


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

**Complaint no.:** 3049 /2020  
2653/2021  
**Date of Complaint:** 06.10.2020  
**Date of decision:** 17.02.2023

1. Goutam Mitra  
2. Abhiroop Mitra  
Both R/o: - House No. A-30/A, Cr Park, New Delhi

**Complainants**

  
Versus

M/s Hans Propcon Pvt. Ltd  
**Regd. Office at:** Paras Twin Towers, Tower B, 6th Floor,  
Golf Course Road, Sector-54, Gurugram-122002

**Respondent**

**CORAM:**  
Shri Vijay Kumar Goyal

**Member**

**APPEARANCE:**  
Sh. Amit Kumar (Advocate)  
Sh. Shriya Takkar (Advocate)

Complainants  
Respondent

**ORDER**

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1. The present complaint 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 to the allottees as per the agreement for sale executed inter se them.

2. The complaint has been received on 06.10.2020 and reply has been filed by the respondent. The complainant generated new proforma B by complaint No. 2653 of 2021. The said complaint i.e. complaint No. 3049 of 2020 is clubbed with complaint no. 2653 of 2021.

**A. Unit and project related details**

3. 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	"M3M The Marina", sector 68, Gurugram, Haryana
2.	Nature of the project	Residential group housing colony
3.	DTCP license no. and validity status	93 of 2014 dated 31.07.2012 valid up to 30.07.2020
4.	RERA Registered/ not registered	i. Registered vide no. 57 a of 2017
5.	RERA registration valid up to	30.11.2022
6.	Application Form	28.04.2015 (Page 33 of reply)
7.	Unit no.	MR TW-03/1701 (Page no. 16 of complaint)
8.	Unit measuring	1304 sq. ft. (Page no. 16 of complaint)
9.	Date of execution of apartment agreement by buyer	Not executed





10.	Possession clause	46. To handover the possession of the apartment within a period of 48 months from the date of commencement of construction or date of execution whichever is later. (Page 48 of the reply).
11.	Due date	28.04.2019 Calculated by 48 months from the date of application form being later as no allotment letter is issued or buyer's agreement is signed and agreement even if signed, will be after date of application. (Inadvertently mentioned in the proceeding of the day as 04.03.2017)
12.	Total sale consideration	Rs. 1,11,35,300/- (Inadvertently mentioned in the proceeding of the day as Rs. 1,13,83,060/-)
13.	Amount paid	Rs.34,51,8521
14.	Occupation Certificate	14.09.2020
15.	Offer of possession	18.09.2020
17.	Reminder letter	08.06.2015, 06.08.2015
18.	Pre cancellation	24.10.2020
19.	Termination letter	17.12.2020 (Page 60 of reply)

**B. Facts of the complaints**

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4. The complainants have made the following submissions: -

5. That in the year 2015 the complainants no. 1 was desirous of purchasing Two properties in a gated society in Gurugram for his son and daughter and approached the respondent to explore their offered options through its channel partner, Brick By Brick, having its office at suite No. 18, INHWA business Centre, IRIS Tech Park, Sohna Road, Gurugram Haryana, in their Housing Project namely 'M3M The Marina' bearing registration number 57 (a) of 2017 dated 17.08.2017 located in Sector-68, Gurugram, Haryana, India.
6. That the complainants thereafter booked a unit being MR TW-03/1701 with the respondent in the "M3M the Marina" in Sector 68, Gurugram, Haryana of super area of 1304 square feet vide their application form dated 28.04.2015. It is submitted that at the time of booking the above said unit, the complainants paid an amount of Rs. 5,00,000/- vide Cheque number 179135 dated 28.04.2015 drawn on HDFC bank to the respondent towards the provisional booking of the said unit. The basic sale price of the said unit is Rs. 87,33,540/- whereas the total cost of unit is Rs. 1,11,35,300/-.
7. That the respondent got an application form signed by the complainants. It is submitted that the said application form contained some broad terms and conditions of the agreement to be executed between the parties. On being enquired by the complainants, the respondent's officials informed the complainants that these are terms and condition of the agreement, which will be executed between the parties and the respondent would provide the copy of the said application form to the complainants, once

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the cheque given by the complainants is encashed on presentation for the perusal and they can deliberate upon the same only thereafter, to which the complainants agreed.

8. It is submitted that the said cheque was duly encashed by the respondent. However, the copy of the application form which was got signed at the time of accepting the cheque from the complainants, was not supplied to the complainants for their perusal of the terms and conditions contained in the said application form.
  9. That thereafter in the month of April of 2015 i.e. on the date of 17.4.2015 precisely, the respondent sent an office copy of apartment buyer's agreement to be signed by the complainants and asked the complainants to hand over the same to the respondent.
  10. That on going through the terms and conditions contained in the said agreement, the complainants found that one of the clauses is not agreeable and communicated the same to the respondent vide email dated 15.01.2016 sent by the complainants number 2. The complainants number 2 specifically informed the respondent that the clause no. 38.3 is not agreeable to the complainants as the terms contained in clause no. 38.3 are onerous and stand to the detriment of the complainants herein and requested the respondent to remove the said clause from the agreement to be executed between them.
  11. That the respondent vide their email dated 02.02.2016 reiterated the said clause and impliedly refused to delete the said clause from the agreement.
- Thereafter, being concerned about the said clause not being agreeable, the

complainants visited the office of the respondent and had extensive meetings with the officials of the respondent, the complainants reiterated its stand that the said clause is still not agreeable to the complainants and informed the respondent that the complainants are ready to sign the buyer's agreement if clause 38.3 is struck off from the agreement.

12. That the respondent informed the complainants that they will be clarifying the matter with the legal department and other relevant departments and promised to revert back to the complainants within a period of one month. However, the respondent did not revert to the complainants till April 2016, whereupon the complainants number 2 made phone calls to the office of the respondent to follow-up on the matter. It is submitted that the respondent officials informed the complainants number 2, that the company is studying the recently passed real estate law and requested for some more time to revert back to the complainants. However, the respondent did not revert back to the complainants till July 2016, whereupon the complaint number 2 again wrote an email dated 24.07.2016 seeking the response from the respondent on the deletion of the clause no. 38.3, from the agreement to be executed between the parties

13. That the respondent vide email dated 05.08.2016 reiterated the previous response, though it was not agreeable to the complainants and insisted upon the signing of the builder buyer agreement at the earliest for execution at their end and referred to the clauses contained in the application form which was never given to the complainants even after

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encashing the cheque amount for booking amount of the said unit as promised by the respondent. Thereafter, the complainants wrote an email on the same day to the respondent asking for the copy of the application form letter signed and taken from the complainants. It is submitted that the said application form was sent to the complainants only on 06.08.2016 by the respondent vide the email dated same.

14. That since 06.08.2016, the complainants have visited the office of the respondent various times to inquire as to why there is no removal of the Clause 38.3 which was not at all acceptable to the complainants since the beginning of negotiations about the BBA.

15. That the complainants could not have gone through the said application form till 06.08.2016 as the same was never supplied to the complainants till 06.08.2016 and the same was sent to the complainants number 2 on email only on 06.08.2016. It is submitted herein that the complainants immediately on receiving the agreement and after having going through the terms and condition listed in the agreement, raised the issue of clause 38.3 which was not acceptable to the complainants herein. It is submitted that had the complainants had any chance of reading the clauses in the application form they would have certainly raised the issue of non acceptability of the clause 38 of the said application form as well. It is submitted that the complainants could not go through the application form as the same was with the respondent till 06.08.2018.

16. That till date for the want of agreeability of both the parties with regard to clauses contained in the said agreement, no concluded contract have

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been executed between the parties and therefore no amount whatsoever can be forfeited by the respondent as the respondent cannot force the complainants herein to sign the apartment buyer's agreement containing the clauses not acceptable to the complainants and which was duly communicated to the respondent herein.

17. That the respondent have got incorporated certain onerous terms in the paragraph 16 of the application form. Paragraph 16 of the said application form is in contravention of the provision of Real Estate Regulation and Development Act, 2016. It is submitted that paragraph 16 of the application states that 15% of the total consideration exclusive of DC, shall constitute the Earnest money whereas in terms of Section 13 of the Real Estate Regulation and Development Act, 2016, a promoter shall not accept a sum of more than 10% of the apartment, plot or building as an advance payment or application fee from a person without first entering into a written agreement for sale with such person. In this case the respondent/promoter have taken advance from the complainants to the tune of Rs. 34,51,821/prior to entering into an agreement to sell.

18. That the terms & conditions as mentioned in the application form signed by the complainants, were first supplied to the complainants only after accepting a large sum of money i.e. Rs. 34,51,821/-. It is submitted that it is highly unrealistic to expect a middle-class man to forgo his claim to the aforesaid amount even when he is faced with a contract with highly unreasonable and uneasy stipulations.

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19. That the respondent, therefore, is liable to refund the paid up amount along with prescribed rate of interest per annum from the receipt till the date of realisation. The interest is also being claimed since the complainants have used and enjoyed the monies which legally belong to the complainants and have either earned interest thereon or have saved interest and have additionally denied the Complainants its opportunity to earn interest on the said amount and have exposed the complainants to interest loss to that extent. Thus, the complainants are entitled in the manner stated above, to the interest on the amount till the date of realisation of the amount claimed.
20. That the flats of this new building are being sold at almost half the price as compared to the flats of the building where Complainants have booked their flat. This clearly stands to the detriment of the complainants.
21. It is submitted the complainants not only shown utter disregard towards the pendency of the complaint but went a step ahead by issuing another letter ref. no. 3398 dated 17.12.2020 with the subject "intimation of termination letter" and communicated to the complainants that the allotment of the said unit unit being MR TW-03/1701 have been cancelled and further that the respondent have forfeited an amount of Rs. 23,84,525/-
22. The cause of action still subsists and continuing as the respondent have till date did not refund the amount received by them from the complainants.

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

23. The complainants have sought following relief(s).

- i. **Direct the respondent to refund the amount of Rs. 34,51821/- to the complainants along with interest at the prescribed rate.**

**D. Reply by respondent:**

The respondent-builder by way of written reply made the following submissions:

24. That the complainants applied for a booking of a residential apartment and accordingly submitted an application for the due allotment of a residential apartment in the said project. In furtherance of the application, the complainants also duly signed and understood the indicative terms and conditions of the allotment of the residential apartment along with - the application form, and by signing the same agreed to remain bound by the said terms and conditions. In due consideration of the commitments made by the complainants to make timely payments and to remain bound by the various terms and conditions, the respondent company provisionally allotted a residential unit bearing no. MR TW- -03/1701.

25. That the complainants vide allotment letter dated 02.05.2015 in the project 'M3M Marina', situated in Sector 68, Gurugram. It is submitted that two copies of the apartment buyer' agreement were dispatched to the complainant with a cover letter dated 29.05.2015 for signing and execution at his end. It is submitted that in terms and conditions contained in the application for dated 28.04.2015 were the indicative terms and conditions of the agreement to be executed between the parties. It is

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submitted that since the complainants failed to fulfil their obligations to duly execute the buyers agreement and make further payments , the respondent was constrained to issue a termination letter dated 17.12.2020, thereby cancelling the complainants the allotment and forfeiting if is submitted that the total loss calculated comes to Rs. 23,84,525.0 /- (apr) which includes earnest money to the tune of 15,90,334 (plus \_T @ 8% amounting to 2,86,260/- on the earnest money), brokerage to the tune of Rs. 1.99.780/- and a further sum of Rs. 1,28,678/- was the interest payable by the Complainant for the delayed payments (plus GST @ 18% ame ing to 23,162/- on the delayed payments), a sum of Rs.\_ 1,56,31 1/- towards taxes which havt. already been deposited by the respondent despite the compliant not having paid the same an amount of Rs.23,84,525.00/- as per the terms of the application for allotment.

26. That it is submitted that the terms and conditions as contained in the apartment buyer's agreement were similar and uniform to those contained in the application form dated 28.04-2015. It is submitted that in accordance, clause 46 of the application form, the possession of the said apartment was to be handed over within 48 months from the date of commencement of construction- which shall mean the date of laying the first plain concrete/ mud mat slab of the tower or date of execution of the agreement whichever is later, rules 6 (six) months grace period. The mud mat slab was laid on 04.03.2013 und the copy of the apartment buyer's agreement was sent to the complainants along with a cover letter dated 29.05.2015 for execution at their end.

27. That it is submitted that the present complaint is pre-mature. It is submitted that the occupation certificate for the project in question was applied on 13.11.2019 and was granted by the competent authorities after due verification and inspection on 14.09.2020. It is submitted that since complainants failed to fulfil their obligations to duly execute the apartment buyers agreement and make ie further payments, the respondent was constrained to issue a termination letter dated 17.12.2020, thereby cancelling the allotment of the complainants.

28. That it is pertinent to mention here that a clause 38 of the apartment buyer's agreement, which has been objected as an afterthought by the complainants, already existed in the Application for Allotment. nt. The complainants, being educated people signed the application for allotment at their own free will, after reading and understanding the terms and conditions completely. The complainants did not object to the Clause time of application for allotment and objected to the similar clause in the apartment buyer's agreement. . It is submitted that since the complainants failed to fulfil their obligations to duly execute the apartment buyers agreement and make the further payments, the respondent was constrained to issue a termination letter dated 17 12.2020, thereby cancelling the allotment of the complainant.

29. That the relationship of the complainant and " respondent is defined and de. led by the Application for allotment agreement. It is submitted that a specific clause for referring disputes to arbitration is included in the said agreement vide Clause 53 of the Agreement which is extracted hereunder.

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"53.

*Thtr any disputes arising out or torching upon or in relation to the terms of this Application and/or standard Buyer's Agreement including the interpretation and the validity of the terms thereof and respective rights and obligations of the settled amicably by mutual discussion, falling which the same shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendment./modifications thereof for the time being in force, by a sole arbitrator selected from the names from the suggested by the company. In case the applicant delays/neglects/refuse to select one of the suggested names within 15 days of intimation, the Company shall be at liberty to appoint one of the proposed persons as a sole arbitrator, whose appointment shall be final and binding on the parties. Costs of arbitration shall be shared equally by the parties. The Arbitration procedure shall be held in English Langur . at an appropriate location in Gurgaon, Haryana.*

30. That it is submitted that since the complainants failed to fulfil their obligations to duly execute the apartment buyers agreement and make the further payments, the respondent was constrained to issue a termination letter dated 17.12.2020, thereby cancelling the complainants application for allotment and forfeiting an amount of Rs. 23,84,525/- as per the terms of the application for allotment.

31. 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 complainant.

#### **E. Jurisdiction of the authority**



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

### **E. I Territorial jurisdiction**

33. 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**

34. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottees 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.*





35. 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.

36. 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. 2021-2022 (1) RCR (Civil), 357*** 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."*

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37. 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 Direct the respondent to refund the amount of Rs. 34,51821/- to the complainants along with interest at the prescribed rate**

38. The complainants were allotted a unit in the project of the respondent detailed above for a total sale consideration of Rs. 1,11,35,300/- No buyer's agreement has been executed between the parties. According to the application form to handover the possession of the apartment within a period of 48 months from the date of commencement of construction or date of execution whichever is later. Hence the due date comes out to be 28.04.2019 .The occupation certificate was received on 14.09.2020 and the possession was offered to the complainants on 18.09.2020. The complainants have filed the present complaint regarding refund of the paid up amount on 06.10.2020 . Hence this becomes the case for delay possession charges . Now the situation is the complainants have filed the present complaint for refund of the paid up amount by filing the present compliant on 06.10.2020 .

39. That the respondent has also sent reminder letter on 08.06.2015 , 06.08.2015 following which he sent pre cancellation notice on 24.10.2020.

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The respondent also cancelled the unit on 17.12.2020 due to nonpayment . Thus, the cancellation of unit is valid.

40. The issue with regard to deduction of earnest money on cancellation of a contract arose in cases of ***Maula Bux VS. Union of India, (1970) 1 SCR 928 and Sirdar K.B. Ram Chandra Raj Urs. VS. Sarah C. Urs., (2015) 4 SCC 136***, and wherein it was held that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in the nature of penalty, then provisions of section 74 of Contract Act, 1872 are attached and the party so forfeiting must prove actual damages But no allotment or agreement was signed between the parties . After cancellation of allotment, the flat remains with the builder as such there is hardly any actual damage. National Consumer Disputes Redressal Commissions in CC/435/2019 ***Ramesh Malhotra VS. Emaar MGF Land Limited*** (decided on 29.06.2020) and ***Mr. Saurav Sanyal VS. M/s IREO Private Limited*** (decided on 12.04.2022) and followed in CC/2766/2017 in case titled as ***Jayant Singhal and Anr. VS. M3M India Limited*** decided on 26.07.2022, held that 10% of basic sale price is reasonable amount to be forfeited in the name of "earnest money". Keeping in view the principles laid down in the first two cases, a regulation known as the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, was framed providing as under-

**"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."*

41. So, the respondent/builder is directed to refund the amount received from the complaints after deducting 10% of the basic sale consideration and return the remaining 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 seeking refund by filing complaint on 06.10.2020 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

**G. Directions of the authority**

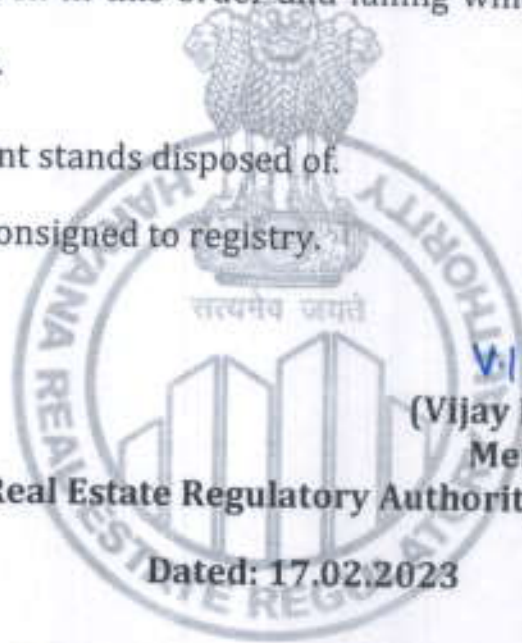
42. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):



- i. The respondent is directed to refund the paid-up amount of Rs.34,51,821/- after deducting 10% as earnest money of the basic sale consideration of Rs.1,11,35,300/- with the interest at the prescribed rate i.e., 10.70% is allowed from the date of seeking refund i.e., 06.10.2020 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.

43. Complaint stands disposed of.

44. File be consigned to registry.



  
(Vijay Kumar Goyal)  
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 17.02.2023

**HARERA**  
**GURUGRAM**