

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

Complaint no. : 85 of 2023
Date of decision : 28.08.2024

1. Raj Kumar Rana
2. Shanti Rana

Both R/o: -H.No-2151/3, Rajiv Nagar, Near
Shiv Mandir, Gurugram, Haryana.

Complainants

Versus

M/s Elan Buildcon Pvt. Ltd.

Office at: 3rd floor, Golf View Corporate Tower,
Golf Course Road, Sector-42, Gurugram,
Haryana.

Respondent

CORAM:

Shri. Ashok Sangwan

Member

APPEARANCE:

Sh. Dhruv Lamba (Advocate)
Sh. Ishan Dang (Advocate)

Complainants
Respondent

ORDER

1. The present complaint has been filed by the complainants/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 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	25.09.2017
6.	Allotment letter	25.09.2017 (As on page no. 47 of reply)
7.	Terms and conditions for fixed amount on provisional booking dated	20.02.2018 (Page 22 of the complaint)
8.	Unit no.	LG-KS-07, Type-Commercial/Retail, Floor-Ground Floor. (As on page no. 38 of complaint)
9.	Unit area admeasuring	555 sq. ft. [Super-area] 278sq.ft. [Actual Area] (As on page no. 38 of complaint)

10.	Date of apartment buyer agreement	11.07.2019 (As on page no. 30 of complaint)
11	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 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></p> <p>[Emphasis supplied]</p>
12.	Due date of possession	11.07.2024 [Calculated 48 months from 11.07.2019 . 12

		months]
13.	Total sale consideration	Rs. 62,71,345/- (As per payment plan on 63 of complaint)
14.	Amount paid by the complainant	Rs. 58,04,162/- (As per S.O.A on page no. 129 of reply)
15.	Application for occupation certificate	09.06.2021 (As on page no. 99 of reply)
16.	Offer of possession for fit outs	07.09.2021 (Page 101-103 of reply)
17.	Occupation certificate	15.03.2023 (As on page no. 124-126 of reply)
18.	Intimation regarding grant of OC w.r.t the commercial project on	22.03.2023 (As on page no. 127 of reply)
19.	Pre-cancellation dated	16.05.2023 (As on page no. 130 of reply)
20.	Assured return received by the complainant from respondent	Rs. 12,76,161/- (As per the respondent on page 12 of reply)

B. Facts of the complaint

3. The complainants have made the following submissions in the complaint: -
- I. That on 30.06.2017, the complainants booked a unit along with 01 car parking space in the project "Elan Miracle" and paid booking amount of Rs.1,00,000/- . The payment was acknowledged by the respondent i.e., M/s. Elan Buildcon Pvt. Limited.
 - II. That on 25.09.2017, a provisional allotment letter was issued by the respondent in favour of the complainants. Vide the said allotment

letter, a retail commercial unit (along with 01 car parking space) bearing no. I.G-KS-07 on Lower Ground Floor having a super area of 555 sq. ft. (approx.) was allotted. The complainants opted for a "Special Fixed Return Payment Plan".

- III. That on 09.02.2018, the complainants made a payment of Rs.23,47,040/- towards the total sale consideration of the subject unit. Accordingly on 20.02.2018, a letter was issued by the respondent relating to the terms and conditions for fixed amount on provisional booking. Clause 1 and 4 of the letter deals with the provisions of assured returns to be paid to the complainants by the respondent.
- IV. As per Clause 1, the respondent agreed to pay to the complainants, a fixed amount of Rs.21,913/- per month on the provisional booking in the project. As per Clause 4, the fixed amount was to be paid by the respondent to the complainants till the date of issuance of offer of possession and offer of possession shall be issued by the respondent on the application of Occupation Certificate.
- V. That on 11.07.2019, a Builder Buyer Agreement was executed between the complainants and the respondent. It is pertinent to mention here that Clause 7.1 of the agreement deals with possession of the unit, wherein the promoter assured to handover the possession of the said unit along with ready and complete common areas with all the specifications, amenities and facilities of the project in place within a period of 48 months from the date of the agreement with an extension of 12 months. That on 30.11.2019, the complainants made a payment of Rs.27,65,681/- towards the total sale consideration of the unit and the same is reflected in the statement of accounts issued by the respondent. **Accordingly, the**

amount of assured return was increased to the tune of Rs.43,708/-.

- VI. That from 01.04.2021, the promoter stopped making payment of assured return. That according to clause 1 and 4 of the letter dated 20.02.2018, the respondent promised to pay the assured return (fixed amount) till the issuance of the offer of possession. It is a matter of fact that till this date the respondent has not obtained occupation certificate from the competent authorities and accordingly no valid/lawful offer of possession has been made.
- VII. In view of the submissions made above, the respondent is liable to pay assured return to the tune of Rs.43,708/- till a valid offer of possession is made after obtaining the occupation certificate.
- VIII. That on 07.09.2021, a notice of offer of possession for fit outs and settlement of dues was sent by the respondent to the complainants. The said offer of possession for fit- outs was completely illegal and unlawful as the occupation certificate w.r.t the subject project was not received by the respondent from the competent authority which is a necessary pre- requisite for handing over of possession.
- IX. That vide clause 1 and 4 of "the terms and conditions for fixed amount on provisional booking dated 20.02.2018", the promoters have promised to pay the assured return (fixed amount) till the issuance of the offer of possession. It is a matter of fact that till this date the respondent has not obtained occupation certificate from the competent authorities and accordingly no valid/ lawful offer of possession has been made. In view of the submissions made above, the respondent is liable to pay assured return (fixed amount) to the tune of Rs.43,708/- till a valid/lawful offer of possession is made

after obtaining necessary pre- requisite from the competent authorities including but not limited to the occupation certificate

- X. That the present complainants had made all the payments well on time as and when demanded by the respondent. It is a matter of fact that the complainants had made a payment of Rs.56,97,881/- towards the total sale consideration of the subject unit.

C. Relief sought by the complainants

4. The complainants have sought following relief(s).
- I. Direct the respondent to pay the assured return to the tune of Rs.43,708/- till the date of actual handover of physical possession after obtaining the occupation certificate.
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 complainants had approached the respondent expressing an interest in the purchase of a commercial unit in the commercial complex being developed by the respondent known as "ELAN MIRACLE", situated in Sector -84, Gurugram. The complainants had opted for a special fixed return payment plan.
- II. That thereafter, the complainants were allotted a commercial space tentatively ad measuring 555 sq. ft. super area bearing Kiosk/Unit No. I.G-KS-07 on the lower ground floor. The terms and conditions

forming part of the application form were duly understood and accepted by the original allottee.

- III. That the respondent issued letter dated 20.02.2018 whereby it agreed to pay to the complainants a fixed amount of Rs.21,913/- 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. It is submitted that the complainants have received Rs.12,76,161/- as assured return with effect from February 2018 till June 2021, upon application for issuance of the occupation certificate.
- IV. That thereafter the complainants and the respondent entered into the Buyer's Agreement dated 11.07.2019. That in the meantime, 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.
- V. That vide letter dated 19.06.2021, the respondent informed the complainants that the Occupation Certificate for the project in question has been applied on 09.06.2021. The complainants were also informed that they would no longer be entitled to get the fixed amount with effect from the date of application for the occupation certificate. Pertinently, Clause 7.2 of the Buyer's Agreement dated 11.07.2019 also provides that the respondent, upon applying for the occupation certificate shall offer possession of the premises to the allottee.
- VI. That vide letter dated 07.09.2021, the respondent sent Offer of Possession for Fit-outs to the complainants whereby the respondent requested the complainants to take possession of unit after clearing

their outstanding clear dues as per the attached statement. The complainants were informed that there was an increase in the super area of the unit allotted, from 555 sq ft to 552 sq ft. Consequently, the payments to be made by the complainants stood revised. The respondent has offered the possession of the units in the project for fit outs at their end keeping in view the interest of all the allottees in mind 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.

- VII. That as per Clause 31 of the 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.
- VIII. That pertinently, after receipt of the offer of possession letter dated 07.09.2021, the complainants refrained from making payment of the demanded amounts and from taking possession of the unit.
- IX. That the respondent gave various opportunities to the complainants to clear their outstanding dues. Letters and reminders dated 12.10.2021, 12.11.2021, 28.12.2021, 08.02.2022, 07.03.2022, 05.04.2022, amongst others were issued to the complainants reminding to clear their outstanding dues. However the said reminders were ignored by the complainants.
- X. That it is pertinent to mention herein that in terms of Clause 5 read with Clause 9.3 of the Buyer's Agreement, 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, the respondent shall have the right to terminate the Provisional Allotment/ Agreement and forfeit the booking amount and other amounts as specified in the buyer's agreement.

- XI. 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 11.07.2019. Hence the respondent has offered possession of the unit to the complainants, well before the agreed time lines for delivering possession.
- XII. That on account of the continuing and wilful lapses on the part of the complainants, the respondent was constrained to issue a pre cancellation letter dated 16.05.2023, calling upon the complainants to clear their outstanding dues failing which the respondent might be compelled to cancel the allotment in their favour.
- XIII. That instead of coming forward to take possession even after issuance of the pre cancellation notice, the complainants refrained from making payment of balance amounts and taking possession of the unit and have instead proceeded to file the present false and frivolous complaint on baseless grounds. 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.

E. Jurisdiction of the authority

7. The respondent raised a preliminary submission/objection that the authority has no jurisdiction to entertain the present complaint. The objection of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.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 relief sought by the complainants

F.1 Assured Return

11. The respondent has submitted in its reply that vide letter dated 20.02.2018, it committed to pay a fixed amount of Rs.21,913/- per month to the complainants from the time of provisional booking until the offer of possession was issued to the complainants. The total sale consideration for the allotted space was Rs.62,71,345/-, of which the complainants have already paid Rs.58,04,162/-.
12. The letter dated 20.02.2018 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. One of the integral parts of this agreement, the letter dated 20.02.2018 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.

13. 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. 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.***
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 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.*

15. In the present case, the essential condition for a valid offer of possession has not been met. The occupation certificate for the project in which the subject unit is located was issued by the relevant authority on 15.03.2023. However, the respondent had offered possession for the fit-out of the allotted unit prior to obtaining this certificate, specifically on 07.09.2021. Consequently, this offer does not constitute a valid offer of possession. Accordingly, the respondent is hereby directed to provide possession of the unit to the complainant within 30 days from the date of this order.
16. The complainants have acknowledged receipt of assured returns up to March 2021. The complainants' counsel contends that, according to the statement of accounts, the assured return amount was increased to Rs.43,708/-, which was paid by the respondent until March 2021. Upon reviewing the statement of account on page 53 of the reply, the Authority notes that the respondent/promoter paid Rs.21,913/- from March 2018 to October 2019, Rs.22,639/- for November 2019, and

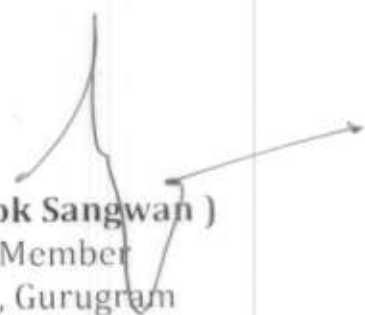
Rs.43,708/- from December 2019 to March 2021. However, the Authority finds that there is no documentary evidence supporting the increase in the assured return amount beyond what is stated in the letter dated 20.02.2018, which is the only document available regarding the assured return.

17. The Authority directs the respondent to issue a fresh Statement of Accounts (S.O.A) to the complainants and to pay the arrears of assured returns as stipulated in the letter dated 20.02.2018. According to this agreement, the respondent is directed to pay a fixed amount of Rs.21,913/- per month from the date of provisional booking, 30.06.2017, until the occupation certificate was obtained, after deducting the amounts already paid by the respondent on account of assured returns.

H. Directions of the authority

18. 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 assured return of Rs.21,913/- per month from 30.06.2017 till the date of obtaining of occupation certificate i.e 15.03.2023, after deducting the amount already paid by the respondent on account of assured return.
 - ii. The respondent is directed to pay arrears of accrued assured return as per the letter of assurance dated 20.02.2018 till the date of obtaining occupation certificate at the agreed rate within 90 days from the date of this order after adjustment of outstanding dues, if any, from the complainants and failing which that amount would be payable with interest @9.10% p.a. till the date of actual realization.

- iii. The respondent shall not charge anything from the complainant which is not the part of the agreement of sale.
19. Complaint stands disposed of.
20. File be consigned to registry.


(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 28.08.2024