

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

Complaint no. : 6576 of 2022  
Date of decision : 05.07.2024

Dilip Dev Jayadevan R/o - D-14/18, Ground Floor, Platinum Greens Ardee City, Sector - 51, Gurugram, Haryana - 122003	<b>Complainant</b>
Versus	
Elan Ltd., R/o: - 1/1100, First floor, Street No. 25, Sangam Vihar, New Delhi - 110062	<b>Respondent</b>
<b>CORAM:</b>	
Shri Sanjeev Kumar Arora	<b>Member</b>
<b>APPEARANCE:</b>	
Mr. Siddharth Karnawat (Advocate)	Complainant
Mr. Ishaan Daang (Advocate)	Respondent

**ORDER**

1. The present complaint dated 14.10.2022 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 allottee 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 complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

Sr. No.	Particulars	Details
1	Name of the project	MERCADO, Sector-80, Gurugram, Haryana.
2.	Nature of project	Retail/Commercial/Serviced apartment
3.	DTCP License	82 of 2009 dated 08.12.2009 valid up to 07.12.2019
4.	RERA registration	189 of 2017 dated 14.09.2017 valid up to 13.09.2022 <b>Registration expired</b>
5.	Name of licensee	RP Estates Pvt. Ltd.
6.	Allotment Letter	15.01.2015 (As per page 29 of complaint)
7.	Unit no.	GF- 0039, Ground floor

		(As per BBA at page 45 of complaint)
8.	Unit admeasuring	517 sq. ft. (super area) (As per BBA at page 45 of complaint) 520 sq. ft. (As per page 102 of complaint)
9.	Buyers agreement	01.08.2016 (as per BBA at page 32 of complaint)
10.	Possession clause	<b>11(a) Schedule for possession of the said unit.</b>  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 <b>48 months with an extensions of further twelve (12) months from the date of this agreement</b> 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 notwithstanding rights available to the Developer elsewhere in this contract, the period for 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.
11.	Due date of delivery of possession	01.08.2021 (calculated from the date of buyer's agreement)
12.	Total sale consideration	Rs.57,10,107/- (As per payment plan at page 70 of complaint)
13.	Total amount paid by the complainant	Rs. 62,61,871/- (as per payment schedule at page 211 of reply)
14.	Occupation certificate	17.10.2022 (As per page 217 of reply)
15.	Offer of possession for fit-out	07.03.2020 (As per page 102 of complaint) Through which respondent demanded Rs. 4,28,455/-
16.	Consent for lease	30.12.2019 (As per page 224 of reply)

17.	Lease of unit in the name of M/s Belgian Waffle co	Mail intimation on 21.08.2023
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### **B. Facts of the complaint**

3. That the complainant in the year 2014 was looking to purchase a commercial property, and he was approached by the respondent for purchasing a unit in the commercial project being developed by the respondent named "Mercado" situated at Sector 80, Gurgaon, Haryana, and paid an amount of Rs. 5,00,000/- towards the booking of a unit in the project of the respondent on 25.05.2014. The respondent issued a provisional allotment letter dated 15.01.2015. Thereafter he was allotted a unit bearing no. 0039 on the ground floor, having a super area of approximately 517 sq. ft. in the said project. However, the respondent executed the buyer's agreement on 01.08.2016.
4. It is stated that as per agreement, the total consideration of the unit was Rs. 57,10,107/-. That as per clause 11. (a) of the agreement, the possession of the unit was promised to be offered within 48 months with the extensions of further 12 months from the date of the execution of this agreement. Since the agreement was executed on 01.08.2016, the possession of the unit was promised to be offered on 01.08.2021.
5. They complied with each payment demand as was raised by the respondent. They sought regular updates from the respondent through meetings and telephonic conversations, with respect to the progress of

construction work of the project and were assured that the same was progressing as per schedule and that possession of the unit would be offered within the time promised. By March 2020, the respondent had collected an amount of Rs. 63,89,875/- against the unit from the complainant.

6. That the respondent vide letter dated 07.03.2020 titled "demand on offer of possession for fit-out" demanded the settlement of final dues from the complainant against the unit booked.
7. The respondent has failed to offer valid and legal possession of the unit to the complainant within the time promised. The delay continues since legal possession of the unit has not been offered to the complainant till date. They have been facing irreparable loss and damage as they have already paid an amount of Rs. 63,89,875/- against the unit to the respondent by March 2020 and even after the expiry of more than 1 year from the promised date of possession, the valid and legal possession has not been offered to the complainant till date.

### **C. Relief Sought**

8. This Authority may be pleased to direct the respondent as follows:
  - a) Direct the respondent to handover possession of the unit to the complainant, complete in all respects and in conformity with the agreement.

- b) Direct the respondent to pay interest @ 10% per annum on the amount deposited by the complainant.
- c) Direct the respondent to refund back the additional plc amount charged to the complainant;
- d) Direct the respondent, to pay a sum of Rs. 2,00,000/- to the complainant towards litigation costs.

#### **D. Reply by the respondent**

9. 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 the buyer's agreement dated 01.08.2016.
10. That vide its judgment in the matter of Rameshwar and others Vs. State of Haryana and others, (Civil Appeal 8788 / 2015 reported as 2018 (6) Supreme Court Cases, 215) , the Hon'ble Supreme Court was pleased to hold that the decision of the State Government dated 24.08.2007 to drop the acquisition proceedings and the subsequent decision dated 29.01.2010 of the industries and commerce department to close the acquisition proceeding as well as the decision to entertain applications for grant of licenses from those who had bought the land after initiation of the acquisition proceedings, to be fraudulent.

11. That in terms of the aforementioned direction, the said land was rightly kept outside the scope of the aforementioned judgment. Pursuant to the said Order passed by the Hon'ble Supreme Court, the respondent approached the office of the Town and Country Planning Department, Haryana for grant of occupation certificate which was subsequently granted on 17.10.2022 i.e. only within 3 months of passing of the said Order by the Hon'ble Supreme Court which clearly indicates that the construction of the project was complete way back in January, 2020 and Town and Country Planning Department, Haryana had no reasons to further delay the grant of occupation certificate. That vide letter dated 07.03.2020 (Annexure R 9) the respondent, offered possession of the unit to the complainant for fit-outs and settlement of dues. The complainant was informed that the super area of the said unit had increased from 517 sq ft to 520 sq ft. Accordingly, there was a corresponding increase in the charges payable by the complainant. They were called upon to clear his outstanding dues as set out in the letter dated 07.03.2020. It is pertinent to mention that the respondent had 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 Town and Country Planning Department, Haryana, the commercial operations from the units can 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 including the complainant.

12. That by email dated 9<sup>th</sup> August 2023 the respondent had informed the complainant regarding an offer of lease in respect of the unit in question (along with an adjoining unit allotted to another customer) in favour of prospective lessee "M/s. Bloombay Enterprises Private Limited" for carrying on its business under the brand name "The Belgian Waffle Co." . The terms and conditions of the proposed lease were shared with the complainant and the approval of the complainant was sought for leasing out the unit of them. They duly conveyed their approval vide email dated 9.08.2023. It is pertinent to mention herein that the complainant had already given his unconditional and irrevocable consent in favour of the respondent for leasing out the complainant's unit on his behalf, as far back as on 30.12.2019. Hence , it is evident that actual physical possession of the unit was never intended to be given to them. Pertinently, no timelines have been agreed upon between the parties for leasing out the unit in question.
13. Copies of all the relevant documents have been duly filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submissions made by the parties.

## **E. Jurisdiction of the authority**

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**

14. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

### **E.II Subject matter jurisdiction**

The 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;*

#### ***Section 34-Functions of the Authority:***

*34(f) of the Act provides to ensure compliance of the obligations cast upon the promoter, the allottees and the*

*real estate agents under this Act and the rules and regulations made thereunder.*

15. 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 complainant at a later stage.

#### **F. Findings on the objections raised by the respondent**

##### **F.I Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act**

16. A contention of the respondent is that authority is deprived of the jurisdiction to go into the interpretation or rights of the parties inter-se in accordance with the apartment buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the act or the said rules has been executed inter se parties. The authority is of the view that the act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the act. Therefore, the provisions of the act, rules and agreement have to be read and interpreted harmoniously. However, if the act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the act and the rules after the date of coming into force of the act and the rules. Numerous provisions of the act save the provisions of the agreements

made between the buyers and sellers. The said contention has been upheld in the landmark judgment of **Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)** decided on 06.12.2017 and which provides as under:

"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter....."

122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."

17. Further, in appeal no. 173 of 2019 titled as **Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya**, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed as under -

"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for

*sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."*

18. The agreements are sacrosanct save and except for the provisions which have been abrogated by the act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

**G. Findings on the relief sought**

**G.I & II Direct the respondent to handover possession of the unit to the complainant, complete in all respects and in conformity with the agreement along with delayed possession charges.**

19. As per relief sought, the complainant is seeking possession of the subject unit. An agreement was executed on 01.08.2016 and as per clause 11(a) the developer was endeavoured to complete the construction of the said building/said unit within a period of **48 months with an extension of further twelve (12) months from the date of this agreement.**

Therefore, the due date of possession comes out to be 01.08.2021. The occupation certificate has been received on 17.10.2022 and as alleged by complainant no offer of possession has been made after receipt of occupation certificate. It is observed that as per documents on records, a consent for lease for the subject unit has been signed by the complainant.

The relevant clause is produced below -:

- (a) *i/we hereby unconditionally and irrevocably agree and confirm that the company would have the exclusive right to lease out the said unit on complainants behalf and we hereby give our unconditional consent on the terms and conditions of the LOI/Lease arrangement/rent/revenue share/other leasing document which may be finalized by company on our behalf*
- (b) *i/we agree that the company on best efforts basis will strive for attractive lease terms. The LOI/term sheet/MOU would be executed by me/us or the company at the company's discretion. The lease deed with the tenant/brand shall be signed by me/us without any protest or demur.*

20. It is to be said that complainant cannot claim two things at the same time.

As on one side he is asking for handover of the subject unit and on the other side he has given his consent for leasing out the unit. Also, as per written synopsis submitted by the complainant on 15.05.2024, the complainant has not denied signing of the consent for lease. Also, intimation through mail dated 21.08.2023 w.r.t leasing details has been sent by the respondent to complainant. Therefore, the said relief cannot be allowed.

21. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the prescribed rate and proviso to section 18 provides that where an allottee

does not intend to withdraw from the project, she 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. Rule 15 has been reproduced as under:

**Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18, and sub-section (4) and subsection (7) of section 19]**

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.

*Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.*

22. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.
23. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 05.07.2024 is 8.95%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.95%.
24. The definition of term 'interest' as defined under section 2(z) of the act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the

promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

*“(za) “interest” means the rates of interest payable by the promoter or the allottee, as the case may be.*

*Explanation. —For the purpose of this clause—*

- (i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
- (ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;”*

25. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 10.95% by the respondent/promoter which is the same as is being granted to the complainant in case of delayed possession charges.
26. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the act by not handing over possession by the due date as per the agreement. By virtue of clause 11(a) of the agreement executed between the parties on 01.08.2016, the possession of the subject apartment was to be delivered within stipulated time (calculated from 48 months from the date of signing of the agreement with a grace period of 12 months) i.e., by 01.08.2021. The occupation certificate of the project has been received on 17.10.2022. Accordingly, it is the failure of the



respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the act on the part of the respondent is established. As such, the allottee shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 01.08.2021 till date of receipt of OC i.e., (17.10.2022) plus two months 17.12.2022 at prescribed rate i.e., 10.95 % p.a. as per proviso to section 18(1) of the act read with rule 15 of the rules.

**G.III Direct the respondent to refund back the additional PLC amount charged to the complainant;**

The complainant has raised an issue with respect to refund of additional PLC and sought relief stating that as per allotment letter dated 15.01.2015, an amount of Rs. Rs. 2,32,650/- on account of PLC whereas as per agreement dated 01.08.2016, an amount of Rs. Rs. 3,48,975/- on account of PLC. It is observed that although both the documents i.e., allotment letter and buyer agreement has been provided by the respondent but in the present case buyer agreement dated 01.08.2016 supersedes the provisional allotment letter dated 15.01.2015 as the buyer agreement has been executed after the said provisional allotment letter. Therefore, the said relief cannot be allowed.

**G.IV Direct the respondent to award compensation of Rs. 2,00,000/-**

27. The complainant is seeking relief w.r.t. compensation in the above-mentioned relief. *Hon'ble Supreme Court of India in civil appeal titled as M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors.(supra)*, has held that an allottee is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses. Therefore, for claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainant may file a separate complaint before the Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.

#### **H. Directions of the authority**

28. 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 delayed possession charges at the prescribed rate of interest i.e., 10.95% p.a. for every month of delay on the amount paid by complainant to it from the due date of possession i.e., 01.08.2021 till date of receipt of occupation certificate

i.e., 17.10.2022 plus two months i.e., 17.12.2022.

29. Complaint stands disposed of.
30. File be consigned to registry.

  
Sanjeev Kumar Arora  
Member

Haryana Real Estate Regulatory Authority, Gurugram  
Dated: 05.07.2024

**HARERA**  
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