

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

**Complaint no. : 4636 of 2020**  
**First date of hearing : 10.02.2021**  
**Date of Decision : 31.03.2021**

Neelu Baliyan  
R/o - D101, Safal Parishar 1,  
South Bopal, Ahmedabad,  
Gujarat-380058

**Complainant**

**Versus**

Elan Buildcon Private Limited  
Regd. office: -H.No. L-1-1100,  
G/F Sangam Vihar, Gali no. - 25  
New Delhi-110062

**Respondent**

**CORAM**

Shri Samir Kumar  
Shri Vijay Kumar Goyal

**Member**  
**Member**

**APPEARANCE**

Sh. Utkarsh Joshi

Advocate for the complainant

Sh. Ganesh Kamath

Advocate for the respondent

**ORDER**

1. The present complaint dated 24.12.2020 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 the project, unit, 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:

S.No.	Heads	Information
1.	Project name and location	"Elan Miracle", Sector-84, Village Hayatpur, Gurugram
2.	Project area	5.91875 acres
3.	Nature of the project	Commercial Complex
4.	DTCP license no.	34 of 2014 dated 12.06.2014
	License valid up to	11.06.2019
	Licensee	Bajaj Motors Ltd. & others
5.	RERA registered/not registered	Registered
	HARERA registration no.	190 of 2017 dated 14.09.2017
	Validity of registration	13.09.2023
6.	Unit no.	FS-022, 2 <sup>nd</sup> Floor [Page no. 22 of complaint]
7.	Provisional booking with its date if any	30.06.2017 [As per acknowledgement on page no. 22 of complaint]
8.	Unit measuring	650 sq. ft.





9.	Date of execution of apartment buyer's agreement	Not executed
10.	Memorandum of Understanding	17.08.2017 [Page 23 of complaint]
11.	Payment plan	Construction linked payment plan. [Page 15 of complaint]
12.	Total consideration	<b>Rs. 44,00,912/-</b> (without tax but including IFMSD) [As per Reminder-III, page 130 of complaint]
13.	Total amount paid by the complainant	<b>Rs. 29,67,800/-</b> [As Reminder-I, page 122 of complaint]

**B. Facts of the complaint**

3. The complainant booked a unit no. FS-022 having super area of 650 sq. ft. on 2<sup>nd</sup> floor in the project namely "Elan Miracle" situated at sector-84, village Hayatpur, Gurugram on 30.06.2017 and has paid a total sum of Rs. 29,67,800/- which amounts to approximately 72% of the total sale consideration i.e., Rs.41,53,050/- as per the schedule given below:

S. No.	Instalment Name	Description
1	On application of booking	60% of Basic Sale Price
2	After 2.5 years of booking	15% of Basic Sale Price + 100% of EDC/IDC
3	On offer of possession	25% of Basic Sale Price + 100% of PLC + 100% of IFMS + 100% of Car Parking-Usage Rights(optional) + All other



charges (as may be applicable)

4. That although 72% of the price of the price was paid to the respondent by the complainant, but no builder buyer agreement was entered into between the parties. The complainant requested the respondent time and again to enter into a legally valid BBA but to no avail. On 17.08.2017, the parties entered into a memorandum of understanding whereby the respondent agreed to pay the complainant a monthly sum of Rs 21,900/-.
5. Some emails were exchanged between the parties between 07.12.2019 and 23.12.2019 whereby the complainant informed the respondent that she had paid more than 60% of the total price and was willing to pay money provided that a valid BBA is entered into. The response of the respondent to the email was that "your booking was made previous to the applicability of the HREERA" and that they had shared copies of a draft BBA to which the complainant had not sent a response.
6. That the complainant received 'reminder I' on 05.11.2020 on behalf of the respondent which stated that the complainant has paid Rs. 29,67,800/- out of the total price. However, that document stated that an interest component of Rs 2,26,183/- had been added to the total price. This reminder letter had not been preceded by any demand letter of any kind. As admitted by the respondent, it did not have the correct communication details of the complainant. Hence, without





servicing a demand notice, any addition of interest component is illegal.

7. That, the respondent has sent 'reminder-II' to complainant on 21.11.2020 in which the interest component was increased to Rs.2,37,745/- and further sent reminder-III on 05.12.2020 which stated that total price had now been increased to Rs. 44,00,912/-, the interest component had risen to Rs. 2,47,862/- and the payment demanded had become Rs. 14,33,112/-.
8. That despite a payment of approximately 72% of the total price, the respondent has failed to enter into a legally valid builder buyer agreement. The responses and communications sent by the complainant have been met with studied silence and demand notices in clear violation of section 13 of the Act are being issued to the complainant as a measure to force her cough up more money without any legal agreement.

**C. Relief sought by the complainant:**

9. The complainant has sought following relief(s):
  - (i) Direct the respondent to enter into a legally valid builder buyer agreement in accordance with the RERA Act, 2016 and the Haryana RERA rules and its corresponding regulations; and
  - (ii) Direct the respondent to stop sending 'demand notices' or 'reminders' until a legally valid builder buyer agreement is entered into.

10. Notice of the complaint was issued to the respondent. The respondent filed reply on 15.02.2021. 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.

**D. Reply by the respondent**

11. The respondent has contested the complaint on the following grounds.
- i. That the complainant is regular investor who has been investing into real estate projects. The complainant has miserably failed to adhere to her promises of timely payments.
  - ii. The complainant had invested in two units i.e.. FS 022 and FS 023 (each admeasuring 650 sq. ft.), both on 2<sup>nd</sup> floor. The unit FS 023 is in the name of Ms. Neelu Baliyan and Ms. Neetu Tomar. For both the units, the complainant has taken huge amount of assured return and now is silent on the same. She has not mentioned about the said unit (FS 023) in present complaint. Regarding the unit no FS 022, the complainant miserably failed to adhere to her promises of timely payments and now filed the present complaint and is trying to take advantage of her own wrongdoings. The complainant herself is trying to avoid the signing of BBA on one pretext or the other.
  - iii. A mere perusal of the emails show that the complainant has been avoiding the signing of BBA on false/flimsy pretexts.





Thus, the complainant, with mala fide intent, has not mentioned the fact that she has already received a huge amount towards "assured returns" from the respondent for the present unit and for the other unit.

- iv. After framing of rules in the State of Haryana, the developer has not charged any further instalments without first offering BBA to the customers. In the present project, most of the customers have signed the BBA, but the complainant chose to evade her part of obligations in guise of false pretexts.
- v. That complainant herself has been avoiding paying the agreed balance amount, despite the project being at completion stage now. The officers of the respondent have been in touch with the complainant requesting her again and again to execute the BBA and pay the further amount, but she has been delaying it on one or the other pretext.
- vi. Further, a mere perusal of the clauses of the said MOU filed by the complainant makes it abundantly clear that she was informed of her duties/obligations well in advance and signed the forms clearly after understanding their obligations. Further, an MOU was also signed soon after the said booking form.
- vii. The complainant has paid merely an amount of Rs. 28,40,000/- (plus service tax of Rs.1,27,800/-) out of Rs.54,60,000/- (plus applicable taxes) against unit no. FS-022. It is most humbly submitted that a huge amount is due towards the complainant.



12. The respondent has prayed for the dismissal of the complaint.
13. 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. Findings on the objection raised by the respondent**

**E.I Objection regarding complainant being investor**

14. The respondent has taken a stand that the complainant is an investor and not a consumer, therefore, is not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act read with rule 28 of the rules. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states the main aims & objectives of enacting a statute but at the same, time preamble cannot be used to defeat the enabling provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter he contravenes or violates any provisions of the Act or rules, or regulations made thereunder. Upon careful perusal of all the terms and conditions of MoU, it is revealed that the complainant is a buyer and has paid total price of





Rs.29,67,800/- to the promoter towards purchase of the apartment in his project. At this stage, it is important to stress upon the definition of term allottee under the Act and the same is reproduced below for ready reference:

*"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"*

In view of above-mentioned definition of "allottee", it is crystal clear that the complainant is an allottee as the subject unit was allotted to her by the promoter. The concept of investor is not defined or referred anywhere in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as *M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.* has also held that the concept of investor is not been defined or referred in the Act. Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.

**E.2 The complainant failed to adhere to the promises of timely payments: -**

15. As per the observations of authority, the total consideration of the apartment is Rs.41,53,050/-. The complainant has paid



only Rs.29,67,800/- including service tax and sum of Rs.11,85,250/- is still outstanding which in spite of the respondent's reminders/demand letters has not been paid. However, it is contended on behalf of builder that despite issuance of number of reminders, the allottee did not come forward to execute builder buyer agreement of the allotted unit. Though she has paid a major portion of sale consideration, but she was also paid assured return of the allotted unit. So, no fault in this regard could be found with the respondent. On the basis of provisional booking 29.06.2017, the complainant started depositing different amounts against the allotted unit with the respondent builder. As per the MoU dated 17.08.2017, she was required to pay 60% of the total sale consideration at the time of booking of unit, 15% of basic sale price plus 100% of EDC, IDC after 2.5 years of booking and the remaining amount at the time of offer of possession. It is not disputed that on the basis of the provisional booking, a MoU dated 17.08.2017 was executed between the parties. She paid a sum of Rs. 29,67,800/- out of total sale consideration but also received a substantial amount as assured returns from the respondent builder. Though a number of reminders for payment of amount due were issued by the respondent builder to the





complainant but there is nothing on record to show that it asked the allottee to execute the builder buyer agreement. Section 13(1) of the Act, 2016 prescribes that a promoter shall not accept a sum more than 10% of cost of apartment, plot, building as an advance. The relevant section is reproduced below for ready reference:

*Section 13(1) - A promoter shall not accept a sum more than ten per cent of the cost of the apartment, plot, or building, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force.*

16. But to the utter disregard to these provision & law of natural justice, the builder failed to execute any BBA of the allotted unit despite receiving a substantial amount from the allottee. So, the complainant is right in asking the respondent builder to execute a BBA of the allotted unit in her favour and raise demand after that of the amount due against her. Thus, the respondent is directed to execute the BBA in favour of complainant of the allotted unit.
17. Though the authority is satisfied that the complainant is in contravention of section 19(6) of the Act but since no BBA as per the provision of section 13(1) has been executed between the parties. So, prior to that no demand for the amount due can be raised against the allottee. After the execution of BBA, the allottee can be directed to comply with the provision of

section 19(6) of the Act and the builder can legally raise the demand of the amount due against the allotted unit.

**F. Findings on the relief sought by the complainant**

**Relief sought by the complainant:** Direct the respondent to enter into a legally valid builder buyer agreement in accordance with the RERA Act, 2016 and the Haryana RERA rules and its corresponding regulations.

18. The complainant/allottee has booked a unit no. FS-022 on 2<sup>nd</sup> floor of 650 sq. ft. in the project namely "Elan Miracle" situated at sector-84, village Hayatpur, Gurugram. The total amount paid by the complainant is Rs. 29,67,800/-. The complainant and respondent had executed a memorandum of understanding for payment of assured return along with other terms and conditions on 17.08.2017. The complainant contended that she has requested the respondent to execute the builder buyer agreement which has not been provided by the respondent till date, and whereas it has contended that the allottee is not coming forward to execute the builder buyer agreement.

19. 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 13(1) of the Act. Therefore, the respondent is directed




to execute the builder buyer agreement in favour of complainant of the allotted unit.

**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 is directed execute the allotted unit's buyer's agreement in favour of complainant within 15 days.
  - ii. The complainant is thereafter directed to make the requisite payments as per the builder buyer agreement.
21. Complaint stands disposed of.
22. File be consigned to registry.

  
(Samir Kumar)  
Member

  
(Vijay Kumar Goyal)  
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 31.03.2021