



HARERA
GURUGRAM

Complaint No. 540 of 2022

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

Complaint no.: 540 of 2022
Order reserved on: 18.01.2024
Date of decision: 08.02.2024

Tarun Sharma
R/o H.No. C-063, Belvedere Park, DLF Phase-3, Gurugram
122002, Haryana.

Complainant

Versus

S.S Group Pvt. Ltd.
Registered Office: 77, SS House, Sector-44, Gurugram,
Haryana -122003

Respondent

CORAM:
Shri Vijay Kumar Goyal

Member

APPEARANCE:
Sh. Sanjeev Dhingra and Ms. Shobha Mishra, Advocates
Sh. Rahul Bhardwaj, 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 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*.

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A. Unit and project related details

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

| Sr. No. | Particulars | Details |
|---------|--|--|
| 1. | Name of the project | 'The Leaf', Sector -84, Gurugram |
| 2. | Nature of the project | Group Housing Complex |
| 3. | DTCP License No. | 81 of 2011 dated 16.09.2011 valid up to 15.09.2024 |
| 4. | RERA Registered/ Not Registered | RERA registered 35 of 2021 dated 14.07.2021 |
| 5. | Unit no. | 7A, 7 th floor, Building T-3 (page no.25 of complaint) |
| 6. | Unit admeasuring | 1620 sq. ft. (page no.25 of complaint) |
| 7. | Date of execution of builder buyer agreement | 17.10.2013 (page no.24 of complaint) |
| 8. | Possession clause | 8. Possession 8.1: Time of handing over the possession 8.1 (a) subject to terms of this clause and subject to the flat buyer(s) having complied with all the terms and conditions of this agreement and not being in default under any of the provisions of this agreement and complied with all provisions, formalities, documentation etc. as prescribed by the developer, the developer proposes to handover the possession of the flat within a period of thirty-six months from the date of signing of this agreement. However, this period will automatically stand extended for the time taken in getting the building plans sanctioned. The flat buyer(s) agrees and understands that the developer shall be |

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| | | |
|-----|--------------------------------------|---|
| | | <i>entitled to a grace period of 90 days, after the expiry of thirty-six months or such extended period, for applying and obtaining occupation certificate in respect of the Group Housing Complex.</i> <i>(Emphasis supplied)</i> |
| 9. | Due date of delivery of possession | 17.10.2016 (calculated from the date of buyer's agreement i.e. 17.10.2013) |
| 10. | Reminder/demand letters | 07.09.2015, 04.12.2015, 20.01.2016, 03.06.2016, 11.08.2018, 18.02.2016, 29.03.2018 and 07.10.2021 (page 55-71 of reply) |
| 11. | Total sale consideration | Rs. 89,79,300/- (page 26 of complaint) |
| 12. | Total amount paid by the complainant | Rs. 25,54,500/- (page 35 of reply) |
| 13. | Request for refund by complainant | 24.03.2019, 20.05.2019 (as per additional documents submitted by the complainant page 10,11) |
| 14. | Notice for cancellation | 24.11.2021 (page 85 of reply) |
| 15. | Cancellation letter | 19.04.2022 (page 16 of written arguments submitted by complainant) |
| 16. | Occupation Certificate | 09.05.2022 (page 89 of reply) |

B. Facts of the complaint.

3. The complainant has made the following submissions in the complaint: -

I. That on 05.07.2012, the respondent approached the complainant for booking of unit no. 7A, tower 3, 7th floor admeasuring 1620 sq. ft. in its project "The Leaf", Sector 84-85, Badha, Tehsil Manesar & District



- Gurugram, Haryana. The complainant paid Rs.7,50,000/- to the respondent as booking amount and a provisional allotment letter was issued on 10.09.2012 by the respondent.
- II. Thereafter, on 17.10.2013 the complainant entered into a builder buyer agreement with the respondent for a total sale consideration of Rs.89,79,300/-. The complainant paid an amount of Rs. 25,54,500/- till 01.06.2015.
- III. That the respondent sent first demand letter dated 07.09.2015 where interest of Rs. 19,346/- was charged from the year 2013 which prevented complainant from making further payments as he had fear that the further payments would be deducted towards interest and not towards the amount due.
- IV. That the complainant visited the project site in 2015 and 2016 but there were no signs of completion of the project in the near future. Thereafter, he lost trust in respondent's company and stopped making further due payments.
- V. That being convinced by the false promises of the respondent, complainant decided to make the further payments due and for which a request was made to waive off the interest deducted by the respondent and the actual due amount wherein respondent agreed to waive off 50% of the deducted interest amount.
- VI. That the complainant vide email dated 24.03.2019 and 20.05.2019 requested the respondent to refund the paid-up amount but the respondent never reverted to the same.
- VII. That on 24.11.2021, a cancellation letter was sent by the respondent to the complainant demanding Rs. 51,71,238/- towards outstanding amount and Rs. 45,54,865/- towards interest calculated at the rate of 18% compound

interest. However, the respondent failed to handover the physical possession of the unit within stipulated time period till 15.01.2017 including grace period.

VIII. That on 22.12.2021, the complainant replied to the cancellation letter dated 24.11.2021 received by him on 03.12.2021 through e-mail in which he mentioned the said letter was illegal, unjust and against the principle of natural justice.

IX. That the respondent has failed to handover the possession of the unit as per the buyer's agreement and has duped the complainant hard earned money. Therefore, the complainant seeks refund of the entire paid-up amount along with interest.

C. Relief sought by the complainant :-

4. The complainant has sought following relief.

a. Direct the respondent to refund the paid-up amount with 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 the complainant vide advance registration form dated 05.07.2012 applied for an allotment of a unit in the respondent's project namely, "The Leaf". Pursuant to it, vide allotment letter dated 10.09.2012, the complainant was allotted a unit no. 7A, 7th floor, T-3. The complainant opted for a construction linked payment plan for remittance of the sale consideration for the subject unit.

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- II. That the advance registration form and the allotment letter being the preliminary and the initial drafts contained the basic and primary understanding between both the parties, to be followed by the flat buyer's agreement to be executed between the parties. Thereafter, flat buyer agreement dated 17.10.2013 was executed between parties which contained the final understandings between the parties stipulating all the rights and obligations.
- III. That the sale consideration of the unit was Rs. 89,79,300/- exclusive of the registration charges, stamp duty charges, service tax and other charges which were to be paid by the complainant at the applicable stages.
- IV. That the complainant defaulted in making payments towards the agreed sale consideration of the unit from the very inception. Also, the complainant had failed to pay the remaining sale consideration amounting to Rs. 64,24,800/- without interest. Therefore, the respondent sent numerous demand letters to the complainant on account of non-payment of the outstanding amount.
- V. That the construction of the project was within the time-line as stipulated in the flat buyer's agreement and accordingly, the complainant was supposed to pay the instalments of the said unit by way of construction linked-payment plan. However, the respondent had to run after the complainant to clear the outstanding dues from the very inception as is evident from demand notices which were sent from 2015 to 2022, i.e., before the cancellation of the unit, i.e., 07.09.2015, 04.12.2015, 20.01.2016, 03.06.2016, 03.03.2017, 11.08.2018, 18.02.2016, 29.03.2018 and 07.10.2021 in addition to e-mails dated 21.03.2018, 07.04.2018, 07.06.2018, 31.07.2018.
- VI. That the complainant till the issuance of the final demand letter had paid only Rs.25,54,500/- towards the total sale consideration of Rs.89,79,300/-

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which accounts to approximately 28% of the total sale consideration. The complainant was very well aware of the continuous delays and were reminded on continuous basis through the demand letters. The last payment amounting of Rs.5,56,577/- was made on 01.06.2015 with respect to the subject unit and since then no further payment was made by the complainant.

VII. That the complainant after being the willful defaulter in complying with the terms and condition of the flat buyer's agreement are trying to take a shelter under the garb of the Real Estate Regulation and development Act, 2016 and are shifting the burden on the part of the respondent whereas, the respondent has suffered huge financial losses due to such willful defaulters. Despite there being a number of defaulters in the project, the respondent itself infused huge amount of funds into the project. The respondent company to show its bona-fide even waived off 50% of the total interest on delayed payment by the complainant on their request.

VIII. That the total delay in rendering the payment towards the outstanding payment by the complainant is approximately Rs.64,24,800/- exclusive of interest occurred on various occasions under different installments. The respondent company sent a detailed reply in 2019 to the complainant wherein the respondent company clearly apprised about the delay in payments towards the total sale consideration of the unit. Despite that, the complainant paid no heed which illustrates that the non-payment towards the total sale consideration is only intentional and deliberate.

IX. That the respondent has sent notice for cancellation of unit dated 24.11.2021 giving an opportunity to make outstanding payments within a period of 30 days, failing which the allotment shall be cancelled

automatically. However, nothing was done by the complainant in this regard.

- X. That it shall be the respondent who shall be entitled for the relief from the Authority for the breach in the terms and conditions of the flat buyer's agreement by the complainant. As per the clause 1.2(f) of the flat buyer's agreement, the respondent is entitled to forfeit the earnest money as well as the brokerage along with the taxes and interest.
- XI. That the respondent had received the occupational certificate of the project from the competent Authority on 09.05.2022 and project stands completed.
- XII. That the complainant has no cause of action to file the present suit. As, an investor complainant had booked a unit to yield gainful returns by selling the unit in question in open market. So, the complainant does not come under the scope of definition of an allottee. Furthermore, complainant has raised the issue at a belated stage, attempting to seek modifications in the agreement entered between the parties in order to acquire benefits. Thus, the complainant is not entitled to any relief.
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 decided on the basis of these undisputed documents and submission made by the parties.

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 allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11

.....
(4) The promoter shall-

(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

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. (Supra)* 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 objections raised by the respondent
F.I Objection regarding complainant being an investor.

14. The respondent has taken a stand that the complainant is an investor and not consumer. Therefore, complainant is not entitled to the protection of the Act and is 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 consumers 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 complainant is a buyer and has paid Rs.25,54,500/- to the respondent towards the purchase of flat 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 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;"

15. Thus, the contention of the promoter that the allottee being investor is not entitled to protection of this Act stands rejected.

G. Findings on the relief sought by the complainant.

G.I Direct the respondent to refund the paid-up amount with interest.

16. The complainant was allotted unit no. 7A on the 7th floor, tower 3 in the project "The Leaf", Sector 85, Gurugram, Haryana of the respondent/builder. The builder buyer agreement was executed between the parties on 17.10.2013. The complainant had paid an amount of Rs.25,54,500/- against the total sale consideration of Rs.89,79,300/-. As per clause 8.1 of the builder buyer agreement the possession of the unit was to be offered within 36 months from the date of the execution of the buyer's agreement. Hence, the due date of possession comes out to be 17.10.2016.

17. The complainant states that he visited the project site in 2016 but there were no signs of completion of the project. Therefore, he stopped making further payment and vide email dated 24.03.2019 and 20.05.2019 has requested the respondent to refund the amount paid by him against the subject unit.
18. On the contrary, the respondent states that the complainant has failed to abide by the terms and conditions of the agreement and defaulted in making payments. Therefore, a cancellation notice dated 24.11.2021 was sent to the complainant giving an opportunity to make outstanding payments with interest within 30 days failing which the allotment will stand cancelled. But the complainant did not pay any heed to the notices. Thereafter, a final cancellation letter dated 19.04.2022 was issued cancelling the subject unit and forfeiting the entire amount paid by the complainant.
19. The authority observes that on 19.04.2022, the respondent has cancelled the allotted unit on account of non-payment. However, the complainant has requested for refund prior to cancellation vide email dated 24.03.2019 and 20.05.2019, as well as prior to receipt of occupation certificate dated 09.05.2022. Since then, the complainant had not withdrawn his refund request, and the same was duly acknowledged by the respondent in his reply dated 12.08.2019.
20. The complainant herein, intends to withdraw from the project and is seeking refund of the paid-up amount as provided under section 18(1) of the Act. Sec. 18(1) proviso reads as under.

"Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building. -

- (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or
(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

(Emphasis supplied)

21. Keeping in view the fact that the allottee complainant wishes to withdraw from the project and demanding return of the amount received by the promoter in respect of the unit with interest on failure of the promoter to complete or inability to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. The matter is covered under section 18(1) of the Act of 2016.
22. The due date of possession was 17.10.2016 and occupation certificate of the buildings/towers where allotted unit of the complainant is situated was received after filing of complaint by the complainant. The allottee has become entitled to his right under section 19(4) to claim the refund of amount paid along with interest at prescribed rate from the promoter as the promoter has failed to comply or unable to give possession of the unit in accordance with the terms of agreement for sale. Accordingly, the promoter is liable to return the amount received by him from the allottee in respect of the subject unit with interest at the prescribed rate.
23. Moreover, the Hon'ble Supreme Court of India in the cases *of Newtech Promoters and Developers Private Limited Vs. State of U.P. and Ors. (supra)* 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 withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed."

24. 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 allottees 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, as he wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by it in respect of the unit with interest at such rate as may be prescribed.
25. **Admissibility of grace period:** The respondent promoter has proposed to hand over the possession of the unit within a period of 36 months from the date signing of flat buyer's agreement, whichever is later, the buyer's agreement was executed on 17.10.2013. So, the due date is calculated from the date of execution of buyer's agreement i.e., 17.10.2016. Further it was provided in the flat buyer's agreement that promoters would be entitled to a grace period of 90 days after the expiry of the said committed period for applying and obtaining occupation certificate. There is no material evidence on record

that the respondent-promoter had completed the said project within this span of 36 months and had started the process of applying and obtaining occupation certificate. As a matter of fact, the promoter has not obtained the occupation certificate and offered the possession within the time limit prescribed by them in the flat buyer's agreement. As per the settled law, one cannot be allowed to take advantage of his own wrongs. Accordingly, this grace period of 90 days cannot be allowed to the promoter.

26. Admissibility of refund along with prescribed rate of interest: The complainant is seeking refund of the amount paid up along with prescribed rate of interest. However, the allottee intend to withdraw from the project and is seeking refund of the amount paid up in respect of the subject unit with interest at prescribed rate as provided under rule 15 of the rules. Rule 15 has been reproduced as under:

Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

27. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

28. 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., 08.02.2024 is **8.85%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.85%**.

29. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation. —For the purpose of this clause—

- (i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
- (ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

30. The authority hereby directs the promoter to return the amount received by it, i.e., Rs.25,54,500/- with interest at the rate of 10.85% (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 each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

H. Directions of the authority

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

- I. The respondent/promoter is directed to refund the amount i.e., Rs.25,54,500/- received by it from the complainant along with

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HARERA
GURUGRAM

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interest at the rate of 10.85% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the deposited amount.

- II. A period of 90 days is given to the respondent to comply with the direction given in this order and failing which legal consequences would follow.

32. The complaint stand disposed of.

33. File be consigned to registry.

Dated: 08.02.2024



V.I - 5

(Vijay Kumar Goyal)

Member

Haryana Real Estate Regulatory
Authority, Gurugram

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