

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

Complaint no. : 4701 of 2022
Date of decision : 14.05.2024

Jitender Kumar
R/o: -F.C.C. Clutch India Pvt. Ltd.
Plot No.-5, Sector-3, IMT Manesar,
Gurugram.

Complainant

Versus

M/s Elan Limited.
Office at: 1100/25, Block I-1,
Sangam Vihar, New Delhi-110062.

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/allottee 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:

Sl. No.	Particulars	Details
1.	Name of the project	"Elan Mercado", Sector-80, Gurugram, Haryana.
2.	Nature of project	Commercial
3.	Hrera registered	Registered Vide no. 189 of 2017 Dated-14.09.2017
4.	Dtcp license	82 OF 2009 Dated -08.12.2009
5.	Unit no.	FF-1039, 1 ST floor. (As on page no. 37 of complaint)
6.	Unit area	344 sq.ft. (As on page no. 37 of complaint)
7.	Allotment letter	10.12.2019 (As on page no. 37 of compliant)
8.	Buyer's Agreement executed	19.02.2020 (As on page no. 43 of complaint)
9.	Letter for assured return	11.12.2019 (As on page no. 38 of complaint)

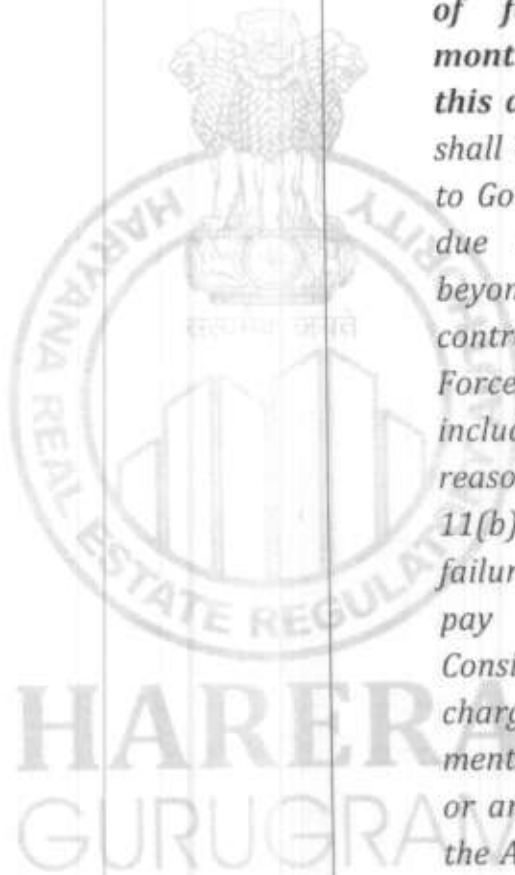


10.	Clause for assured return	<p>CLAUSE 1</p> <p><i>That Elan Limited (hereinafter referred to as "Company"), agrees and undertakes to pay to the applicant down payment discount equivalent to Rs.57/- (Rupees Fifty Seven Only) per sq.ft. in total amount of Rs.19,608/- (Rupees Nineteen Thousand Six Hundred Eight Only) shall be disbursed in 01 equal monthly instalments (subject to deduction of applicable taxes), on the provisional booking of Unit No. FF-1039, on FIRST FLOOR in ELAN MERCADO, on receipt of amount of Rs.13,55,428/- (Rupees Thirteen Lakh Fifty Five Thousand Four Hundred Twenty Eight Only) received through RTGS/NEFT No. 933318409491' Dated 29.11.2019 RTGS/NEFT No. 934318399964' Dated 09.12.2019 and Cheque No. 111515' Dated 10.12.2019 all are drawn on ICICI Bank, and after expiry of 01 months (if the project gets delayed), then the applicant would get a delayed penalty of Rs.57/- (Rupees Fifty Seven Only) per sq.ft. per month (Subject to deduction of applicable taxes) till the date of offer of possession by the company.</i></p> <p><i>[Emphasis supplied]</i></p> <p><i>(As on page no. 38 of complaint)</i></p>
11.	Possession clause	<p>CLAUSE 11</p>



(a) Schedule for possession of the said Unit

The Developer based on its project planning and estimates and subject to all just exceptions endeavours to complete construction of the Said Building/Said Unit **within a period of 48 months with an 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 conditions of this Agreement. In case there is any delay on the part of the Allottee(s) in making of payments to the Developer then not withstanding rights available to the Developer elsewhere in this contract, the period for implementation of the project



		<p><i>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. 57 of complaint)</i></p>
12.	Due date of possession	19.02.2025 [Calculated 48 months + 12 months from date of execution of BBA]
13.	Total sales consideration	RS.32,16,744/- (As on page no. 37 of complaint)
14.	Total amount paid by the complainant	Rs.36,94,982/- (As per S.O.A on page no. 77 of complaint)
15.	Occupation certificate	17.10.2022 (As per list of documents submitted by the counsel of respondent on 20.09.2023)
16.	Offer of possession for fit-out	07.03.2020 (As on page no. 75 of reply)

B. Facts of the complaint

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

- I. That the complainant is a respectable, law-abiding citizen and within the meaning of Section 2 (d) of The Real Estate (Regulation and Development) Act, 2016 an allottee. The respondent company, M/s Elan Buildcon Private Limited 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 for himself, the complainant booked a unit on 29.11.2019 by filing an application form, in the project and paid amount of Rs.2,00,000/- towards the booking of the unit.
- IV. That thereafter on 10.12.2019, the respondent issued an allotment letter of retail and commercial at the basic sale price of Rs.32,44,797/- under special fixed return payment plan.
- V. That following receipt of aforesaid payments a letter consisting of terms and conditions for fixed amount on provisional booking was given by respondent to the complainant on 11.12.2019, in which a fixed amount of Rs.57/- per Sq. Ft. totaling to Rs.19,608/- per

month was agreed to be given to the complainant by the respondent till the offer of possession of the unit.

- VI. That the complainant during the period of 2019 contacted the respondent to execute the builder buyer agreement but respondent failed to execute the same and kept on demanding money. The complainant even vehemently asserted that failing execution of agreement, he shall not make any payment to the respondent but the respondent threatened the complainant to cancel the allotment and forfeit the deposited amount. Left with no other option the complainant made a payment of Rs.11,80,728/- to the respondent.
- VII. That almost after more than two months from the date of booking and after taking more than 10 percent of total sale consideration of the unit, a builder buyer agreement was executed on 19.02.2020 between the complainant and the respondent. It is pertinent to mention here that the complete payment within 12 months of booking have been paid on 10.12.2019 by the complainant and the total amount paid so far is Rs.36,94,982/- against the total sale consideration of Rs.32,44,797/-.
- VIII. That the respondent as per terms and conditions for provisional booking stated that the respondent will pay a fixed amount of Rs.57.00/- per sq. ft per month equivalent to Rs.19,608/- to the applicant till the time of offer of possession. However, the possession of the unit has been delayed and from the time of

booking of the said unit i.e. 11.12.2019 till now, the respondent has paid the said assured return amount to the complainant only once. The complainant time and again requested the respondent to make the payment of Rs.19,608/- on account of assured return but the same has not been paid till date on one pretext or the other.

IX. 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. That the respondent on 29.07.2020 sent a letter to the complainant mentioning the offer of possession for fit out and requested the complainant to take possession of the unit. In order to enquire about the possession of the unit, the complainant visited the project site wherein the complainant found that the project was nowhere near completion. The complainant had also requested the respondent to share the copy of occupation certificate but the respondent clearly refused to provide the same. It is pertinent to note that no offer of possession can be made to the Allottee without obtaining occupation certificate from concerned department. Hence, the said act of the respondent is illegal, arbitrary and has been done with malafide intention.

X. That the respondent retained the hard earned money of the complainant in the garb of providing Assured Return but has miserably failed to do make the payment of the same and further

sent offer of possession for fit-out without obtaining occupation certificate.

C. Relief sought by the complainant

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

- I. Direct the respondent to make the payment of Rs.19,608/- on account of assured return from 11.12.2019 till valid offer of possession after obtaining occupation certificate.
 - II. Direct the respondent to handover possession of the unit after obtaining occupation certificate from the concerned department.
 - III. Direct the respondent not to charge beyond the terms and conditions as mentioned in builder buyer agreement.
 - IV. May pass any other order as the authority may deem fit and proper in the interest of justice.
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 in 2019 the complainant had independently approached the respondent through Channel Partner expressing his interest in booking a commercial unit in the commercial complex known as "Elan Mercado" being developed by the respondent in Sector-80, Gurugram, Haryana.

- II. That after making detailed enquiries and after independently satisfying himself with regard to all aspects of the project, including the entitlement and capability of the respondent to develop the project, and after duly understanding and accepting the applicable terms and conditions governing the allotment and sale of units in the commercial complex in the project, the complainant approached the respondent for allotment of unit bearing no. FF-1039 in the project.
- III. That the letter dated 11.12.2019 was sent to the complainant, setting out the terms and conditions for payment of fixed amount on provisional booking. In accordance with paras 1 and 4 of the said letter, the respondent had agreed to pay to the complainant down payment discount of Rs.19,608/- in 1 equal monthly instalment, subject to tax deduction, on an amount of Rs.13,55,428/- received from the complainant. The said down payment discount was agreed to be paid to the complainant till the issuance of offer of possession by the respondent on applying for occupation certificate. The terms and conditions of payment of down payment discount were duly accepted by the complainant. The respondent has credited an amount of Rs.19,356.00/- as down payment discount out of which an amount of Rs.11, 955/- was credited for the period 11.12.2019 to 31.12.2019 and an amount of Rs.7,401/- was adjusted from 01.01.2020 to 13.01.2020 in complainant's account. The builder buyer's agreement was executed on 19.02.2020 between both the parties.
- IV. That vide letter dated 15.01.2020 the complainant was informed that the application for the occupation certificate in respect of the project had been submitted to the competent authority on

14.01.2020 and the complainant was further informed that with effect from 14.01.2020, the complainant would not be entitled to payment of down payment discount as per the agreed terms and conditions under letter dated 11.12.2019. The complainant was also informed that the final statement of account would be sent by the respondent shortly to initiate the hand over process.

- V. That vide offer of possession letter dated 07.03.2020 the respondent, offered possession of the unit to the complainant for fit-outs and settlement of dues. The complainant was called upon to pay outstanding amount of Rs.21,61,223/-. The complainant cleared the outstanding dues, accordingly receipts dated 21.03.2020 were issued by the respondent.
- VI. It is pertinent to mention herein that construction at site is complete and the respondent has already applied for grant of Occupation Certificate before Town and Country Planning Department Haryana.
- VII. That the complainant is estopped from filing the present complaint by his own acts, conduct and acquiescence. The project in which the complainant has booked the unit is being developed by Elan Limited, however Elan Buildcon Pvt Ltd. has been wrongly impleaded as a party in the petition. The petition is liable to be dismissed on this ground alone since no orders can be passed against Elan Buildcon Pvt Ltd. as the complainant has executed the Builder Buyer Agreement with Elan Limited and not Elan Buildcon Pvt. Ltd. All the documents related to allotment have been issued by Elan Limited. Reference to "Respondent" in the present petition shall mean and imply Elan Limited and not Elan Buildcon Pvt Ltd., which is a separate legal entity and has no

locus in the present transaction. That Elan Buildcon Pvt Ltd has nothing to do with the present project or the complainant.

- VIII. That the complainant has got no locus standi or cause of action to file the present complaint. The present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of booking, as shall be evident from the submissions made in the following paras of the present reply. The respondent craves leave of authority to refer to and rely upon the terms and conditions set out in the application form as well as the terms and conditions for payment of fixed amount, in detail at the time of the hearing of the present complaint, so as to bring out the mutual obligations and the responsibilities of the respondent as well as the complainant thereunder.
- IX. 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.
- X. That in so far as the respondent is concerned, the respondent has already completed construction well within the agreed timelines for delivery of possession and within the period of registration of the project under RERA. The application for issuance of occupation certificate was submitted to the competent authority as far back as on 14.01.2020 and the same is pending before the

competent authority. There is no default or lapse in so far as the respondent is concerned.

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;

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 objections raised by the respondent

F.I Objection regarding wrongful impleadment of Elan Buildcon Pvt Ltd. as a party in the petition.

11. The respondent have raised the contention that the complainant has wrongly impleaded Elan Buildcon Pvt Ltd. as a party to the petition. The project in which the complainant has booked the unit is being developed by Elan Limited. Thus, the petition is liable to be dismissed on this ground alone since no orders can be passed against Elan Buildcon Pvt Ltd. as the complainant has executed the Builder Buyer Agreement with Elan Limited and not Elan Buildcon Pvt. Ltd.
12. However, the arguments presented in this matter lacks merit. Upon examination of the documents and Performa "B" of the current complaint, it is clear that the complainant/allottee has filed the complaint against Elan Limited, a party to the suit, rather than Elan Buildcon Private Limited. Therefore, the respondent's claim of being wrongfully impleaded is dismissed.

G. Findings on the relief sought by the complainant

G.I Direct the respondent to handover possession of the unit after obtaining occupation certificate.

13. In the present case, the respondent/builder have misused its dominant position by including a clause in the letter outlining terms and conditions for a fixed return. This clause is notably vague and contravenes the statutory rights of the complainant/allottee, as it stipulates that the offer of possession is not contingent upon the granting of an occupation certificate.



14. 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 to the complainant. 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.*

15. 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 as per the list of documents submitted by the counsel of respondent on 20.09.2023. The respondent offered the possession for fit out of the allotted unit before obtaining occupation certificate i.e., on 07.03.2020. Hence, the said offer is not a valid offer of possession. Therefore, the respondent is directed to handover possession of the unit to the complainant within 60 days from the date of this order, without raising any further demands, which are not part of the builder buyer agreement.

G.II. Direct the respondent to make the payment of Rs.19,608/- on account of assured return from 11.12.2019 till valid offer of possession after obtaining occupation certificate.

16. The complainant submitted that the respondent vide clause 1 of the letter dated 11.12.2019 agreed to pay to the applicant down payment discount equivalent to Rs.57/- per sq.ft. of Rs.19,608 /- per month from date of provisional booking i.e 29.11.2019 till the time of offer of possession of the said unit. The total sale consideration of the allotted space was Rs.32,16,744/- and the complainant has paid a sum of Rs.36,94,982/- against the same i.e., more than the total sale price.
17. The present complainant 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 of letter dated 11.12.2019 for an amount of Rs.19,608/- per month from the date of provisional booking i.e. 29.11.2019 till the date of obtaining occupation certificate plus two months.

Matter stands disposed off. Detailed order will follow."

18. However, while preparing the detailed order the Authority has observed that the provision for assured return from the date of provisional booking, i.e., 29.11.2019, until obtaining the occupation certificate plus two months, was mistakenly noted in the proceedings dated 13.03.2024 as the question of assured return does not arise in the circumstances outlined in the present complaint, as per the respondent's commitment in the letter dated 11.12.2019. This commitment entailed a down payment discount of Rs.57/- per sq.ft., to be disbursed in **one** equal monthly installments, with an additional delayed penalty of Rs.57/- per sq.ft. per month in case the project encounter delays beyond one month. It is noted that the one-time down payment discount has already been provided by the respondent



and according to clause 11(a) of the builder-buyer agreement dated 19.02.2020, the due date for possession of the unit is 19.02.2025, and the occupation certificate for the project was obtained on 17.10.2022. Consequently, there has been no delay on the part of the respondent, and the complainant is not entitled to any further delayed penalty. 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 returns in the factual matrix of the present complaint does not arise as the respondent vide letter dated 11.12.2019 undertook to pay a down payment discount equivalent to Rs.57/- per sq.ft. to be disbursed in one equal monthly instalments and after the expiry of the said one month (if the project gets delayed) then the applicant would get a delayed penalty of Rs.57/- per sq.ft. per month till the date of offer of possession by the company. However, it is observed that the said one time down payment discount has been already paid by the respondent. As per clause 11(a) of the builder buyer agreement dated 19.02.2020 the due date of possession of the unit was 19.02.2025 and the occupation certificate in respect of the project was obtained on 17,10,2022. Thus, there is no delay on the part of the respondent and the complainant is not entitled to any further delayed penalty"

21. The letter dated 11.12.2019 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 11.12.2019 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 allottee.

22. In the present case, the respondent has offered the possession of the unit vide offer of possession for fit outs on 07.09.2021 which was before obtaining the occupation certificate. The said offer of possession for fit-outs is no doubt bad in the eyes of law but the



authority is of the view that by the said offer of possession, the respondent wanted to intimate to the complainant that the unit is complete on its part and applied for the occupation certificate. Thus, the authority thinks fit that as and when the occupation certificate is obtained, it will amount to offer of possession. Under section 19(10) of the Act, the allottee is under an obligation to take the possession of this unit within two months of the date of grant of occupation certificate.

23. The question of assured return does not arise in the circumstances outlined in the present complaint, as per the respondent's commitment in the letter dated 11.12.2019. This commitment entailed a down payment discount of Rs.57/- per sq.ft., to be disbursed in **one** equal monthly installments, with an additional delayed penalty of Rs.57/- per sq.ft. per month should the project encounter delays beyond one month. It is noted that the one-time down payment discount has already been provided by the respondent. According to clause 11(a) of the builder-buyer agreement dated 19.02.2020, the due date for possession of the unit is 19.02.2025, and the occupation certificate for the project was obtained on 17.10.2022. Consequently, there has been no delay on the part of the respondent, and the complainant is not entitled to any further delayed penalty.

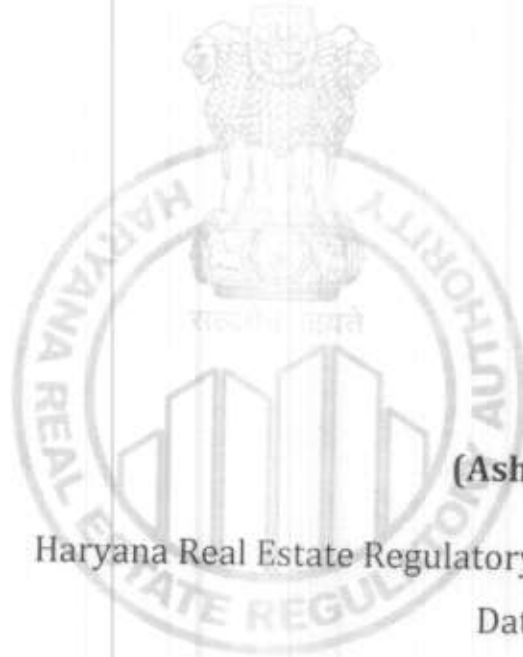
H. Directions of the authority


24. 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 hand over possession of the unit to complainant within 60 days from the date of this order.

ii. The respondent shall not charge anything from the complainant which is not a part of the buyer's agreement.

25. Complaint stands disposed of.

26. File be consigned to registry.




(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 14.05.2024

HARERA
GURUGRAM