

**BEFORE THE HARYANA REAL ESTATE
APPELLATE TRIBUNAL**

(1) Appeal No.446 of 2023

Date of Decision: January 18 , 2025

Nitin Malhotra, C-121, 1st Floor, Suncity, Sector-54, Gurugram,
Haryana-122011.

...Appellant

Versus

Elan Buildcon Private Limited, L-1/1100, First Floor, Street
No.25, Sangam Vihar, New Delhi-110062. Also at 3rd Floor, Golf
View Corporate Tower, Golf Course Road, Sector 42, Gurugram-
122002.

Respondent

(2) Appeal No.452 of 2023

Vinod Kumar son of Sh. Shyam Lal, resident of 34, JDM
Apartments, Plot No.11, Sector-5, Dwarka, New Delhi-110075.

Appellant.

Versus

Elan Buildcon Private Limited, L-1/1100, First Floor, Street No.25,
Sangam Vihar, New Delhi-110062. Also at 3rd Floor, Golf View
Corporate Tower, Golf Course Road, Sector 42, Gurugram-122002.

Respondent

(3) Appeal No.592 of 2023

Urvashi Tewari, wife of Amit Tewari, resident of T-17, Flat-903,
Orchid Petals, Sector-49, Sohna Road, Gurugram, Haryana-
122018.

Appellant.

Versus

Elan Buildcon Private Limited, L-1/1100, First Floor, Street No.25,
Sangam Vihar, New Delhi-110062. Also at 3rd Floor, Golf View
Corporate Tower, Golf Course Road, Sector 42, Gurugram-122002.

Respondent

(4) Appeal No.593 of 2023

Dinesh Bisht, son of D.S. Bisht, resident of 2002, Bayview, House
of Hiranandani, 5/63, Old Mahabalipuram Road, Opp. SIPCOT IT
Park Siruseri, Egattur, Chennai-600130.

Appellant.

Versus

Elan Buildcon Private Limited, L-1/1100, First Floor, Street No.25,
Sangam Vihar, New Delhi-110062. Also at 3rd Floor, Golf View
Corporate Tower, Golf Course Road, Sector 42, Gurugram-122002.

Respondent

(5) Appeal No.594 of 2023

Sanjiv Kumar Sharma, son of Dev Raj Sharma, resident of 2-12,
Royal Residency, Plot-5, Sector-9, Dwarka, New Delhi-110075.

Appellant.

Versus

Elan Buildcon Private Limited, L-1/1100, First Floor, Street No.25,
Sangam Vihar, New Delhi-110062. Also at 3rd Floor, Golf View
Corporate Tower, Golf Course Road, Sector 42, Gurugram-122002.

Respondent

(6) Appeal No.595 of 2023

1. Madhu Sharma, wife of Manoj Sharma, resident of C-1586,
Sushant Lok-I, Gurgaon, Haryana-122002.
2. Vandana Mehrotra, D/o O.N. Chadha, resident of C-121, 1st
Floor, Suncity, Sector-54, Gurgaon, Haryana.

Appellants.

Versus

Elan Buildcon Private Limited, L-1/1100, First Floor, Street No.25,
Sangam Vihar, New Delhi-110062. Also at 3rd Floor, Golf View
Corporate Tower, Golf Course Road, Sector 42, Gurugram-122002.

Respondent

(7) Appeal No.596 of 2023

Manoj Sharma son of K.D. Sharma, resident of C-1586, Sushant
Lok-I, Gurgaon, Haryana-122002.

Appellant.

Versus

Elan Buildcon Private Limited, L-1/1100, First Floor, Street No.25,
Sangam Vihar, New Delhi-110062. Also at 3rd Floor, Golf View
Corporate Tower, Golf Course Road, Sector 42, Gurugram-122002.

Respondent

(8) Appeal No.597 of 2023

1. Sumit Dogra son of S.C. Dogra
2. Shaivali Sharma wife of Rajesh Sharma, residents of Flat
No.120, Sector 17, Pocket D, Keshav Kung Apartments,
Dwarka, New Delhi-110078 & A-103, PNB Apartments, Plot
No.11, Sector 4, Dwarka, New Delhi-110078.

Appellants.

Versus

Elan Buildcon Private Limited, L-1/1100, First Floor, Street
No.25, Sangam Vihar, New Delhi-110062. Also at 3rd Floor, Golf
View Corporate Tower, Golf Course Road, Sector 42, Gurugram-
122002.

Respondent

(9) Appeal No.598 of 2023

Manoj Kumar son of Ram Balak, resident of A-310, Plot No.6A,
Navnirman CGHS, Sector 2, Dwarka, New Delhi-110075.

Appellant.

Versus

Elan Buildcon Private Limited, L-1/1100, First Floor, Street
No.25, Sangam Vihar, New Delhi-110062. Also at 3rd Floor, Golf
View Corporate Tower, Golf Course Road, Sector 42, Gurugram-
122002.Respondent

(10) Appeal No.661 of 2023

Abhey Y Deshmukh resident of J-1201, Bestech Park View Spa,
Next Sector 67, Badshahpur, Gurgaon 122101.

Appellant.

Versus

Elan Buildcon Private Limited, L-1/1100, First Floor, Street
No.25, Sangam Vihar, New Delhi-110062. Also at 3rd Floor, Golf
View Corporate Tower, Golf Course Road, Sector 42, Gurugram-
122002.

Respondent

**CORAM: Justice Rajan Gupta
Shri Rakesh Manocha**

**Chairman
Member (Technical)**

Argued by: Mr. Nitin Kant Setia, Advocate along with
Mr. Sahil Sabharwal, Advocate,
for the appellant.
(In appeals No.446, 452, 592, 593, 594, 595,
596, 597 and 598 of 2023).

Mr. Rajan Kumar Hans, Advocate,
for the appellant.
(In appeal No.661 of 2023)

Mr. Kunal Dawar, Advocate along with
Ms. Tanika Goyal, Advocate,
Mr. Rohit, Advocate,
for the respondent.

:O R D E R:**RAJAN GUPTA, CHAIRMAN**

This order shall dispose of above mentioned ten
appeals, as common question of law and facts are involved.
However, the facts have been extracted from Appeal No.446 of
2023 titled as “Nitin Malhotra v. Elan Buildcon Pvt. Ltd.”.

2. Present appeal is directed against order dated
03.03.2023 passed by the Authority¹. Operative part thereof reads
as under:-

¹ Haryana Real Estate Regulatory Authority at Gurugram

“i. The respondent is directed to refund to the complainant the paid-up amount (subject to deduction of statutory dues and brokerage i.e. 0.5%) after deduction 10% as earnest money of the basic sale consideration with interest at the prescribed rate i.e. 10.70% is allowed, from the date of surrender till date of actual refund.

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.

3. Grievance of the appellant-allottee is that out of refundable amount remitted by the allottee, deduction of 10% from the basic sale consideration is not justified and unsustainable in law.

4. Mr. Setia, learned counsel for the appellant has assailed the order on the ground that the allottee had no option but to withdraw from the project in question; as on a visit to the site, they found that much lesser area was proposed to be allotted to the him than that promised. As per him, out of 300 sq. ft. for which agreement was entered upto only 42 sq. ft. (7x6) kiosk had been carved out for allotment. It is also claimed that there is drastic reduction in size of the area of the unit to be allotted. The allottee also found that number of units had also increased from 28 to 99 at the site, due to reduction in carpet area of the units. Even service corridors were not constructed as per the original plan.

5. Mr. Dawar, learned counsel for the respondent, on the other hand, submits that as per the agreement (Annexure P-2) area allotted was to be 50% of 300 sq. ft., yet the builder ensured that same was 161 sq. ft. as would be clear from the chart now annexed

along with CM No.115 of 2025. As per him, the allottee never contemplated providing any space for kitchen. As per him, carpet area is exactly as per the agreement with the allottee. The Authority having considered the entire issue has allowed 10% deduction from the amount to be refunded as it found that the promoter had acted as per BBA.

6. We have heard learned counsel for the parties and given careful thoughts of the case.

7. It appears that a project, namely, Elan Tower Centre was floated in Sector 67, Gurugram having a project area of 2.00 acres. The project is a commercial in nature. It was granted licence by DTCP on 28.08.2012 which would remain valid upto 27.08.2021. RERA registration was also granted to remain valid upto 01.02.2022.

8. The allottee was to be allotted unit having super area of 300 sq. ft., due date of possession being 20.07.2021. Total sale consideration for the unit was Rs.26,74,500/- out of which the allottee remitted about Rs.10 lakhs odd.

9. Admittedly, offer of possession was given on 18.09.2020. However, the allottees decided to surrender their respective units in the first week of October.

10. The allottee sought return of the amount remitted by him to the promoter, thus he filed instant complaint. Same was decided by the Adjudicating Officer vide order dated 20.08.2021. While deciding the matter, the adjudicating officer observed as under:

14. It is not plea of the respondent even that the same had clarified to the complainant that actual carpet area of the unit being sold to him i.e. complainant will be 42

sq ft. Needless to say that it is not denied by the respondent that actual carpet area of unit allotted to the complainant came out 42 sq. ft. as alleged by the latter.

15. Rule 4(2) of the Rules, 2017 obliges the promoter to disclose the size of apartment based on carpet area even if sold on any other basis, such as super area or super built-up area etc. No such information was given by the respondent/promoter to the complainant. All this amounts to failing of respondent/promoter in discharging its obligations imposed upon it under this Act.

11. Against the aforesaid order, appeal was preferred by the promoter-Elan Buildcon Pvt. Ltd. (respondent herein) on the ground that substantive question raked up in the complaint could not have been decided by the Adjudicating Officer as it would be beyond his domain. This plea of the builder was accepted and it was held as follows:

15. Keeping in view our aforesaid discussion, the present appeal is hereby allowed. The impugned order dated 20.08.2021 is hereby set aside. The case is remitted for fresh trial in accordance with law to the learned Haryana Real Estate Regulatory Authority, Gurugram.

The pre-deposit amount was directed to be remitted to the promoter in view of the remand order.

12. The Authority after affording opportunity to both the parties passed the impugned order dated 03.03.2023. Respondent-Promoter did not prefer any appeal against the said order. However, allottee being aggrieved by the deduction of the 10% of the basic sale consideration out of the amount to be refunded, has come in appeal.

13. The first and foremost question which arises before this Bench is whether the promoter adhered to the norms laid down in the agreement-Annexure P2, according to which 50% of 300 sq. ft. area would be given to the allottee as carpet area. The allottee claims that that the covered area of the kiosk/shop allotted to him was found to be only 42 sq. feet at the site in question.

14. In the first round of litigation, the carpet area of the unit allotted to the complainant was found to be 42 square feet (*see para 10 above*). The order was, however, set aside on the ground of jurisdiction and remitted to the Authority below. The Authority merely examined the question whether the allottee had withdrawn from the project before due date of handing over of possession. Answering this question in affirmative, it held that the promoter was justified in deducting 10% of the basic sale consideration out of the amount to be refunded. However, it has to be seen as to what prompted the allottee from withdrawing from the project after having remitted an amount of Rs.10 lakhs odd.

15. From a perusal of the chart submitted by the promoter (taken on record *vide* CM No. 115 of 2025), it is evident that 300 sq. ft. super area which finds mention in the agreement has been divided under following three separate heads:

- A. Covered area: 51.44 sq. ft.
 - B. Covered sitting area component: 85.32 sq. ft.
 - C. Covered service corridor: 25.96 sq. ft.
- Total: 299.48 sq. ft.

16. The aforesaid segregation of the area by the promoter leaves no room for doubt that the allottee was actually sought to be given not more than 51.44 sq. ft. as covered area. The heads

'Covered sitting area component' and 'covered service corridors' appear to be part of the common area only; a superficial distinction is sought to be made by the promoter to justify its claim that it is adhering to the condition of allotment of 50% of the super area (300 sq. ft.) to be allotted. Besides, in the order of the Adjudicating Officer dated 20.08.2021, before the matter was remanded, it was held that the carpet area of the unit came out to be 42 sq. ft. Needless to say that the area of the unit comes out to be much lesser than that agreed upon in the agreement between the promoter and the allottee. Out of promised 300 sq. ft. area, atleast 50% was to form part of the unit to be allotted. As per the promoter, the unit comprises 161 sq. ft. of area, however, from the chart submitted by the promoter itself, this assertion is belied. In fact, the area sought to be allotted is approximately 1/6th of the super area (300 sq. ft. mentioned in the agreement).

17. Under these circumstances, this Bench cannot uphold the verdict of the Authority that the promoter was entitled to 10% deduction out of the refundable amount, as the allottee withdrew from the project before handing over of possession to the allottee. In fact, the allottee had no other option but to withdraw finding the area of the unit drastically below 300 sq. ft., 50% of which was to be allotted as per agreement.

18. Thus, plea of the allottee that he was forced to withdraw from the project as in such a small unit (i.e. 1/6th of the size of promised area), he would hardly be able to carry out any activity, has merit. The allottee was pitted against the promoter having a dominant position qua him. Though he may have had lot of expectations from the project in question, he felt deceived on

completion thereof. Thus, he was constrained to inform the promoter that he intended to withdraw from the project and knocked the doors of the competent authority for getting refund.

19. In these circumstances, 10% deduction from the amount to be refunded is wholly unjustified. The order of the Authority to this extent is hereby set aside. The allottee would be entitled to refund of the entire amount remitted by him along with interest @ 10.5% per annum from the date of surrender till the date of actual refund. The promoter would remit the said amount within 90 days of the uploading of this order, failing which penal provisions of Section 64 of the Act would come into play. The allottee has suffered long enough in the hope that he would get commercial space of his own but was offered 1/6th of the promised shop, forcing him to seek refund. Even for getting refund, he had to knock at the doors of court of law.

In the aforesaid circumstances, any delay by the promoter in refunding the amount due beyond 90 days of uploading the order would attract penalty of Rs.10,000/- per day.

20. The appeals are allowed in these terms.

21. Files be consigned to the record.

Justice Rajan Gupta
Chairman
Haryana Real Estate Appellate Tribunal

Rakesh Manocha
Member (Technical)

January 18, 2025
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