

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

Complaint no.: 7028 of 2022
Complaint filed on: 31.10.2023
Date of decision : 12.10.2023

Jawahar Lal Mehra

R/o: - House No. 87, Block-D, Multitech Towers,
Sector-91, Mohali, Punjab

(Through Special Power of Attorney holder Mr.
Sanchit Mehra)

Complainant

Versus

M/s Aaliyah Real Estates Private Limited

Regd. office at: Corporate One, Ground Floor, Plot No.
5, District Centre Jasola, New Delhi - 110025

Also At: - 271, Udyog Vihar, Phase-2, Gurugram,
Haryana - 122016

Respondent

CORAM:

Shri Vijay Kumar Goyal

Member

APPEARANCE:

Shri Ashish Budhiraja (Advovate)

Shri Somesh Arora (Advocate)

**Complainant
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 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions to the allottee as per the agreement for sale executed inter-se them.

A. Unit and Project related details:



2. The particulars of the project, the details of 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. N.	Particulars	Details		
1.	Name of the project	"Baani City Centre"		
2.	Project location	Sector 63, Village Maidawas, Gurugram, Haryana		
3.	Nature of the project	Commercial Colony		
4.	DTCP license no. and validity status	80 of 2010 dated 15.10.2010		
		Valid up to 14.10.2023		
5.	Name of licensee	M/s Aaliyah Real Estate Pvt. Ltd. (BIP Holder vide order dated 04.01.2016)		
6.	RERA registration details	Applied on 28.01.2022		
7.	Allotment letter	01.01.2013		
		[As per page no. 61 of reply]		
8.	Unit details			
	S.no.	Unit no.	Unit Area	Documentary proof
	a	811	1179 sq. ft.	[As per allotment letter on page no. 61 of reply]
	b.	707 on 7 th floor, tower-IKON	1180 sq. ft.	[As per buyer's agreement on page no. 37 of complaint]
	c.	811	-	As alleged by the complainant that vide letter dated 23.02.2016, its allotment was changed; on page no. 09 of complaint

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				(As per page no. 56, vide letter dated 23.02.2016, demand was raised against allotment of unit no. 707 only)
9.	Date of builder buyer's agreement	29.02.2014		[As per page no. 36 of complaint]
10.	Possession clause	2. Possession 2.1 The intending seller, based upon its present plans and estimates, and subject to all exceptions, proposes to handover possession of the commercial space within a period of forty-two (42) months from the date of approval of building plans of the commercial complex or the date of execution of this agreement, whichever is later ("commitment period"). Should the possession of the commercial unit not be given within the commitment period due to any reason (except delays mentioned in clause 9 below), the intending purchaser agrees to an extension of one hundred and eighty (180) days ("grace period") after expiry of the commitment period for handing over the possession of the commercial unit.		
11.	Date of building plan	24.01.2013		[As per complaint no. 3416-2020]
12.	Revised payment plan	03.02.2016		[As per page no. 53 of complaint]
13.	Due date of possession	29.02.2018		[Calculated from date of buyer's agreement i.e. 29.02.2014, being later.] Grace period of 180 days is allowed.

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14.	Total sale consideration	Rs.1,12,10,000/- (BSP) Rs.1,20,97,340/- (TSC) [As per payment plan on page no. 46 of complaint]
15.	Amount paid by the complainant	Rs.34,70,901/- [As per statement of account dated 30.11.2022 on page no. 156 of complaint]
16.	Demand letter and reminder letters	26.11.2013, 20.05.2014, 04.07.2014, 12.10.2015, 14.06.2016, 06.07.2016, 27.09.2016 [As per page no. 97-103 of complaint]
17.	Cancellation letter dated	13.02.2019 [As per page no. 109 of reply]
18.	Part occupation certificate	16.01.2018 [As per page no. 54 of complaint]
19.	Notice of possession (Offer of possession)	30.03.2018 [As per page no. 107 of reply]
20.	Legal notice dated	22.03.2019 [As per page no. 117 of reply] <i>The same was duly replied by the respondent.</i>

B. Facts of the complaint

3. The complainant has made the following submissions: -

- I. That in the month of October, 2012, the respondent along with its agent, Raj Kumar Budhiraja of A-1 Properties, having address at 12-A, 1st floor,

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Ninex City Mart, Sohna Road, Gurgaon represented to the complainant that the respondent is in the process of constructing a commercial complex under the name and style "Baani City Center" at Sector-63, Village Maidawas, Gurugram.

- II. That the respondent, acting in criminal conspiracy/common intention and in connivance with each other deliberately and with *mala fide* intentions deceived the complainant by concealing it from the complainant that vide License No. 80 of 2010 granted to the respondent from the Town and Country Planning Department of the Haryana Government (License") qua the said project, the respondent was specifically prohibited from carrying out any advertising and sale pertaining to the project before obtaining the necessary and mandatory approval of layout plan/building plans, a condition precedent set out in the said license.
- III. That with a view to defraud and cheat the complainant as above, the respondent, dishonestly, fraudulently and by exercising deceit and fraud by misrepresentation, obtained a total sum of Rs.34,70,901/- from the period October 2012 till May, 2013 paid vide different transactions.
- IV. That, even having represented it to the complainant that the project would be a construction-linked project, the respondent kept on sending reminders to make further payments, although the complainant was under no obligation whatsoever to make any further payment, since the respondent had failed to commence construction of the project. The respondent was never authorized to carry out the construction of the project since it obtained the approval from the Directorate of Town Planning, Haryana only on 03.02.2016.

- V. That to further defraud the complainant, the respondent made the complainant sign across the dotted lines of the unstamped and unregistered commercial space buyer's agreement dated 24.02.2014. The signature of the complainant was obtained by misrepresentation and total deception on part of the respondent. Some of the clauses in the said agreement which the complainant/buyer was made to sign by the respondent are one sided. The complainant had signed already prepared documents and some of the clauses contained therein are totally unreasonable and in favours of the respondent.
- VI. That pursuant to the said agreement, in an absolutely clandestine and unauthorized manner the respondent kept raising demand letters on the complainant even without commencing work on the project and without obtaining the necessary approvals from the competent authorities only with a view to arm-twist the complainant and usurp the complainant's hard-earned money.
- VII. That vide letter dated 23.02.2016, by pressing on the terms and conditions of the illegally obtained agreement, the respondent further demanded an exorbitant sum of Rs.51,75,589/- from the complainant, but had failed to respond to the queries pertaining to the unit made by the complainant. The respondent unilaterally changed the apartment allotted to the complainant from 811 to 707 without any knowledge or approval of the complainant. Thereafter, the respondent issued a cancellation letter dated 13.02.2019 which went contrary to the representations including apologies made by its representatives to the complainant on the phone.
- VIII. That vide the aforesaid letter dated 13.02.2019, the respondent has admitted the receipt of the payments from the complainant and by

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relying on the said one-sided agreement which was executed by exercising fraud, deceit and misrepresentation, the respondent illegally threatened to forfeit 15% of the total consideration of the unit, which the respondent stated shall be paid to the complainant only after the unit is sold off to a third party. This conduct of the respondent was solely perpetrated to arm-twist the complainant and illegally obtain further sums of money from the complainant and to further cheat and defraud the complainant.

- IX. That the overall conduct of the respondent towards the complainant has been perpetrated solely with the motive of cheating the complainant, and has brought, *inter alia*, undeterminable pecuniary loss to the complainant, from which the respondent has made undue monetary profits illegally and fraudulently, thereby causing a wrongful gain to itself and a wrongful loss to the complainant.
- X. That the complainant sent a legal notice dated 23.03.2019 to the respondent but instead of complying with the same, the respondent got issued a reply thereto vide the reply dated 25.04.2019.
- XI. That the respondent earlier cancelled the unit and offered possession of the said unit on 06.07.2022 and later sent final notice dated 14.07.2022 to the complainant calling upon to pay the remaining dues and for possession, execution and registration of conveyance deed of the changed unit.
- XII. That receiving all the payments of all demands raised by the respondent for the said unit and despite repeated requests and reminders over phone calls and personal visits, the respondent illegally and arbitrarily cancelled the unit of the complainant and in any case failed to deliver

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the possession of the allotted unit to the complainant within the stipulated period.

XIII. That on account of the acts and omissions on the part of the respondent, the complainant has suffered extreme mental pain and agony and also continues to incur severe financial losses. This could be avoided if the respondents had refunded the money of the complainant along with interest, when the same was demanded by the complainant.

C. Relief sought by the complainant:

4. The complainant has sought following relief:
 - i. Direct the respondent to refund the total paid up amount along with prescribed rate of interest.
5. On the date of hearing, the authority explained to the respondent/ promoter about the contraventions 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 has contested the complaint on the following grounds:-
 - I. That on 11.11.2012, the complainant applied for the unit no. 811 admeasuring 1179 sq. ft.in the project "*Baani City Center*". The complainant had signed and understood the indicative terms and conditions of the allotment mentioned in the application form. The said unit was allotted vide provisional allotment letter dated 01.01.2013. It was clearly stated that the allotted unit was a tentative unit

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- II. That vide letter dated 14.08.2013 respondent informed complainant that the area and unit has revised to unit no. 707 admeasuring 1180 sq. ft. (super area). That the complainant did not raised any objection regarding the change in unit and further requested to send builder buyers agreement vide email dated 24.10.2013.
- III. That the respondent sent builder buyers agreement for unit no. 707 admeasuring 1180 sq. ft. (super area) to the complainant on 15.11.2013 which was then signed by the complainant and respondent on 24.02.2014.
- IV. That the respondent has issued several reminders dated 12.09.2013, 04.10.2013, 23.10.2013, 26.11.2013, 20.05.2014, 04.07.2014, 12.10.2015, 14.06.2016, 06.07.2016 and 27.09.2016 for due payments to the complainant. The respondent was left with no option to but to server a final notice dated 19.01.2017 for clearing the outstanding amount.
- V. That the occupation certificate was granted on 16.01.2018 to the respondent after due inspection and verification by the relevant authorities and verifying that it is habitable and has been constructed in accordance with the approved building plan and building sanctions. That after obtaining OC respondent has offered possession on 30.03.2018 to the complainant but complainant refused to come forward to clear due payments and take physical possession of unit.

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- VI. That respondent had already granted extension to the complainant to clear due payments but eventually the respondent cancelled the unit after waiting for long period of time and issue the cancellation notice to the complainant on 13.02.2019.
- VII. That after the complainant issued a legal notice dated 23.03.2019 to the respondent for asking for full refund with interest and threatened to file the present complaint, instead of clearing due payments and taking possession of the unit, the complainant filed a complaint in the District Town Planner (Enforcement) Gurugram and also filed a policy complaint at Udhyog Vihar PS, Gurugram.
- VIII. That the respondent on 17.10.2019, receiving a show cause notice dated 16.09.2019, issued by DTP, Enforcement, Gurugram. The respondent filed the reply to show cause notice and submitted by it to the DTP, Enforcement, Gurugram on 18.10.2019.
- IX. That the respondent again issued final notice for possession latter along with dues on 06.07.2022 and final notice for possession execute all necessary documents on 14.07.2022 to the complainant but the complainant chose to remain silent. Till date the complainant has only paid Rs.34,70,901/- out of the total sale consideration of Rs.1,20,97,340/-.
- X. That the Act of 2016 it is nowhere mentioned that the allottee can withdraw anytime from the project after the possession has been



offered. The occupation certificate was received on 16.01.2018 and the possession was offered on time on 30.03.2018.

XI. That the present complaint was filed in 2022 as an after-thought because if the reason for delay was a ground for refund then the complainant would have communicated through e-mails/letters /notices etc. for refund and would had filed petition prior to offer of possession dated 30.03.2018 whereas the complainant being investor after paying initial amount waited to watch the market sentiments and when found that it is not in his favour then asked for refund after the possession was offered. The complainant neither paid as per terms of BBA nor the respondent had the opportunity to allot the unit to any other third party thus respondent suffered loss both on non-payment as well as blocking of the unit. To add further the complainant should not be entitled for multi-benefits of its wrongs as to non- payment during construction, holding the unit for years altogether and due to its own failure then demand refund. For certain this is not the intent of the Act of 2016 nor this authority has in its previous orders/judgements has encouraged this. Moreover, the Act of 2016 is a balanced legislature and treat both allottee and builder the same. The intent of legislature is to penalise the defaulter and the penalty is for both the allottee and builder.

7. 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

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decided on the basis of these undisputed documents and submissions made by the complainant.

D. Jurisdiction of the authority

8. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint.

D. 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.

D. 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(4)(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 allottee as per the agreement for sale, or to the association of allottee, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottee, or the common areas to the association of allottee or the competent authority, as the case may be;

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottee 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 of 2016 quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation

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which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

E. Findings on the objections raised by the respondent.

E.1 Objection regarding the complainants being investor.

11. The respondent has taken a stand that the complainant is the investor and not consumer, therefore, he is not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondents also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumer of the real estate sector. The authority observed 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 preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time 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. 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 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;"

In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyer's agreement executed between

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promoter and complainants, it is crystal clear that the complainant is allottee(s) as the subject unit was allotted to him by the promoter. The concept of investor is not defined or referred 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". Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected

F. Findings regarding relief sought by the complainant.

F.I Direct the respondent to refund the total paid up amount along with prescribed rate of interest.

12. The complainant was allotted a unit bearing no. 811, vide allotment letter dated 01.01.2013, under construction linked payment plan. Thereafter, a commercial space buyer's agreement was executed between the parties on 29.02.2014 vide which a unit bearing no. 707, 7th floor, having a super area of 1180 sq. ft. was allotted to him. The respondent had unilaterally changed the apartment allotted to the complainant from 811 to 707 without any knowledge or approval of the complainant. He has paid an amount of Rs.34,70,901/- against the basic sale consideration of Rs.1,12,10,000/-. As per clause 2.1 of the agreement, the respondent was required to hand over possession of the unit within a period of 42 months from the date of approval of building plans of the commercial complex or the date of execution of that agreement, whichever is later ("commitment period") along with a grace period of 180 days after expiry of the commitment period for handing over of possession of the commercial unit. Therefore, the due date of possession comes out to be 29.02.2018

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(calculated from date of execution of this agreement i.e., 29.02.2014 being later including grace period).

13. That vide letter dated 23.02.2016, the respondent further made a demand of Rs.51,75,589/- from the complainant, but it had failed to respond to the queries pertaining to the change of unit made by the complainant. Thereafter, the respondent issued a cancellation letter dated 13.02.2019 vide which it illegally threatened the complainant to forfeit 15% of the total consideration of the unit, and the balance if any shall be paid to him only after the unit is sold off to the third party.
14. The respondent submitted that the complainant is a defaulter and has failed to make payment as per the agreed payment plan. Therefore, various reminders and final opportunities were given to the complainant and thereafter the unit was finally terminated vide letter dated 13.02.2019. Accordingly, the complainant failed to abide by the terms of the agreement to sell executed inter-se parties by defaulting in making payments in a time bound manner as per payment schedule. Now, the question before the authority is whether this cancellation is valid or not?
15. The authority has gone through the payment plan, which was duly signed by both the parties. As per payment plan agreed between the parties, the complainant has only paid 30.96% of the basic sale consideration and has paid the last payment on 24.05.2013. Therefore, the authority is of considered view that the respondent is right in raising demands as per payment plan agreed between the parties and the complainant has failed

to fulfil the obligations conferred upon them vide section 19(6) & (7) of the Act of 2016, wherein the allottee was under obligation to make payment towards consideration of allotted unit. The respondent after giving reminders dated 12.09.2013, 04.10.2013, 23.10.2013, 26.11.2013, 20.05.2014, 04.07.2014, 12.10.2015, 14.06.2016, 06.07.2016, 27.09.2016, 19.01.2017, 20.09.2017 given notice for possession to the complainant on 30.03.2018. However, the complainant has failed to take possession and clearing the outstanding dues. Therefore, the respondent cancelled/terminated the unit of the complainant vide letter dated 13.02.2019. The respondent has given sufficient opportunity to the complainant before proceeding with termination of allotted unit. Thus, the termination letter dated 13.02.2019 is held valid in eyes of law.

16. The respondent company had obtained the part completion certificate for the project of the allotted unit was on 16.01.2018. The respondent /promoter issued demands letter and further, issued termination /cancellation letter to the complainant. The respondent cancelled the unit of the complainant after giving adequate demands notices. Further, as per clause 10 of the agreement to sell, the respondent/promoter have right to cancel the unit and forfeit the earnest money in case the allottee breached the terms and conditions of the agreement to sell executed between both the parties. Clause 10 of the agreement to sell is reproduced as under for ready reference.

10. Time is the Essence of this Contract:

Timely Payments by the Intending Purchaser shall be the essence of this Agreement. If the Intending Purchaser neglects, omits or fails for

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any reason whatsoever to pay to the Intending Seller any of the installments or other amounts due and payable to the Intending Seller under the terms and conditions of this Agreement or by respective due dates thereof or if the Intending Purchaser in any other way fails to perform or observe any of the terms and conditions on his part herein contained within the time stipulated or agreed to, the Intending Seller shall be entitled to cancel this Agreement and forfeit the Earnest Money."

17. The respondent company had obtained the occupation certificate for the project of the allotted unit was on 16.01.2018. The respondent/promoter issued demands letter and further, issued termination/cancellation letter to the complainant. The respondent cancelled the unit of the complainant after giving adequate demands notices. Thus, the cancellation of unit is valid.
18. The issue with regard to deduction of earnest money on cancellation of a contract arose in cases of ***Maula Bux VS. Union of India, (1970) 1 SCR 928 and Sirdar K.B. Ram Chandra Raj Urs. VS. Sarah C. Urs., (2015) 4 SCC 136***, and wherein it was held that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in the nature of penalty, then provisions of section 74 of Contract Act, 1872 are attached and the party so forfeiting must prove actual damages. After cancellation of allotment, the flat remains with the builder as such there is hardly any actual damage. National Consumer Disputes Redressal Commissions in CC/435/2019 ***Ramesh Malhotra VS. Emaar MGF Land Limited (decided on 29.06.2020)*** and ***Mr. Saurav Sanyal VS. M/s IREO Private Limited (decided on 12.04.2022)*** and followed in CC/2766/2017 in case titled as ***Jayant Singhal and Anr. VS. M3M India Limited decided on 26.07.2022***, held that 10% of basic sale price is reasonable amount to be forfeited in

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the name of “earnest money”. Keeping in view the principles laid down in the first two cases, a regulation known as the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, was framed providing as under-

“5. AMOUNT OF EARNEST MONEY

Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon’ble National Consumer Disputes Redressal Commission and the Hon’ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment/plot/building as the case may be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer.”

19. So, keeping in view the law laid down by the Hon’ble Apex court and provisions of regulation 11 of 2018 framed by the Haryana Real Estate Regulatory Authority, Gurugram, and the respondent/builder can’t retain more than 10% of sale consideration as earnest money on cancellation but that was not done. So, the respondent/builder is directed to refund the amount received from the complaints after deducting 10% of the basic sale consideration and return the remaining amount along with interest at the rate of 10.75% (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 termination/cancellation 13.02.2019 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

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F. Directions of the Authority


20. 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 respondents are directed to refund the paid-up amount of Rs.34,70,901/- after deducting the earnest money which shall not exceed the 10% of the basic sale consideration of Rs.1,12,10,000/-. The refund should have been made on the date of cancellation i.e., 13.02.2019. Accordingly, the interest at the prescribed rate i.e., 10.75% is allowed on the balance amount from the date of cancellation 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 respondent to comply with the directions given in this order and failing which legal consequences would follow.

21. Complaint stands disposed of.

22. File be consigned to registry.

Dated: 12.10.2023

v.1- 
(Vijay Kumar Goyal)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram