

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

Complaint no. :	3121 of 2023
Date of filing of complaint:	07.07.2023
Date of Order:	13.01.2026

1. Gaurav Chaudhary (Through his legal heir
Ms. Suhani)
2. Manisha
Both R/o: House No. 3, First Floor, Hauz Khas
Village, New Delhi-110016

Complainants

Versus

Elan Buildcon Pvt. Ltd.
Regd. Office at: L-1/1100, First floor, Street No.
25, Sangam Vihar, New Delhi-110062
Corporate Office at: 3rd floor, Golf View
Corporate tower, Golf Course Road, Sector-42,
Gurugram-122001

Respondent

CORAM:

Shri Arun Kumar

Chairman

APPEARANCE:

Ms. Ankur Berry (Advocate)
Sh. Ishaan Dang (Advocate)

Complainants
Respondent

ORDER

1. This 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 thereunder or to the allottee as per the agreement for sale executed *inter se*.

A. Unit and project related details

2. The particulars of the project, the details of sale consideration, the amount paid by the complainant, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S. No.	Particulars	Details
1.	Name and location of the project	Elan Miracle, Sec 84, Village Hayatpur, Gurugram.
2.	Nature of the project	Commercial complex
3.	DTCP license no.	34 of 2014 dated 12.06.2014
	Valid up to	11.06.2019
4.	RERA registered/ not registered	Registered 190 of 2017 dated 14.09.2017 for 5.91875 acres
	RERA registration valid up to	13.09.2023
5.	Provisional Allotment letter	19.02.2018 (As per page no. 23 of the complaint)
6.	Date of execution of builder buyer's agreement	04.04.2019 (As per page no. 29 of the complaint)
7.	Unit no. and floor	G-029 and Ground Floor (As per page no. 41 of complaint)
8.	Unit measuring	463 sq. ft. (Actual Area) 925 sq. ft. (Super area) (As per page no. 41 of complaint)
9.	Revised super area	1182 sq. ft. (As per page no. 115 of the reply)
10.	Payment plan	Special possession linked payment plan (As per page no. 66 of the complaint)
11.	Basic sale consideration	Rs.92,50,000/- (As per payment plan on page no. 66 of the complaint)
12.	Total sale consideration	Rs.1,21,79,875/- (As per payment plan on page no. 66 of the complaint)

13.	Total amount paid by the complainants	Rs.31,31,125/- (As per statement of account dated 26.07.2023 on page no. 150 of reply)
14.	Possession clause	<p><i>"7.1 Schedule for Possession of the said Premises/Unit:</i></p> <p><i>The promoter agrees and understand that timely delivery of possession of the said premises/unit to the allottee(s) and the common area 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 handover possession of the said premises/unit along with ready and complete common area 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....."</i></p> <p>(As per page no. 47 of the complaint)</p>
15.	Grace period	<p>The respondent/promoter has sought the grace period of 12 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. However, as per HARERA notification no. 9/3-2020 dated 26.05.2020 for the projects having completion date on or after 25.03.2020, the Authority allowed the grace period of 6 months only being unqualified.</p>
16.	Due date of delivery of possession	<p>04.10.2023</p> <p>(Note: Due date to be calculated 48 months from the date of execution of buyer's agreement i.e., 04.04.2019 + 6 months as per HARERA notification no.</p>

		9/3-2020 dated 26.05.2020 for the projects having completion date on or after 25.03.2020.)
17.	Offer of possession	07.09.2021 (As per page no. 115 of the reply)
18.	Reminder letters of possession	12.10.2021, 12.11.2021, 28.12.2021, 05.04.2022, 09.05.2022, 06.06.2022, 04.07.2022, 05.08.2022, 05.09.2022, 10.10.2022, 03.11.2022, 03.12.2022, 03.01.2023 and 03.02.2023 (As per page no. 118-133 of the reply)
19.	Date of occupation certificate	15.03.2023 (As per page no. 137 of the reply)
20.	Pre-Cancellation notice dated	09.06.2023 (As per page no. 143 of the reply)
21.	Cancellation notice dated	28.06.2023 (As per page no. 144 of the reply)

B. Facts of the complaint:

3. The complainants have made the following submissions:

- I. That the complainants are law abiding citizens of the India and being interested in buying a commercial unit visited the respondent company regarding information and amenities in the project namely 'Elan Miracle' of the respondent company. The complainants were lured by the /officials/representatives of the respondent company who misrepresented the information regarding the luxurious amenities at reasonable prices.
- II. That the complainants were highly influenced by the representations of the respondent company. The complainants duly filled the application form on 09.02.2018 provided by the respondent company in the project 'Elan Miracle.' That the complainants also made a payment of Rs.2,00,000/- against the said application form. That on 19.02.2018, the respondent company

issued allotment letter to the complainants thereby allotting unit no. 029, Retail/Commercial Tower, on ground floor, having carpet area of 925 sq. ft. located at Sector-84, Village Hayatpur, Gurugram.

III. That upon completion of due formality, the complainants approached the respondent company for execution of the BBA however the respondent company started playing around bush and delayed the execution of BBA. In one of the emails of the complainants dated 27.08.2018, the complainants wrote that *"Dear Sir/Ma'am, I have a booking of unit no. G-029 on ground floor in Elan Miracle, sector- 84, Gurugram, Haryana. As discussed with you and payment plan opted by me, I already paid 20% BSP amount with GST along with 100% EDC/IDC. Balance amount 5% of BSP with GST (Rs.5,18,000/-) is outstanding which I am eager to pay, but only after the execution of the BBA between us. While booking this unit I was made assure of execution of BBA will happen in next three months. From the past six months I am regularly in touch with you for execution of BBA but every time you replied me the same, it will be going to happen in the next fifteen days. So, I am hoping to get my BBA soon in near term."* This email clearly depicts that the complainants had already made more than 20% of the payment even before execution of the BBA, and to submit herein that the complainants also made the payment of 5% of BSP.

IV. That upon several instance of follow ups, emails, calls and visit by the complainants for execution of the BBA, finally after one year on 04.04.2019 the BBA was signed and executed between the complainants and the respondent company. That as per the Schedule B of the BBA, the total sale consideration of the unit was

Rs.1,21,79,875/-. That as per clause 7.1 of the BBA, the respondent company had to offer possession within 48 months from the date of execution of the BBA. However, the whole intention behind delaying the process of execution of BBA for over a 1 year after filling of the application form and issuance of the allotment letter was to delay the possession of the commercial space and buying an extra year time for completion of the project.

- V. That the complainants were looking forward to take possession of the commercial unit as soon as possible but the respondent company were throwing one or the other hurdles in front of the complainants. Since the inception, the complainants were actively making payments and visiting the office of the respondent to make sure everything proceeded smoothly and thus chose a payment plan suited to his needs. That the complainants have fulfilled every demand and necessary documentation provided by the respondent company.
- VI. That there has never been any default from the side of the complainants. However, to the utter surprise of the complainants the respondent company issued a letter for offer of possession for fit-outs on 07.09.2021, while admitting that they did not possess the occupation certificate. The complainants felt cheated wrote an email dated 22.12.2021 to the respondent company after duly visiting the actual site of construction and requested the respondent to wait for OC to come then to offer possession and then raise demands however no valid response to the same was ever received by the complainants. The alleged letter of possession had major size change which was never intimated to the complainants earlier. The super

area of the allotted unit being 925 sq. ft. was now suddenly increased to 1182 sq. ft. without any explanation.

- VII. That the complainants were left in shock after they discovered that the respondent company has illegally, unlawfully and mischievously increased the super area of the said unit from 925 sq. ft. to 1182 sq. ft., which is almost 30% increase in super area without even taking consent from the complainants. The said huge increase in super area was made without giving the complainants an iota of information regarding the illegal change in super area. That it is well settled proposition of law that promoter cannot unilaterally change the size of the unit without prior informing the allottees. Moreover, as per clause 1.15 of the BBA, *'The Allottee(s) agrees and acknowledges that any change in the sanction of the building plan, from time to time and Allottee(s) acknowledges that in such an eventuality, the dimensions of the said unit allotted to the Allottee(s) can change. In case of such eventuality if the change in super area of the unit is more/less than 20%, alternative unit shall be provided for allotment to the allottee(s) by the developer.'* However, the complainants do not wish for alternate unit but it is illegal to change the size of the unit and then raise illegal demand on that change of size. The complainants sent various emails to the respondent to address the issue of how the super area was changed however even after various emails the only image received from the respondent showed that the respondent company had added a mezzanine to the unit without the same being part of the original building plans.
- VIII. That after various emails exchanges between the complainants and the respondent, the respondent representatives promised to remove

the mezzanine or in alternate the reduce the unit to alternate size as soon as the final offer of possession was issued, however upon the complainants request to give the same in writing were outrightly refused by the respondent company. That to show the actual malice played by the respondent it is important to note that on 10.08.2022 the complainants received an update of the project. The respondent while providing the update for the project highlighted the following 3 points:

- a. Ready for possession
- b. Getting OC shortly
- c. Fit-out commencing soon

Upon receiving the said letter, the complainants were certain of the cheating and malpractice of the respondent since September, 2021 the respondent has been harassing the complainants to make payment of installment which was due on offer of possession. The complainants immediately visited the office of the respondent but all discussions were futile since the respondent officials informed that due to real estate price hike, the respondent company only wanted to cancel the unit and was willing to refund the monies/consideration paid by the complainants so that the commercial unit could be sold with greater profits.

- IX. That thereafter the various visits were made by the complainants between September 2022 to March 2023 to the office of the respondent yielded no result since suddenly on 22.03.2023, the respondent company issued a letter to the complainants titled "Intimation regarding grant of Occupation Certificate". The said intimation letter also showed that there was further increase in the size of the unit from earlier 1182 sq. ft. to 1193 sq. ft. It is important

to note that as the respondent claimed that OC was received, the letter did not possess the copy of the said OC. Further the said letter again failed to offer possession to the complainants. Thereafter, a similar letter was also received through email on 27.03.2023.

- X. That the respondent company as pre-planned, issued a pre-cancellation letter dated 09.06.2023, without even considering the fact that Occupation certificate was still not given to the complainants nor possession was offered to the complainants. The respondent company according to their own whims and fancies are issuing illegal demands against the complainants, further without having any concrete proof to showcase that occupation certificate is issued by the concerned governmental authority.
- XI. That the complainants thereafter took legal advice as to how to move forward as the respondent company was hell-bent on harassing the complainants and use the consideration amount paid by the complainants for assisting the construction work and then deprive the complainants of the benefits of their allotted commercial unit. The complainants upon advice, responded to the pre-cancellation letter of the respondent and stated that the cancellation could not have been issued as no breach of terms of BBA was committed by the complainants and the payments of installments were due only on offer of possession. That yet on 28.06.2023, the respondent maliciously and connivingly issued the cancellation letter based upon the pre-cancellation letter.
- XII. That the respondent company is using their dominant position to prevail over the innocent allottees by threatening to cancel the commercial unit and forfeiting the hard-earned amount paid by the

complainants. The respondent company has got every tool and means to ruin the complainants by issuing such threatening letters as the main motive of the respondent company is to gain unlawfully by cancelling and re-selling the commercial unit to third party at higher profits.

- XIII. That even after the complainants helplessly tried to amicably settle the dispute, the respondent company have persistently harassing the complainants. The cancellation letter issued by the respondent company shows what treatment does an innocent allottee get from such big corporate companies who does not even bother to hear the plea of the innocent allottees whereas the wrong committed is on the part of the respondent company.
- XIV. That the due date of possession as per the BBA dated 04.04.2019 was 03.04.2023, which has already lapsed. As per clause 7.1 of the BBA, the respondent Company had to offer possession within 48 months from the date of execution of the BBA. But till date no offer of possession has been issued to the complainants even though the false claim of applying for OC and receiving of OC has been made by the respondent since 2021. The complainants intend to continue with the project and thus claim qua delay possession charges be granted in favour of the complainants till valid possession has been issued by the respondent company.

C. Relief sought by the complainant:

4. The complainants have sought following relief(s):
- i. Direct the respondent company to set-aside/cancel the cancellation letter dated 28.06.2023 issued against the complainants.

- ii. Direct the respondent company to offer the possession of the commercial unit in terms of the BBA dated 04.04.2019.
- iii. Direct the respondent company to pay delay possession charges since the due date of possession in terms of the BBA have already expired.
- iv. Direct the respondent company to offer possession without imposing any illegal or unlawful conditions.
- v. Direct the respondent company to waive off illegal interest being charged to the complainants.
- vi. Direct the respondent company not to create any third-party rights and alienate in the unit in question.
- vii. Direct the respondent company to provide necessary documentation such as occupation certificate to the complainants.
- viii. Direct the respondent company not to charge any maintenance charges till the adjudication of the present matter or till the unit is offered.
- ix. Direct the respondent company to produce the building plans showcasing the increase of super area from 925 sq. ft. to 1193 sq. ft. as changed while issuance of letter of intimation of OC dated 22.03.2023.
- x. Direct the respondent company to remove the illegal structure namely staircase and connected mezzanine, which was never agreed or defined in the building plans and the BBA.
- xi. Direct the respondent company to set-aside the demand on account of super area increase.
- xii. Direct the respondent company to execute conveyance deed in favour of the complainants.

D. Reply by the respondent:

5. The respondent has contested the complaint on the following grounds:
- a. 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.
 - b. That the present reply is being filed by Sh. Gaurav Khandelwal on behalf of the respondent i.e., M/s Elan Buildcon Pvt. Ltd. who has been duly authorized vide Board Resolution of the respondent dated 10.08.2023 to file the reply. All averments, claims, allegations and contentions raised in the complaint by the complainants are denied as false and incorrect unless specifically admitted to be true by the respondent. The contents of the complaint that are not being specifically admitted shall be deemed to have been denied and traversed.
 - c. That the complainants have misinterpreted the provisions of the Act of 2016 and the rules and regulations made thereunder as well as the provisions of the buyer's agreement dated 04.04.2019, willingly and consciously executed by the parties.
 - d. 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.
 - e. That the complainants are estopped from filing the present complaint by their own acts, conduct and acquiescence.

- f. That the complainants had approached the respondent through property dealer Geetanjali Homestate Private Limited 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 approached the respondent after making independent enquiries and duly satisfying themselves regarding the viability and suitability of the aforesaid project as per their needs and requirements as well as the capability of the respondent to undertake the project.
- g. That thereafter, the complainants were allotted a commercial space/unit tentatively admeasuring 925 sq. ft. super area bearing unit no. G-29 on the ground floor of the project by the respondent, subject, *inter alia*, to increase or decrease on basis of variation in calculation of actual super area of the premises which were to be determined at the time of offer of possession of the premises. The terms and conditions forming part of the application form dated 09.02.2018 were duly understood and accepted by the complainants.
- h. That above-mentioned unit was provisionally allotted in favour of the complainants. An allotment letter was issued in favour of the complainants on 19.02.2018 and the complainants agreed to a special possession linked payment plan.
- i. That the complainants and the respondent had entered into the buyer's agreement on 04.04.2019. It is pertinent to mention herein that the buyer's agreement dated 04.04.2019 was willingly and voluntarily executed by the complainants without raising any objections and the terms and conditions thereof are binding upon

the complainants with full force and effect. It is pertinent to mention herein that the buyer's agreement was forwarded to the complainants on 30.10.2018 for execution. However, the complainants delayed execution of the buyer's agreement for reasons best known to themselves.

- j. That the complainants vide letter dated 02.02.2021 conveyed their consent to revision in building plans as well as resultant increase in the area and dimensions of the unit.
- k. That 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 and the same was intimated to the complainants vide letter dated 19.06.2021.
- l. 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 dues as per the attached statement. The complainants were informed that there was an increase in the super area of the unit allotted, from 925 sq. ft. to 1182 sq. ft. Consequently, the payments to be made by the complainants stood revised due to the increase in super area. It is pertinent to mention that respondent has offered the possession of the units in the project for fit outs at their end 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, 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 .

- m. That at the time of allotment of the said unit in favour of the complainants, the height of the said unit was initially conceived to be of 4.5 meters. However, the unit as constructed has a Mezzanine Floor and height of the unit is now 6.35 meters. While issuing the letter dated 07.09.2021, the respondent informed the complainants that super area of the unit in question stands revised from 925 sq. ft. to 1182 sq. ft.
- n. That from a perusal of the clauses of the application form as well as the buyer's 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. The complainants have consented to any additions, amendments, modification of the size, location, dimensions etc. of the unit on account of revision in building plans and have undertaken not to raise any objections to the same. The complainants have already conveyed their no objection vide letter dated 02.02.2021 to the revised plans as well as the resultant increase in area, units, height, number of floors, ground coverage etc.
- o. That on account of the increased height of the unit and the existence of a mezzanine level, the super area as well as carpet area of the unit has increased. The complainants are liable to make payment for increase in super area of the unit in accordance with the terms and conditions of the buyer's agreement executed by the complainants. The respondent had informed the complainants about the increase

in carpet/usage area of the unit in question vide its letter dated 07.09.2021.

- p. That pertinently, after receipt of the offer of possession letter dated 07.09.2021, the complainants never raised any objection to the increase in super area within 30 days in accordance with clause 31 of the buyer's agreement referred to above and are thus deemed to have accepted the increased area. However, the complainants also refrained from making payment of the demanded amounts. Accordingly, in accordance with clauses 18 and 19 of the application form and clause 1.15 of the buyer's agreement, the respondent gave an option to the complainants with an offer of an alternate unit in the project, one without a mezzanine floor and increased height. However, the complainants being greedy and with a *malafide* intention to obtain increased area without making payment in respect thereof and to extract maximum benefit from the respondent, have proceeded to file the present complaint before this Authority.
- q. That since the complainants did not clear their outstanding dues, the respondent issued various reminders calling upon the complainants to clear the outstanding dues and take possession of the unit. It is pertinent to mention herein that in terms of clause 28 of the booking application form, 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 by the complainant, the respondent shall have the right to terminate the provisional allotment/ agreement and forfeit the booking amount.

- r. 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 04.04.2019. Hence the respondent has offered possession of the unit to the complainants, well before the agreed time lines for delivering possession. The respondent has duly fulfilled its obligations under the buyer's agreement.
- s. That the respondent has received the occupation certificate on 15.03.2023 and vide letter dated 22.03.2023, the complainants have been informed about receipt of the occupation certificate.
- t. That the complainants, still refrained from taking possession of the unit and consequently, the respondent sent reminders dated 14.04.2023 and 16.05.2023. The complainants have till date only made payment of Rs.28,53,625/- which is 25% of the basic sale price and 100% of EDC and IDC.
- u. That when the complainants still failed to come forward to take possession of their unit even after numerous reminders, the respondent was constrained to issue pre cancellation notice dated 09.06.2023. However, the complainants continued to ignore the reminders and notices sent by the respondent, accordingly, the respondent was compelled to issue cancellation letter dated 28.06.2023.
- v. That during the proceedings held on 13.07.2023, the Hon'ble Authority had directed the respondent to send the offer letter along

with OC to the complainants within 15 days and the complainant was directed to make the outstanding payment within 15 days.

- w. That in compliance with the order dated 13.07.2023 passed by the Hon'ble Authority, the respondent through letter dated 26.07.2023 provided the occupation certificate to the complainants and called upon the complainants to take possession of the unit in terms of the offer of possession dated 07.09.2021 after clearing their outstanding dues along with interest on delayed payment, as per the statement of account attached along with the said letter. It is pertinent to mention herein that the letter dated 26.07.2023 was issued without prejudice to the cancellation letter dated 28.06.2023.
- x. That instead of clearing their outstanding dues as directed by the Hon'ble Authority, the complainants addressed emails dated 02.08.2023 and 09.08.2023 whereby the complainants demanded waiver of interest on delayed payments and questioned the increase in super area of the unit. 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.
- y. That the complainants are needlessly avoiding taking possession of the unit and making payment of outstanding dues on false and frivolous pretexts. The respondent on its part has duly fulfilled its obligations under the agreement between the parties. There is no default or lapse in so far as the respondent is concerned.
- z. That on account of the increase in the super area, the carpet area of the unit has increased. The complainants are liable to make payment for increase in super area of the unit in accordance with the terms

and conditions of the application form/buyer's agreement executed by the complainants. The complainants are contractually bound to make payment of the demanded amounts and take possession of the unit in question. The false and frivolous complaint is liable to be dismissed with costs.

6. 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.

E. Jurisdiction of the authority:

7. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

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

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;

Section 34: Functions of the Authority;

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

8. 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 relief sought by the complainants:

F.1 Direct the respondent company to set-aside/cancel the cancellation letter dated 28.06.2023 issued against the complainants.

9. The complainants were allotted a unit in the project of respondent "Elan Miracle" situated in Sector 84, Village Hayatpur, Gurugram for a total sale consideration of Rs.1,21,79,875/-. A flat buyer's agreement was executed between the parties on 04.04.2019 and the complainants started paying the amount due against the allotted unit and paid a total sum of Rs.31,31,125/. As per clause 7.1 of the buyer's agreement, the possession of the subject unit is to be handed over on or before 04.10.2023.
10. The counsel for the complainants vide proceedings of the day dated 04.07.2024 brought to the notice of the Authority that Sh. Gaurav Chaudhary i.e., the primary complainant has expired on 12.04.2024 and his legal heirs certificate is in process and shall be filing the same in due course. On 06.02.2025, the counsel for the complainant has filed an amended memo of parties along with affidavit and made Ms. Suhani i.e.,

- the daughter of the complainant no.1 a party to the present complaint along with the complainant no. 2 i.e., Smt. Manisha.
11. The respondent has mentioned in its reply that the unit of the complainants was cancelled on 28.06.2023 on account of non-payment of the outstanding dues. Further, the respondent has issued numerous payment request letter cum demand letter to the complainants herein but the complainants failed to pay the same. The respondent has completed the construction of the project and obtained occupation certificate on 15.03.2023 from the competent Authority and the complaint has been filed on 07.07.2023. Now, the question arises before the Authority is that the cancellation letter dated 28.06.2023 is valid or not?
 12. The counsel for the complainants vide proceedings of the day dated 13.02.2025 brought to the notice of the Authority that the unit was booked under 30:70 plan with an area admeasuring 925 sq. ft. super area but the area has been unilaterally revised to 1182 sq. ft. (increase of 27% in the area) while making fit out offer of possession which is not valid and requests for striking of the extra demand raised in lieu of increase in area.
 13. The counsel for the respondent vide proceedings of the day dated 15.05.2025 mentioned that the complainants has given an NoC for revision of the plan placed at annexure R5 on page no. 112 of the reply and OC has been issued in the year 2023. He further drawn attention of the Authority towards direction of the Authority dated 13.07.2023 vide which the complainants were directed to make the outstanding payment after a revised account statement has been issued by the respondent failing which the cancellation dated 28.06.2023 shall be held valid.
 14. On perusal of documents placed on record and submissions made by the parties, the Authority observed that in compliance of the order dated

- 13.07.2023, the respondent has made an offer of possession along with revised statement of account on 26.07.2023 but the complainants have failed to pay the outstanding dues. The respondent has obtained the occupation certificate on 15.03.2023 but the complainant has paid only Rs.31,31,125/- which is 26% of the total sale consideration of Rs.1,21,79,875/- till date which clearly depicts that the complainants have failed to abide the terms and conditions of the opted payment plan. Thus, the cancellation letter dated 28.06.2023 is valid. Thus, the relief sought in the present complaint is not maintainable but the same doesn't shed off the liability of the respondent to refund the paid-up amount by the complainants after necessary deductions as per the provisions of the Act of 2016.
15. As per clause 9.2 of buyer's agreement dated 04.04.2019, the respondent-promoter is entitled to deduct the earnest money in case of default by the allottee. Clause 9.2 of the buyer's agreement is reproduced below for the ready reference:
- 9.2**
The allottee shall have the option of terminating the agreement in which case the promoter shall be liable to refund the entire money paid by the allottee under any head whatsoever towards the purchase of the premises/unit, subject to deduction of earnest money and non-refundable amounts.
- EARNEST MONEY**
"Earnest Money" means 15% of the total consideration of the said unit payable by the allottee(s) and more clearly set out in Schedule-B
16. The issue with regard to deduction of earnest money on cancellation of a contract arose in cases of ***Maula Bux VS. Union of India, (1970) 1 SCR 928 and Sirdar K.B Ram Chandra Raj Urs. VS. Sarah C. Urs., (2015) 4 SCC 136***, and wherein it was held that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in the nature of penalty, then provisions of section 74 of Indian Contract Act, 1872 are attached and the party so forfeiting must prove actual damages. After

cancellation of allotment, the flat remains with the builder as such there is hardly any actual damage. National Consumer disputes Redressal Commissions in CC/435/2019 **Ramesh Malhotra VS. Emaar MGF Land Limited** (decided on 29.06.2020) and **Mr. Saurav Sanyal VS. M/s IREO Private Limited** (decided on 12.04.2022) **and followed in CC/2766/2017 in case titled as Jayant Singhal and Anr. VS. M3M India Private Limited decided on 26.07.2022**, held that 10% of basic sale price is a reasonable amount to be forfeited in the name of "earnest money". Keeping in view the principles laid down in the first two cases, a regulation known as the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, was framed providing as under:

"5. Amount Of Earnest Money

*Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view **that the forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount** of the real estate i.e. apartment /plot/building as the case may be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer."*

17. Keeping in view the aforesaid factual and legal provisions, the respondent can retain the earnest money paid by the complainants against the allotted unit and shall not exceed 10% of the consideration amount. So, the same was liable to be forfeited as per clause 9.2 of the buyer's agreement and Haryana Real Estate Regulatory Authority Regulation 11(5). So, the respondent/builder is directed to refund the amount received from the complainants i.e., Rs.31,31,125/- after deducting 10% of the basic sale consideration i.e., Rs.92,50,000/- and return the remaining amount along with interest at the rate of 10.80% (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, from the date of cancellation i.e., 28.06.2023 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

- F.II Direct the respondent company to offer the possession of the commercial unit in terms of the BBA dated 04.04.2019.**
- F.III Direct the respondent company to pay delay possession charges since the due date of possession in terms of the BBA have already expired.**
- F.IV Direct the respondent company to offer possession without imposing any illegal or unlawful conditions.**
- F.V Direct the respondent company to waive off illegal interest being charged to the complainants.**
- F.VI Direct the respondent company not to create any third-party rights and alienate in the unit in question.**
- F.VII Direct the respondent company to provide necessary documentation such as occupation certificate to the complainants.**
- F.VIII Direct the respondent company not to charge any maintenance charges till the adjudication of the present matter or till the unit is offered.**
- F.IX Direct the respondent company to produce the building plans showcasing the increase of super area from 925 sq. ft. to 1193 sq. ft. as changed while issuance of letter of intimation of OC dated 22.03.2023.**
- F.X Direct the respondent company to remove the illegal structure namely staircase and connected mezzanine, which was never agreed or defined in the building plans and the BBA.**
- F.XI Direct the respondent company to set-aside the demand on account of super area increase.**
- F.XII Direct the respondent company to execute conveyance deed in favour of the complainants.**

18. As the Authority is allowing refund of the amount to the complainants as per provisions of the Act of 2016 and Rules, 2017 as detailed out in para 17 of this order, all the above-mentioned reliefs become redundant. Thus, no direction to this effect.

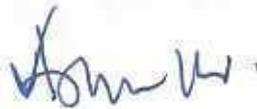
G. Directions of the Authority:

19. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

- i. The respondent/promoter is directed to refund the amount i.e., **Rs.31,31,125/-** received by him from the complainants after deduction of 10% of basic sale consideration of Rs.92,50,000/- as earnest money along with interest at the rate of 10.80% p.a. on such balance amount as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of cancellation i.e., 28.06.2023 till the actual realization.
- ii. A period of 90 days is given to the respondent-builder to comply with the directions given in this order and failing which legal consequences would follow.

20. The complaint stand disposed of.

21. Files be consigned to the registry.



(Arun Kumar)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 13.01.2026