



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

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| Complaint no.: | 4938 of 2022 |
| First date of hearing: | 04.11.2022 |
| Date of decision: | 13.07.2023 |

1. Arjun Gupta
 2. Kiran Gupta
- R/o 12/12, V-Block, DLF City, Phase 3, Nathupur
(67), Gurugram

Complainants

Versus

1. M/s New Look Builders & Developers Pvt. Ltd.
formerly known as Ansal Phalak Infrastructure Pvt.
Ltd.
Office address: 1202, Antriksh Bhawan 16, Kasturba
Gandhi marg, new delhi-110001
2. Star Facilities Management Ltd.
Office address: Half Basement no. 1, Sandhya Deep
Building 15, East of Kailash, New Delhi-110065

Respondents

CORAM:

Shri Vijay Kumar Goyal

Member

APPEARANCE:

Shri Harshit Batra (Advocate)
Shri Dhruv Gupta (Advocate)

Complainants
Respondents

ORDER

1. The present complaint dated 27.07.2022 has been filed by the complainants/allottee 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 as provided 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*.

A. Unit and project related details

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

| S. N. | Particulars | Details |
|-------|--------------------------------------|---|
| 1. | Name of the project | "Esencia", Sector 67, Gurugram |
| 2. | Nature of the project | Residential Plotted Colony |
| 3. | DTCP license no. and validity status | 21 of 2011 dated 24.03.2011 valid upto 23.03.2019 |
| 4. | Name of licensee | Bisram S/o Shera and 20 others |
| 5. | RERA Registered/ not registered | 336 of 2017 dated 27.10.2017 |
| 6. | RERA registration valid up to | 31.12.2019 |
| 7. | Unit no. | D1556SF, Second Floor [pg. 32 of complaint] |
| 8. | Unit area admeasuring | 2198 sq. ft. [pg. 32 of complaint] |
| 9. | Allotment letter | 23.01.2013 [pg. 32 of complaint] |
| 10. | Date of Execution of SBA | 15.02.2013 [pg. 35 of complaint] |
| 11. | Possession clause | 5.1 |

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| | | <p>Subject to clause 5.2 infra and further subject to all the buyers of the floors in the residential colony making timely payment, the company shall endeavor to complete the development of residential colony and the floor as far as possible within 36 months with an extended period of (6) six months from the date of execution of this floor buyer agreement subject to the receipt of requisite building /revised building plans/ other approvals & permissions from the concerned authorities, as well as force majeure conditions as defined in the agreement and subject to fulfilment of the terms and conditions of the allotment, certificate & agreement including but not limited to timely payments by the buyer(s), in terms hereof. The company shall be entitled to an extension of time for completion of construction of the unit equivalent to the period of delay caused on account of the reasons stated above. No claim by way of damages/compensation shall lie against the company in case of delay in handing over possession of the unit on account of the aforesaid reasons. However, if the buyer(s) opts to pay in advance of the schedule, a suitable discount may be allowed but the completion schedule shall remain unaffected. The buyer(s) agrees and understands that the construction will commence only after all necessary approvals are received from the concerned authorities and competent authorities including but not limited to the environment & forest.</p> <p>[pg. 46 of complaint]</p> |
| 12. | Due date of possession | <p>15.08.2016</p> <p>(Calculated as 36 months plus 6 months from date of execution of floor buyer agreement)</p> <p>Note: Grace period is allowed as the same is unqualified</p> |
| 13. | Total sale consideration as per payment plan annexed | <p>₹ 1,71,54,550/-</p> |



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| | with BBA dated 15.02.2013 at page 41 of reply | | |
| 14. | Amount paid by the complainant as per clause 4.1 of BBA dated 15.02.2013 at page 20 of reply | ₹ 17,17,479/- | |
| 15. | Amount paid by the complainant as per SOA | ₹ 1,52,00,000/- [pg. 71 of complaint] | |
| 16. | Offer of possession | 04.03.2016 [pg. 42 of reply] | |
| 17. | Occupation certificate /Completion certificate | 04.01.2017 [pg. 51 of reply] | |

B. Facts of the complaint.

3. The complainants pleaded the complaint on the following facts:

- That the complainants are law-abiding citizens of India, who are residents of 12/12, V Block DLF City, Phase 3, Nathupur (67), Gurgaon and had booked a floor in the project of the respondent no.1 company namely, "Esencia" at Sector 67, Gurgaon, Haryana (hereinafter referred to as "**Project**") and hence are allottees under section 2(d) of the Real Estate (Regulation and Development) Act, 2016.
- That the complainants, being an innocent person lured by the representation, booked sovereign floor no.1556, 2nd floor in D block admeasuring super area 2198 sq. ft sq. (hereinafter referred to as the "**floor/unit**") in the said project vide application dated 23.01.2013 believing on claims, made by the authorized representative of the respondent no.1 for sale consideration of ₹ 1,60,00,000/-.

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- c. That respondent no.1 issued an allotment letter dated 23.01.2013 in the name of complainants with respect to the unit. Subsequently, a floor buyer agreement was executed on 15.02.2013 and the respondent assured the complainant to hand over said unit within 36 months from the date of the execution of the agreement, as per clause 5.1 of the agreement.
- d. That the complainants took a home loan from India Bulls Finance Ltd. of ₹ 1,41,65,799/- to finance the purchase of the said residential flat and executed a tripartite agreement dated 16.03.2013 with respondent no.1 and India Bulls Housing Finance Ltd. Foreclosing the loan from India bulls, a loan from ICICI was taken. That on 27.01.2022, ICICI issued a no lien certificate noting that all the dues had been made by the complainants.
- e. That the complainants have always acted in good faith. Upon the continuous and strong representations and warranties of the respondent that the development of the floor along with the project is carrying out in full swing, payments were made against the unit. A total sum of ₹ 1,60,08,050/- has been paid for the floor.
- f. That as noted above, as per clause 5.1. of the agreement, the respondent was obligated to deliver the valid possession of the floor within 36 months of the execution of the agreement (15.02.2013), thus, the due date of delivery of possession comes to be **15.02.2016**. However, in complete violation of the same, no valid and legal offer of possession has been provided by respondent no. 1 or respondent no. 2, till date. That no copy of the occupancy certificate has been delivered to the complainants till date.

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- g. That though the complainants were assured of the services as mentioned in clause 7.1 of the agreement but respondent no.1 miserably failed to fulfill its obligations. It is a matter of fact that the roads to block D were partially dug up, hindering the right to way. The construction of the project and the services around is grossly incomplete. Even in 2017, *i.e.*, post the due date of possession, the building material which was being used in the construction of surrounding floors was lying all around and no constructive efforts were taken to remove the building material for a long time, and thus owing to the inhabitable conditions of the colony the complainants. It is also a matter of fact that since 2019, there has been no electricity and water supply to the project area.
- h. That the complainants were coerced into making the payment of an amount of ₹ 1,09,800/- to respondent no. 3, as evident from the receipt dated 16.09.2016 issued by respondent no.3. Respondent no.3 has been issuing bills on account of water charges and other charges without executing any agreement with the complainant. And thus, without execution of any maintenance agreement, respondent no.3 is illegally extorting money from complainants on account of water charges, IFSD etc. and now raising maintenance bills of hefty amounts without having any legal rights to do so. That it is a settled matter of law that there can be no consideration without contra.
- i. That the complainant stopped paying the maintenance charges as the assured maintenance services were not available in the project and a bill from 01.01.2018 to 31.03.2022 has been generated reflecting total outstanding of ₹ 4,06,649/-.

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C. Relief sought by the complainants:

4. The complainants have sought following reliefs:

- a. DPC & Possession.
- b. Restrain the respondent from raising demands on account of maintenance charges and to waive off the illegal maintenance charges and interest of ₹ 4,06,649/- and not to charge maintenance charges till valid offer of possession after obtaining OC.
- c. Direct the respondent to recall the bill of supply dated 14.07.2021 for ₹ 2,984/-.
- d. Direct the respondent to refund the amount of ₹ 1,09,800/- money taken without any agreement and without providing any services in lieu of the money taken.
- e. Direct the respondent not to charge ₹ 40,000/- miscellaneous expenses not agreed between the parties and not to charge ₹ 2,19,600/- on account of cost of escalation unlawfully without providing any justification.

5. Any On the date of hearing, the authority explained to the respondents/promoters about the contravention as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent.

6. The respondent contended the complaint on the following grounds:

- a. At the outset, the respondent no. 1 i.e., Ansal Phalak Infrastructure Pvt. Ltd. (now known as "New Look Builders and Developers Pvt. Ltd.") denies each and every assertion, averment, statement, allegation made in the complaint filed by the complainant as false, frivolous, vexatious and misleading, except for those which are

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matter of record or are specifically admitted hereinunder. It is humbly submitted that the present complaint is nothing more than an afterthought and has been made with the sole purpose to wrongfully gain at the cost of the answering respondent and to malign its reputation in the market.

- b. That the answering respondent is engaged in the business of construction and development of real estate projects having its registered office at first floor, the Great Eastern Centre 70, Nehru Place behind IFCI Tower, New Delhi-110019. The present reply to the captioned complaint is being filed on behalf of the answering respondent is being filed through Mr. Anil Kansal who have been duly authorized by the board of directors of the answering respondent vide board resolution dated 26.08.2021, inter alia, to defend, verify and sign pleadings and other documents etc. in the present complaint on behalf of the answering respondent and do all such acts, deeds, things as may be considered necessary to represent and act for and on behalf of the answering respondent.
- c. The complainant through the present complaint has sought direction for handing over the possession of the unit no. 1556 SF (hereinafter referred to as "**unit**") in the project "Sovereign Floors, "Esencia" situated at Sector 67, Gurugram (hereinafter referred to as "**project**") and payment of delayed possession charges.
- d. That the unit was allotted to the complainants vide floor buyer agreement dated 15.02.2013 (hereinafter referred to as "**FBA**") for a basic sale price of ₹ 1,60,00,000/-. The aforesaid fact can be verified from clause no. 3.1 of the FBA. Pertinently, the external

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development charges, electricity connection charges, taxes and other charges were separately payable by the complainants.

- e. Subsequently, the answering respondent completed the construction of the unit and offered possession of the unit to the complainants, vide its letter dated 04.03.2016 i.e., within a period of 37 months from the date of execution of the FBA.
- f. That the complainants after the receipt of offer of possession on 04.03.2016, approached the answering respondent on 27.06.2016 for taking the possession of the unit. Pertinently, at the time of handing over the possession of the unit, the complainants issued a letter dated 27.06.2016 praying for handing over of the possession of the unit. The complainants in the letter dated 27.06.2016, admits that all the claims or interest towards the unit have been settled by the answering respondent and that the complainants do not have any accrued right for compensation or any other money from the answering respondent.
- g. Thereafter, the possession of the unit was handed over to the complainant on 27.06.2016 itself. That in terms of letter dated 27.06.2016, the complainants had undertaken to pay the registration charges for the conveyance deed of the unit. However, the complainants for the reasons best known to them did not produce the required stamp papers for registration of the conveyance deed in their favor.
- h. Pertinently, the answering respondent had applied for the occupancy certificate of the unit before the District Town Planner, Gurugram upon completion of the construction of the unit. However, due to the delay solely attributable to the District Town



Planner, the occupancy certificate of the unit was received on 04.01.2017 vide letter dated 04.01.2017 sent by District Town Planner, Gurugram.

E. Jurisdiction of the authority

7. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I. Territorial jurisdiction

8. 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

9. 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

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(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.

10. 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.

F.I. DPC & Possession.

11. In the present complaint, the complainant intends to continue with the project and is seeking delay possession charges. Clause 5.1 of the BBA dated 15.02.2013 provides for the handing over of possession and is reproduced below for the reference:

"Subject to clause 5.2 and further subject to all the buyers of the dwelling units in the said sovereign floors, esencia, making timely payment, the company shall endeavour to complete the development of residential colony and the floor as far as possible within 36 months with an extended period of 6 months from the date of execution of this floor buyer agreement or the date of sanction of the building plans whichever falls the later."

12. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the complainants not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling

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formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the flat buyer agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

13. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment within a period of 36 months from date of execution of the agreement or within 36 months from the date of sanction of the building plans whichever falls the later. The authority calculated the due date from the date of agreement i.e., 15.02.2013 as the date of building plan is not known. The period of 36 months ends on 15.02.2016. Since in the present matter the BBA incorporates unqualified reason for grace period/extended period in the possession clause. Accordingly, the authority allows this grace period of 6 months to the promoter at this stage, accordingly the due date of possession comes out to be 15.08.2016.
14. The authority observes that the respondent/builder has obtained occupation certificate dated 04.01.2017 of the project in which the allotted unit of the complainant is located. So, without getting occupation certificate, the builder/ respondent is not competent to issue any intimation regarding offer of possession. It is well settled that for a valid offer of possession there are three pre-requisites Firstly, it



should be after receiving occupation certificate; Secondly, the subject unit should be in habitable condition and thirdly, the offer must not be accompanied with any unreasonable demand. But while issuing intimation regarding offer of possession on 04.03.2016, the builder has not obtained occupation certificate. Hence, the intimation regarding offer of possession dated 04.03.2016 issued by respondent is not a valid offer of possession.

15. **Admissibility of delay possession charges at prescribed rate of interest:** 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]

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."

16. The legislature in its wisdom in the subordinate legislation under 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.
17. 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., **13.07.2023** is 8.70%. Accordingly, the prescribed rate of interest will be MCLR +2% i.e., 10.70%.

18. The definition of term 'interest' as defined under section 2(z) 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 allottees, as the case may be.

Explanation. —For the purpose of this clause—

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 interest payable by the promoter to the allottees 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 allottees to the promoter shall be from the date the allottees defaults in payment to the promoter till the date it is paid;"

19. 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.

20. On consideration of the documents available on record and submissions made 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 5.1 of the agreement executed between the parties on 15.02.2013, the possession of the subject apartment was to be delivered within 36 months from the date of execution of agreement or date of sanction of the building plans whichever falls the



later. The authority calculated the due date from date of agreement being later. The period of 36 months expired on 15.02.2016. 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 15.08.2016. 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.

21. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. 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. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e., 15.08.2016 till the expiry of 2 months from the date of issuance of occupation certificate i.e., 04.03.2017 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.

F.II. Restrain the respondent from raising demands on account of maintenance charges and to waive off the illegal maintenance charges and interest of ₹ 4,06,649/- and not to charge maintenance charges till valid offer of possession after obtaining OC.

F.III. Direct the respondent to recall the bill of supply dated 14.07.2021 for ₹ 2,984/-.

F.IV. Direct the respondent to refund the amount of ₹ 1,09,800/- money taken without any agreement and without providing any services in lieu of the money taken.

22. However, as far as issue regarding maintenance charges is concerned where the said agreements have been entered into before coming into force the Act, the matter is to be dealt with as per the provisions of the builder buyer's agreement. With respect to advance maintenance

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charges, the relevant clause of the builder buyer's agreement is as follows:

"7.1 The company shall either directly or through its appointed maintenance agency as the case may be, provide the requisite common area maintenance and other services to sovereign floors, esencia, and integrated residential colony- esencia which shall broadly include garbage disposal & upkeep, water supply, sewerage system and drainage system, lighting facilities for the common area and internal roads, maintenance and upkeep of internal roads, pathways, boundary walls / fencing, horticulture, provision of general watch and ward within esencia (collectively referred to as "maintenance services). Further, it is clarified that the cost of provision for power back up to 6KVA subject to earnest money deposit, which is being provided by the company, the individual water/ sewer connection charges are not included either in the sale consideration or in the maintenance charges. Similarly, the club membership/usage of club facilities, IFMS, etc. are not included in the sale consideration and shall be payable by the buyer separately."

23. The reading of the above clause shows that the amount towards maintenance charges being demanded by the promoter shall be utilized towards the upkeep and maintenance of the project, its common areas, utilities, equipment's installed in the building and such other facilities forming the part of the project. The maintenance of the project is essential to enjoy the basic facilities provided in the project by the promoter. Therefore, while providing these essential services, the promoter would be required to maintain sufficient funds with him. In order to meet these expenses, the demand of the promoter raised on the allottee to pay advance maintenance charges for a certain period cannot by any stretch of imagination be said to be unreasonable or unjustified.

F.V. Direct the respondent not to charge ₹ 40,000/- miscellaneous expenses not agreed between the parties and not to charge ₹ 2,19,600/- on account of cost of escalation unlawfully without providing any justification.

24. In the present matter although the complainant has mentioned about the amount of ₹ 40,000/- charged under miscellaneous head but there



is no documentary proof of the charges. Therefore, the authority cannot deliberate upon the said relief. As far as the cost of escalation is concerned then it will be governed by the agreement executed inter se parties. According to clause 3.5 the cost of escalation has to be borne by the allottee and will be based on the prescribed formula. Therefore, the respondent is right in charging the said amount on account of cost escalation however the complainant has right to know the calculation of the said amount.

G. Directions of the authority

25. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations casted upon the promoters as per the functions entrusted to the authority under section 34(f):

- a. The respondent is directed to pay the interest at the prescribed rate i.e., 10.750% per annum for every month of delay on the amount paid by the complainant from due date of possession i.e., 15.08.2016 till the expiry of 2 months from the date of issuance of occupation certificate i.e., 04.03.2017.
- b. The arrears of such interest accrued from 15.08.2016 till 04.03.2014 shall be paid by the promoters to the allottee within a period of 90 days from date of this order.
- c. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- d. The rate of interest chargeable from the complainant /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 allottees, in case of default i.e., the delay possession charges as per section 2(za) of the Act.

- e. The respondent is directed not to place any condition or ask the complainant to sign an indemnity of any nature whatsoever, which is prejudicial to the rights of the complainant as has been decided by the authority in complaint bearing no. **4031 of 2019 titled as Varun Gupta V. Emaar MGF Land Ltd.**
- f. The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement. However, holding charges shall not be charged by the promoters at any point of time even after being part of agreement as per law settled by **Hon'ble Supreme Court in civil appeal no. 3864-3889/2020.**
26. Complaint stands disposed of.
27. File be consigned to registry.

V.I - S
(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 13.07.2023