

Complaint no.	:	5690 of 2019
First date of heari	18.02.2020	
Date of decision	;	10.05.2022

- Mr. Jitender Singh R/o: - F-111, Jalvayu Towers, Sector- 56, Gurugram, Haryana
- Mrs. Ashwani Sethi R/o: - 80/15B, Malviya Nager, Delhi.

Complainants

Versus

M/s Raheja Developers Limited. **Regd. Office at**: W4D, 204/5, Keshav Kunj, Cariappa Marg, Western Avenue, Sainik Farms, New Delhi-110062

TAT

Respondent

CORAM: Shri K.K. Khandelwal Shri Vijay Kumar Goyal

APPEARANCE:

Sh. Jitender Singh & Ashwani Sethi Sh. Rahul Bhardwaj (Advocate) Chairman Member

Complainant Respondent

ORDER

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1. The present complaint dated 05.12.2019 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 allottees as per the agreement for sale executed *inter se*.

# A. Unit and project related details

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

S. N.	Particulars	Details	
1.	Name of the project	"Raheja Trinity", Sector 84, Gurugram,	
2.	Project area	2.281 acres	
3.	Nature of the project	Commercial colony	
4.	DTCP license no. and validity status	26 of 2013 dated 17.05.2013 valid up to 16.05.2019	
5.	Name of licensee	Sh. Bhoop Singh and others	
6	RERA Registered/ not registered	Registered vide no. 24 of 2017 dated 25.07.2017	
7.	RERA registration valid up to	For a period commencing from 25.07.2017 to 5 years from the date revised Environment Clearance	
8.	Date of environment clearance	pure	
9.	Shop no.	45, ground floor (As per submitted by complainant page no. 9 of the complaint and the same was	



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		admittedly by the respondent in his reply)
10.	Unit area admeasuring	565.115 sq. ft. (Page no. 78 of the reply)
11.	Date of execution of agreement to sell – Raheja Trinity	BBA annexed but not signed.
12.	Allotment letter	01.05.2014 (As per averment of complainant, page 9 of complaint)
13.	Date of booking application form	23.10.2013 (As per averment of complainant, page 9 of complaint)
14.	Possession clause	<b>34.</b> The company shall endeavour to complete the construction of the shop/ Commercial space of the applicant(s)/ intending allottee(s) within 36 months from the date of execution of agreement to sell or sanction of building plans and environment clearances whichever is later but subject to force majeure, circumstances and reasons beyond the control of the company. The company on obtaining certificate for occupation and use by the competent authorities shall hand over the shop/commercial space to the Applicant(s)/intending allottee(s) for his/her occupation and use and subject to the applicant(s)/ intending allottee(s) having complied with all terms and conditions of the agreement to sell. In the event of his/her failure to take over and /o

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		occupy and use the shop/commercial space provisionally and/or finally allotted within thirty (30) days from the date of intimation in writing by the company, them the same shall lie at his/her risk and cost and the applicant(s)/intending allottee(s) shall be liable to pay compensation @Rs.5/- sq. ft. of the gross saleable area per month as holding charges for the entire period of such delay" (Page no. 86 of the reply)
15.	Due date of possession	23.10.2016 [Calculated on the basis of the date of booking application form i.e., 23.10.2013 in the absence of BBA]
16.	Total sale consideration	Rs.74,76,076/- (As per averment of complainant, page 10 of complaint)
17.	Amount paid by the complainants	Rs.16,17,552/- (As per averment of complainant, page 13 of complaint)
18.	Occupation certificate /Completion certificate	Not received
19.	Offer of possession	Not offered
20.	Delay in handing over the possession till date of this order i.e. 10.05.2022	



## B. Facts of the complaint

- 3. The complainants have made the following submissions: -
  - That on 29.10.2013, the respondent through its marketing I. executives and advertisement done through various medium and means approached the complainants with an offer to invest and buy an apartment in the proposed project being developed by it namely "Raheja Trinity" in sector-84, Gurugram. The respondent had represented to the complainants that it is very ethical business house in the field of construction of residential project and in case he would invest in its project of it would deliver the possession of proposed apartment/flat on the assured delivery date as per the best quality. The respondent had further assured the complainants that it has already secured all the necessary sanctions and approvals from the appropriate and concerned authorities for the development and completion of said project on time with the promised quality and specifications. The complainants while relying on the representations and warranties and believing them to be true had agreed to the proposal and booked a commercial shop in the said project of proposal of the respondent.
    - II. The complainants were allotted the unit bearing no. 45 admeasuring 512.64 sq. ft. for a total sale consideration of Rs.74,76,076/- in the said project only calculated @ 1140/- per Sq. Ft. (Sale consideration plus EDC /IDC /ACETC as per clause 3.1 of



the BBA (not signed) made payment to the respondent of an amount of Rs.16,17,522/- and the respondent issued receipt thereof various dates in favour of complainant.

- III. That the builder buyer agreement was not signed between the parties. However, the complainants were allotted the aforesaid commercial shop and they paid a sum of Rs.1617552/- towards the sale consideration.
- IV. That as per clause 18.1 of the standard buyer agreement, the conveyance deed was to be executed and registered to convey the title of the commercial shop in favour of the complainants subject to receipt of the full payment of the total consideration including, but not limited to, interest on delayed payments and other dues/charges/ amounts as reserved herein (i.e. no other payments and other charges remaining due to the company) along with compliance of all other terms and conditions of the agreement by the complainants, execution of required documents including but not limited to maintenance agreement, electricity supply agreement".
  - V. That the complainants are facing all these financial burdens and hardship from their limited income resources, only because of the respondent's failure to fulfil its promises and commitments. The failure of commitment on the part of respondent had made the complainant(s) suffer grave, severe, and immense mental and



financial harassment with no-fault on their part. The complainant being common persons just made a mistake of relying on false and fake promises, which lured them to buy a unit in the aforesaid project of the respondent and have defrauded and cheated they by not completing the project uptil now.

- C. Relief sought by the complainants:
- The complainants have sought following relief(s).
  - Direct the respondent to refund the amount with 18% interest in favour of the complainant in respect of the aforesaid commercial project.
- 5. 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
- 6. The respondent contested the complaint on the following grounds:
  - i. That the complaint is neither maintainable nor tenable and is liable to be out-rightly dismissed. It is submitted that the instant complaint is absolutely malicious, vexatious, and unjustifiable and accordingly has to pave the path of singular consequence, that is, dismissal. The booking of the commercial unit was made prior to the enactment of the Real Estate (Regulation and Development) Act, 2016 and the provisions laid down in the said Act cannot be

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applied retrospectively. Although the provisions of the Act, 2016 are not applicable to the facts of the present case in hand yet without prejudice and in order to avoid complications later on, the respondent has registered the project with the authority. The said project is registered under this authority with registration no. 24 of 2017 dated 25.07.2017.

- ii. That the complainants are seeking refund, interest, and compensation for alleged delay in executing conveyance deed of the office/shop space booked by them. The complaints pertaining to possession, compensation and refund are to be decided by the adjudicating officer under section 71 of the Act, 2016 read with rule 29 of the Rules, 2017 and not by this authority. The present complaint is liable to be dismissed on this ground alone.
- iii. That the respondent is traversing and dealing with only those allegations, contentions and/or submissions that are material and relevant for the purpose of adjudication of present dispute. It is further submitted that save and except what would appear from the record and what is expressly admitted herein, the remaining allegations, contentions and/or submissions shall be deemed to have been denied and disputed by the respondent.
- iv. That the complainants have not approached this authority with clean hands and has intentionally suppressed and concealed the material facts in the present complaint. The complaint has been



filed by it maliciously with an ulterior motive and it is nothing but a sheer abuse of the process of law. The true and correct facts are as follows:

- That the respondent is a reputed real estate company having immense goodwill, comprised of law abiding and peace-loving persons and has always believed in satisfaction of its customers. The respondent has developed and delivered several prestigious projects such as 'Raheja Atharva', 'Raheja Shilas' and 'Raheja Vedanta' 'Raheja Highway Arcade', 'Raheja Square', 'Raheja Trade Tower' and 'Raheja SCO Market 83, 84' and in most of these projects a large number of allottees have taken possession and are functioning their offices/shop without any problem.
- That the complainants are a real estate investor and they have booked the unit in question with a view to earn quick profit in a short period. However, it appears that its calculations have gone wrong on account of severe slump in the real estate market, and they are now raising untenable and illegal pleas on highly flimsy and baseless grounds. Such malafide tactics of the complainants cannot be allowed to succeed.
- That only such allottees, who have complied with all the terms and conditions of the office space buyer's agreement including making timely payment of installments are entitled to receive

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compensation under the buyer's agreement. Here the complainants never came forward to sign the agreement to sell.

- That the delay, if any, in the project has been due to the delay in grant of the necessary approvals by the competent authorities and not due to any deficiency on part of the respondent. The process of grant of the necessary approvals by the competent authorities had been beyond the control of the respondent. The respondent has made best possible endeavour and all efforts at every stage to diligently follow with the competent authorities for the concerned approvals. In fact, it is in the interest of the respondent to complete the project as early as possible and handover the possession to the complainants. However, much against the normal practice and expectations of the respondent, at every stage, each division of the concerned authorities has taken time, which was beyond normal course and practice.
- That the origin of the complaint is because an investor is unable to get required return due to bad real estate market. The complaint has been filed with malafide motives and the same is liable to be dismissed with heavy costs payable to the respondent.
- That the shop buyers who had invested in the hope of rising markets, finding insufficient price rise – due to delay of Dwarka



expressway, delay in development of allied roads and shifting of toll plaza engineered false and ingenious excuses to complain and then used social media to make other (nonspeculator) shop buyers join them and make complaints, in all probability, by giving them an impression that the attempt may mean 'profit', and there is no penalty if the complaint failed.

- That the three factors: (1) delay in acquisition of land for development of roads and infrastructure (2) delay by government in construction of the Dwarka Expressway and allied roads; and (3) oversupply of the commercial units/shops in the NCR region, operated to not yield the price rise as was expected by a few. This cannot be a ground for complainants for refund as the application form itself has abundantly cautioned about the possible delay that might happened due to non-performance by Government agencies.
- That in the present case, keeping in view the contracted price, the completed (and lived-in) unit including interest and opportunity cost to the respondent may not yield profits as expected than what envisaged as possible profit. The completed structure as also the price charged may be contrasted with the possible profit's v/s cost of building investment, effort and intent. It is in this background that the complaint, the prevailing situation at site and this response



may kindly be considered. The present complaint has been filed with malafide motives and the same is liable to be dismissed with heavy costs payable to the respondent.

7. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submissions made by the parties.

## E. Jurisdiction of the authority

 The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

### E.I Territorial jurisdiction

9. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. In the present case, the project in question is situated within the planning area of Gurugram district. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

## E.II Subject-matter jurisdiction

10. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

#### Section 11



(4) The promoter shall-

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

#### 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.

- 11. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding noncompliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.
- 12. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in *Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors." followed in case of Ramprastha Promoter and Developers Pvt. Ltd. Versus Union of India and others dated 13.01.2022 in CWP bearing no. 6688 of 2021* wherein it has been laid down as under:

"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest



thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. if the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."

- 13. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the case mentioned above, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.
  - ii. F. Findings on the objections raised by the respondent
  - iii. F.I. Objection regarding entitlement of DPC on ground of complainant being investor.
- 14. The respondent has taken a stand that the complainants are 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 if 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 the apartment buyer's agreement, it is revealed that the complainant is buyer and has paid total price of **Rs.16,17,552/**-to the promoter towards purchase of an apartment in the project of the promoter. At this stage, it is important to stress upon the definition of term allottees 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;"

15. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the buyer's agreement cum provisional allotment letter executed between promoter and complainants, it is crystal clear that they have an allottee(s) as the subject unit allotted to him 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. 000600000010557 titled as

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*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 investors are not entitled to protection of this Act also stands rejected.

iv. G. Findings on the relief sought by the complainants.

G.I To direct the respondent to refund the amount with 18% interest in favour of the complainants in respect of the aforesaid commercial project.

16. In the present complaint, the complainants intend to withdraw from the project and are seeking return of the amount paid by them in respect of subject unit along with interest at the prescribed rate as provided under section 18(1) of the Act. Sec. 18(1) of the Act is reproduced below for ready reference.

#### "Section 18: - Return of amount and compensation

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

- (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or
- (b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

(Emphasis supplied)



17. As per clause 34 of the booking application form (Possession clause taken from the BBA/application form annexed in complaint no.5690-2019 of the same project being developed by the same promoter) provides for handing over of possession and is reproduced below:

34. The company shall endeavour to complete the construction of the shop/ Commercial space of the applicant(s)/ intending allottee(s) within 36 months from the date of execution of agreement to sell or sanction of building plans and environment clearances whichever is later but subject to force majeure, circumstances and reasons beyond the control of the company. The company on obtaining certificate for occupation and use by the competent authorities shall hand over the shop/commercial space to the Applicant(s)/intending allottee(s) for his/her occupation and use and subject to the applicant(s)/ intending allottee(s) having complied with all terms and conditions of the agreement to sell. In the event of his/her failure to take over and /or occupy and use the shop/commercial space provisionally and/or finally allotted within thirty (30) days from the date of intimation in writing by the company, them the same shall lie at his/her risk and cost and the applicant(s)/intending allottee(s) shall be liable to pay compensation @Rs.5/- sq. ft. of the gross salable area per month as holding charges for the entire period of such delay ......

18. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to providing necessary infrastructure specially road, sewer & water in the sector by the government, but subject to force majeure conditions or any government/regulatory authority's action, inaction or omission and reason beyond the control of the seller. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in making payment as per the plan may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its

meaning. The incorporation of such a clause in the agreement to sell by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such a mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

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19. Admissibility of refund along with prescribed rate of interest: The complainants are seeking refund the amount paid by them at the rate of 18%. However, the allottees intend to withdraw from the project and are seeking refund of the amount paid by them in respect of the subject unit with interest at prescribed rate as provided under rule 15 of the rules. Rule 15 has been reproduced as under:

#### Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

(1) For the purpose of proviso to section 12; section 18; and subsections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

20. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.



- 21. Consequently, as per website of the State Bank of India i.e., <u>https://sbi.co.in</u>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 10.05.2022 is 7.40%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.40%.
- 22. On consideration of the circumstances, the documents, submissions and based on the findings of the authority regarding contraventions as per provisions of rule 28(1), the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 34 of the booking application form executed between the parties on 23.10.2013, the possession of the subject unit was to be delivered within a period of 36 months from the date of execution of buyer's agreement which comes out to be 23.10.2016. (Calculated on the basis of the date of booking application form i.e., 23.10.2013 in the absence of BBA). It is pertinent to mention over here that even after a passage of more than 5.6 years neither the construction is complete nor the offer of possession of the allotted unit has been made to the allottees by the builder. Further in the instant matter, the authority observes that the respondent company failed to execute the buyer's agreement. There is no document placed on record from which it can be ascertained that whether the respondent has applied for occupation certificate/part occupation certificate or what is the status of construction of the project. In view of the above-mentioned facts, the allottees intend to withdraw from the project and are well within their right to do the same



in view of section 18(1) of the Act, 2016. Further, the authority has no hitch in proceeding further and to grant a relief in the present matter in view of the recent judgement of the Hon'ble Supreme Court of India in the case of *Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2021-2022(I), RCR (civil),357* and followed by the Hon'ble High Court of Punjab & Haryana in case *Ramprashtha Promoters and Developers Pvt Ltd Vs Union of India and Ors. in CWP No.6688 of 2021* decided on 04.03.2022, it was observed as under:

> "25. The unqualified right of the allottee to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed."

23. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such, the complainants are entitled to refund of the entire amount paid by them at the prescribed rate of interest i.e., @ 9.40% p.a. (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from



the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

# H. Directions of the authority

- 24. 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):
  - The respondent /promoter is directed to refund the amount i.e., Rs.16,17,552/- received by it from the complainants along with interest at the rate of 9.40% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the deposited amount.
  - 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.
  - 25. Complaint stands disposed of.
  - 26. File be consigned to registry.

(Dr. K.K. Khai elwal)

(Vijay Kumar Goyal) Member

Chairman Haryana Real Estate Regulatory Authority, Gurugram

Dated: 10.05.2022