haryana, the commercial operations from the units could be commenced without there being any loss of time, therefore, keeping in view the interest of all the allottees in mind the Respondent issued offer of possession for fit outs to the Allottees in the Complex .

- xi. That the following clauses of the Booking Application Form executed by the original allottee are reproduced hereinbelow for ready reference:

"Clause 10: The Applicant confirms having made this application with the full knowledge that the Company is in the process of developing the Project as part of a commercial complex on land and that the site plan and building plans are tentative and may be changed, altered, modified, revised, added or deleted at the sole discretion of the Respondent, subject to regulatory approvals and the applicant shall have no objection to the same, if done, in pursuance thereof. It is understood and agreed by the applicant that the location, size, floor and dimension of a Unit including the Super Area mentioned is tentative and subject to change, and may be modified or revised or changed from time to time during the course of its completion and grant of occupation certificate. It is only upon the receipt of Occupation Certificate, the final Super Area shall be calculated and communicated, which shall be final and binding."

"Clause 17: The Applicant understand that the Company shall develop the Project in accordance with the approved layout plan and building plans. However, if any alterations or modifications are required in such layout and building plans, whether by any statutory authority or as otherwise may be required in the best interest of development of the Project, the applicant shall not have any objection and undertakes to abide by any such change as may be approved by the DGTCP or any other competent statutory authorities. While every attempt shall be made by the Company to adhere to the location and to the Super area of the Unit, in the event there is any change in the Unit's location, its Super area or related PLC, then the resultant variation in applicable Total Consideration agreed

herein, as the case may be, shall either be payable or refundable without any interest thereon and the BSP mentioned herein."

"Clause 18: In the event the variation in the Super area of the unit is greater than 20% and such variation is not acceptable to the applicant, every attempt shall be made to offer an alternate unit of an approximately similar size within the project subject to availability. In the event such an alternate unit is available and the applicant accepts such alternate unit, the applicable Total Consideration, including the applicable PLC, resulting due to such changed location/ unit shall be payable or refundable, as the case may be, at the BSP mentioned herein. No other claim, monetary or otherwise, shall lie against the Company."

"Clause 19 : In the event the applicant does not accept such alternate unit or if there is no other unit of an approximately similar size at another location within the Project, the applicant shall be refunded the actual amounts received against the Total Consideration without any interest or compensation in any form within Thirty (30) days of receipt of equivalent amount from the subsequent sale of the Unit without deduction of Earnest Money. No refund of service tax paid by the applicant shall be made by the Company. No other claim, monetary or otherwise shall lie against the Company. Further, it is agreed that the applicant shall have no objection to nor shall there be any claim or lien on the Unit for its subsequent sale regardless of the applicant accepting or declining the alternate unit."

The relevant clauses of the Buyer's Agreement duly executed by the Complainant are reproduced hereinbelow for ready reference.

31. ALTERATION/MODIFICATION

"In case of any alteration / modifications resulting in change in the Super Area of the Said Unit any time prior to and up on the grant of occupation certificate +20%, the Developer shall intimate in writing to the Allottee(s) the changes thereof and the resultant change, if any, in the Total Consideration of the Said Unit to be paid by the Allottee(s) and the Allottee(s) agrees to deliver to the Developer written consent or objections to the changes within thirty (30) days from the date of dispatch by the Developer. In case the Allottee(s) does not send his written consent, the Allottee(s) shall be deemed to have given unconditional consent to all such alterations / modifications and for payments, if any, to be paid in consequence thereof. If the Allottee(s) objects in writing indicating his non-consent / objections to such alterations / modifications then in such case alone the Developer may at its sole discretion decide to cancel this Agreement without further notice and refund the money received from the Allottee(s) (less earnest money & non-refundable amounts) within ninety (90) days from the date of receipt of funds by the Developer from resale of the said unit. Upon the decision of the Developer to cancel the Said Unit, the Developer shall be discharged from all its obligations and liabilities under this Agreement and the Allottee(s) shall have no right, interest or claim of any nature whatsoever on the Said Unit and the Parking Space(s), if allotted. Should there be any addition of a Floor or part thereof in the Unit, consequent to the provisions of the Clause-18 of this BBA, then the actual area and consequently the Super Area of the said

Unit shall stand increased accordingly and the Allottee hereby gives his unconditional acceptance to the same "

- xii. That from a perusal of the aforesaid clauses of the application form as well as the Buyer's Agreement, it is evident that the super area of the unit is tentative and that the same is determined upon completion of construction. In case of any increase in super area, the allottees shall have to make payment for such increase and in the event of decrease in super area, the proportionate amount shall stand refunded. The complainant has consented to additions, amendments, modification of the size, location, dimensions etc. of the unit on account of revision in building plans and have undertaken not to raise any objections to the same. The Complainant has already conveyed their no objection vide letter dated 15.03.2021 to the revised plans as well as the resultant increase in area, units, height, number of floors, ground coverage etc.
- xiii. That on account of the increased Super Area, the Complainant is liable to make payment for increase in super area of the unit in accordance with the terms and conditions of the Buyer's Agreement executed by the Complainant. The Respondent had informed the Complainant about the increase in carpet/usage area of the Unit in question vide its letter dated 24.06.2022.
- xiv. That pertinently, after receipt of the offer of possession letter dated 24.06.2022, the Complainant never raised any objection to the increase in super area within 30 days in accordance with Clause 31 of the Buyer's Agreement referred to above and is thus deemed to have accepted the increased area. However, the

Complainants also refrained from making payment of the demanded amounts.

xv. That although under no obligation to do so and as a gesture of goodwill, the Respondent gave various opportunities to the complainant to clear her outstanding dues. Letters and reminders dated 19.10.2022, 05.08.2022, 05.09.2022, 10.10.2022, 03.12.2022, 03.01.2023 and 03.02.2023 were issued to the complainant reminding the complainant to clear her outstanding dues. That It is pertinent to mention herein that in terms of Clause 28 of the Booking Application Form, time is the essence with respect to Complainant's obligation to pay the sale consideration as provided in the payment schedule and in case of delay in making payment by the Complainant, the Respondent shall have the right to terminate the Provisional Allotment/ Agreement and forfeit the Booking Amount.

xvi. That in terms of Clause 7 of the Buyer's Agreement, possession of the unit was agreed to be offered to the Complainants within 48 months from the date of execution of the Buyer's Agreement, with grace period of 12 months and subject to force majeure conditions and events beyond the power and control of the Respondent. The Buyer's Agreement was executed on 09.06.2020. Hence the Respondent has offered possession of the unit to the Complainant, well before the agreed timelines for delivering possession. The Respondent has duly fulfilled its obligations under the Buyer's Agreement. That it is pertinent to mention herein that the project has been registered under the provisions

of the RERA. RERA Registration Certificate bearing Memo No. HRERA -137 (a)/2017 /1072 dated 14.09.2017. The registration of the project is valid till 13.09.2023. That the Respondent is in receipt of the Occupation Certificate dated 15.03.2023. Vide letter dated 22.03.2023, the Complainants have been informed about receipt of the occupation certificate. That when the Complainant still failed to come forward to take possession of their unit even after numerous reminders , the Respondent was constrained to issue a final reminder dated 14.04.2023 and thereafter issue pre cancellation notice dated 16.05.2023. However, the Complainant continued to ignore the reminders and notices sent by the Respondent, accordingly, the Respondent was compelled to issue cancellation letter dated 09.06.2023. It is respectfully submitted that evidently the complainants are not interested in taking possession of the unit but are seeking false and frivolous pretexts to avoid their contractual obligations under the Buyer's Agreement.

- xvii. it is evident from the forgoing that the Complainant has needlessly avoided taking possession of the unit and making payment of outstanding dues on false and frivolous pretexts. The Complainant is in breach of the buyer's agreement and a wilful defaulter. The Respondent, on its part has duly fulfilled its obligations under the Agreement between the parties. There is no default or lapse in so far as the Respondent is concerned. That it is submitted that the Complainant is not left with any right, title or interest in the unit in question. The complainant is not entitled

to any relief and the false and frivolous complaint is liable to be dismissed with costs.

E. Jurisdiction of the authority

6. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below:

E.I Territorial jurisdiction

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

8. Section 11(4)(a) of the Act 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.

9. 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 as per provisions of section 11(4)(a) of the Act leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. I Objection regarding force majeure conditions:

10. The respondent/promoter in the builder buyer agreement under the clause 7.1 itself has sought the grace period of 12 months as may be approved by the Real Estate Regulatory Authority on account of force majeure events, court orders, government guidelines etc. The Authority as per notification no. 9/3-2020 dated 26.05.2020 for the projects having completion date on or after 25.03.2020, has already allowed the grace period of 6 months from 01.03.2020 to 01.09.2020. Therefore, there is no reason why this benefit cannot be allowed to the complainant/allottee who is duly affected during above such adverse eventualities and hence a relief of 6 months will be given equally to both the complainant/allottee, and the respondent and no interest shall be charged by either party, during the COVID period i.e., from 01.03.2020 to 01.09.2020.

G. Findings on the relief sought by the complainant:

- G.I Direct the respondent to hand over the possession of the said unit with all amenities and specification as promised in all completeness without any further delay.
- G.II Restrain the respondent from raising fresh demand for payment under any head.
- G.III Quash the illegal demand of respondent raised along with offer of possession for fit outdated 26.06.2022 and increase super area.
- G.IV Direct the respondent to set aside cancellation letter dated 09.06.2023.
11. In the present complaint, the complainant intends to continue with the project and are seeking delay possession charges along with interest on the amount paid. Proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules.

"Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —

*.....
Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."*

12. Clause 7.1 of the agreement to sell provides for handing over of possession and is reproduced below:

7.1 The Promoter agrees and understands that timely delivery of possession of the said premises / unit to the allottee(s) and the common areas to the association of allottee(s) or the competent authority, as the case may be, is the essence of the Agreement. The Promoter assures to hand over possession of the said premises / unit

along with ready and complete common areas with all specifications, amenities and facilities of the project in place within a period of 48 (forty eight) months from the date of this Agreement with an extension of further twelve months, unless there is delay or failure due to war, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature affecting the regular development of the real estate project ("Force Majeure"). If, however, the completion of the Project is delayed due to the Force Majeure conditions then the Allottee agrees that the Promoter shall be entitled to the extension of time for delivery of possession of the said premises/ unit, provided that such Force Majeure conditions are not of a nature which make it impossible for the contract to be implemented. The Allottee agrees and confirms that, in the event it becomes impossible for the Promoter to implement the project due to Force Majeure conditions, then this allotment shall stand terminated and the Promoter shall refund to the Allottee the entire amount received by the Promoter from the allottee (s) subject to deduction of non-refundable amounts including but not limited to return on investments paid / payable by the Promoter to the Allottee(s).

- 13 . At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoters. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoters may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its

meaning. The incorporation of such clause in the flat buyer agreement by the promoters are just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

14. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment within a period of 48 (forty-eight) months from the date of this Agreement. The authority calculated due date of possession according to clause 7.1 of the agreement dated 09.06.2020 i.e., within 48 months from date of execution of agreement an extension of further twelve months. The Authority as per notification no. 9/3-2020 dated 26.05.2020 for the projects having completion date on or after 25.03.2020, has already allowed the grace period of 6 months from 01.03.2020 to 01.09.2020. Accordingly, this grace period of 6 months shall be allowed to the promoter at this stage instead of 12 months and the due date comes out to be 09.12.2024. Therefore, from the due date, it is understood that there is no delay in the present complaint. Hence, no case of delay possession charges is made out under proviso to section 18(1) of the Act.
15. The authority would express its views regarding the concept of a "valid offer of possession". It is necessary to clarify this concept because, after a valid and lawful offer of possession, the liability of the promoter for the delayed offer of possession comes to an end. On the other hand,

if the possession is not valid and lawful, the liability of the promoter continues till a valid offer is made and the allottee remains entitled to receive interest for the delay caused in handing over of possession. The Authority after a detailed consideration of the matter has concluded that a valid offer of possession must have the following components:

- a. The possession must be offered after obtaining an occupation certificate/completion certificate.
- b. The subject unit must be in a habitable condition.
- c. Possession should not be accompanied by unreasonable additional demands.

16. In the present case, the first and foremost condition of a valid offer of possession is not fulfilled. The occupation certificate in respect of the project in question where the subject unit is situated was granted by the concerned authority on 15.03.2023 and the same is evident from page 187 of the reply filed by the respondent. The respondent offered the possession for fit out of the allotted unit before obtaining occupation certificate i.e., on 24.06.2022. Hence, the said offer is not a valid offer of possession.

G.III Quash the illegal demand of respondent raised along with offer of possession for fit outdated 26.06.2022 and increase super area.

17. In the present case, the respondent allotted the unit of area admeasuring 300 sq. ft. but while offering the possession for fit outs to the complaint on 24.06.2022, the super area of the unit was revised from 300 sq. ft. to 414sq. ft. by 36%.

18. In the present case, clause 31 deals with alteration/modification and the same is reproduced as under for ready reference:

“31. ALTERATION/MODIFICATION

*In case of any alteration / modifications resulting in change in the Super Area of the Said Unit any time prior to and up on the grant of occupation certificate is more than *20%, the Developer shall Intimate In writing to the Allottee.(s) the changes thereof and the resultant change, if any, In the Total Consideration of the Said Unit to be paid by the Allottee(s) and the Allottee(s) agrees to deliver to the Developer written consent or objections to the changes within thirty (30) days from the date of dispatch by the Developer. In case the Allottee(s) does not send his written consent, the Allottee(s) shall be deemed to have given unconditional consent to all such alterations / modifications and for payments, if any, to be paid in consequence thereof. If the Allottee(s) objects in writing indicating his non-consent / objections to such alterations / modifications then in such case alone the Developer may at Its sole discretion decide to cancel this Agreement without further notice and refund the money received from the Allottee(s) (less earnest money & non-refundable amounts) within ninety (80) days from the date of receipt of funds by the Developer from resale of the said unit. Upon the decision of the Developer to cancel the Said Unit, the Developer shall be discharged from all its obligations and liabilities under this Agreement and the Allottee(s) shall have no right, interest or claim of any nature whatsoever on the Said Unit and the Parking Space(s), it allotted. Should there be any addition of a Floor or part thereof In the Unit, consequent to the provisions of the Clause-18 of this BBA, then the Actual Area and consequently the Super Area of the said Unit shall stand increased accordingly and the Allottee hereby gives his unconditional acceptance to the same”*

19. Clause 31 of the buyer's agreement is in the utter violation of the model agreement laid down in the Rules of 2017 and has been included by the respondent- builder being in a dominant position as the same has been held in a similar matter in its judgement by the Hon'ble Supreme Court of India in civil appeal no. 5785 of 2019 titled as ***IREO Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors. dated 11.01.2021*** .
20. The authority observes that the builder buyer agreement in the present case was executed on 09.06.2020 i.e., after coming into force of the Act and

Haryana Real Estate (Regulation and Development) Rules, 2017. Any increase in area beyond 5% of the carpet area is not justified keeping in view clause 1.7 of the model agreement laid down in the Haryana Real Estate (Regulation and Development) Rules, 2017. If there is reduction in the carpet area then the Promoter shall refund the excess money paid by Allottee within 90 days with annual interest at the rate prescribed in the Rules, from the date when such an excess amount was paid by the Allottee. If there is any increase in the carpet area, which is not more than five percent of the carpet area of the apartment, allotted to the Allottee, the Promoter may demand that from the Allottee as per the next milestone of the Payment Plan. Accordingly, the complainant shall be liable to make the payment for increase in area up to 5% of carpet area and for any increase in excess of 5% of the carpet area, the complainant cannot be made liable to pay.

21. The respondent offered the possession for fit out of the allotted unit before obtaining occupation certificate on 24.06.2022 which is not a valid offer of possession. Therefore, the respondent is directed to offer the possession of the unit to the complainant within 30 days from the date of this order. The termination made by the respondent vide letter dated 09.06.2023 is held unlawful.

H. Directions of the authority

22. 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 promoters as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

- i. The termination made by the respondent vide letter dated 09.06.2023 is hereby set aside and directed to restore the allotted unit of the complainant within a period of 15 days from the date of this order and issue a fresh statement of account as per builder buyer's agreement with prescribed rate of interest i.e. 10.75% p.a. on the outstanding amount towards complainant/allottee as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017.
 - ii. The respondent is directed to offer the possession of the unit to the complainant within 30 days from the date of this order.
 - iii. The respondent shall not charge anything from the complainant which is not the part of the builder buyers agreement.
23. Complaint stands disposed of.
24. File be consigned to registry.


(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 15.11.2023