

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

Complaint no.: 871 of 2020
Date of filing of complaint: 02.03.2020
Order reserved on:- 02.05.2023
Order pronounced on:- 25.07.2023

Ocus Skyscrapers Realty Limited
Office at : Ocus Technopolis Building, Golf Course Road,
Sector 54, Gurgaon, Haryana

Complainant

Versus

1. Mrs. Richa Sharma
2. Mrs. Usha Sharma
Both R/o P-6/1, DLF City, Phase 3, Gurgaon

Respondents

CORAM:

Shri Ashok Sangwan
Shri Sanjeev Kumar Arora

**Member
Member**

APPEARANCE:

Sh. Lokesh Bhola (Advocate)
Sh. Nitin Jaspal (Advocate)

**Complainant
Respondents**

ORDER

1. This complaint has been filed by the complainant/promoter 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 of section 19(10) of the Act wherein it is inter alia



prescribed that the allottee shall take physical possession of the apartment, plot or building as the case may be, within a period of two months of the occupancy certificate issued for the said unit. Also, the obligation of allottee to make necessary payments in the manner and within time as specified in the agreement for sale under section 19(6) and to pay interest, at such rate as may be prescribed, for any delay in payments as per section 19(7) of the Act.

2. The complainant-builder dated 02.03.2020 had filed the complaint against the allottees/respondents to make the balance payment and to take possession of the unit alongwith holding charges. After taking reply and presuming the case file, the complaint was disposed off vide order dated 03.08.2021, with a direction to the respondents/allottees "It has been brought on record that the promoter had been issuing request for payment/instalments as per construction linked plan but nothing tangible has happened on the part of the allottee at length, as such, the promoter has no choice but to cancel the unit. The allottee wants to wriggle out from the project as he has no sufficient funds to make the balance payment to the builder and as such the builder has no choice but to refund the balance amount after deducting 10% of the paid up amount, as per the provisions of RERE Regulation No' 11 RERA GGM Regulation 2018 dated 05.12.2018. As such the matter stands disposed of. File be consigned to the registry." Felling aggrieved with the same, the order

was challenged by the complainant/promoter before the Haryana Real Estate Appellate Tribunal, Chandigarh and who vide order dated 16.05.2022, set aside the same with a direction to the authority for fresh decision of the complaint in accordance with law. So, in pursuant to those directions, both the parties put in appearance before the authority. It is expected that the learned authority after going through the pleadings, evidence available on record and hearing the parties, would adjudicate the controversy between the parties, expeditiously by handing down a detailed and speaking order, to avoid any further delay in the disposal of the complaint as per provisions of law. Therefore, the complaint is being deal with the authority.

A. Unit and project details

3. The particulars of unit, sale consideration, the amount paid by the respondents, 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	Ocus 24K, Main Sohna Road, Sector 68, Gurgaon
2.	Project area	4.44 acres
3.	Nature of the project	Commercial Project
4.	DTCP license no. and validity status	76 of 2012 dated 01.08.2012 valid up to 27/10/2022

5.	Name of licensee	M/s Perfect Constech Private Limited
6.	RERA Registered/ not registered	Registered vide no. 220 of 2017 dated 18.09.2017 valid upto 17.09.2022
7.	Unit no.	161 on upper ground floor (Page no. 45 of the complaint)
8.	Unit area admeasuring	311 sq. ft. (super area) (Page no. 45 of the complaint)
9.	Date of application form	19.06.2013 (Page no.21 of complaint)
10.	Date of execution of BBA	30.12.2013 (Page no. 40 of the complaint)
11.	Possession clause	<p>11(a) Schedule for possession of the Said Unit</p> <p>The Company based on its present plans and estimates and subject to all just exceptions endeavours to complete construction of the Said Building/Said Unit within a period of sixty (60) months from the date of this agreement unless there shall be delay or failure due to department delay or due to any circumstances beyond the power and control of the Company or Force Majeure conditions including but not limited to reasons mentioned in clause 11(b) and 11(c) or due to failure of the Allottee(s) to pay in time the Total Price and other charges and dues/payments mentioned in this Agreement or any failure on the part of the Allottee(s) to abide by all</p>

		or any of the terms and conditions of this Agreement.
12.	Due date of possession	30.12.2018
13.	Total sale consideration as per payment plan	34,51,788/- (Page no. 71 of complaint)
14.	Amount paid by the respondents	Rs.17,27,508/- (As per final statement of account dated 18.07.2019 at page 121 of the complaint)
15.	Occupation certificate received on	17.07.2019
16.	Offer of possession	18.07.2019
17.	Pre-cancellation letter sent on:-	28.09.2020 (As per written submission of the respondent/allottee)

B. Fact of the complaint

4. The complainant has made the following submissions: -

- i. That the complainant launched its project "OCUS 24K" for the development, construction and marketing of commercial buildings consisting of office/ retail space(s) /service apartment(s) / other commercial/parking space(s) (hereinafter referred to as "the said Complex" in Sector-68, Sohna Road, Gurugram, Haryana. That the respondents showed interest in the said complex and applied for a



Retail Space bearing No.UG-161 vide Application dated 19.06.2013, admeasuring 311 sq. ft. (approx.) i.e. 28.89 sq. mtr. in the said complex of the complainant and also made a payment of Rs.4,00,000/- towards the same vide cheques bearing Nos.749298 and 012912 of Rs.2,00,000/- each drawn on Punjab National Bank and ICICI Bank respectively.

- ii. Thereafter, the respondents entered into a buyer's agreement with the complainant on 30.12.2013 for the unit No.UG - 161 in the project "Ocus 24K" and the complainant allotted the above said retail space provisionally for a total sale consideration is Rs.34,51,788/- which includes BSP, EDC & ICD, IFMS, Sinking Fund, Electricity Connection Charges, excluding Service tax. That the Respondents made a further payment of Rs.6,76,640/- vide cheque bearing No.018323 drawn on Bank of Maharashtra for which the complainant issued a receipt on 30.12.2013.
- iii. That thereafter the complainant sent a demand letter cum service tax invoice to the respondents requesting for instalment of rs.7,94,955/- as per the agreed "Payment Plan" to which the Respondents raised several objections vide e-mail dated 23.04.2014 written to the complainant and denied to make the payment.



- iv. That the complainant replied to the e-mail dated 23.04.2014 of the respondents thereby clearing the issue and objections of the respondents and also requested them to visit its site on the date and time suitable to the respondents regarding their objections, after which the respondents made the above mentioned payments through two different cheques bearing No.012917 dated 28.04.2014 for an amount of Rs.3,96,817/- and another cheque bearing No.012918 dated 10.05.2014 for an equal amount both drawn on ICICI Bank and the complainant issued the receipts of both the cheques on 16.07.2014 to the respondents.
- v. That the respondents have made a total payment of Rs.17,27,509/- till date to the complainant through different cheques on different dates, the details of which has already been provided in the preceding paras. That as per the builder buyer agreement dated 30.12.2013, the complainant has provisionally allotted a Retail Space bearing No.UG - 161 having an area of 311 sq. ft. (approx.) to the respondents. That as per para 11 of the buyer's agreement, the complainant had agreed to deliver the possession of the said unit within 60 months from the date of signing of the buyer's agreement dated 30.12.2013 with an extended / grace period of 6 months.
- vi. That the complainant sent a reminder letter dated 18.04.2015 as per the agreed "payment plan" requesting the respondents to pay

- an instalment of rs.4,85,736/-. Failing to make the above-mentioned payment, the complainant sent another reminder letter dated 13.05.2015 requesting the respondents to make a payment of Rs.4,90,720/- . The complainant sent a final opportunity letter dated 30.06.2015 to the respondents to pay the overdue amount of Rs.5,00,291/- immediately to avoid cancellation/termination of the booking and forfeiture of earnest money and other charges as per the terms of application/agreement.
- vii. That after waiting for 2 years for payments from the respondents, the complainant again sent a reminder letter dated 30.06.2017 to the respondents to make a payment of Rs.10,20,461/- as per the agreed payment plan. Second reminder letter dated 21.07.2017 was sent to the respondents requesting them to make a payment of rs.10,30,218/- but the respondents again failed to make the payment. A Final Opportunity Letter dated 18.08.2017 was sent to the respondents to make a payment of Rs.10,43,228/- immediately to avoid cancellation/termination of the booking and forfeiture of earnest money and other charges as per the terms of application/agreement.
- viii. That hoping that the respondents would make the outstanding payments on possession of their unit, the complainant offered possession of the unit bearing No.UG - 161 to the respondents vide

letter dated 18.07.2019 along with the final statement of account and requested the respondents to clear the outstanding dues of their unit on or before 08.08.2019 and take over the possession of them after completing possession formalities. That thereafter, the complainant had sent several reminder letters dated 10.08.2019, 30.08.2019, 04.10.2019 and 22.11.2019 and e-mails to the respondents demanding outstanding payments due towards their unit failing which holding charges @ rs.20/- per sq. ft. per month will be applicable on them.

- ix. That till date, the Respondents have not made any payment towards the outstanding dues and also did not reply to any of the letters and e-mails of the Complainant. It is most respectfully submitted that the respondents have miserably failed to make the final outstanding payments of Rs.29,98,549/- till the date of the filing of the present complaint to the complainant and does not wish to take possession of the said unit which can be clearly seen from the failure to respond to the reminder letter and e-mails by the complainant.

C. Relief sought by the complainant/Promoter

5. The complainant has sought the following relief sought: -
- i. Direct the respondent to make the payments per the Final Demand Notice amounting to Rs.20,98,940/- along with Statutory

Charges with prescribed rate of interest from the date when the amount became due and take immediate possession of their unit.

- ii. Direct respondent to pay Holding Charges @ Rs.20/sq.ft. per month from the date of offer of possession till the date of actual possession of the unit.

D. Reply by the respondent

6. The respondents have contested the complaint on the following grounds:-

- i. That the respondents booked the said retail space from the complainant in the commercial project namely "OCUS 24K" at Sector 68, Gurgaon Haryana on 19th June 2013 in the total sale consideration of Rs. 34,51,788/- including Basic sale price, fixtures and fittings, EDC & IDC and IMFS charges. On dated 19.06.2013, the respondents paid the booking amount of Rs. 4,00,000/- to the complainant.
- ii. That even though the BBA was not signed and executed, within one month of the booking of the said unit, the complainant demanded the next installment of the said unit from the respondents. Respondent made further payment of Rs. 5,33,875/- on 01.08.2013 to the complainants in good faith and considering that the BBA would be executed in due course and the project will be delivered on time. The respondents further submits that during the last week of Dec 2013, when the BBA was executed , the respondents came to know that the possession

date would be with effect from the date of signing of agreement not from the date of booking of the unit and further it is pertinent to mention here that the time gap between the date of booking of the apartment and the date of execution of BBA is 6 months i.e. 30.12.2013 and the complainant arbitrarily and for their own illegal gains and illegal benefits delayed the execution of the Builder Buyer Agreement by 6 months. Only upon seeing the Builder Buyer Agreement the respondents noticed that it is one sided and biased and in favour of the complainant. The respondents further submits that the due date of handing over the possession of the unit is 60 months as per BBA is also contradict the provisions of RERA Act which says that the maximum time to complete a project is 36 months.

- iii. That one of the respondent Mrs. Usha Sharma is house wife of age 62+ year, she is a heart patient and a Senior Citizen, she even went through a bypass surgery and she also went through angioplasty treatment at Medanta, The Medicity, Gurugram has very serious medical problem which requires her to spend more money on her medical expenses. Therefore, in view of the above circumstances in order to meet the medical expenses, the respondents want to withdraw from the above said project and wants to get refund of the entire consideration amount paid to the complainant.
- iv. That the complainant on dated 18.04.2015, raised a demand of Rs. 4,85,736/- to the respondents which was due at the time of casting of the ground floor slab but again the demand raised by

- the complainant much before than it was actually due. That the respondents even received a loan sanctioned from ICICI bank dated 17.07.15 as a backup plan for the payments of legitimate demands of the complainant.
- v. That the total consideration of the unit was Rs.34,51,788/- of which the respondents have already made a payment of Rs.17,27,509/- to the complainant. The respondents never made the delayed payments to the legitimate demands of the complainant. But the complainant had miserably failed to deliver the possession of the unit within the time frame as stipulated in the agreement. The complainant is well aware about the fact that the offer of possession of the unit is long delayed as per the BBA and if the respondents moved to the AO, HRERA then the complainant has to refund the entire consideration amount to the respondents along with interest. It is therefore the complainant who moved before the authority to seek directions to take possession and to pay the holding charges by the respondents.
- vi. Further it is pertinent to mention here that the complainant sent a Pre-cancellation letter dated 28.09.2020, to the respondents with a unlawful demand of Rs 32,22,943 /- while the matter is pending before the court. So, the complainant is contradicting himself on one hand asking court to order respondent to take possession and on other hand sending pre cancellation letter to the respondents.

7. Copies of all the documents have been filed and placed on record. The authenticity is not in dispute. Hence, the complaint can be decided on basis of these undisputed documents.

E. Jurisdiction of the authority

8. 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

9. 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

10. 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.

11. 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.
12. 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. 2020-2021 (1) RCR (C), 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."

13. 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 complainant/promoter

F.1 Relief sought by the complainant: The complainant has sought the following reliefs:

- i. Direct the respondent to make the payments per the Final Demand Notice amounting to Rs.20,98,940/- along with Statutory Charges with prescribed rate of interest from the date when the amount became due and take immediate possession of their unit.

14. **Due date of possession :-** Clause 11(a) of the buyer's agreement provides for time period for handing over of possession and is reproduced below:

11(a) Schedule for possession of the Said Unit

*The Company based on its present plans and estimates and subject to all just exceptions endeavours to complete construction of the Said Building/Said Unit within a period of **sixty (60) months from the date of this agreement unless there shall be delay or failure due to department delay or due to any circumstances beyond the power and control of the Company or Force Majeure conditions including but not limited to reasons mentioned in clause 11(b) and 11(c) or due to failure of the***

Allottee(s) to pay in time the Total Price and other charges and dues/payments mentioned in this Agreement or any failure on the part of the Allottee(s) to abide by all or any of the terms and conditions of this Agreement.

(Emphasis supplied)

15. The promoter has proposed to hand over the possession of the said unit within 60 months from the date of execution of buyer's agreement. The buyer's agreement was executed on 30.12.2013. The period of 60 months expired on 30.12.2018. Therefore, the due date of possession comes out to be 30.12.2018. On perusal of documents on record, it is observed that the occupation certificate of the said project was granted by the competent authority on 17.07.2019 and the complainant/promoter has offered possession of the subject unit to the respondents-allottees on 18.07.2019. However, the respondents allottees have failed to abide by the terms and conditions of the buyer's agreement by not making the payments in timely manner as per the payment plan opted by them and by not taking the possession of the unit in question as per the terms and conditions of the buyer's agreement, Further, despite repeated follow-ups by the promoter and having performed its contractual obligations, the respondents-allottees withheld to perform their contractual obligation. The respondents allottees have failed make the requisite payment as per the provision of section 19(6) of the Act and as per section 19(7) of the Act to pay the interest at such rate as may be prescribed for any delay in payments towards any amount or charges to be paid under sub-section 19(6).

Section 19(6) and 19(7) reads as under:

"Section 19: - Right and duties of allottees.-

.....

- (6) *every allottee, who has entered into an agreement for sale to take an apartment, plot or building as the case may be, under section 13[1] shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity ,charges, maintenance charges, ground rent, and other charges, if any.*
- (7) *the allottee shall be liable to pay interest, at such rate as may be prescribed, for any delay in payment towards any amount or charges to be paid under sub-section (6).*

16. As per clause 8 of the buyer's agreement, the respondents-allottees was liable to pay the instalment as per construction linked payment plan opted by them. Clause 8 of the agreement is reproduced under for ready reference:

Clause 8. Time is essence

The Allottee(s) agrees that time is essence with respect to payment of Total Price and other charges, deposits and amounts payable by the Allottee(s) as per this Agreement and/or as demanded by the Company from time to time and also to perform/observe all the other obligations of the Allottee(s) under this Agreement. The Company is not under any obligation to send any reminders for the payments to be made by the Allottee(s) as per the schedule of payments and for the payments to be made as per demand by the Company or other obligations to be performed by the Allottee(s).

17. The authority observes that the possession of the unit was offered to respondents-allottees on 18.07.2019 and despite repeated reminders to the respondents-allottees, they are not coming forward to clear the outstanding dues and to execute conveyance deed.
18. However, the respondents-allottee states in reply filed on 20.03.2020, that due to financial crunch, the allottee does not want to continue with the project.

19. The authority is of view that in the present complaint, the respondents/allottees have made their intention clear to withdraw from the project by filing reply to the present complaint. As far as contention of the complainant regarding obligation of the respondents-allottee to take possession is concerned, the authority is of view that no one can be forced to purchase a house but as the respondents themselves are at default in making the payment as per the payment schedule and still they intend to withdraw from the project which will amount to the breach of the contract on their part. This has also been observed by the appellate tribunal in appeal no. 255 of 2019 case titled as **Ravinder Pal Singh V/s Emaar MGF Land Ltd, & anr.** wherein it is stated as follows:

"32. However, nobody can be forced or compelled to purchase the house, but as the appellant himself is at default in making the payment as per the payment schedule and if he still intends to withdraw from the project out of his own which will amount to the breach of the contract on his part, in that eventuality he will be entitled for refund of the amount paid by him after forfeiting 10% of the basic sale consideration, which will be considered to be the reasonable earnest money amount and after deducting the statutory dues already deposited with the government"

20. The Hon'ble Apex court of the land in cases of **Maula Bux Vs. Union of India (1973) 1 SCR 928** and **Sirdar K.B Ram Chandra Raj Urs Vs. Sarah C. Urs, (2015) 4 SCC 136**, and followed by the National Consumer Dispute Redressal Commission, New Delhi in consumer case no. 2766/2017 titled as **Jayant Singhal and Anr. Vs. M/s M3M India Ltd.** decided on 26.07.2022, took a view that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in nature of penalty, then provisions of Section 74 of Contract Act, 1872 are

attracted and the party so forfeiting must prove actual damages. After cancellation of allotment, the flat remains with the builder as such there is hardly any actual damage. So, it was held that 10% of the basic sale price is reasonable amount to be forfeited in the name of earnest money. Keeping in view, the principles laid down by the Hon'ble Apex court in the above mentioned two cases, rules with regard to forfeiture of earnest money were framed and known as Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018, which provides 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.

21. Hence, keeping in view of the aforesaid factual and legal provisions, the authority hereby directs the complainant-promoter to return the paid-up amount of Rs. 17,27,508/- to the respondents-allottees after deduction of 10% of the sale consideration. The complainant-promoter is further directed to pay an interest on the balance amount at the rate of 10.75% p.a. (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 filing of reply to the present complaint i.e., 20.03.2020 till the actual date of refund of the amount within the timelines provided in rule 16 of the rules, 2017. A period of 90 days is given to the complainant -builder to comply with the directions given in this order and failing which legal consequences would follow.

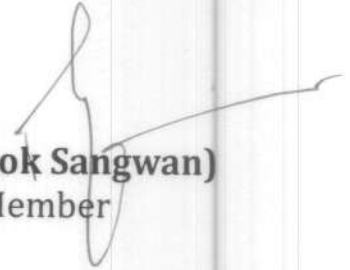
G. Directions of the authority

22. 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 complainant-promoter is directed to refund the paid-up amount of Rs. 17,27,508/- to the respondents-allottee after deducting 10% of the sale consideration of the unit by deducting the earnest money as per regulation Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018 along with an interest @ 10.75% p.a. as prescribed under rule 15 of the rules, 2017 from the date of filing of reply to the present complaint i.e., 20.03.2020 till the actual date of refund of the amount within the timelines provided in rule 16 of the rules, 2017.
- ii. A period of 90 days is given to the complainant-promoter to comply with the directions given in this order and failing which legal consequences would follow.

23. Complaint stands disposed of.
24. File be consigned to registry.


(Sanjeev Kumar Arora)
Member


(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 25.07.2023



HARERA
GURUGRAM