

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

Complaint no. : 5351 of 2023
Date of order : 04.12.2024

1. Mr. Akash Khanna
2. Mrs. Kanchan Khanna
Both R/o: - C-182, Sarvodaya Enclave,
Malviya Nagar, South Delhi.

Complainants

Versus

M/s Elan Limited
Regd. Office At: Floor-3rd, Golf View Corporate
Tower, Golf Course Road, Sector-42, Gurugram-
122002.

Respondent

CORAM:
Shri. Ashok Sangwan

Member

APPEARANCE:
Sh. Amit Kumar Srivastav (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 provisions 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	"Elan Epic", Sector-70, Gurugram, Haryana.
2.	Nature of the project	Commercial project
3.	Area of project	3.525 acres
4.	DTCP license	License no. 148 of 2008 Dated-02.08.2008
5.	RERA Registered	Registered Registration no.-30 of 2018 dated 06.12.2018
6.	Application Form	29.10.2020
7.	Provisional Allotment letter	08.11.2020 (As on page no. 17 of complaint)
8.	Unit no.	KIOSK 05-A, Type-Foor Court, Floor-2 nd . (As on page no. 17 of complaint)
9.	Unit area	478 sq.ft.
10.	Date of execution of buyer's	Not executed

	agreement	
11.	Due date of possession	08.11.2023 + 6months = 08.05.2024 [Calculated 3 years from the date of allotment + 6 months on account of Covid-19]
12.	Payment plan	Special payment plan <ol style="list-style-type: none"> 1. On application of booking-09% of Basic Sale Price 2. On or before 15-Nov-2020-26% of Basic Sale Price. 3. On Offer of Possession-65% of Basic Sale Price + 100% Car Parking-Usage Rights-if any + 100% of IFMS charges (*Stamp duty, Registration charges & Administrative charges & all other charges as applicable will be charged extra)
13.	Total sales consideration	Rs.70,07,480/-
14.	Total amount paid by the complainant	Rs.28,29,641/- (As on page no. 92 of reply)
15.	Letter of Assurance sent by the respondent to the complainant	13.11.2020 (As on page no. 21 of complaint)
16.	Assured Return	Clause 1 <i>That Elan Limited (herein after referred to as "Company") agrees and undertakes to pay to the applicant down payment discount</i>

equivalent to **Rs.477/- (Rupees Four Hundred Seventy Seven Only)** per sq.ft. in total of amount **Rs.2,28,006/- (Rupees Two Lac Twenty Eight Thousand Six Only)** shall be disbursed in 09 equal monthly installments (subject to deduction of applicable taxes), on the provisional booking of Unit No. **KIOSK 05A**, on **SECOND FLOOR** in **ELAN EPIC**, on receipt of amount of **RS.25,10,706/- (Rupees Twenty Five Lac Ten Thousand Seven Hundred Six Only)** received through Card No. Inv No.000240 dated 29-Oct-2020 drawn on Card Swipe and Card No. Inv NO. 000241 dated 29-Oct-2020 drawn on Card Swipe and Cheque No.000001 dated 08-Nov-2020 drawn on HDFC Bank and Cheque No. 000007 dated 08-Nov-2020 drawn on UCO Bank and Cheque No.000002 dated 08-Nov-2020 drawn on HDFC Bank and RTGS No.000132336818 dated 12-Nov-2020 drawn on HDFC Bank and Challan NO.14595 dated 17-Nov-2020 drawn on HDFC Bank and Challan No.-14286 dated 17-Nov-2020 drawn on HDFC Bank and after expiry of

		<p>09 months (if the project gets delayed), then the applicant would get a delayed penalty of Rs.53/- (Rupees Fifty Three Only) per sq.ft. per month of super-area of the above said unit (Subject to deduction of applicable taxes) till the offer of possession by the Company.</p> <p>Clause 5</p> <p>The delayed penalty as mentioned above in Para 1, shall be paid by the Company to the applicant till the date of issuance of offer of possession by the Company on applying of occupancy certificate to the competent authority. The offer of possession is not dependent upon grant of occupancy and/or completion certificate. After issuance of offer of possession by the Company, the applicant shall not be entitled for payment of any down payment discount and/or delay penalty amount on the provisional booking from the Company.</p> <p>(As on page 21-22 of complaint)</p>
17.	Assured return paid	Rs.7,69,512/- (As on page no. 94 of reply)
18.	Occupation certificate	31.10.2023

		(As on page no. 79 of complaint)
19.	Conditional offer of possession for fit-outs	01.07.2023 [Super area increased from 478 sq.ft. to 513 sq.ft.]
20.	Reminders to clear outstanding dues	24.07.2023 18.08.2023 07.09.2023
21.	Final reminder	25.09.2023 (As on page no. 86 of reply)
22.	Legal notice seeking refund	10.10.2023 (As on page no. 70 of complaint)
23.	Pre-cancellation	12.10.2023 (As on page no. 91 of reply)
24.	Cancellation letter	16.11.2023 (As on page no. 92 of reply)

A. Facts of the complaint

3. The complainants have made the following submissions in the complaint:
- I. That the complainants booked a unit in the project "Elan Epic" situated in Sector-70, Gurgaon on 29.10.2020 and paid booking amount Rs.1,00,000. That the respondent issued a provisional allotment cum demand letter to the complainants on 08.11.2020. By this allotment the complainants were allotted unit no. KIOSK 05A on 2nd floor, admeasuring 478 sq.ft. super area, type food court in the said project and cost of unit was Rs.70,07,480/-.
 - II. That the complainants further paid the remaining amount as per the

- payment plan as mentioned in the terms and conditions issued by the respondent till 17.11.2020 as per demand made by the respondent and the complainants made a total payment of Rs. 28,11,990/-.
- III. That as per section-13 of the RERA Act, 2016 the respondent had to execute the builder buyer agreement with the complainants after getting payment of 10% of the BSP, but the respondent failed to execute agreement till now.
- IV. That the respondent by the terms and conditions dated 13.11.2020 agreed to pay down payment discount to the complainants by PDC cheque which was duly paid by the respondent to the complainant till May 2023. That the respondent sent a draft agreement by email on 18.06.2021 for the signature to the complainants, but certain issues were raised by the complainants and they requested some modifications in the draft vide email dated 03.07.2021, but after this email, the complainants received no reply from the respondents.
- V. That after this E-mail, the complainants visited the office of the respondents on various occasions for the execution of the agreement but every time the respondent made excuses and did nothing, and finally sent an offer of possession on 01.07.2023 in which the super area was increased from 478 sq.ft. to 513 sq.ft. without any prior information and in the said letter carpet area was mentioned as 74.16 sq.ft.
- VI. That after receiving the above sad offer of possession and demand, the complainants immediately visited the office of the respondent and objected to the discrepancy in super area and carpet area because the same was never communicated by the respondent to complainants.
- VII. That the respondent neither accepted the requests made by the complainants for refund nor did provide any justification about the carpet area and instead was sending regular demand for the payment of due

amount for the fit outs.

- VIII. That the complainants after making a payment of Rs.28,11,990/- to the respondent with the hope of getting their property within the time frame. The respondent assured to the complainants at the time of booking that there will be assured rental with the said property, but there is no assurance about the future rental after July 2023, it was also confirmed that the carpet area will be around 40-45% of the super area but in the possession letter, it is only around 15 %.
- IX. That the complainant also issued a legal notice dated 13.10.2023 through their advocate for the refund but no response has been received from the respondent till date. That after the said legal notice, the complainants received a letter on 03.11.2023 for the intimation regarding grant of occupation certificate of the project by the DTCP Haryana. In the said letter the super area was mentioned as 513 sq. ft. and the carpet area 170.18 sq. ft. From the said letter it is much clear that there is no standard measurement set by the respondent about the carpet area in the food court and they are making it a mockery as per own choice.

B. Relief sought by the complainants: -

4. The complainants have sought following relief(s):
- i. Direct the respondent to cancel the booking and refund the amount Rs.28,11,990/- with interest to the complainant.
 - ii. Award cost of litigation of Rs.60,000/- in favour of the complainants.
5. On the date of hearing, the Authority explained to the respondent/promoter about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the act to plead guilty or not to plead guilty.

C. Reply by the respondent

6. The respondent has contested the complaint on the following grounds: -

- I. That the present complaint is not maintainable in law or on facts. The complainants have no locus standi or cause of action to file the present complaint. 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.
- II. That the complainants approached the respondent, through their broker/agent M/s Atulyam, for booking of Kiosk unit no.05A on the second floor in the project, "Elan Epic" situated in Sector-70A, Gurugram and had opted for a Special payment plan. The complainants had approached the respondent after conducting extensive and independent investigations with regard to all aspects of the project and proceeded to book the unit.
- III. That the complainants agreed and undertook to execute the Buyer's Agreement in the standard format of the respondent as and when called upon to do so. The complainants agreed and acknowledged that the provisional allotment in their favour shall take effect only upon execution of the Buyer's Agreement.
- IV. That provisional allotment letter dated 08.11.2020 was issued in favour of the complainant whereby Kiosk unit no. 05A on the second floor in the project, admeasuring 478 sq ft of super area approx. was allotted in favour of the complainants, for a total consideration amounting to Rs.70,07,480/-.
- V. That a letter dated 13.11.2020 containing the detailed "Terms and conditions for provisional booking and payment of down payment

discount " was issued by the respondent to the complainants. In terms of Clause 1 of the said letter, the respondent was liable to pay down payment discount equivalent to Rs.477/- per sq. ft. to the complainants, amounting to Rs 2,28,006/- in 09 equal monthly installments, subject to deduction of taxes, in the manner set out in the said letter.

- VI. In terms of the said letter the respondent handed over post dated cheques upto 31st March, 2021 which have been duly encashed by the complainants. The respondent has paid an amount of Rs.7,695,12/- (inclusive of TDS) as total down payment discount to the complainants till May, 2023. In terms of clause 2 of the said letter, after expiry of 09 months (if the project gets delayed), the respondent had undertaken to pay to the complainants delay penalty as set out in clause 1 of the said letter.
- VII. That vide letter dated 21.12.2020, the respondent called upon the complainants to come forward for execution and registration of the Buyer's Agreement. However, for reasons best known to themselves, the complainants failed to come forward for execution and registration of the Buyer's Agreement. The complainants demanded changes in the Buyer's Agreement although having undertaken to execute the Buyer's Agreement in the standard format of the respondent.
- VIII. That Clause 7 of the unexecuted Buyer's Agreement provides that subject to timely payment of sale consideration by the complainants and subject to force majeure conditions and delays caused due to reasons beyond the power and control of the respondent and time taken by statutory/government authorities in according approvals, possession of the unit was proposed to be handed over within 48 months from the date of the Buyer's Agreement, with further grace period of 12 months.

- IX. That the respondent duly completed construction of the project and applied for Occupation Certificate before Town and Country Planning, Haryana vide letter dated 25.05.2023. The complainants were also informed that upon application for the occupation certificate, the complainants shall no longer be entitled to get any fixed amount/delay penalty/down payment rebate.
- X. That by letter dated 01.07.2023, the complainants were offered possession of the unit for fit outs. The complainants were also informed that the super area of the unit had increased from 478 sq ft to 513 sq ft and that the final dues had been calculated on the basis of the finally determined super area of 513 sq.ft. The complainants were called upon to make payment of their outstanding dues as set out in the enclosed statement of account and take possession of the unit. However, the complainant did not come forward to take possession of the unit and clear his outstanding dues. Hence the respondent addressed reminders for possession dated 24.07.2023, 18.08.2023, 07.09.2023 and final reminder dated 25.09.2023.
- XI. That the respondent received the occupation certificate on 31.10.2023 from the competent authority. The complainants were informed by letter dated 03.11.2023. The complainants continued to ignore the communications sent by the respondent and refused to take possession of the unit and clear the outstanding dues despite repeated reminders from the respondent. Accordingly, the respondent sent a pre-cancellation letter dated 12.10.2023, giving the complainants a last and final opportunity for payment of outstanding dues. Since, the complainants have not paid any heed to the reminders and pre-cancellation letter, the respondent issued a cancellation letter dated 16.11.2023 and after adjustment of the earnest

money, interest, admin charges & taxes offered a refund for a sum of Rs. 6,47,828/-, after return of all original documents pertaining to the unit.

- XII. That the allotment in favour of the complainants has been rightly cancelled by the respondent in accordance with the terms and conditions of the application executed by the complainants. Hence, the complaint is liable to be dismissed.
7. Copies of all the relevant documents have been 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 submission made by the parties.

D. Jurisdiction of the authority

8. 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

9. 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

10. 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) The promoter shall-

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

11. 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.

F. Findings on the relief sought by the complainant

I. Direct the respondent to refund the entire paid-up amount along with prescribed rate of interest.

12. In the present complaint, the complainants intends to withdraw from the project and are seeking return of the amount paid by them in respect of subject unit along with interest as per section 18(1) of the Act and the same is reproduced below for ready reference:

"Section 18: - Return of amount and compensation

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

- (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."

(Emphasis supplied)

13. **Due date of possession:** As per the documents available on record, no BBA has been executed between the parties and no possession clause is available. A considerate view has already been taken by the Hon'ble Supreme Court in the cases where due date of possession cannot be ascertained, then a reasonable time period of 3 years has to be taken into consideration. It was held in matter *Fortune Infrastructure v. Trevor d' lima (2018) 5 SCC 442 : (2018) 3 SCC (civ) 1* and then was reiterated in *Pioneer Urban land & Infrastructure Ltd. V. Govindan Raghavan (2019) SC 725 -:*

"Moreover, a person cannot be made to wait indefinitely for the possession of the flats allotted to them and they are entitled to seek the refund of the amount paid by them, along with compensation. Although we are aware of the fact that when there was no delivery period stipulated in the agreement, a reasonable time has to be taken into consideration. In the facts and circumstances of this case, a time period of 3 years would have been reasonable for completion of the contract i.e., the possession was required to be given by last quarter of 2014. Further there is no dispute as to the fact that until now there is no redevelopment of the property. Hence, in view of the above discussion, which draw us to an irresistible conclusion that there is deficiency of service on the part of the appellants and accordingly the issue is answered."

14. Accordingly, the due date of possession is calculated as 3 years from the date of allotment i.e., 08.11.2020. Therefore, the due date of handing over of the possession for the unit/flat comes out to be 08.11.2023. Further, an extension of 6 months is granted to the respondent in view of notification no. 9/3-2020 dated 26.05.2020, on account of outbreak of Covid-19 pandemic. Therefore, the due date of possession comes out to be 08.05.2024.

15. The complainants have submitted that they have booked a unit in the project "Elan Epic" situated at Sector-70, Gurugram. Vide allotment letter dated 08.11.2020, the complainants were allotted unit no. KIOSK 05-A on 2nd floor admeasuring 478 sq.ft. of super area in the food court at the total sale consideration of Rs.70,07,480/-. As per the payment plan, 9% of the Basic Sale Price was payable at the time of booking, 26% of the Basic Sale Price was to be paid on or before 15.11.2020 and the complainants were to pay 65% of the Basic Sale price, 100% of EDC/IDC, 100% of car parking usage rights, 100% of IFMS charges on the offer of possession. No Buyer's agreement has been executed between the complainants and the respondent till date. The respondent has sent a draft copy of the BBA to the complainants but several discrepancies were noted by the complainants and the same were objected. The respondent offered possession of the unit to the complainants on 01.07.2023 and thereby informed the complainants that the super area has been increased from 478 sq. ft. to 513 sq.ft. and a demand of Rs.55,84,177/- was raised. The said offer of possession was issued by the respondent prior to obtaining the Occupation Certificate from the competent authorities. The Occupation Certificate has been obtained by the respondent from the competent authorities on 31.10.2023
16. After considering the documents available on record as well as submissions made by the parties, it is determined that the due date of possession was 08.05.2024 and the occupation certificate of the unit of complainants has been obtained by the respondent on 31.10.2023. The complainants claimed that they had requested the respondent for refund vide Legal notice dated 10.10.2023.

17. In the present case, the unit was allotted to the complainants vide allotment letter dated 08.11.2020 and the due date for handing over for possession was 08.05.2024. The occupation certificate was received on 31.10.2023 whereas, offer of possession for fit outs was made on 01.07.2023. The Authority is of the view that the offer of possession for fit outs made by the respondent was not a valid offer of possession as that was made prior to obtaining the Occupation Certificate. Also, the offer of possession constituted of a demand of Rs.56,94,989/- and that was in lieu of the outstanding dues that were payable by the complainants on the stage of offer of possession. Thus the cancellation is liable to be set aside as the offer of possession was invalid. Moreover, the super area of the unit was increased leading to an increase in the sale consideration of the unit and the same was done without taking the consent of the complainants and the same was also objected to by the complainants. Accordingly, the complainants had sent a legal notice to the respondent for withdrawal from the project and sought refund on 10.10.2023. The complainants have paid an amount of Rs.28,29,641 out of the total sale consideration of Rs.70,07,480/- which is more than 10% of the sale consideration and no Agreement to sale has been executed between the complainants and the respondent. Thus, the respondent is also in violation of Section 13 of the Act, 2016.
18. Keeping in view the aforesaid factual and legal provision, the respondent is directed to refund the full paid-up amount of Rs.28,29,641/- along with an interest @11.10% p.a. (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 on the refundable amount, from the date of each payment till actual

realization of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*, after deducting the amount of Assured return paid by the respondent, if any.

F.II. Award cost of litigation of Rs.60,000/- in favour of the complainants

19. The complainants are seeking the above mentioned reliefs w.r.t compensation. The Hon'ble Supreme Court of India in Civil Appeals no. 674445-679 of 2021 titled as **M/s Newtech Promoters and Developers Ltd. V/s State of UP (Supra)** has held that an allottee is entitled to claim compensation and litigation charges under Section 12, 14, 18 and Section 19 which is to be decided by the Adjudicating Officer as per Section 71 and the quantum of compensation and litigation charges shall be adjudicated by the adjudicating officer having due regards to the factors mentioned in Section 72. Therefore, the complainants may approach the adjudicating officer for seeking the relief of compensation.

G. Directions of the authority

20. 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/promoter is directed to refund the paid-up amount of Rs.28,29,641/- along with an interest @11.10% p.a. (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 on the refundable amount, from the date of each payment till its actual realization, after deducting the amount of assured return paid by the respondent, if any

- ii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.
 - iii. The respondent is further directed not to create any third-party rights against the subject unit before full realization of the refundable along with interest thereon to the complainant, and even if, any transfer is initiated with respect to subject unit, the receivable shall be first utilized for clearing dues of complainant/allotee.
21. The complaints stand disposed of.
 22. Files be consigned to the registry.



(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 04.12.2024