

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

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| Complaint no. : | 2361 of 2022 |
| Date of filing complaint: | 25.05.2022 |
| Date of decision : | 26.07.2024 |

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| Bhoop Singh Rana R/O: H.No. 124, Vill. Bajghera, P.O. Palam Vihar, Distt. Gurugram, Haryana | Complainant |
| versus | |
| Emaar Mgf Land Ltd. R/O:Emaar Mgf Land Ltd. Ece House, 28 Kasturba Gandhi Marg, New Delhi I 10001 | Respondent |

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| CORAM: | |
| Shri Sanjeev Kumar Arora | Member |
| APPEARANCE: | |
| Sh. Sukhbir Yadav (Advocate) | Complainant |
| Sh. Ishaan Dang (Advocate) | 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 29 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 made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

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

| S.No. | Heads | Information |
|-------|--|--|
| 1. | Name of the project | Gurgaon Greens, Sector 102, Gurugram, Haryana |
| 2. | Total area of the project | 13.531 acres |
| 3. | Nature of the project | Group Housing Colony |
| 4. | DTCP license no. | 75 of 2012 dated 31.07.2012 |
| 5. | Validity of license | 30.07.2020 |
| 6. | Licensee | Kamdhenu Projects Pvt. Ltd. & Anr. |
| 7. | HRERA registered/ not registered | Registered vide no. 36(a) of 2017 dated 05.12.2017 for 95829.92 sq. mtrs. |
| 8. | HRERA registration valid up to | 31.12.2018 |
| 9. | HRERA extension of registration vide | 01 of 2019 dated 02.08.2019 |
| 10. | Extension valid up to | 31.12.2019 |
| 11. | Payment Plan | Construction linked payment plan (As per the facts stated by the complainant) |
| 12. | Provisional allotment letter issued in favour of the original allottee i.e., Mr. Om Prakash Kadian | 27.01.2013 [page 29 of reply] |
| 13. | Unit no. | GGN-25-0401, 4 th floor, building no. 25 [page 43 of reply] |
| 14. | Unit measuring (super area) | 1650 sq. ft. |



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| 15. | Date of execution of buyer's agreement between the original allottees and the respondent | 15.04.2013 [page 40 of reply] |
| 16. | Complainant is a subsequent allottee | The original allottees has entered into agreement to sell with the complainant on 25.07.2013 (Page 95 of reply) and in pursuance of the same, the respondent acknowledged the complainant as allottee vide nomination letter dated 26.07.2013 (page 102 of reply). |
| 17. | Possession clause | 14. POSSESSION <i>(a) Time of handing over the Possession</i> <i>Subject to terms of this clause and barring force majeure conditions, subject to the Allottee 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 compliance with all provisions, formalities, documentation etc., as prescribed by the Company, the Company proposes to hand over the possession of the Unit within 36 (Thirty Six) months from the date of start of construction, subject to timely compliance of the provisions of the Agreement by the Allottee. The Allottee agrees and understands that the Company shall be entitled to a grace period of 5 (five) months, for applying and obtaining the completion certificate/occupation certificate in respect of the Unit and/or the Project.</i> (Emphasis supplied) |

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| | | [page 56 of reply] |
| 18. | Date of start of construction as per statement of account dated 13.12.2018 at page 149 of reply | 22.06.2013 |
| 19. | Due date of possession | 22.11.2016 [Note: Grace period is included] |
| 20. | Basic sale price | Rs.1,20,47,987/- (As per payment plan annexed with the buyer's agreement) |
| 21. | Total consideration | Rs.1,24,30,607/- (As per statement of account dated 13.12.2018 at page 148 of reply) |
| 22. | Total amount paid by the complainant | Rs.39,59,842/- (as per statement of account dated 13.12.2018 at page 149 of reply and as per calculation sheet annexed at page 146 of reply) |
| 23. | Occupation certificate granted on | 16.07.2019 [As per information available on DTCP website] |
| 24. | Payment request letters dated | 18.02.2015 ,10.03.2015 , 11.03.2015 , 29.04.2015 , 12.02.2016 , 06.02.2016 , 07.02.2017 , 01.03.2017 , 09.05.2017 , 05.06.2017 , and further notice were sent till 06.02.2018 |
| 25. | Cancellation of unit vide letter dated | 28.12.2018 [page 144 of reply] |

B. Facts of the complaint:

3. That in July 2012, the original allottee namely (Om Prakash Kadian) received a marketing call from a real estate agent, who represented

himself as an authorized agent of the respondent and invited for booking a residential project being developed by the Respondent by the name and style of "Gurgaon Greens", Sector - 102, Dwarka Expressway Gurugram

4. That in September 2012, the original allottee Mr. Om Parkesh Kadian relied on the representation & assurances of the respondent and booked a residential unit bearing unit no. ggn-25-0401 admeasuring 1650 sq. ft. in the project "gurgaon greens", Sector - 102, Dwarka Expressway Gurugram marketed and developed by the respondent and issued five cheques bearing No. 173895,173896,173897,173898,173899 dated 04.09.2012 all drawn on SBI Bank of Rs. 7,50,000/- as booking amount. The unit was booked under the construction link payment plan for a total sale consideration of Rs. 1,16,27,767/- including Basic sales price, development charges & ifms, etc.
5. That on 15.04.2013, a pre-printed, unilateral, arbitrary builder buyer's agreement/buyer's agreement was executed inter-se the respondent and the original allottee. According clause 14(a), the respondent has to hand over the possession of the unit within 36 months from the date of start of construction. As per the payment plan and statement of account, the 4th installment was demanded on 22.06.2013, ("on start of pcc for foundation), therefore the due date of possession is 22.06.2016.
6. That the complainant purchased the said unit from the original allottee, with the permission of the respondent, and became the subsequent allottee, and the respondent endorsed the name of the allottee in its record and on buyer agreement on 25.07.2013.

Endorsement is marked on page no. 52 of buyer agreement. On 26.07.2013 the Respondent issues a Nomination Confirmation Letter for Unit No. GGN-0401 at Gurgaon Greens, Sector-102, Dwarka Expressway, Gurgaon from Om Praksh Kadian to Bhoop Singh Rana and issue a nomination Letter.

7. That from July 2013 to September 2014 the construction of the project was abandoned, therefore, in July 2014, the complainant asked for a refund of the paid amount with interest. On 07.11.2014 the respondent raised demand and asked for the payment of Rs. 9,87,288/- within 30 days, but when the compliant visited the site of the project, it was an utter surprise to see that construction was abandoned at the project site. Thereafter, the respondent kept sending the reminder for payment but fails to resume the construction at the site. The complainant also visit the project site several times but he got disappointed and depressed when the complainant saw there was no progress in construction. It is pertinent to mention as per the agreement the payment plan is the construction link payment plan, but the construction was abandoned and there was no hope to get the project complete by the due date, therefore, the complainant choose not to pay the demands and asked for the refund of the paid money along with interest.

8. That on 28.12.2018 the respondent sent a cancellation of allotment notice to the complainant and give the calculation that he has forfeited Rs. 20,83,040/- i.e. 18% of the total cost of the flat, out of total paid amount Rs. 38,91,754/- .After receipt of the cancelation letter, the complainant visited the office of the respondent and meet with the CRM staff of the respondent and represented that the due date of

possession was 21.06.2016, and the respondent failed to complete the construction and handover of the possession of the flat on or before the due date of possession, therefore, the respondent cannot deduct the earnest money. The CRM staff of the respondent assured that they will discuss the matter with senior management. Since 2019 the complainant is regularly contacting the CRM staff of the respondent party, and making efforts to get the refund but despite several visits by the complainant the respondent refused to refund the paid amount. From January 2019 to March 2022, there were several developments, i.e. NCLT appointed IRP on respondent company, thereafter, due to COVID - 19 there was lockdown, etc. In March 2022, the complainant visited the office of the respondent and asked for a refund of the paid amount, but the CRM staff informed that the company can pay only Rs. 17,84,429/-. Thereafter, under the compelling circumstances, the complainant received Two cheques for Rs. 12,49,100/- and Rs. 5,35,329/- dated 25.03.2022 drawn on HSBC, New Delhi

9. That the main grievance of the complainant in the present case is that the project is HARERA registered to vide registration No. 36 (a) of 2017 and as per the regulation the builder cannot forfeit earnest money more than 10% of the total cost.
10. Written submission have been taken on record and perused further.

C. Relief sought by the complainant:

11. The complainant has sought the following relief(s):

- i. Direct the respondent – builder to refund the paid up amount with interest after deduction of 10% of earnest money.

D. Reply by respondent:

The answering respondent by way of written reply made the following submissions:

12. That the complainant is not an “Allottee” but actually an investor who has purchased the unit in question as a speculative investment.
13. That the original allottee had approached the respondent and expressed his interest in booking a unit in the residential group housing project being developed by the respondent known as “Gurgaon Greens” situated in Sector 102, Village Dhankot, Tehsil & District Gurgaon.
14. That the original allottee was provisionally allotted unit no GGN-25-0401, admeasuring 1650 square feet approx. (super area) and opted for a construction linked payment plan. The buyer’s agreement was executed between the original allottee and the respondent on 15.04.2013.
15. That thereafter, the complainant purchased the said unit from the original allottee voluntarily and not influenced in any manner by the respondent. Agreement to sell dated 25.07.2013 executed between the original allottee and the complainant .Indemnity cum undertaking dated 25.07.2013 was executed by the original allottee in favour of the respondent.
16. That the respondent was constrained to send a cancellation letter dated 28.12.2018 to the complainant on account of the defaults committed by the complainant. It is submitted that several payment

reminder letters had been issued to the complainant but to no avail. Furthermore, the same had been duly received by the complainant by the complainant did not come forward to make payment of the outstanding amount which had been demanded as per the payment plan. As per the terms and conditions of the buyer's agreement, the complainant/ original allottee were under a contractual obligation to make timely payment of all amounts payable under the buyer's agreement, on or before the due dates of payment failing which the respondent is entitled to levy delayed payment charges in accordance with clause 1.2(c) read with clauses 12 and 13 of the buyer's agreement.

17. That thus, it is evident that the entire case of the complainant is nothing but a web of lies and the false and frivolous allegations have been made against the respondent. The respondent has cancelled the allotment of the complainant on account of the defaults committed by the complainant. The complainant is left with no right, title or interest in the said unit. Furthermore, the amount liable to be refunded to the complainant has been correctly mentioned in cancellation letter dated 28.12.2018.

18. That it is most respectfully submitted that the contractual relationship between the complainant and the respondent is governed by the terms and conditions of the buyer's agreement dated 15.04.2013. clause 12 of the buyer's agreement provides that time shall be the essence of the contract in respect of the allottee's obligation to perform/observe all obligations of the allottee including timely payment of the sale consideration as well as other amounts payable by the allottee under the agreement. Clause 13 of the buyer's

agreement, *inter alia*, provides for levy of interest on delayed payments by the allottee.

19. That it is submitted that several allottees, including the complainant had defaulted in timely remittance of payment of installments which was an essential, crucial and an indispensable requirement for conceptualization and development of the project in question. Furthermore, when the proposed allottees default in their payments as per schedule agreed upon, the failure has a cascading effect on the operations and the cost for proper execution of the project increases exponentially whereas enormous business losses befall upon the respondent.

20. That the respondent, despite default of several allottees, has diligently and earnestly pursued the development of the project in question and has constructed the project in question as expeditiously as possible. Therefore, there is no default or lapse on the part of the respondent and there is no equity in favour of the complainant. It is evident from the entire sequence of events, that no illegality can be attributed to the respondent. The allegations levelled by the complainant are totally baseless. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.

21. That it is important to point out that no payment has been directly remitted by the complainant in favour of the respondent. The total sale consideration paid was remitted by the original allottee and no payment has been received from the complainant against the demands raised by the respondent as per the terms agreed in the buyer's agreement. There was no intention on the part of the

complainant to perform the terms of the buyer's agreement and hence was never keen to pay the demands raised by the respondent. It is humbly submitted that the complainant is using the Ld. HRERA Gurugram as a tool to extort extra money by arm twisting the respondent.

22. That it is important to point out that the complainant never sought for any refund of the sale consideration on the ground that he did not want to continue with the project. Hence the demand of refund of forfeited amount doesn't lie in the mouth of the complainant.

23. All other averments made in the complaint were denied in toto.

24. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be denied on the basis of these undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority:

25. 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

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

26. 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.

27. 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 complainant at a later stage.

28. 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. 2021-***

2022(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."

29. 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. Objections raised by the respondent :-

F.I Objection regarding maintainability of complaint on account of complainant being investor.

30. The respondent took a stand that the complainant is investor and not consumers and 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. However, it is pertinent to note that any aggrieved person can file a complaint against the promoter if he 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 allotment letter, it is revealed that the complainant is buyer's, and he has paid a total price of Rs.39,59,842/- to the promoter towards purchase of a unit 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;"

31. In view of the above-mentioned definition of "allottee" as well as all the terms and conditions of the buyer's agreement executed between promoter and complainant, it is crystal clear that the complainant are allottee(s) 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". Thus, the contention of the promoter that the allottee being investor are not entitled to protection of this Act also stands rejected.

F.II Where the subsequent allottee had stepped into the shoes of original allottee before the due date of handing over possession.

32. The complainant/subsequent allottee had been acknowledged as an allottee by the respondent vide endorsement dated 26.07.2013. The authority has perused the endorsement where the promoter has confirmed the transfer of allotment in favour of subsequent allottee, Bhoop Singh Rana (complainant). The same builder buyer's agreement has been endorsed in favour of subsequent allottee. All the terms of builder buyer's agreement remain the same so it is quite clear that the subsequent allottee has stepped into the shoes of the original allottee.

33. Though the promised date of delivery was 22.11.2016 but the construction of the tower in question was not completed by the said date. If these facts are taken into consideration, the complainant/subsequent allottee had agreed to buy the unit in question with the expectation that the respondent/promoter would abide by the terms of the builder buyer's agreement and would deliver the subject unit by the said due date. At this juncture, the subsequent purchaser cannot be expected to have knowledge, by any stretch of imagination that the project will be delayed, and the possession would not be handed over within the stipulated period. So, the authority is of the view that in cases where the subsequent allottee had stepped into the shoes of original allottee before the due date of handing over possession, the delayed possession charges shall be granted w.e.f. due date of handing over possession.

G. Findings on the relief sought by the complainant:

G.I Direct the respondent - builder to refund the paid up amount with interest after deduction of 10% of earnest money.

34. In the present case the original allottee was allotted a unit in the project of the respondent vide allotment letter dated 27.01.2013. The complainant purchased the said unit in the project from original allottees and subsequently the original allottee transfer the said unit in the name of the complainant i.e., Bhoop Singh Rana being the 1st subsequent allottee vide agreement to sell dated 25.07.2013 which was executed between the original allottee and the 1st subsequent allottee . The respondent acknowledged the 1st subsequent allottee vide nomination letter dated 26.07.2013. Therefore the complainant became the 1st subsequent allottee and stepped into the shoes of an allottee on 26.07.2013.

35. The original complainant-allottee booked a unit in the project of the respondent named as "Gurgaon Greens" situated at sector 102, Gurgaon, Haryana for a total sale consideration of Rs. 1,24,30,607/-. The allotment of the unit was made on 27.01.2013. The buyer's agreement was executed between the original allottee and the respondent on 15.04.2013. The complainant became the 1st subsequent allottee and stepped into the shoes of an allottee on 26.07.2013. As per clause 14 of the buyer's agreement dated 15.04.2013 the company proposes to handover the possession of the unit within 36 months from the date of start of construction. The date of start of construction is 22.06.2013 .Further, it was provided in the buyer's agreement that company shall be entitled to a grace period of five months, for applying and obtaining the completion certificate/ occupation certificate in respect of the unit and/or the project.

36. The promoter is entitled to avail the grace period so provided in the agreement for applying and obtaining the occupation certificate. Thus the due date of handing over of possession comes out to be 22.11.2016
37. The respondent started raising payments demands from the complainant from the year 2015 but they defaulted to make the payments. The complainant-allottee in total has made a payment of Rs. 39,59,842/-. The respondent has sent various demand letters and reminder letters on 18.02.2015, 10.03.2015, 11.03.2015, 29.04.2015, 12.02.2016, 06.02.2016, 07.02.2017, 01.03.2017, 09.05.2017, 05.06.2017, and further notice were sent till 06.02.2018.
38. Thereafter the respondent cancelled the allotment of the unit vide letter dated 28.12.2018. The occupation certificate of the tower where the allotted unit is situated has been received on 16.07.2019.
39. As per the settled law of the land in the various pronouncements of the Hon'ble Apex Court and as per Regulation 11(5) of 2018 known as Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder), the respondent could have deducted 10% of the sale consideration from the paid-up amount and was bound to return the remaining amount.
40. The due date for completion of the project was 22.11.2016. No doubt the complainant had already paid a significant amount of the sale consideration but it was also required to pay the amount due on the basis of payment plan. Also, the respondent has sent various reminders before cancelling the unit. The counsel for the respondent stated at bar that this complaint should be barred by the provisions of

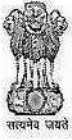
limitation act but the authority is of the view that cause of action in case of seeking refund is a subsisting obligation of the respondent. However vide proceeding dated 02.02.2024 the respondent stated at bar that a part payment of Rs. 17,84,429/- has been made by the respondent on 26.03.2022 to the complainant and the rest of the amount is still pending.

41. Thus, the respondent cannot retain the amount paid by the complainant against the subject unit and is directed to refund the same in view of the agreement by forfeiting the earnest money which shall not exceed the 10% of the basic sale consideration of the said unit and shall return the balance amount along with interest at the rate of 11% (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 cancellation i.e., 28.12.2018 till the actual date of refund of the amount after adjusting the amount already credited in the account of the complainant, if any, within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

H. Directions of the Authority:

42. 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 functions entrusted to the Authority under Section 34(f) of the Act of 2016:

- i) The respondent is directed to refund the deposited amount of Rs. 39,59,842/- after deducting 10% of the basic sale consideration i.e., Rs. 1,20,47,987/- being earnest money after

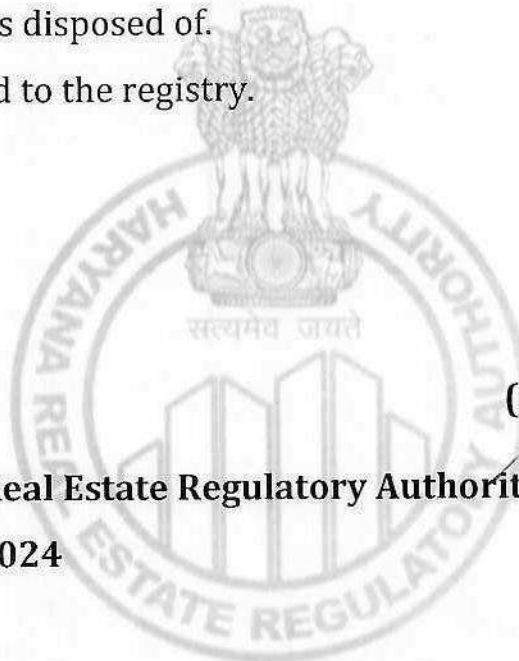



adjusting the amount already credited in the account of the complainant, if any along with an interest @11% on the refundable amount, from the date of cancellation i.e., 28.12.2018 till the date of realization of payment.

- 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.

43. Complaint stands disposed of.

44. File be consigned to the registry.




(Sanjeev Kumar Arora)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 26.07.2024