

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

Complaint no. : 4163 of 2021
First date of hearing: 13.12.2021
Date of decision : 13.12.2022

1. Rajbir Singh
2. Bhavana Yadav

R/o: H. no. 470, 2nd Floor, Housing Board Colony,
Sector-17 A, Gurgaon, Haryana-122001

Complainants

Versus

M/s Imperia Structures Pvt. Ltd.
Regd. Office at: - A-25, Mohan Co-operative
Industrial Estate, New Delhi-110044

Respondent

CORAM:

Shri Vijay Kumar Goyal
Shri Sanjeev Kumar Arora

Member
Member

APPEARANCE:

Shri Sunil Kumar
Shri Himanshu Singh

Advocate for the complainant
Advocate for the respondent

ORDER

1. The present complaint dated 26.10.2021 has been filed by the complainant/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

dl



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 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. No.	Heads	Information
1.	Name and location of the project	"The Esfera" Phase II at sector 37-C, Gurgaon, Haryana
2.	Nature of the project	Group Housing Complex
3.	Project area	17 acres
4.	DTCP license no.	64 of 2011 dated 06.07.2011 valid upto 15.07.2017
5.	Name of license holder	M/s Phonix Datatech Services Pvt Ltd and 4 others
6.	RERA Registered/ not registered	Registered vide no. 352 of 2017 issued on 17.11.2017 up to 31.12.2020
7.	Apartment no.	402, 4 th Floor, Block B (page no. 25 of complaint)
8.	Unit measuring	1850 sq. ft. @ 34,790/- sq. mtr. (page no. 25 of complaint)
9.	Date of builder buyer agreement	21.02.2013 (page no. 23 of complaint)
10.	New apartment no.	1004, 10 th floor, tower E
11.	New unit area	1578 sq. ft. @ 41,460/- sq. mtr.
12.	Date of agreement executed for new unit	21.11.2017
13.	Date of tripartite agreement	15.07.2013



		(page no. 47 of reply)
14.	Total consideration	Rs. 84,59,949/- [as per statement of account on page no. 61 of complaint]
15.	Total amount paid by the complainants	Rs. 65,00,124/- [as per statement of account on page no. 61 of reply]
16.	Possession clause	<p>10.1. SCHEDULE FOR POSSESSION</p> <p>"The developer based on its present plans and estimates and subject to all just exceptions, contemplates to complete the construction of the said building/said apartment within a period of three and half years from the date of execution of this agreement unless there shall be delay or there shall be failure due to reasons mentioned in clause 11.1, 11.2, 11.3, and clause 41 or due to failure of allottee(s) to pay in time the price of the said unit along with other charges and dues in accordance with the schedule of payments given in annexure C or as per the demands raised by the developer from time to time or any failure on the part of the allottee to abide by all or any of the terms or conditions of this agreement."</p> <p>(emphasis supplied)</p>

[Handwritten signature]



17.	Due date of possession	21.08.2016 [calculated as per possession clause from 1 st agreement even agreed by the respondent vide letter for fit out dated 29.07.2021] <i>space</i>
18.	Offer of possession	Not offered
19.	Occupation certificate	Not obtained

B. Facts of the complaint

3. That the complainants were approached by the respondent for the project and believing on the statements and representations of the respondent they paid an amount of Rs. 4,00,000/-. As booking amount of the said apartment on 08th September 2011 vide letter issue by respondent on 21.09.2011.
4. That complainants paid a total amount of Rs. 26,10,301/- till 04th October 2012. But the buyer's agreement was executed between the parties on 21 February 2013. The respondent violated Section 13 of the Act, 2016 by taking more than ten per cent (10%) cost of the flat before the execution of the flat buyer's agreement. The total cost of the flat is Rs.82,03,250/- including other charges includes - DC, reserved covered parking, IFMS, club membership charges, FFC, PBIC & EEC, PLC including corner and park facing, while the respondent had collected a total sum of Rs.26,10,301/-, more than 40% of the cost of BSP till 04th October 2012 before execution of buyer agreement.
5. That the buyer's agreement for the apartment no 402, tower B, measuring 1850 square feet was executed on 21 February 2013 between the parties. The date of possession as per the Agreement

Handwritten signature/initials



was 21 August 2016 (36 Months + 06 Months Including), from the date of execution of the agreement.

6. That they further paid all instalments of payments as and when demanded by the respondent and ultimately paid a sum out of the total consideration of Rs.67,50,364/-, which is more than 90% payable amount of the apartment. A sum of Rs. 37,50,364/- paid till 16th January 2014 and remaining Rs 30,00,000/- paid till 16th January, 2018. Further, they feel deceive/dupped by the respondent for not offering offer of possession after made booking Since 2011 to Dec 2021, although they take home loan from the financial institutions and paid instalments and their interest to the financial institution, this is very well aware by the respondent a "Permission to Mortgage" letter issued by the respondent in favour of financial institution namely called "India Bulls Housing Finance Ltd. (IHFL), dated 15-01-2018.
7. That it was unfair, illegal, unlawful, unethical for the respondent when he had demanded the amount from them without the particular stage of construction being achieved as the completion of the apartment has been delayed by five (5) years approximately, which has ultimately resulted in the difficulties for them and many such buyers. Further, instead of making reparations for the delay caused due to failure of the respondent, the builder/developer company charged from them.
8. That the complainants have come to know about the poor quality of the construction of his apartment and the apartments of other buyers. The respondent is not constructing the construction of his apartment and other apartments as per the quality committed at the



time of application/allotment/ buyer's agreement. Further when the complainants came to know that the respondent did not construct the apartment, so that's why the complainants did not pay as the construction not completed upto construction linked plan but demand of money still going on from the respondent so, complainants denied paying as construction was not according to the construction linked payment plan, it was an excess demand raised by the respondent. And one sided the respondent cancelled the unit on 24 August, 2015 and later when the complainants did several visits to the office of the respondent for refund their hard earned money back then the respondent deny them and compel to signing a new apartment buyer agreement on 21 November 2017 by reducing super area 1578 sq. ft. from 1850 Sq. Ft. in tower E to tower B, on 10th floor to 04 floor, BSP Rate @ 41460.43/sq. mtr from BSP Rate @34970/ sq. mtr. As complainants were stated by the respondent for forget their earlier paid money due to cancellation, there is no option left with the complainants they bound/compel to signing new apartment buyer agreement by the respondent on higher rate in compare with earlier rate charged by the respondent.

9. That the complainants had come to know that the respondent is not constructing the construction of their apartment and others as per the commitment at the time of application/allotment/buyer's agreement.
10. That the complainants do not intend to withdraw from the project. As per obligations on the promoter under Section 18(1) proviso, the promoter is obligated to pay the complainants interest per month for delay of possession, at the rate of 10.75 per cent as per the



prevailing MCLR plus 2%, till the rightful legal possession of the apartment is handed over to them. The amount is calculated as prescribed in the Real Estate (Regulation and Development) Act, 2016 and the Haryana Real Estate (Regulation and Development) Rules, 2017.

C. Relief sought by the complainants:

11. The complainants have sought the following relief:

- Delay possession interest Rs. 67,50,367/- on paid amount since possession due date i.e., 20.02.2016 till today.
- Direct the respondent to handover the construction of the apartment to the complainants immediately. The complainants have paid 90% of the total sale consideration.
- Direct the respondent to complete the construction of common areas infrastructural facilities and amenities like club, park, etc for the complainants and other buyers of the project.
- Direct the respondent to offer 1850 sq. ft. on 4th floor, in tower B instead of later Tower E, on same BSP rate @34970/-sq.mtr. as it was promised on first apartment buyer agreement.
- Direct the respondent to compensate Rs.7,79,000/- in lieu of rent paid by the complainants to the respective owner. After being booked a residential flat since 2011 to December 2021 but unfortunately complainants did not offered possession of his unit. Rent need to be compensate from offer of possession due date which is 2016 onwards.
- Direct the respondent to compensate the interest paid by the complainants to the financial institution as permission to mortgage letter issued by the respondent vide letter dated



15.01.2018 in favour of India Bulls Housing Finance Limited. Due to default from the respondent the complainants are worst sufferer.

- Direct the respondent to pay legal expenses of Rs. 2,00,000/-.

12. 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.

13. That the complainants approached the respondent for booking of residential unit in the respondents' project and paid an amount of Rs. 65,00,124/- towards booking.

14. That in the consideration of the booking amount paid by the complainants and their commitments to comply with the terms of the booking/allotment and make timely payments, the respondent company provisionally allotted the unit bearing no. tower E 1004, 10 floor, admeasuring with of 1578 Sq. ft. in favour of complainants for an agreed cost of Rs 84,59,949/- (including applicable tax) plus other charges.

15. That thereafter respondent company in furtherance of allotment had sent copies of buyer's agreement to the complainants for the execution at their end along with same was executed between the parties.

16. That the construction of the tower's way before the agreed timeline and applied to the competent authority for the application for grant of occupation certificate on 15.04.2021 after complying with all



requisite formalities. That the project Esfera of two phases whereas OC of the Phase 1 of the project is duly issued by DTCP, Haryana on 07.02.2018.

17. That the respondent is in extreme financial crunch at this critical juncture and has also been saddled with orders of refund from the authority and NCDRC in the project. The total amount payable in terms of these decrees exceeds an amount of Rs.40 Crores. The said project involves hundreds of allottees and who are eagerly awaiting possession of their apartments will be prejudiced beyond repair in case any monetary order be passed when the project is almost completed now.

18. That, on account of many allottees exiting the project and many other allottees not paying the installment amounts, the company, with great difficulty, in these turbulent times has managed to secure a last mile funding of Rs.99 crores from SWAMIH Investment Fund – I. The said Alternate Investment Fund (AIF) was established under the Special Window declared on 6.11.2019 by the Hon'ble Finance Minister to provide priority debt financing for the completion of stalled, brownfield, RERA registered residential developments that are in the affordable housing /mid-income category, are net-worth positive and require last mile funding to complete construction. The company was granted a sanction on 23.09.2020 after examination of its status and its subject project "Esfera" for the amount of Rs.99 crores.

19. That the respondent is extremely committed to complete the phase – 2 of project Esfera, in fact the super structure of all towers in phase – 2 has already been completed, the internal finishing work and MEP



works is going in a full swing with almost 450 construction labourers are working hard to achieve the intent of the appellant to complete the entire project despite all prevailing adversaries.

20. That the respondent fulfilled its promise and had constructed the said unit of the complainants and sent an offer of possession for *fit out* on 29.07.2021 to the complainant's way before the agreed timeline.
21. That on account of wilful breach of terms of buyer's agreement by failing to clear the outstanding dues despite repeated requests, it is submitted that the complainants have till date made a payment of rs. 65,00,124/- as raised by the respondent company in accordance with the payment plan and the terms of the buyer's agreement.
22. That the complainants hasn't approached the authority with clean hands and bonafide intentions and that depicts in their action as they haven't paid the instalments on time and still a large portion of amount is still due despite the fact that so many reminders have been sent to them asking for clearance of payment.
23. 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 authority

24. 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



25. 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

26. 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)(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;

The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA dated..... Accordingly, the promoter is responsible for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.

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.

27. 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 complainants at a later stage.

F. Findings on the relief sought by the complainants.

Relief sought by the complainants: The complainants had sought following relief(s):

- i. Delay possession interest Rs. 67,50,367/- on paid amount since possession due date i.e., 20.02.2016 till today.
- ii. Direct the respondent to handover the construction of the apartment to the complainants immediately. The complainants have paid 90% of the total sale consideration.
- iii. Direct the respondent to complete the construction of common areas infrastructural facilities and amenities like club, park, etc for the complainants and other buyers of the project.
- iv. Direct the respondent to offer 1850 sq. ft. on 4th floor, in tower B instead of later Tower E, on same BSP rate @34970/-sq.mtr. as it was promised on first apartment buyer agreement.

28. In the present complaint, the complainants intend to continue with the project and are seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

"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, —

.....

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."

29. Clause 10.1 of the flat buyer's agreement provides the time period of handing over possession and the same is reproduced below:

10.1. SCHEDULE FOR POSSESSION

"The developer based on its present plans and estimates and subject to all just exceptions, contemplates to complete the construction of the said building/said apartment within a period of three and half years from the date of execution of this agreement unless there shall be delay or there shall be failure due to reasons mentioned in clause 11.1, 11.2, 11.3, and clause 41 or due to failure of allottee(s) to pay in time the price of the said unit along with other charges and dues in accordance with the schedule of payments given in annexure C or as per the demands raised by the developer from time to time or any failure on the part of the allottee to abide by all or any of the terms or conditions of this agreement."

30. **Due date of handing over of possession:** In the present complaint, initially a buyer's agreement in respect of unit no. 402, tower B was executed on 21.02.2013 inter se parties. The said unit was booked under subvention scheme as per which only 40% amount was to be paid before execution and remaining 60 % amount was to be paid at the time of completion of the project. But despite releasing the payment to the extent of Rs. 31,52,866/- by the allottee and Rs. 11,40,063/- by the Bank, the said unit was cancelled by the respondent on 24.08.2015 ignoring the above provision and despite having paid more than 62% of BSP. Subsequently, second BBA was signed on 21.11.2017 in respect of unit no. 1004, 10th floor at a higher price and the allottee made

dk



payment on 30.01.2018 of an amount of Rs. 30 lakhs and till date a total amount of Rs. 67,50,367/- has been paid to the respondent and the unit is not yet handed over.

31. The counsel for the complainants argued that the due date of possession shall be computed from the date when first buyer's agreement i.e. 21.02.2013 was executed and not from the second agreement dated 21.11.2017. Hence the complainants/ allottees are seeking DPC from the due date of handing over of possession at the prescribed rate of interest instead of only Rs. 5 per sq. ft. being offered by the respondent starting from 22.08.2016 till 31.05.2021 vide letter dated 29.07.2021 (annexure 5 on page no. 23 of reply).
32. Now, the question before the authority is that whether the due date should be computed from the first BBA dated 21.02.2013 or the subsequently executed BBA dated 21.11.2017. It is evident from the 'Demand Note cum Possession Offer for Fit Outs' dated 29.07.2021 issued by the respondent that the respondent has agreed to pay Rs. 5/- sq. ft. to the complainants starting from 22.08.2016 till 31.05.2021. As such, the respondent itself has admitted its liability to pay delay possession charges to the complainant w.e.f. 22.08.2016. In other words, the respondent itself has agreed to pay delay possession charges in terms of the first agreement dated 21.02.2013. By virtue of clause 10.1 of the buyer's agreement executed between the parties, the possession of the booked unit was to be delivered within three and half years from the date of execution of the agreement. The agreement was executed on 21.02.2013, therefore the due date of possession comes out to be 22.08.2016.



33. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges, proviso to section 18 provides 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 possession, at such rate as may be prescribed and it has been prescribed 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 sub-sections (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.

34. 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.
35. Taking the case from another angle, the complainants-allottees were entitled to the delayed possession charges/interest only at the rate of Rs.5/- per sq. ft. per month of the super area as per clause 11.4 of the buyer's agreement for the period of such delay; whereas, as per clause 8 of the buyer's agreement, the promoter was entitled to interest @ 18% per annum at the time of every succeeding instalment from the due date of instalment till date of payment on account for the delayed payments by the allottee. The



functions of the authority are to safeguard the interest of the aggrieved person, may be the allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take undue advantage of his dominant position and to exploit the needs of the home buyers. This authority is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumers/allottees in the real estate sector. The clauses of the buyer's agreement entered into between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the buyer's agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the buyer's agreement are ex-facie one-sided, unfair and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the buyer's agreement will not be final and binding.

36. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 13.12.2022 is 8.35%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.35% per annum.
37. The definition of term 'interest' as defined under section 2(z) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate



of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation. —For the purpose of this clause—

- (i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
- (ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

38. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 10.35% p.a. by the respondent/promoter which is the same as is being granted to the complainants in case of delay possession charges.
39. On consideration of the circumstances, the evidence and other record and submissions made by the parties, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. It is a matter of fact that as per the flat buyer's agreement executed between the parties on 21.02.2013, the possession of the booked unit was to be delivered within a period of three and half years from the date of execution of the agreement, which comes out to be 21.08.2016.
40. Accordingly, non-compliance of the mandate contained in section 11(4) (a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such complainants are entitled to delayed possession charges at the prescribed rate of interest i.e., 10.35% p.a. for every month of delay on the amount paid by the



complainants to the respondent from the due date of possession i.e., 21.08.2016 till the offer of possession of the subject flat after obtaining occupation certificate from the competent authority plus two months or handing over of possession whichever is earlier as per the provisions of section 18(1) of the Act read with rule 15 of the rules

- v. **Direct the respondent to compensate Rs.7,79,000/- in lieu of rent paid by the complainants to the respective owner. After being booked a residential flat since 2011 to December 2021 but unfortunately complainants did not offered possession of his unit. Rent need to be compensate from offer of possession due date which is 2016 onwards.**
- vi. **Direct the respondent to compensate the interest paid by the complainants to the financial institution as permission to mortgage letter issued by the respondent vide letter dated 15.01.2018 in favour of India Bulls Housing Finance Limited. Due to default from the respondent the complainants are worst sufferer.**
- vii. **Direct the respondent to pay legal expenses of Rs. 2,00,000/-.**

41. The complainants in the aforesaid relief are seeking relief w.r.t compensation. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors.* (Decided on 11.11.2021), has held that an allottee is entitled to claim compensation under sections 12, 14, 18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the



quantum of compensation shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation. Therefore, the complainants are advised to approach the adjudicating officer for seeking the relief of compensation.

G. Directions of the authority

42. 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 pay interest at the prescribed rate of 10.35% p.a. for every month of delay from the due date of possession i.e., 21.08.2016 till the offer of possession of the subject flat after obtaining occupation certificate from the competent authority plus two months or handing over of possession whichever is earlier.
- ii. The respondent is directed to pay arrears of interest accrued within 90 days from the date of order and thereafter monthly payment of interest to be paid till date of handing over of possession shall be paid on or before the 10th of each succeeding month.
- iii. The complainants are also directed to pay the outstanding dues, if any.
- iv. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.35% by the respondent/promoter

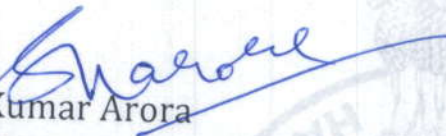



which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(z a) of the Act.

v. The respondent shall not charge anything from the complainants which is not part of the builder buyer agreement.

43. Complaint stands disposed of.

44. File be consigned to registry.


Sanjeev Kumar Arora
Member


Vijay Kumar Goyal
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 13.12.2022