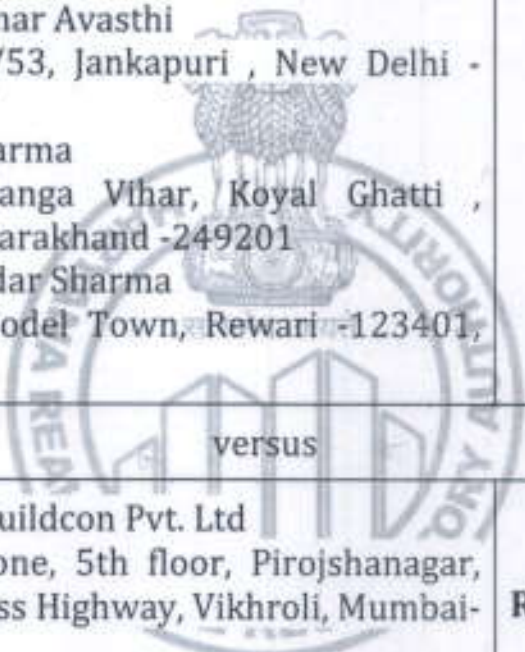


**BEFORE THE HARYANA REAL ESTATE REGULATORY
AUTHORITY, GURUGRAM**

Complaint no. : 5143 of 2019
Date of filing 19.11.2019
complaint:
First date of hearing: 13.12.2019
Date of decision : 23.02.2023

1. Sh. Anjani Kumar Avasthi R/O - A-4 C/53, Jankapuri , New Delhi - 110058	 Complainants
2. Sh. Chhaya Sharma R/O- 212, Ganga Vihar, Koyal Ghatti , Rishikesh , Uttarakhand -249201	
3. Sh. Sanjay Kedar Sharma R/O - 281 Model Town, Rewari -123401, Haryana	
versus	
Wonder city Buildcon Pvt. Ltd R/O: Godrej one, 5th floor, Pirojshanagar, Eastern Express Highway, Vikhroli, Mumbai- 400079	Respondent

CORAM:	
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Sh. Deepak Kumar Khushalani (Advocate)	Complainant
Sh. Kapil Madan (Advocate) Sh. Saurabh Gauba (Advocate)	Respondent

ORDER

1. The present complaint dated 19.11.2019 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 provisions of the act or the rules and regulations made there under or to the allottees as per the agreement for sale executed *inter se*.

2. The complaint has been received on 19.11.2019 and reply has been filed by the respondent. The complainant generated new proforma B by complaint No. 537 of 2021. The said complaint i.e. complaint No. 5143 of 2019 is clubbed with complaint No. 537 of 2021.

A. Unit and project details

3. The particulars of 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.	Name of the project	"Godrej- aria101", Sector 79, Gurgaon
2.	Nature of the project	Group Housing Project
3.	RERA Registered/ not registered	61 of 2017 from 17.08.2017 upto 28.02.2021

4.	DTCP	47 OF 2013 dated 06.06.2013 UPTC 13.08.2024
5.	Name of licensee	Sterling Infrastructure Pvt. Ltd. And ors.
6.	Unit no.	GODARA 0301 3 rd floor tower A (Page no. 16 of the CRA)
7.	Total area admeasuring	1401 sq. ft. (Page no. 16 of the CRA)
8.	Allotment Letter	09.07.2015 (Page no. 18 of the CRA)
9.	Date of execution of buyer's agreement	04.08.2015 (Page 21 of complaint) s
10.	Possession clause	4.3 Possession Time and Compensation The developer shall endeavour to complete the construction of the Apartment and to initiate possession of apartment within 48 months from date of issue of Allotment Letter along with a grace period of 12 months over and above this period. (Page 38 of the Complaint)
11.	Due date of possession	09.07.2020 (Calculated from the allotment letter + 12 months)
12.	Total sale consideration	Rs. 1,61,03,732/- (As alleged by the Complaint)
13.	Amount paid by the complainants	Rs. 49,99,512/- (As alleged by the Complaint)

14.	Occupation certificate /Completion certificate	01.10.2019 (Page 99 of reply)
15.	Offer of possession	Not Offered
16.	Surrender letter	10.08.2019, 16.09.2019 (page 141 of reply, Annexure c 8 of cra page 74)

B. Fact of the complaint

4. The complainant booked a commercial unit in the project namely "GODREJ ARIA" Sector-79, Tehsil: Manesar, District: Gurugram, Haryana . That at the time of booking vide application submitted on 27.02.2015 the respondent collected the initial Earnest money amount of Rs. 6,22,733 from the complainants on 28.2.2015 through RTGS transfer; out of which Service Tax of Rs.22,733/- was collected on 23.02.2015 i.e., even prior to submission of application.
5. The complainants thereafter paid a sum of Rs.11,32,113/- as per Invoice raised on 09.04.2015 i.e. within 2 months from the day of booking and another sum of Rs. 10,61,400/- was also paid in terms to the 3rd invoice raised i.e. within 4 months from booking; and lastly a sum of Rs.21,77,466/- was also paid by the complainants in condition to 4th invoice raised i.e. within 18 months from booking. That in total the complainants had paid a sum of Rs.49,99,512/-qua the unit-in-question, .
6. That respondent after collection of and payment instalment issued the Allotment letter dated .09.07.2015. A buyer's agreement was also sent by the respondent so, as to get it signed by the complainants; but, upon

receiving the same the complainants were astonished to note that the Housing License qua the project vide No. 47 of 2013 had only been granted to M/s Sterling Infrastructure Private Limited jointly with M/s KIS Colonisers Private Limited, who are the "Confirming Parties/Licensee Companies" mentioning themselves the subsidiary Companies of respondent.

7. The respondent were duty bound and were under obligation to disclose the name of the licensee along-with the license details in its advertisement issued for launch of present project, which they failed to do. A buyer's agreement was executed between the parties on 04.08.2015 and according to clause 4.3 the possession was to be calculate 48 months from the date of issue of Allotment Letter along with a grace period of 12 months . Hence the due date comes out to be 09.07.2020.
8. The complainants further submits that as per the representations made by the respondent that it is fully competent to develop, transfer and convey the right, title and interest of the residential apartment pursuant to which complainants booked the unit. Thus, the term as defined, requires that a colonizer to be as such under the provisions of Haryana Act, 1975, must necessarily hold the land in its ownership to apply and get a license under section 3 thereof. In the present case, undeniably, till date, the respondent is neither an owner of any part of land comprised of project nor any license has been granted by the Director General Town & Country Planning, Chandigarh to the respondent. therefore , it meets none

of the essential conditions of the expression "Colonizer" as prescribed under section 2 (d) of the Haryana Act, 1975.

9. That in order to make illegal and unjust pecuniary benefit, the respondent in association with licensee companies devised a novelty to circumvent the law in the manner that the housing license No. 47/2013 had been granted in favour of licensee companies have unilaterally without any prior permission/approval from D.G.T.C.P, Chandigarh represents to have transferred the whole project to the respondent representing that by virtue of their alleged inter-se agreements between them, hence the respondent is empowered to act as the "Colonizer".
10. That from the above stated position it is apprehended that the respondent has no legal authority to deal with the said housing license and/or to book, allot, sell, transfer any flats/units made thereat with any third party and the entire transaction made by the respondent is totally illegal and unlawful based on misrepresentations and false statements.
11. That the apartment buyer's agreement had only been signed by the respondent also on behalf of land owing companies, in absence of valid relationship with them, which seems that no approval for change in developer in terms of policy dated 18.2.2015 had been applied or granted to respondent by Director Town & Country Planning Department, Haryana,; which clearly proves the fact "that the project has been sold by the respondent, which is not a licensee company in absence of documents regarding relationship of respondent with licensee companies terming

project imperfect and defective", which is also a violation of agreement executed between Director Town & Country Planning, Haryana and Licensee Companies, which clearly says that no 3rd party rights can be created without prior approval of Director Town & Country Planning, Chandigarh.

12. That the respondent be put to strict proof so, as to bring on record that approval in reference to Form LC-IV and LC-IVA had been given by Director Town & Country Planning, Haryana (Chandigarh), to the licensee companies for creating 3rd party rights in favour of respondent.
13. The complainants also submits that at the time of advertising the project or receiving the earnest money whether a proper and valid license for carrying out the residential project was granted to respondent or it was competent and authorized with valid approvals/clearances from the DGTCP, Chandigarh to carry out with the project; failing which prima-facie proves that respondent was/is neither the owner for carrying out the residential project nor was competent to collect the money and to the book/sell the flats thereof.
14. That the other fact that too had to be looked-into that as to whether collaboration agreement executed between colonizers i.e. respondent and landowners/licensee companies is registered before Sub-Registrar having territorial jurisdiction of the area in terms of separate order/guidelines dated 03.01.2011 issued by Department of Town & Country Planning, Haryana.

15. That the respondent at the time of booking advertised the project with a 24 meter motorable access road approaching to the project; further saying in para No. 3.3 of apartment buyer's agreement that said 24 meter road exists at the time is also shown in lay-out plan at page No. 44 of the apartment buyer agreement. But, the respondent since inception and on every account had concealed the fact that no such 24 meter road exists or is developed by the respondent. Thus, non-existence of 24-meter-wide road had rendered the project imperfect suffers from material defects leading to deficiency in services. The respondent better chosen to collect money from the complainants by adopting unfair trade practice for promoting the sale in project, had adopted unfair and deceptive methods including making false statement in the form of visible representation which are misleading, false and farfetched from truth.
16. That the respondent allured the complainants by showing rosy picture about the project, hence the complainants entrusted their amount by booking the unit in the said project; but the respondent continued with unfair practices thereby deceiving the complainant since beginning and were moderately engaged in collecting the money illegally without any right over the project.
17. The complainants re-iterate that no legal & valid title of respondent over the land on which the development with no valid documents with authentication of title only owned by the licensee companies is being carried out . That the respondent being a developer in terms of Section 4

(2) (1) (E) of Act 2016 was supposed to take all pending approvals on time, from the Competent Authorities; but in present scenario neither any permission for change in beneficial interest/change in developer seems to be applied by the licensee companies before competent authority i.e. DCP, Chandigarh, nor had ever been any approval been granted in favour of respondent to deal with the project in any manner rather being a stranger to the project. Thus, the respondent has no legal authority to deal with the said license No.47/2013 and/or to book, allot, sell, transfer any flats made thereat with any third party and the entire transaction made by the respondent in league with licensee companies is totally illegal and unlawful based on misrepresentations and false statements.

18. That the respondent in total disregard of the Act, 2016 and in violation of "The Haryana Development and Regulation of Urban Areas Act, 1975 had acted unilaterally without complying to the provisions of law and at present also the matrix position is the same as proved from the record itself that unfair practice & irregularities had been adopted by the respondent. That in continuation the respondent cannot surpass to obtain mandatory licenses and necessary approvals from the concerned authorities; are now trying to shift their own negligence upon the complainants, who opt to withdraw from the project and had not paid the 5th payment demand raised "on intimation of interim possession" vide invoice dtd.13.8.2019 and requested the respondent to return the amount paid by the complainants, which respondent vide their response

dtd.23.8.2019 threatened to forfeit 20% of the basic sale price also alleged to deduct other charges; such act of respondent instead of refund the amount are rather sending the payment reminders thus, the whole act of respondent is unwarranted, illegal, arbitrary, one-sided and against the principles of law.

19. That the cause of action arose when the complainants came to know that the license is in the name of some other company. The complainants have filed the present complaint for refund of the total paid up amount.

C. Relief sought by the complainant:

20. The complainants have sought following relief(s):

I. Direct the respondent to refund to the complainants their paid up amount of Rs.49,99,512/- towards the unit allotted with interest .

21. On the date of hearing, the authority explained to the respondent/ promoters 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

22. The respondent has contested the complaint on the following grounds.

23. That the present complaint pertains to a unit booked vide an application form dated 27.02.2015 wherein the complainant's booked a unit in the project 'Godrej ARIA' situated at Sector 79, Gurugram, Haryana, for a total consideration of Rs.1,61,03,732/- . The complainant's made the booking after carefully going through the terms and conditions as mentioned in the application form. The complainant's opted for a possession linked

payment plan wherein they unequivocally agreed to make timely payments as provided in schedule III of the application form .

24. That thereafter a unit bearing no. A0310 on the Third floor in tower A was allotted to the complainant's vide an allotment letter dated 09.07.2015. The said apartment was to be delivered to the complainant's in (48 months +12 months) months from the date of issuance of allotment letter i.e. 25.07.2020.

25. That an apartment buyer agreement was executed between the complainants and respondent. It is submitted that clause 2.5 of the ABA, clearly states that 20% of the cost of property shall be considered and treated as earnest money, which was meant to ensure performance, compliance and fulfillment of obligations and responsibilities of the buyer.

26. That the apartment buyer agreement was executed between SILLP, KJS, respondent and the complainant's and all the pertinent information regarding transactions was dutifully enumerated in the apartment buyer agreement.

27. That Sterling Infrastructure LLP(SILLP) and KJS Colonisers LLP (earlier known as Rizon Developers Pvt. Ltd.) were granted license no. 47 of 2013 dated 06.06.2013 for an area measuring 14.59 acres. Thereafter SILL and KJS entered into a development agreement with the respondent herein on 02.05.2014. It is important to mention here-in that thereafter the respondent obtained RERA registration certificate on 17.08.2017.

28. That in the meanwhile the DTCP issued a policy parameters for change in beneficial interest vide memo number PF51A/20152708 dated 18.02.2015 under Section 9A of the Haryana Development and Regulation of Urban Areas Act. It is submitted that in compliance of the policy, SILL and KJS applied for change of developer for license number 47 of 2013 in favour of the respondent herein. It is submitted that thereafter DCP raised a few observations and several letters on were exchanged in this regard. Copy of the COD application dated 24.11.2017 together with all subsequent communication.
29. That the respondent is completing the project/ unit with all amenities as promised at a fast pace as per the layout plan approved by the authorities and has obtained the Occupation certificate dated 01.10.2019. The respondent accordingly issued invoices as per the stages enumerated in possession linked payment plan as agreed between the parties.
30. That the respondent is completing the construction and has inter-alia also developed a 24 metre road as per the license conditions on its licensed land. The OP has duly received in-principle approval for Change of Developer dated 25.11.2020 and as such the OP is duly compliant to the change of developer policy.
31. That the complainant's had made default as they failed to pay the agreed installment as per the possession linked payment plan agreed between the parties in the ABA. It is submitted that the complainant's were irregular in

making payments and have always delayed the payments on several occasions. The complainant's have abjectly failed to honour its obligation regarding timely payment and has failed to clear the outstanding amount. As on 03.12.2019 there is an outstanding amount of Rs. 1,16,56,766/- together with the interest amount of Rs. 3,63,438/- .

32. That instead of paying the outstanding amount due, the complainant's abruptly sent a request seeking cancellation of the apartment vide a cancellation request dated 21.08.2019. It is submitted that the said cancellation request was made after the respondent raised the demand on 13.08.2019 of RS. 1,16,56,766/- as the complainant's appears to be not in a position to pay the said demand. It is submitted that the respondent has mischievously concealed the email dated 21.08.2019 in order to mislead this Hon'ble Authority. It is further clarified that it is important to state here that the complainant's also have mischievously attached a purported letter dated 10.08.2019 which was sent to the respondent only on 21.08.2019 as an attachment to the said email.

33. That the respondent vide email dated 23.08.2019 clarified that the cancellation will be governed by the terms of ABA and sought complainant's consent for the same. Thereafter the complainant's sent a legal notice dated 16.09.2019 inundated with incorrect facts. It is important to mention here that the said legal notice is based on misconceived understanding of the statutory provisions.

34. That the respondent have sent various reminder letters dated requesting the complainants to clear the outstanding amount but to no avail. It is submitted that the respondent issued invoices as per the agreed payment plan, however the complainant's miserably failed to make payments against instalment and started making vague frivolous excuses in order to evade the payment
35. That it is relevant to state here that the respondent has not only lost the opportunity to sell the said unit to some other person, (at the time when complainant's booked the flat) who would have adhered with the terms of the contract and paid the entire sale consideration in time. The non-payment by the complainant's has put great hardship on the respondent who is under pressure to ensure progress of the construction without any interim payment by the complainants.
36. That the complainant in the instant complaint has challenged the terms and conditions of the apartment buyer agreement dated 04.08.2015. It is submitted that admittedly the details of the license holders and the developers were clearly enumerated in the ABA and at no point in time earlier the issue was raised by the complainant's. It is reiterated that the complainant's have belatedly as an afterthought filed the present complaint. It is submitted that admittedly the present complaint is filed on 06.11.2019 and thus the present complaint is filed beyond the period of limitation.

37. That the complainant's are trying to take advantage of its own wrong in as much as it is the complainant's who has committed a serious default by not paying the instalments in timely manner. Thus, the instant complaint is liable to be dismissed on account of concealment of material facts and documents, besides being vitiated on account of the false, vexatious and unsubstantiated allegations levelled by the complainant's. It is submitted that in fact it is the complainant's who has violated Section 19(6) of the RERA Act by not making timely payments. It is submitted that there is no misrepresentation or violations of any rules of RERA nor that the complainants have suffered any loss attributable to the respondent.
38. Thus, the present complaint is not maintainable under the provisions of RERA Act , as such this Hon'ble Authority has no jurisdiction to entertain the present complaint. That the complainant's have relied on inappropriate statutes as the said statutes are not applicable on the respondent. In the absence of any violations by the respondent the present complaint is not maintainable before this Hon'ble Authority.
39. All other averments made in the complaint were denied in toto.
40. 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

41. 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

42. 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

43. 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.

44. 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.

45. 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. (Supra)*** and reiterated in case of ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*** 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."

46. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the cases mentioned above, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

F. Findings on the relief sought by the complainants

F.I Direct the respondent to refund to the complainants their paid-up amount of Rs. 49,99,512/- towards the unit allotted with interest.

47. The complainants were allotted a unit in the project of the respondent detailed above on 09.07.2015 for a total sale consideration of Rs. 1,61,03,732/- The builder buyer's agreement was executed on 04.08.2015. The possession of the subject unit was to be offered within 48 months from date of issue of allotment letter along with a grace period of 12 months over and above this period. The due date of completion of project and offering possession of the unit comes out 09.07.2020. But the complainants were astonished to see that Housing license is in the name of some other company and which led to their withdrawal from the project and seeking refund by filing of complaint. They also made request for surrender of the unit on 10.08.2019 which is evident from page no. 141 of reply and the same is before due date of handing over of possession seeking refund against the allotted unit.

48. Further, the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, states that-

"5. AMOUNT OF EARNEST MONEY

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

49. It is evident from the above mentions facts that the complainants paid a sum of Rs.49,99,512/- against basic sale consideration of Rs.1,61,03,732/- of the unit allotted on 09.07.2015. The respondent was bound to act and respond to the pleas for surrender/withdrawal and refund of the paid-up amount accordingly.

50. Thus, keeping in view the aforesaid factual and legal provisions, the respondent cannot retain the amount paid by the complainants against the allotted unit and is directed to refund the same in view of the agreement to sell for allotment by forfeiting the earnest money which shall not exceed the 10% of the basic sale consideration of the said unit and shall return the balance amount along with interest at the rate of 10.70% (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 surrender i.e., 10.08.2019 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

51. 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 refund to the complainants the paid-up amount of Rs.49,99,512/- after deducting 10% as earnest money of the basic sale consideration of Rs.1,61,03,732/- with interest at the prescribed rate i.e., 10.70% is allowed, from the date of surrender i.e 10.08.2019 till date of actual refund.
- ii. 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.

52. Complaint stands disposed of.

53. File be consigned to registry.


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 23.02.2023