

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

**Complaint no.** : 1755 of 2019  
**First date of hearing** : 24.09.2019  
**Date of Decision** : 31.03.2021

1. Neelu Baliyan  
2. Neetu Tomar  
Both RR/o: B-1401, Sethi Max Royal  
Sector-76, Noida

**Complainants**

**Versus**

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

**Respondent**

**CORAM**

Shri Samir Kumar  
Shri Vijay Kumar Goyal

**Member  
Member**

**APPEARANCE**

Sh. Utkarsh Joshi Advocate for the complainants  
Sh. Ganesh Kamath Advocate for the respondent

**BRIEF**

1. The present complaint dated 15.05.2019 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 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 project, unit, sale consideration, the amount paid by the complainants, 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 Colony
4.	DTCP license no.	34 of 2014 dated 12.06.2014
	License valid up to	11.06.2019
	Name of the licensee	Bajaj Motors Limited
5.	RERA registered/not registered	Registered
	HARERA registration	190 of 2017 dated 14.09.2017
	Validity status	13.09.2023
6.	Unit no.	FS-023, Second Floor [Page no. 32 of the reply]
7.	Provisional booking with its date if any	30.06.2017 [As per acknowledgement on page no. 12 of complaint]
8.	Unit measuring	650 sq. ft.
9.	Date of execution of Memorandum of Understanding	29.08.2017 [Page no. 13 of complaint]





10.	Payment plan	Construction linked payment plan
11.	Total consideration	Rs. 20,89,395 [As per Reminder-I on page 22 of complaint]
12.	Total amount paid by the complainants	Rs. 14,70,315/- [As per Reminder-I on page 22 of complaint]
13.	Occupation Certificate	Not in file

**B. Facts of the complaint**

3. The complainants booked a commercial space cum food court bearing unit no. FS-023, second floor admeasuring 650 sq. ft., in the respondent's upcoming project namely "Elan Miracle" by signing a booking form. The complainants have paid Rs.14,70,315/- as an initial booking amount for the said unit as per the schedule given below.

S. No.	Instalment Name	Description
1	On application of booking	35% of Basic Sale Price
2	Within 6 months of booking	10% of Basic Sale Price
3	After 2.5 years of booking	30% of Basic Sale Price + 100% of EDC/IDC
4	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 in the month of May, 2017, the complainants were approached by the representative of the respondent for buying a commercial space cum food court in the respondent's upcoming project. The complainants were assured by the respondent that all the necessary permissions and approvals from the competent authorities would be made available within next 15-20 days.
5. That the complainants jointly made a payment of Rs. 14,70,315/- through cheques/NEFT/RTGS and a sum of Rs. 3,90,000/- in cash to the respondent towards the booking of commercial space under the assured return scheme.
6. That on 30.06.2017, the complainants were issued an acknowledgment receipt by the respondent for the initial payment made by the complainants with respect to the allotted said-unit in the upcoming project of the respondent namely, "Elan Miracle" situated in sector-84, village Hayatpur, Gurugram.
7. That the complainants requested the respondent to provide the copy of the builder buyer agreement approved under Real Estate (Regulation and Development) Act, 2016 along with the other necessary permissions and documents approved by the concerned authorities. Further, the complainants had made a payment of Rs. 18,60,315/- equivalent to the 40% of total sale consideration to the respondent.
8. That on 29.08.2017, a memorandum of understanding was executed between the complainants and respondent for





payment of assured return along with other terms and conditions. In the month of October 2017, the complainants were also informed by the respondent through a whatsapp communication that the respondent's project has been issued a registration certificate vide letter dated 14.09.2017 by the Haryana Real Estate Regulatory Authority.

9. That on 17.01.2018, the complainants requested the respondent to execute the BBA but instead of doing the same the respondent sent a demand letter of Rs. 6,19,079/- to the complainants.
10. That on 03.08.2018, the complainants further received a demand letter of Rs. 6,19,079/- from the respondent. The complainants were pressurised by the respondent to deposit the above-mentioned amount without executing the BBA which was in violation of clause (viii) of the registration certificate dated 14.09.2017.
11. That on 26.11.2018, the complainants again received a reminder from the respondent demanding Rs. 6,19,079/- which was arbitrary and illegal. On 18.12.2018, the complainants sent a legal notice to the respondent demanding copy of the BBA, other approvals and documents related to the respondent's upcoming project.
12. That the cause of action arose against the respondent for the first time on 17.01.2018 when the respondent without executing the BBA raised illegal demand of Rs. 6,19,079/- from the complainant. The cause of action is still continuing as the respondent has failed to execute the BBA and provide



relevant information/documents to the complainants till now with respect to the respondent's upcoming project.

13. That the complainants do not want to withdraw from the project. The respondent has not fulfilled its obligation therefore, as per provisions under sections 11(4) and 13, the respondent is obligated to execute the BBA before demanding more than 10% of the sale consideration.

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

14. The complainants have sought following relief:

- (i) Direct the respondent to supply the desired documents/approvals of the respondent's upcoming project.
- (ii) Direct the respondent to execute the builder buyer's agreement in favor of the complainants.

15. On the date of hearing, the authority explained to the respondent/promoter about the contravention 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**

16. The respondent has contested the complaint on the following grounds:

**Preliminary submissions of the respondent**



- a) That the complainants were regular investors who had been investing in real estate projects. The complainants invested in two units i.e., FS-022 and FS-023 (each admeasuring 650 sq. ft.), both on second floor. The unit FS-022 was in the name of the complainant no. 1 and for both the units, the complainants were receiving assured returns till date. The complainants had failed to mention about the unit no. FS-022 in their present complaint. The complainants had failed to adhere to their promises regarding said unit of making timely payments and had filed a false complaint. Moreover, it was the complainants who were avoiding executing the BBA on one pretext or the other.
- b) That most of the customers of the respondent in the present project had signed the BBA but the complainants were avoiding the execution of the BBA due to their ulterior motives. The respondent had already supplied the copy of the BBA to the complainants which was also acknowledged by the complainants in their complaint. Therefore, the present complaint filed by the complainants is proved



false and the same is liable to be dismissed on this ground alone.

- c) That the communications sent by the respondent's officers/representatives proved that the complainants are avoiding the execution of the BBA even though the project of the respondent was at advanced stages of development. It is also pertinent to mention here that it was the complainants who were in an advantageous position by not executing the BBA as the project was on advanced stage.
- d) That the complainants signed the booking form for booking the said unit and the MoU was also signed by the complainants for the same and assured returns. Clause 7 of the MoU clearly mentioned the complainants were obliged to follow the terms of the MoU in respect of making timely payments and as per clause "J" of the booking form the respondent would be free to charge interest on delayed payments from the complainants. Further, clause 2 of the booking form clearly mentioned the approval of Director General, Town & Country Planning ("DTCP"), Haryana therefore, the complainants were making false claim



with respect to non-supply of copy of relevant approvals/documents by the respondent.

- e) That the complainants till now have only paid Rs. 14,07,001/- (plus service tax of Rs. 63,314/-) out of total consideration of Rs. 50,50,500/- (plus applicable taxes) against unit no. FS-023 and had failed miserably to fulfil their obligations under the booking form.

**Preliminary objections of the respondent**

- i. That the complainants have not approached this authority with clean hands and are suppressing material facts. Hence, the complaint is liable to be dismissed with exemplary costs. The complainants are investors and are avoiding executing the BBA for their own vested interests. The complainants should be directed to execute the BBA and to pay the remaining balance with interest.
- ii. That the complainants had mala-fidely distorted the facts by claiming that it was the respondent's representatives who approached the complainants. However, it was the complainants who approached the respondent through their agent M/s Geetanjali Homestate Private Limited.

- iii. That the complainants had also suppressed the facts that they had received huge amount in the form of assured returns and they are still encashing the PDC cheques of the assured returns of the respondent/developer. Further, the complainants were regular investors who had also purchased unit no. FS-022, second floor and had received assured returns on the same from the respondent.
- iv. That the present complaint is also not a complaint within the meaning of section 31 of the Real Estate (Regulation and Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 as there is no deficiency in service on the part of the respondent. The complainants have grossly misguided the Hon'ble Authority and have hidden facts that the complainants had enjoyed the assured returns from the respondent.
- v. That the complainants are not a consumer and had purchased the unit no. FS-023, second floor for commercial purposes to gain profit by selling the said unit at higher prices.

17. 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**

The contentions of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

**E.I Territorial jurisdiction**

18. 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**

19. The respondent contended that the relief regarding refund and compensation are within the jurisdiction of the adjudicating officer and jurisdiction w.r.t the same does not lie with the authority. It seems that the reply given by the respondent is without going through the facts of the complaint as the same is totally out of context. The



complainants have nowhere sought the relief of refund and regarding compensation part the complainant has stated that he is reserving the right for compensation and at present he is seeking only delay possession charges. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as held in *Simmi Sikka v/s M/s EMAAR MGF Land Ltd. (complaint no. 7 of 2018)* leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage. The said decision of the authority has been upheld by the Haryana Real Estate Appellate Tribunal in its judgement dated 03.11.2020, in appeal nos. 52 & 64 of 2018 titled as *Emaar MGF Land Ltd. V. Simmi Sikka and anr.*

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

**F.1 Objection regarding entitlement of DPC on ground of complainant being investor**

20. The respondent has taken a stand that the complainants are the investors and not consumers, therefore, they are not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. 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 main aims & objects of enacting a statute but at the same time preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter(s) if it contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainants are buyers and they have paid total price of Rs.14,70315 /- to the promoter towards purchase of a unit in the project of the promoter. At this stage, it is important to stress upon the definition of term allottee under the Act, 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;"*

21. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyer's agreement executed between promoter and complainants, it



is crystal clear that the complainants are allottee(s) as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred 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 defined or referred in the Act. Thus, the contention of promoter that the allottees being an investor are not entitled to protection of this Act stands rejected.

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

22. As per the observations of authority, the total consideration of the apartment is Rs.20,89,395/-. The complainant has paid only Rs.14,70,315/- including service tax and sum of Rs.6,19,080/- 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 30.06.2017, the complainant started depositing different amounts against the allotted unit with the respondent builder. As per the MoU dated 29.08.2017, the complainants were required to pay 35% of the total sale consideration at the time of booking of unit, 10% of basic sale price within 6 months of booking, 30% 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 29.08.2017 was executed between the parties. The complainants paid a sum of Rs. 14,70,315/- out of total sale consideration but also received a substantial amount as assured returns from the respondent builder. 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.*

23. 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 complainants are right in asking the respondent builder to execute a BBA of the allotted unit in their favour and raise demand after that of the amount due against them. Thus, the respondent is directed to execute the BBA in favour of complainant of the allotted unit.

24. 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.

**G. Findings of the authority**

**Relief sought by the complainant** - Direct the respondent to execute the builder buyer's agreement in favor of the complainants.





25. The complainants/allottees have booked a unit no. FS-23 on 2<sup>nd</sup> floor of 650 sq. ft., BSP (basic sale price) of Rs.6,700/- per sq. ft. in the project namely "Elan Miracle" situated at sector-84, village Hayatpur, Gurugram. The total amount paid by the complainants on the provisional booking is Rs. 14,70,315/-. The complainants and respondent had executed a memorandum of understanding for payment of assured return along with other terms and conditions on 29.08.2017. Though it is pleaded that the builder buyer agreement was executed between the parties, but the respondent builder failed to place on file copy of the same. Therefore, the respondent is directed to execute the builder buyer agreement in favour of complainants on the allotted unit.
26. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not executing the builder buyer's agreement.

**H. Directions of the authority**

27. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure

compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f): -

- i. The respondent is directed to execute the unit buyer's agreement in favour of complainants within 15 days.
- ii. The complainants are also directed to pay outstanding dues, if any with interest at the prescribed rate within 15 days.

28. Complaint stands disposed of.

29. File be consigned to registry.

  
**(Samir Kumar)**  
Member

  
**(Vijay Kumar Goyal)**  
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated:31.03.2021

Judgment uploaded on 10.09.2021