

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

Complaint no.	4878 of 2021
Date of filing of complaint	06.12.2021
First date of hearing	13.01.2022
Date of decision	21.02.2023

1. Pavan Jeet Goyal 2. Jaya Goyal R/O: Office No 911 Block Atralis Plot No 3 Supernova Sector 94 Noida Up 201301	Complainants
Versus	
Eminence Townships India Pvt. Ltd Regd. Office: H-3/157, 2nd Floor, Vkaspuri, New Delhi-110018	Respondent

CORAM:

Shri Ashok Sangwan

Member

Shri Sanjeev Kumar Arora

Member**APPEARANCE:**

Sh. Gaurav Rawat (Advocate)

Complainants

Sh. Pritesh proxy counsel (Advocate)

Respondent**ORDER**

1. The present complaint has been filed by the complainant/allottee under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section

11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se

Unit and project related details

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

S.No.	Heads	Information
1.	Project name and location	"Eminence Kimberly Suites" Sector - 112, Gurugram.
2.	Project Area	2.875 acres
3.	Nature of the project	Commercial Project
4.	DTCP License no.	35 of 2012 dated 22.04.2012 valid upto 21.04.2025
5.	Name of the licensee	Umed Singh and Others Revised schedule - KPS C colonisers Pvt. Ltd.
6.	RERA Registration	Registered 74 of 2017 dated 21.08.2017
	RERA Registration valid up to	30.12.2018
7.	Unit no.	B-0604 6 th floor (Page 19 of complaint)
8.	Unit admeasuring	795 sq. ft
9.	Date of execution of flat agreement	06.06.2014 (page 17 of complaint)
10.	Possession Clause	27 - Possession of unit The Company based on its present plans and estimates and subject to all

		exceptions shall endeavor to complete the construction of the said Project within 36 (thirty six) months (plus 6 months grace period) from the date of start of the stilt / ground floor roof slab of the particular tower in which the booking is made, subject to timely payment by the Allottee(s) of sale price and other charges due and payable according to the Payment Plan applicable to him/her/them and/or as demanded by the Company and subject to force majeure circumstances including but not limited to clauses 27 and 28. The possession of the Said Unit(s) shall, however, be offered only after grant of completion/occupation certificate from the Competent Authority.
11.	Due date of possession	01.12.2017 (Calculated from the date of start of the ground floor roof slab i.e 01.06.2014 of the particular tower in which the booking is made plus grace period of six months)
12.	Total sale consideration	Rs. 55,10,940/- (As per the buyer's agreement on page 20 of the complaint)
13.	Total amount paid by the complainant	Rs. 59,85,652/-/- (Page 95 of reply)
14.	Offer of Possession	24.07.2019 (Page 953 of complaint)
15.	Occupation Certificate	11.07.2019 (As per page no. 80 of reply)

Facts of the complaint

- That the complainants booked an apartment in the project of the respondent namely "Eminence Kimberly Suites" located at Sector 112, Villagr Bajghera, Gurugram, Haryana.

4. That the OP as represented to be founded by people who have been pioneers in the real estate industry. It was further represented that the vast experience and expertise of people of OP and the deep comprehension of the client needs brings indispensable and valuable wisdom to the OP and this is what makes OP fit to survive in today's challenging market. It was represented that OP is dedicated to building not just grand structures, but a great repertoire of work too, due to which OP adhere to the highest quality standards in everything we do.
5. That It was added that OP not only seek to build stable and solid structures but its ambition is to also implement the concept of strength, stability and solidarity in the relationship that it share with clients. That it was further added by the OP that OP entered the real estate and construction business and accomplished projects for top notch real estate players and thus vision of the OP is to become a real estate conglomerate with diversified construction services. OP through its official further added that aim of the OP is to build the most exquisite homes and commercial complexes through a strong management and an experienced team.
6. That the complainants have decided to book a unit bearing No. 0604 in Tower B of the above project measuring around 795 sq. ft. situated at 6th Floor . The complainants have paid an amount of Rs. 58,85,652/- against the total sale consideration of Rs. 55,10,940/-
7. That the parties entered into a buyer's agreement on 06.06.2014. That according to the clause no. 24 of the builder buyer agreement, time for

- making the payment has been specifically made the essence of the entire contract and contravention of the same would be conceded to be attended with a penal interest of 24% p.a. compounded quarterly.
8. That according to clause No. 27 of the buyer's agreement provided for the possession of the unit to be offered within a period of 36 months from the date of the start of the ground floor of the particular tower in which booking was made of the unit and additional 6 months were also kept as grace period. That as per Buyer's Agreement dated 06.07.2014, the unit in was to be offered in Dec. 2017 including grace period of 6 months, whereas till date physical possession has not been given.
 9. That it is essential to emphatically submit here that, however provisions / terms and conditions were laid down for the compensation of meagre sum of Rs. 15/- per sq. ft/month in clause no. 33 to be provided to the complainants for the default caused by the OP in handing over the possession on the committed date, as such the same is highly unjust and capricious.
 10. That it is pertinent to respectfully submit here that apparently the OP in flagrant violation of the provisions laid down under section 12 of the RERA Act, has substantially represented to provide revenue /profit on the basis of the leasing of the unit. However the same have never been complied by the OP, thus the OP is further liable to compensate to the complainants to the same effect.
 11. That it is also laid down in continuation of the preceding para that OP has cleverly laid down even of indemnification or predicament under

which OP shall be entitled to the indemnity, whereas no such arrangement was even thought for the complainants being always harassed and agonised at the hands of the OP.

12. That the complainants enquired from the OP regarding the status but could not get satisfactory response. However, opposed to the information shared, OP has surprisingly sent a letter dated 24.07.2019 offering possession of the unit and also appended an annexure raising illegitimate demand of Rs. 4,97,616.55/- despite of the same being already paid but physical possession has still not been provided.
13. That it is further added that the OP shall be liable to make the delay compensation for the significant period of 4 years in handing over the possession to the complainant along with mental agony and harassment being caused.
14. That the complainants have approached the respondent- builder to know the status of the project but the respondent- builder never gave any concrete reply and has not got the delayed possession leading to filing this complaint seeking delay possession charges and possession of the deposited amount

C. Relief Sought

This Authority may be pleased to direct the respondent as follows:

- Direct the respondent to pay delay penalty interest on the amount paid from the due date till date of actual physical possession and offer the possession .

- Direct the respondent to honour provisions contemplated under clause 25 of the BBA of providing benefit of leasing rentals etc.
- Direct the op to execute conveyance deed in favour of the complainants after making delay payments.
- Direct the respondent to provide litigation cost of Rs. 10,000/-

D. Reply by the respondent

That the respondent has contested the complaint on the following grounds:

15. That the complainants has allegedly submitted in the present complaint that they had paid the due installments in time, but it is stated that the entire project of the respondent company is dependent upon the timely payments by all the investors. It is pertinent to state here that the respondent company has diligently invested all the money collected from the complainants in the project itself and has never diverted any funds on any account and the construction has got jeopardized, if any, is purely on account of non-timely payments .
16. That the request of the complainants are untenable as the entire money from complainants have already been spent towards construction activity of the said project. The project is on the verge of completion and even the works related to *External Plaster, Internal Roads, Internal Sewerage System, Internal Flooring, STP, Fire Fighting System, Unit Outer Façade, overhead tanks, underground water tanks, plumbing connections, Internal and External Electricity wires, Installation of Lifts, Certificate for Operation of Lifts, Installation of Electrical components and Even Gen-Set Installation for Power Supply and Back-Up*, has been

completed and project is already due for handover of the possession, to the complainant and is awaiting final approvals.

17. That furthermore, any delay, if so has been caused in delivering the possession of the property as stated by the complainants, was purely due to the strict orders of National Green Tribunal in banning the construction activity on various occasions and thus on every occasion the Green Body ordered the civic bodies to set up teams to ensure there is no burning of waste in Delhi-NCR and asked them to inspect places where construction material were lying in the open uncovered and take appropriate action including levy of environment compensation.
18. That there have also been several unforeseeable events in the intervening periods which has materially and adversely affected the project and were beyond the control of the respondent, are being set out herein under:

a) It is stated that on account of every halt due to the ban on construction activities, following the order of National Green Tribunal and Pollution Control Board, the entire machinery of the respondent used to suffer adversely, and it took long periods, for the respondent to remobilize the entire construction activity and increased cost of construction. The delay on account of Force majeure is as follows: -

S. No.	Year	Order Dated	Closure of sites (From-To)	Delay, due to halt
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1.	2016	10th November, 2016	09.11.2016-15.11.2016	90 days
2.	2017	9th November, 2017	09.11.2017-16.11.2017	75 days
3.	2018	14th June 2018	15.06.2018-16.06.2018	45 days
4.	2018	29th October 2018	01.11.2018-10.11.2018	45 Days
5.	2018	24th December, 2018	25.12.2018-26.12.2018	35 Days

b) That the demonetisation of currency notes of Rs. 500 & Rs. 100 announced vide executive order dated 08th November 2016, has also affected the pace and the development of the project. Due to this policy change by the Central Government, the pace of construction of the project greatly and adversely affected the construction work since the withdrawal of the money was restricted by Reserve Bank of India as the availability of new currency was limited and unavailable with the banks. It is well known that the Real Estate Sectors deploy maximum number of construction workers who are paid in cash and hence the said sector requires cash in hand to offer such employment of the work force to carry out the works. All the workers, labourers at the construction sites are paid their wages in cash keeping in view

their nature of employment as the daily wages' labourers. The effect of such Demonetisation was that the labourers were not paid and consequently they had stopped working on the project and had left the project site / NCR which led in huge labour crisis which was widely reported in various newspapers/ various media. Capping on withdrawal and non-availability of adequate funds with the banks and further escalated this problem many folds.

19. That further in the month of 19-03-2018, the respondent applied for renewal of License for the said project and it was only after a period of 06 months i.e. on 03-08-2018, the DTCP reverted back to the respondent company with erroneous demand and further after efforts of the respondent company, the said demand was rectified and was notified back to the respondent on 01-02-2019, only and the said demand has already been paid along with future due demands by the respondent company, acting under its Bonafide. It is stated that the Occupancy Certificate, which is to be obtained before offer of possession could not be obtained due to the Delays on the party of Government. Thus, the Force Majeure existed from 19-03-2018 till 01-02-2019 i.e., approx. 11 Months.
20. That even otherwise the period of possession of the said unit, as per the buyer's agreement is to be counted from the date of laying off the Ground Floor Roof Slab i.e., 01.06.2014. Thus, in the terms of the buyer's agreement, it is stated that the due date for possession was 01.12.2017

i.e., 42 months from the date of laying of Ground Floor Slab, subject to Force Majeure.

21. That on account of delays due to NGT orders (09 Months and 20 days), Demonetisation (03 months) and Correction of erroneous EDC / IDC demand (11 months), overlaps with each other and caused a total period of force majeure as **18 Months**. And in the light of the above stated force Majeure, the works at the project site was to be completed on or before **01.06.2019** and accordingly, possession was to be offered.
22. That the works at the project site were completed on 27-03-2019 and the respondent had applied for occupancy certificate to DGTCP, Haryana at Chandigarh and subsequently the DGTCP, Haryana post its Inspection & as per provisions of applicable law, have already granted the Occupancy Certificate on 11-07-2019. It is submitted that the period taken by the Government Office for approval of the application for occupancy certificate is also covered under force majeure and thus the force majeure period of 104 days is also exempted and thus the period for offer of possession was extended upto 31-08-2019.
23. That the offer of possession has already been issued by the respondent to the complainants and thus the present petition of the complainants is pre-mature and is now liable to be dismissed as the tenure for offer of possession is complied with in accordance with the law and as per the terms of Builder Buyer agreement.
24. All the other averments made in the complaint were denied in toto.

25. Copies of all the relevant do have been filed and placed on 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

26. 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

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

27. 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.

28. 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 complainant at a later stage.

F. Findings on the objections raised by the respondent

F.1 Objection regarding delay due to force majeure

29. The respondent-builder raised the contention that the construction of the project was delayed due to conditions beyond the control of the respondent - builder such as banned construction in Delhi NCR , demonetization, various orders passed by NGT but all the pleas advanced in this regard are devoid of merit. The agreement to sale was executed between the parties on 06.06.2014 and as per terms and conditions of the said agreement for sale the due date of handing-over of possession was 01.12.2017. The events such as demonetization and various orders by NGT were for a shorter duration of time and were not continuous whereas there is a delay of more than three years. Even after due date of handing over of possession. Though some allottees may not

be regular in paying the amount due but whether the interest of all the stakeholders concerned with the said project be put on hold due to fault of on hold due to fault of some of the allottees. Thus, the promoter-respondent cannot be given any leniency on based of aforesaid reasons. It is well settled principle that a person cannot take benefit of his own wrong.

G. Findings on the relief sought by the complainants

G.I Direct the respondent to pay delay penalty interest on the amount paid from the due date till date of actual physical possession and offer the possession.

30. The complainants are admittedly the allottees of respondent – builder of a commercial unit for a total sum of Rs. 55,10,940/-. A buyer's agreement was executed between the parties in this regard on 06.07.2014. The due date for completion of the project was fixed as 01.12.2017 So, in this way, the complainant paid a total sum of Rs. /- 45,45,114/- against the allotted unit. The occupation certificate of the project was received on 11.07.2019 and the possession was offered to the complainants on 24.07.2019.
31. In the present complaint, the complainants intends to continue with the project and is 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."

32. Clause 23 of the buyer's agreement (in short, agreement) provides for handing over of possession and is reproduced below:

27. POSSESSION OF THE UNIT

The Company based on its present plans and estimates and subject to all exceptions shall endeavor to complete the construction of the said Project within 36 (thirty six) months (plus 6 months grace period) from the date of start of the stilt / ground floor roof slab of the particular tower in which the booking is made, subject to timely payment by the Allottee(s) of sale price and other charges due and payable according to the Payment Plan applicable to him/her/them and/or as demanded by the Company and subject to force majeure circumstances including but not limited to clauses 27 and 28. The possession of the Said Unit(s) shall, however, be offered only after grant of completion/occupation certificate from the Competent Authority.

33. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges however, 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. 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., 21.02.2023 is @8.70%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.70%.
36. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottees by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottees, 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;"*

37. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 10.70% by the respondent/promoter which is the same as is being granted to the complainants in case of delayed possession charges.
38. The on consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the act by not handing over possession by the due date as per the agreement. By virtue of clause 27 of the agreement executed between the parties on 06.06.2014, the possession of the subject apartment was to be delivered within stipulated time i.e., by 01.12.2017. As far as grace period is concerned, the same is allowed for the reasons quoted above. Therefore, the due date of handing over possession is 01.12.2017. The respondent has delayed in offering the possession and the same is offered on i.e. 24.07.2019. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. Accordingly, the 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 the allottee shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 01.12.2017 till handing over of the possession i.e. 24.07.2019 plus two months which



comes to 24.09.2019 at prescribed rate i.e., 10.70 % p.a. as per proviso to section 18(1) of the act read with rule 15 of the rules.

39. The respondent has offered the possession on 24.07.2019 demanding charges. The respondent is directed to offer the possession within one month to the complainants and shall not charge anything which is not part of the BBA and in particular holding charges which have been disallowed by this authority in many other cases keeping in view the decision of the Hon'ble Supreme Court of India.

G.II Direct the respondent to honour provisions contemplated under clause 25 of the BBA of providing benefit of leasing rentals etc.

25. Leasing of the Units

40. *The company is in talks with hospitality operators for the operation and management of the Units in the said project. The Allottee(s) will be informed about the decision once the deal is materialized and will be made aware of all the terms and condition of the terms sheet that will be finalized with the operator/third party including but not limited to sharing of revenue/profit. The Allottee(s) hereby agrees and undertakes that he has no objection and gives his/her/its consent for the Company to enter into any agreement with the operator/third party for management of the Units. The Allottee(s) agrees and undertakes that the Unit being sold to him will be leased back to the Company or operator or any other agency /third party that may be appointed by the Company for such period and on such terms and conditions including initial Lock-in period as may be finalized by the Company. In case the Allottee(s) wishes not to enter into an agreement with the operator /third party for management of the Units and wishes to keep the Unit for self-use, then the Allottee(s) understands, agrees and gives the Company the right to change his/her/its Unit to another location as may be decided by the Company. The Allottee(s) will have no say whatsoever in the matter and agrees that the decision of*

the Company will be final and binding. The Allottee(s) further confirms and agrees to execute a separate detailed agreement with the Company/third party /operator nominated /appointed by the Company at the time of final call notice of full and final dues.

41. The above-mentioned relief is up to the parties to work out up to mutual consent. The authority cannot interfere with the matter.

G.III Direct the OP to execute the conveyance deed in favour of the complainants.

42. As per section 11(4)(f) and section 17(1) of the Act of 2016, the promoter is under obligation to get the conveyance deed executed in favour of the complainant. Whereas as per section 19(11) of the Act of 2016, the allottee is also obligated to participate towards registration of the conveyance deed of the unit in question.
43. Since the possession of the subject unit has already been offered after obtaining occupation certificate on 24.07.2019. The respondent is directed to get the conveyance deed executed within a period of three months from the date of this order.

G.IV Litigation cost of Rs. 10,000/-

44. The the complainant is seeking above mentioned relief with regard to 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. 2021-2022 (1) RCR (c) 357*, has held that an allottee is entitled to claim compensation & litigation charges 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 & litigation expense 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 & legal expenses. Therefore, the complainants are advised to approach the adjudicating officer for seeking the relief of litigation expenses.

G. Directions of the authority

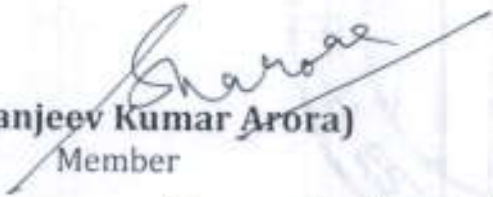
45. Hence, the authority hereby passes this order and issues the following directions under section 37 of the act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):


- i. The respondent is directed to pay delayed possession charges as per the proviso of section 18(1) of the Real Estate (Regulation and Development) Act, 2016 at the prescribed rate of interest i.e., 10.70% 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 01.12.2017 till offer of possession i.e 24.07.2019 plus 2 months which comes out to be 24.09.2019 as per proviso to section 18(1) of the Act read with rule 15 of the rules.
- ii. The respondent is directed to handover the possession of the unit within one month to the complainants and shall not charge anything which is not part of the BBA and in particular holding charges which have been



disallowed by this authority in many other cases keeping in view the decision of the Hon'ble Supreme Court of India.

- iii. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.70% 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(za) of the Act.
 - iv. The respondent is directed to get the conveyance deed executed within a period of one month from the date of this order.
46. Complaint stands disposed of.
47. File be consigned to registry.


(Sanjeev Kumar Arora)
Member


(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 21.02.2023