



**HARERA**  
**GURUGRAM**

Complaint No. 924 of 2022

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

**Complaint no.:** 924 of 2022  
**First Date of Hearing:** 07.12.2022  
**Order reserved on:** 13.07.2023  
**Order Pronounced on:** 28.09.2023

1. Mrs. Mansi Bhutani  
2. Mr. Manoj Bhutani

**R/o:** - H. No. 435, Ground Floor, Sector-31, Gurgaon,  
Haryana-122001

**Complainants**

Versus

**NINANIYA ESTATES LIMITED**

Office at: Prism Tower, Tower A, 6<sup>th</sup> floor, Sector 2, Gwal  
Pahari, Gurgaon - 122003

**Respondent**

**CORAM:**

Shri Vijay Kumar Goyal

**Member**

**APPEARANCE:**

Sh. Sanjeev Sharma (Advocate)  
Sh. Shagun Singla (Advocate)

**Complainants**  
**Respondent**

**ORDER**

1. This complaint has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provisions of the Act or the Rules and regulations

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made there under or to the allottee as per the agreement for sale executed *inter se*.

**A. Unit and project details**

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

S. N.	Particulars	Details
1.	Name of the project	Prism Hotels & Suits, Gwal Pahari, Sector 2, Gurgaon
2.	Project area	20876.97 sq. yds
3.	Nature of the project	Commercial
4.	RERA Registered/ not registered	Not registered
5.	Unit no.	102 and 202, 1 <sup>st</sup> and 2 <sup>nd</sup> floor (As per page no. 21 of the complaint)
6.	Unit area admeasuring	1900 sq. ft. (super area) (As per page no. 21 of the complaint)
7.	Dae of provisional allotment	N/A
8.	Date of execution of BBA and MoU	29.03.2017 (As per page no. 19 and 32 of the complaint)
9.	Completion of building	<b>6. "COMPLETION OF THE BUILDING"</b> <i>In 6(i) no specific date is mentioned but is written as earliest possible, whereas,</i>

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		<i>As per 6 (ii) In case the building is not completed within 24 months / indefinitely delayed, then it will be the Buyer's option whether to accept the cancellation or claim back the amount paid with interest @ 24% (which is being paid on monthly basis)</i>
10.	Possession clause	<b>Clause 9</b> <i>The buyer shall be entitled to the possession of the said unit only after the payment of entire sale consideration as payable under this agreement. The buyer shall execute an undertaking to pay External Development charges, Internal Development charges as demanded by the company.</i>
11.	Assured Return clause	<b>Clause 6 of MoU:</b> <i>The developer shall pay an assured return @ Rs. 2,00,000/- per month on or before 1<sup>st</sup> of every month after the expiry of the month for which it shall fall due w.e.f. 07.01.2017 till the possession of the fully furnished suite under reference is handed over to the buyer.</i>
12.	Total sale consideration	Rs.1,00,00,000/- excluding all applicable tax (As per page no. 21 of the complaint)
13.	Amount paid by the complainants	Rs.1,00,00,000/- (As per page no. 33 of complaint)
14.	Due date of possession	<b>Cannot be ascertained</b>



15.	Occupation certificate /Completion certificate	20.04.2017 (As per page no. 44 of reply) Issuance of part OC by Municipal Corporation Gurugram
16.	Offer of possession	Not offered
16.	Full and Final Settlement Deed	06.10.2020 (As per page no. 36 of the complaint)

**B. Fact of the complaint**

3. The complainants have made the following submissions: -

- I. That the complainants on 29.03.2017 had booked a suite bearing no. 102 & 202 in the project called as "Prism Hotels & Suits" admeasuring approximately 1900 sq. ft. and the respondent was responsible for development and conceptualization of Prism Hotel & Suites claiming to Five Star Hotel and Suites Complex admeasuring 20876.97 sq. yds. approx. in the revenue estate of Gwal Pahari, Distt. Gurgaon (along the Gurgaon - Faridabad Scheduled Road).
- II. That the complainants on the request of the respondent had made the payment of Rs. 1,00,00,000/- at the time of booking and the respondent had assured that the complainants will get an investment return of Rs. 2,00,000/- per month for a maximum period of 12 months from the date of booking and if there is delay the complainants will get assured return amount till the fully furnished said unit is handed over to the complainants.
- III. That the complainants and the respondent has again agreed in MoU dated 29.03.2017 that the complainants would get investment return

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of Rs. 2,00,000/- per month till the fully furnished said unit is handed over to him.

- IV. That as per the terms and conditions of the buyer's agreement and MoU it was agreed that the complainants have all the rights to transfer the said unit to third party and further, they have right to recover the assured investment return till the time of possession is not handed over to the complainants of said unit.
- V. That the complainants visited the respondent many a time however the respondent refused to pay the assured return. The respondent neither handed over the possession of the said unit nor paying the amount assured at the time of booking.
- VI. That the due date of delivery of possession of the said units in question was March 2020. The complainants after passing of the due date for delivery of possession visited the office of the respondent on various occasions and had requested its official's multiple times to handover the possession and for the payments of assured investment return in terms of the said agreement and MoU. They have kept on evading the queries raised by the complainants on one pretext or the other, in order to leave no option for the complainants to back out of the transaction.
- VII. That the aforesaid act of the respondent is violative of Section 13 of the Act, 2016. Furthermore, it is submitted that the aforesaid practice has been adopted by the builders/developer/promoters including the Respondent invariably in order to gain an undue advantage and assume dominance over an intending purchaser. The aforesaid provision has been incorporated in the Act in order to curb such

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malpractices of obtaining part or full consideration amount prior to execution of the buyer's agreement.

- VIII. That the complainants on the instructions of the respondent had made 100% payment as demanded prior of booking the said unit to the respondent.
- IX. That the due date for delivery of possession of the said units in terms of the buyer agreement was 29.03.2020. However, the possession has not been offered to complainants by the respondent till date.
- X. That the units in question were not offered timely and another MoU/Full and final settlement got executed between the complainants and the respondent and two others dated 06.10.2020 wherein the respondent agreed to buy-back the unit 102 wherein the respondent was to pay Rs.81,72,855/- which includes Rs.70,00,000/- towards refund of the principal amount and Rs. 11,72,855/- towards assured return and the TDS deducted by the respondent on assured return shall be paid by 31.03.2021 along with realization of the full amount also by 31.03.2021.
- XI. That further vide separate MoU/ Full and final settlement dated 06.10.2020, the respondent agreed to buy-back unit 202 and make payment of amount of Rs.54,80,000/- which includes Rs.40,00,000/- towards refund of the principal amount and Rs.14,80,000/- towards assured return by 31.03.2021.
- XII. That it is submitted that the respondent with complete illegal malafide intent made the complainants execute the MoU whereas the respondent never intended to refund the monies paid by the complainants and therefore, one year has already elapsed for making

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the full and final payment by the respondent, yet MoU stands unsatisfied till date.

XIII. That the complainants have approached this Authority seeking refund of their paid amount with interest. The complainants reserve their right to seek compensation apart from the reliefs claimed hereunder from the appropriate forum.

**C. Relief sought by the complainants**

4. The complainants have sought the following relief sought: -

- i. Direct the respondent to refund the principal amount paid by the complainants i.e., Rs.1,00,00,000/-.
- ii. Direct the respondent to pay total interest due at prescribed rate i.e., MCLR+ 2% till the date of filing of complaint i.e., Rs. 18,60,000/-.
- iii. Direct respondent to pay interest/charges of Rs.77,500/- towards delay in possession to the complainants for the period of delay from March 2020.

**D. Reply by the respondent**

5. The respondent contested the complaint on the following grounds:

- a. That the respondent is a company, registered under the Companies Act, 1956 having its registered office at PRISM TOWER, Tower- A, 6th Floor, Sector- 2, Gwal Pahari, Gurugram - Faridabad Road, Gurugram, Haryana - 122003.
- b. That at the very outset it is submitted that the present complaint is not maintainable or tenable in the eyes of law. The complainants have misdirected himself in filing the above captioned complaint before this Authority as the reliefs being claimed by the complainants cannot be

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said to fall within the realm of jurisdiction of this Authority. It is pertinent to mention here that for the fair adjudication of grievance as alleged by the complainants requires detailed deliberation by leading the evidence and cross-examination, thus only the Civil Court has jurisdiction to deal with the cases required detailed evidence for proper and fair adjudication.

- c. That the complainants came to the officials of the respondent for booking a unit in one the most coveted projects of the respondent company and complainants submitted the application form and paid the booking amount accordingly. That at the time of signing the application form, the respondent officials clarified and explained in detail all the terms and conditions of the application form. Thus, the complainants is not entitled for the relief which he is seeking by the way of the present complaint as he is already seeking the claim of assured return in respect of the unit in question and the present petition is not maintainable under the provisions of the Act, 2016.
- d. That it is pertinent to mention that the present complaint is not maintainable before this Authority as it is crystal clear from reading the complaint that the complainants are not 'Allottees', but are 'Investors', who are only seeking assured return from the respondent, by way of present petition, which is not maintainable under the provisions of the RERA Act, 2016. They themselves have admitted the fact that they had invested in the project of the respondent.
- e. That in view of the judgment and order dated 16.10.2017 passed by the Maharashtra RERA Authority in the complaint titled **Mahesh Pariani vs. Monarch Solitaire order, Complaint No:**

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CC00600000000078 of 2017 wherein it has been observed that in case where the complainants have invested money in the project with sole intention of gaining profits out of the project, then the complainants are in the position of co-promoter and cannot be treated as 'allottee'. Thus, in view of the aforesaid decision, the complainants could not and ought not have filed the present complaint being a co-promoter.

- f. That further in the matter of *Bharam Singh & Ors vs. Venetian LDF Projects LLP (Complaint No. 175 of 2018)*, the Hon'ble Real Estate Regulatory Authority, Gurugram upheld its earlier decision of not entertaining any matter related to assured returns.
- g. That the complainants are attempting to seek an advantage of the slowdown in the real estate sector, and it is apparent from the facts of the present case that the main purpose of the present complaint is to harass the respondent by engaging and igniting frivolous issues with ulterior motives to pressurize the respondent. Thus, the complaint is without any basis and no cause of action has arisen till date in favour of the complainants and against the respondent and hence, the complaint deserves to be dismissed.
- h. That from the bare reading of the buyer's agreement executed between the parties, it is clearly visible that the intention of the complainants has never been to take possession and only to gain assured returns. The respondent has already completed the unit/project in question. Moreover, the respondent has already received the occupation certificate in respect of the unit in question on

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20.04.2017 which is much prior to the coming of HRERA rules and regulations.

- i. That the sole motive of the complainants is to get profits from the project by the way of assured returns scheme. Thus, the Complainants shall be treated as co-promoter in the project, in no eventuality, the Complainants may be called as the "Allottee" before this Authority under the definition and provisions of RERA Act, 2016 and, thus, on this ground alone, the present complaint is not maintainable in the eyes of law before this Authority and is liable to be rejected.
- j. That it is brought to the knowledge of the Authority that the complainants are guilty of placing untrue facts and is attempting to hide the true colour of the intention of the complainants. That before signing the agreement the complainants were well aware of the terms and conditions as imposed upon the parties under the buyer's agreement, buy back MoU and Full and final settlement MoU dated 06.10.2020 and only after thorough reading, the said agreement got signed and executed. That the complainants are misrepresenting the true contents of the buyer's agreement to extract from the respondent.
- k. That the complainants are habitual of lodging false and frivolous complaints against the answering respondent before different police stations, courts, departments and authorities in order to extract money by creating pressure on the answering respondent. The complainants had also lodged a false and frivolous complaint bearing no. 3590/CP/21/EML dated 20.03.2021 before Economic Offences Wing Gurugram. A Full and final settlement deed dated 06.10.2020 was executed between the respondent company and the complainants

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whereby all the disputes in respect of the units in question were settled amicably between the parties to the complaint for a sum of Rs.81,72,855/-resulting which the said complaint was closed by the Investigation officer and the complainants exited from the project way back in the year 2020 and accordingly the allotment was duly cancelled by the respondent company. That in compliance of the terms and conditions of the Full and final settlement deed dated 06.10.2020 executed between the respondent company and the complainants, the respondent company has already paid a sum of Rs. 72,22,852/- and the complainants have concealed the said facts from the Authority.

1. That, it is evident that the entire case of the complainants is nothing but a web of lies and the false and frivolous allegations made against the respondent are nothing but an afterthought, hence the complaint filed by the complainants deserves to be dismissed with heavy costs.
6. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.

#### **E. Jurisdiction of the Authority**

7. The respondent has raised a preliminary submission/objection the authority has no jurisdiction to entertain the present complaint. The objection of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. 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**

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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 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.*

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.

11. 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."*

12. 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 for the delayed delivery of possession.

**F. Findings on objections raised by the respondent:**



**F.I Objection regarding the complainants being investors.**

13. The respondent has taken a stand that the complainants are the investors and not consumers. Therefore, they are not entitled to the protection of the Act and are not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumer of the real estate sector. It is settled principle of interpretation that the preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainants are buyers and paid total price of Rs.1,00,00,000/- to the promoter towards purchase of an apartment in its project. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

*"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through*

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*sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"*

14. In view of the above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment application for allotment, it is crystal clear that the complainants are allottees as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred to in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The concept of investor is not defined or referred to in the Act. Thus, the contention of the promoter that the allottee being investor is not entitled to protection of this Act also stands rejected.

**G. Findings on relief sought by the complainant:**

**G.I Settlement deed dated 06.10.2020 executed between the complainants and respondent**

15. A full and final settlement deed was executed between the complainants and respondent on 06.10.2020 in which the respondent agreed to buy back unit no. 202 and to pay the amount of Rs. 54,80,000/- after settling the accounts towards assured return till March 2021. The authority has observed that vide affidavit dated 02.02.2023, an amount of Rs. 9,50,000/- is still due to be paid as per settlement agreement and the respondent has agreed to pay Rs. 54,80,000/- of assured return till March, 2021 and the remaining amount from the settlement agreement after March, 2021.

**G.II Direct the respondent-builder to refund the entire amount paid by the complainants along with interest.**

16. The project detailed above was launched by the respondent as commercial project and the complainants have booked two prism suites i.e., unit no. 102 and 202 on 1<sup>st</sup> and 2<sup>nd</sup> floor against total sale consideration of Rs.

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1,00,00,000/- As per clause 9 of the suites buyer's agreement executed between the parties, the possession of the said unit was to be delivered after the payment of the entire sale consideration and the complainants have already paid the 100% amount of the sale consideration.

17. The promoter has obtained the part occupation certificate way back on 20.04.2017 but he has failed to deliver the possession of the said unit till date. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the allotted unit and for which they have paid a considerable amount towards the sale consideration and as observed by **Hon'ble Supreme Court of India in Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors., civil appeal no. 5785 of 2019**, decided on 11.01.2021

*" .... The occupation certificate is not available even as on date, which clearly amounts to deficiency of service. The allottee cannot be made to wait indefinitely for possession of the apartments allotted to them, nor can they be bound to take the apartments in Phase 1 of the project....."*

18. Further in the judgement of the Hon'ble Supreme Court of India in the cases of **Newtech Promoter and Developers Private Limited Vs State of U.P. and Ors. (2021-2022(1)RCR(Civil),357)** 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 observed as under:

*25. The unqualified right of the allottee to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to*

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*withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed.*

19. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottee as per agreement for sale under section 11(4)(a). The promoter has failed to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottee(s), as the allottee(s) do not want to continue with the project, without prejudice to any other remedy available, to return the amount received by him in respect of the unit with interest at such rate as may be prescribed.
20. This is without prejudice to any other remedy available to the allottee(s) including compensation for which they may file an application for adjudging compensation with the adjudicating officer under sections 71 & 72 read with section 31(1) of the Act of 2016.
21. The authority vide its order dated 27.07.2023 has given an opportunity to the respondent to file the submissions or objections w.r.t to the affidavit dated 02.02.2023 filed by the complainant. But despite ample opportunities, the respondent has neither filed any objections nor put up any appearance. In view of that, the Authority presumed that the respondent is in agreement to the contentions of the complainant.
22. Accordingly, the respondent is liable to refund the due amount of Rs.9,50,000/- as per settlement deed dated 06.10.2020 along with Rs.54,80,000/- towards assured return till March, 2021 and the remaining amount after March, 2021 as per above settlement deed.

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**H. Directions of the authority:**

23. Hence, the authority hereby passes this order and issue 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/promoter is directed to refund the due amount of Rs.9,50,000/- as per settlement deed dated 06.10.2020 along with Rs.54,80,000/- towards assured return till March, 2021 as per above settlement deed.
- ii) The respondent is further directed to pay the remaining amount after March, 2021 as per above settlement deed.
- iii) A period of 90 days is given to the respondent-builder to comply with the directions given in this order and failing which legal consequences would follow.
- iv) The respondent is further directed not to create any third-party rights against the subject unit before full realization of paid-up amount along with interest thereon to the complainants, and even if, any transfer is initiated with respect to subject unit, the receivable shall be first utilized for clearing dues of allottee-complainants.

24. Complaints stand disposed of.

25. File be consigned to registry.

  
(Vijay Kumar Goyal)  
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 28.09.2023