



HARERA
GURUGRAM

Complaint No. 5277 of 2022

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

Complaint no. : 5277 of 2022
Date of complaint : 28.07.2022
Date of decision : 14.05.2024

Deepankan Gupta
R/o: - C-8/5, Ground Floor, Ardee City, Gate no.
3, Sector-52, Gurugram-122002.

Complainant

Versus

M/s Elan Limited.
Office at: 3rd Floor, Golf View Corporate
Tower, Golf Course Road, Sector-42, Gurugram.

Respondent

CORAM:
Ashok Sangwan

Member

APPEARANCE:

Gaurav Bhardwaj
Jagmohan Krishan Dang

Advocate for the complainant
Advocate for the respondent

ORDER

1. The present complaint has been filed by the complainant/allottees 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 there under or to the allottees as per the agreement for sale executed *inter se*.

A. Unit and project related details

2. The particulars of unit details, sale consideration, the amount paid by the complainants, 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 Mercado", Sector-80, Village-Naurangpur , Gurugram, Haryana.
2.	Project type	Commercial colony
3.	Area of project	5.91875 acres
4.	RERA registered	Registered 190 of 2017 dated 14.09.2017
5.	Dtcp license	License no. 34 of 2014 dated 12.06.2014
6.	Date of allotment letter	01.06.2019 (As on page no. 32 of complaint)
7.	Date of execution of BBA	20.09.2020 (As on page no. 38 of complaint)
8.	Unit no.	SA-1208, Floor-12 th (As on page no. 35 of complaint)
9.	Unit area admeasuring	750 sq.ft. [Super-Area] (As on page no. 35 of complaint)
10.	Possession clause as per BBA	Clause 11 POSSESSION OF THE PREMISES/UNIT: (a) Schedule for Possession of the said Premises/Unit: <i>The Developer based on its project planning and estimates and subject to all just exceptions</i>

		<p><i>endeavours to complete construction of the Said Building/Said Unit within a period of 48 months with an extensions of further twelve (12) months from the date of this agreement unless there shall be delay or failure due to Govt. department delay or due to any circumstances beyond the power and control of the Developer or Force Majeure conditions including but not limited to reasons mentioned in clause 11(b) and 11(c) or due to failure of the Allottee(s) to pay in time the Total Consideration and other charges and dues/payments mentioned in this Agreement or any failure on the part of the Allottee(s) to abide by all or any of the terms and condition of this Agreement. In case there is any delay on the part of the Allottee(s) in making of payments to the Developer then not withstanding rights available to the Developer elsewhere in this contract, the period of implementation of the project shall also be extended by a span of time equivalent to each delay on the part of the Allottee(s) in remitting payment(s) to the Developer.</i></p> <p><i>[Emphasis supplied]</i></p> <p><i>(As on page no. 61 of reply)</i></p>
11.	Due date of possession	20.09.2025 [Calculated 48 months + 12 months from date of agreement]
12.	Letter of assurance	24.05.2019 (As on page no. 34 of complaint)
13.	Clause for Assured Return	1. <i>That Elan Limited (herein after referred to as "Company"), agrees and undertakes to pay to the applicant, a Fixed Amount of Rs.30,000/- (Rupees Thirty Thousand Only) per month, which is subject to Tax Deduction at Source, on the provisional booking in Mercado, as the amount of basic sale price received Rs.15,00,000/- (Rupees Fifteen Lakh Only) received through Cheque No. 000007 Dated 10.04.2019 and Cheque No. 000010 Dated 22.05.2019 Drawn on HDFC bank.</i>

		(As on Page no. 34 of complaint)
14.	Total sale consideration	Rs.48,94,500/- (As per allotment letter on page no. 32 of complaint)
15.	Amount paid by the complainant	Rs.55,74,559/- (As per the receipts on the file)
16.	Occupation certificate	17.10.2022 (As on page no. 72 of reply)
17.	Offer of possession for fit outs	11.09.2020 (As on page no. 55 of complaint)
18.	Conveyance deed	Not executed

B. Facts of the complaint

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

- I. That the complainant is a respectable and law-abiding citizen and is an allottee within the meaning of Section 2 (d) of The Real Estate (Regulation and Development) Act, 2016. The respondent company, is a limited company incorporated under the Companies Act, 1956 and is *inter alia* engaged in the business of providing real estate services.
- II. That in 2019, the respondent advertised about development of its new commercial project namely "Elan Mercado" situated in Sector-80, Gurugram, Haryana. The respondent painted a rosy picture of the project in their advertisement representing that the project aims at providing ready to move commercial space

comprising of high street retail with double heights shops, huge multi-activity atrium –space, lower ground floor dedicated to hypermarket and retail shops, one of the nation’s largest superplex by PVR cinema, multi cuisine restaurant, kids zone along with assured rent scheme.

- III. That believing the representations of the respondent and in the lookout for an affordable commercial space the complainant booked a unit in the project of the respondent and paid an amount of Rs.1,01,000/- towards the booking of the unit in question.
- IV. That thereafter on 01.06.2019, the respondent issued an allotment letter of retail and commercial unit bearing no. SA-1208 admeasuring 750 sq.ft. on the 12th floor in the project namely “Mercado” situated at Sector 80, NH-8, Village Naurangpur, Tehsil Manesar, District Gurugram at the total sale consideration of Rs.48,94,500/- to the complainant under special fixed return payment plan.
- V. That following receipt of aforesaid payments on 24.05.2019, a letter consist of terms and conditions for fixed amount on provisional booking was given by respondent to complainant in which a fixed amount of Rs. 30,000/- per month was agreed to be given to the complainant till the valid offer of possession.
- VI. That the complainant during the period of 2019 contacted the respondent to execute the builder buyer agreement but the

respondent failed to execute the same and kept on demanding the money on account of purchase of the said unit. The complainant even vehemently asserted that failing execution of agreement, the complainant shall not make any payment to the respondent but the respondent threatened the complainant to cancel the allotment of the said and to forfeit the deposited amount. Left with no other option the complainant has made a payment of Rs.17,92,323/- to the respondent.

VII. That almost after more than one year from the date of booking and after taking more than 10 percent of total sale consideration of the unit, a builder buyer agreement dated 20.09.2020 was executed between the complainant and the respondent. Copy of the BBA has been submitted to the Financial Institution by the complainant and as such front page of the BBA has been attached along with the Complaint. The complainant requested the respondent to provide copy of BBA but the same has not been provided by the respondent.. It is pertinent to mention here that the complainant has paid a total amount of Rs.55,74,559/- against the total sale consideration of Rs.48,94,500/- as and when demanded by the respondent in lieu of the said unit.

VIII. That On 15.01.2020, the respondent issued a letter in which the respondent has stated that the construction has been completed and the occupation certificate for said project has been applied. Further, the respondent vide the said letter demanded the



balance sale consideration within a period 15 days from the issuance of the said letter. It is further to note that no offer of possession can be made to the Allottee without obtaining occupation certificate from concerned department but the respondent have illegally and without considering the payment plan issued a demand notice on account of payment of balance sale consideration due at the time of offer of possession. The complainant approached the respondent after receiving the said notice and requested to withdraw the same as the project is nowhere near completion and occupation certificate of the project has not been received but, the respondent clearly refused to withdraw the same notice and further threatened the complainant for imposing holding charges.

- IX. That on 11.09.2020 the respondent issued an offer of possession for fit-outs wherein the respondent has stated that the construction has been completed and the occupation certificate of the project has been applied.
- X. That the respondent, after issuing the offer of possession for fit-outs without obtaining occupation certificate, stopped making payment on account of Assured Return. The complainant then approached the respondent to enquire about the non- payment of Assured Return as the possession has not been offered till yet after obtaining occupation certificate but to the utter shock of the complainant, the respondent clearly refused to make the payment

on account of assured return on the ground of issuing the offer of possession for fit outs.

- XI. That the complainant in order to make the payment of remaining sale consideration took a loan of Rs.34,70,000/- from Punjab National Bank resulting into which a quadripartite agreement was also executed. The respondent further granted permission to mortgage the said unit against the loan taken by the complainant.
- XII. That the complainant has paid an amount of Rs.34,70,000/- by taking loan from the Financial Institution and the same amount has been illegally demanded by the respondent in lieu of offer of possession for fit outs. Further the said payment of Rs.34,70,000/- has been illegally retained by the respondent by offering the possession of the unit without obtaining occupation certificate. The complainant is under liability to make the payment of said loan along with its interest to the financial institution and as such the complainant is entitled to the relief to refund for the said amount of Rs.34,70,000/- or payment of Interest from the date of payment till valid offer of possession of the said unit after obtaining occupation certificate. It is further to note that a processing fees amounting to Rs. 34,810/- has been paid by the complainant to the financial institution in order to obtain loan.
- XIII. That the respondent retained the hard earned money of the complainant and illegally refused to make the payment on

account of assured return thereby highlighting unfair trade practice and also breach of terms and conditions of the agreement and deficiency in the services on part of the respondent as against the complainant.

- XIV. That as per section 11 (4) of the Real Estate (Regulation and Development) Act, 2016, the promoter is liable to abide by the terms and agreement of the sale. The relevant portion of Section 11(4) is reproduced hereunder:

"11.4(a) The promoter shall 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:

Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed."

- XV. That as per section 18 of the Real Estate (Regulation and Development) Act, 2016, the promoter is liable to pay interest to the allottees of an apartment, building or project for a delay or failure in handing over of such possession as per the terms and



agreement of the sale. The relevant portion of Section 18 is reproduced hereunder:

"18. Return of amount and compensation:-

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

(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

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."

XVI. That accordingly, the complainant is entitled to get relief of directing the respondent to obtain occupation certificate and then issue valid offer of possession along with the other relief of not charging/demanding outside the builder buyer agreement and further to seek payment of Assured Return till actual handing over of possession as agreed. Hence this complaint.

C. Relief sought by the complainant

4. The complainant has sought following relief(s).
 - i Declare the offer of possession for Fit out dated 11.09.2020 as illegal, null and void being without obtaining occupation certificate.
 - ii Direct the respondent to issue fresh offer of possession after obtaining occupation certificate from the concerned authority and further revise the offer of possession by calculating the area of the unit as per builder buyer agreement and to handover the possession of the unit.
 - iii Direct the respondent to make the payment of Rs.30,000/- on account of Assured Return from April 2020 till actual handing over of possession.
 - iv Direct the respondent to make the payment of interest on Rs.34,70,000/- which have been illegally demanded and retained by the builder.
5. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4)(a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent

6. The respondent has contested the complaint on the following grounds:-
 - I. That, the complainant after making extensive research had approached the respondent expressing his interest in the purchase of



a commercial unit in the project known as "Elan Miracle", situated in sector-80, Gurugram. The complainant had through Channel partner-Oracle Landbase, approached the respondent after making independent enquiries and duly satisfying himself regarding the viability and suitability of the project as per his needs and financial capacity had opted for a special fixed return payment plan.

- II. That unit no. SA-1208 located on the 12th floor was provisionally allotted in favour of the complainant vide allotment letter dated 01.06.2019. On 24.05.2019 a letter was sent to complainant containing the detailed terms and conditions for payment of fixed returns of Rs. 30,000/- per month.
- III. The respondent have made payment of assured return from May, 2019 till 13.01.2020. The respondent, have applied for the occupation certificate with respect to the project on 14.01.2020 and the same was intimated to the complainant on 15.01.2020. The complainant was further informed that the final statement of account would be sent shortly thereafter. It is further submitted that the respondent has been granted occupation certificate on 17.10.2022 by the Town and Country Planning Department, Haryana.
- IV. The Buyer's Agreement containing detailed terms and conditions of allotment was executed between the respondent and the complainant on 20.09.2020.
- V. It is pertinent to mention that despite restrictions imposed due to outbreak of Covid-19, the respondent have completed the construction and offered possession within the timelines as agreed between the parties and vide offer of possession for fit-out letter dated 11.09.2020, the respondent offered possession of the unit to the complainants for fit-outs and settlement of dues. The respondent

have offered the possession of the unit in the project for fit-outs at their end so that as and when the occupation certificate is issued by the authorities, the commercial operations from the unit can be commenced without there being any loss of time.

- VI. That in terms of Clause 11 of the Buyer's agreement, possession of the unit was agreed to be offered to the complainant 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). That it is an admitted fact that the buyer's agreement was executed on 20.09.2020. Hence, the respondent have offered possession of the unit well before the agreed timelines for delivering possession. Moreover, it is pertinent to mention that the occupation certificate was received on 17.10.2022 which is well before the time stipulated in the buyer's agreement. In a very surreptitious and clandestine manner, for gaining wrongfully, the complainant has mixed two issues of assured returns and handover of unit.
- VII. That the possession of the unit has been offered on time and the assured return is always subject matter of contract by and between the parties. That, a mere reading of clauses of letter dated 24.05.2019 it is amply clear that the payment of assured return was for a fixed term of time till filing of application for grant of occupation certificate. In this case, there is no delay in offering possession as the occupation certificate has been received before the time limit of 48 months stipulated in the buyer's agreement. Thus, neither any assured return, nor any amounts of delay compensation are due to the complainant.
- VIII. That it shall not be out of place to mention that despite completing

the construction of the complex well before time and applying for the occupation certificate on 14.01.2020 , the occupation certificate was granted on 17.10.2022.

- IX. That the delay in grant of occupation certificate, despite timely completion of construction of the complex was outside the ambit of the respondent. The respondent have at all times been ready and willing to offer possession of the unit in a timely manner.
- X. That it is submitted that the contractual relationship between the complainant and the respondent is governed by the buyer's agreement executed between the parties. The complainant cannot set up any imaginary claim/s which is contrary to the terms and conditions of the buyer's agreement. The complainant has falsely alleged that the offer of possession for fit outs made is wrongful.

E. Jurisdiction of the authority

7. 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

8. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. 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

9. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

The provision of assured returns is part of the memorandum of understanding, as per clause 1 of the MOU dated 03.08.2017. Accordingly, the promoter is responsible for all obligations /responsibilities and functions including payment of assured returns as provided in memorandum of understanding..

10. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the reliefs sought by the complainant

F. I. Direct the respondent to issue fresh offer of possession after obtaining the occupation certificate and declare the offer of possession dated 11.09.2020 as illegal.

11. There is a contractual relationship between the complainant and the respondent which is governed by the Builder Buyer Agreement, executed between them. However, it is seen that the drafting of the clauses in the builder buyer agreement are not only vague and uncertain but so heavily loaded in favour of the promoter and by the allottee in fulfilling formalities and documentations etc as prescribed by the promoter. 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. Even if the contractual obligations commenced pre-RERA, the builder cannot misuse his dominant position by drafting anything which is repugnant to the statutory rights of the allottees. In the present case, the respondent/builder have misused its dominant position and drafted a clause in the letter containing terms and conditions for fixed return, which are completely vague and against the statutory rights of the complainant/allottee whereby it says that the offer of possession is not dependent on the grant of occupation certificate.

12. 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.*
13. 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 17.10.2022 and the same is evident from



page 42 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 11.09.2020. Hence, the said offer is not a valid offer of possession. Therefore, the respondent is directed to offer the possession to the complainant within 30 days from the date of this order.

F. II. Direct the respondent to make payment of Rs.30,000/- on account of Assured return from April 2020 till actual handing over of possession.

14. The respondent has submitted in its reply that vide letter dated 24.05.2019, it will pay a fixed amount of Rs.30,000/- per month to the complainant from 10.04.2019 till filing of the application for grant of occupation certificate of the said project. However, the complainant submitted that the respondent vide clause 1 of the letter dated 24.05.2019 agreed to give an investment return of Rs.30,000/- per month from 10.04.2019 till the time of offer of possession of the said unit. The total sale consideration of the allotted space was Rs.48,94,500/- and the complainant has paid a sum of Rs.55,74,559/- against the same i.e., more than the total sale price.
15. The letter dated 24.05.2019 regarding the terms and conditions for fixed amount on provisional booking can be considered as an agreement for sale interpreting the definition of the agreement for "agreement for sale" under section 2(c) of the Act and broadly by taking into consideration the objects of the Act. Therefore, the promoter and allottee would be bound by the obligations contained in the memorandum of understandings and the promoter shall be responsible for all obligations, responsibilities, and functions to the allottee as per the agreement for sale executed inter-se them under section 11(4)(a) of the Act. An agreement defines the rights and



liabilities of both the parties i.e., promoter and the allottee and marks the start of new contractual relationship between them. This contractual relationship gives rise to future agreements and transactions between them. Therefore, different kinds of payment plans were in vogue and legal within the meaning of the agreement for sale. One of the integral parts of this agreement, the letter dated 24.05.2019 is the transaction of assured return inter-se parties. The "agreement for sale" after coming into force of this Act (i.e., Act of 2016) shall be in the prescribed form as per rules but this Act of 2016 does not rewrite the "agreement" entered between promoter and allottee prior to coming into force of the Act as held by the Hon'ble Bombay High Court in case *Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors.*, (Writ Petition No. 2737 of 2017) decided on 06.12.2017. Since the agreement defines the buyer-promoter relationship therefore, it can be said that the agreement for assured return between the promoter and allottee arises out of the same relationship. Therefore, it can be said that the real estate regulatory authority has complete jurisdiction to deal with assured return cases as the contractual relationship arise out of agreement for sale only and between the same parties as per the provisions of section 11(4)(a) of the Act of 2016 which provides that the promoter would be responsible for all the obligations under the Act as per the agreement for sale till the execution of conveyance deed of the unit in favour of the allottees.

16. The present complaint was fixed for pronouncement of order on 13.03.2024. Vide proceedings dated 13.03.2024, the Authority had made following observations:

"Order pronounced.



The respondent is directed to pay the arrears on amount of assured return on monthly basis as per terms and conditions vide letter dated 24.05.2019 for an amount of Rs.30,000/- per month from the date of provisional booking i.e 10.04.2019 till the date of obtaining occupation certificate plus two months. Matter stands disposed off. Detailed order will follow."

17. However, while preparing the detailed order the Authority has observed that the provision for assured return from the date of provisional booking, i.e., 10.04.2019, until obtaining the occupation certificate plus two months, was inadvertently noted in the proceedings dated 13.03.2024 as the assured return was payable upto the offer of possession. Here in the present complaint, the offer of possession was not valid as it was made in the absence of occupation certificate. Therefore, the assured return is liable to be given upto grant of occupation certificate, only after which a valid offer of possession could have been made. Consequently, the case was scheduled for re-hearing before the full bench, and the proceedings dated 13.03.2024 were amended as follows:

" The relief of assured return at the agreed rate of Rs.30,000/0 per month in the factual matrix of the present complaint deserves to be allowed from the date of provisional booking i.e., 10.04.2019 till obtaining the occupation certificate."

18. The authority hereby directs the respondent to pay arrears of assured return which was agreed between the respondent and the complainant vide letter dated 24.05.2019, at a fixed amount of Rs.30,000/- per month from 10.04.2019 till the date of obtaining occupation certificate.

H. Directions of the authority

19. 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 pay the arrears on amount of assured return on monthly basis for fixed amount of Rs.30,000/- per month from the date of provisional booking i.e., 10.04.2019 till the date of obtaining occupation certificate after deducting any amount that has already been paid by the respondent to the allottee on account of assured returns, if any.
 - ii. The respondent is directed to hand over possession of the unit to complainant within 60 days of this order.
 - iii. The respondent is also directed to pay the outstanding accrued assured return amount till the date at the agreed rate within 90 days from the date of order after adjustment of outstanding dues if any, from the complainant and failing which that amount would be payable with interest @8.85 p.a till the date of actual realization.
 - iv. The respondent shall not charge anything from the complainant which is not a part of the buyer's agreement.
20. Complaint stands disposed of.
21. File be consigned to registry.

Dated: 14.05.2024

HARERA
GURUGRAM

(Ashok Sangwan)

Member

Haryana Real Estate Regulatory
Authority, Gurugram