

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

Complaint no.: 3415 of 2023
Date of decision: 11.09.2024

Mr. Aman Gupta
R/o: - 373, Block-B, Floor-4th,
Near Shamrock Play School,
Sector-19-B, Dwarka, Amberhai,
South west Delhi, Delhi-110075.

Complainant

Versus

1. M/s Agrante Developers Private Limited
Having registered office at: - DTJ-704, 7th Floor, DLF
Tower-B, Jasola, New Delhi - 110025
Also at: - 522-524, 5th Floor, DLF Tower-A, Jasola, New
Delhi
2. Indiabulls Housing Finance Limited
Office at: - M-62 and 63, Floor-1st,
Connaught Place, New Delhi-110001.

Respondents

CORAM:

Shri Ashok Sangwan

Member

APPEARANCE:

Daggar Malhotra (Advocate)
Tarun Biswas (Advocate)
Gaurav Dua (Advocate)

Complainant
Respondent no. 1
Respondent no. 2

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 allottees as per the agreement for sale executed *inter se*.

A. Project and unit related details

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

S. N.	Particulars	Details
1.	Name of the project	"Beethoven's 8", Sector- 107, Gurgaon
2.	Nature of project	Group housing complex
3.	RERA registered/not registered	Not Registered
4.	DTPC License no.	23 of 2012 dated 23.03.2012
	Validity status	Not available on record
	Name of licensee	Narendra Kumar Gupta & others
	Licensed area	18.0625 acres
5.	Unit no.	Harmony-K/E/1903, Floor-19, Tower/Building-Harmony. [Page no. 19 of complaint]
6.	Unit area admeasuring	2261 sq. ft. [Page no. 19 of complaint]
7.	Allotment letter	14.03.2016 (As on page no. 13 of complaint)
8.	Agreement to sale	15.03.2016 [Page no. 17 of complaint]
9.	Date of quadripartite agreement	15.03.2016 [Page no. 41 of complaint]
10.	Possession clause	Clause 18(a) <i>Subject to other terms of this Agreement /Agreement, including but not limited to timely payment of the Total Price, stamp</i>

		<p><i>duty and other charges by the Vendee(s), the Company shall endeavor to complete the construction of the Said Apartment within 42 (Forty-two) months from the date of Allotment, which is not the same as date of this Agreement. The Company will offer possession of the Said Apartment to the Vendee(s) as and when the Company receives the occupation certificate from the competent authority(ies). Any delay by the Vendee(s) in taking possession of the Said Apartment from the date of offer of possession, would attract holding charges @ Rs.05(Five) per sq. ft. per month for any delay of full one month or any part thereof.</i></p> <p><i>(Emphasis supplied)</i> <i>[pg. 33 of complaint]</i></p>
11.	Due date of possession	14.09.2019 [Due date calculated from date of allotment]
12.	Total sale consideration	Rs.1,61,66,985/- [Page no. 26 of complaint]
13.	Amount paid by the complainant	Rs.16,00,000- (As booking amount) Rs.50,68,054/- (Disbursed by the financial institution)
14.	Occupation certificate	Not obtained
15.	Offer of possession	Not offered
16.	Legal notice send by the complainants w.r.t. refund the paid up amount	23.03.2021 [Page no. 142 of the complaint]

B. Facts of the complaint

3. The complainant has made the following submissions in the complaint: -
- I. That the complainant got to know about project namely Beethoven's 8 at Sector -107, Gurugram being developed by respondent no. 1 I.e., M/s Agrante Developers Pvt. Ltd. The complainant then approached respondent no.1 regarding the booking of a residential unit in the said project. Accordingly, the complainant filled in the Application Form and made a total payment of Rs.16,00,000/- as booking amount vide cheque bearing no. 007512 dated 13.02.2016.
 - II. Accordingly, an allotment letter dated 14.03.2016 was issued by respondent no.1 in the favour of the complainant thereby confirming allotment of unit/flat no.: Harmony - I K/E/1903 having super area of 2261 sq.ft for a total sales consideration of Rs.1,61,66,985/-.
 - III. That, as per Clause 18(a) of the Agreement for Sale, respondent no.1 undertook to complete the construction within 42 months from the date of allotment. The due date of possession being 14.09.2019. That, even till date the status of construction of the unit is far from complete.
 - IV. That the complainant took a loan from respondent no.2 for an amount of Rs.1,25,00,000/- and entered into a Quadrapartite Agreement dated 15.03.2016 with the respondent no.1 and respondent no. 2 wherein respondent no.1 undertook to pay the Pre EMI for the subvention period. The total loan amount disbursed by respondent no.2 till date to the respondent no.1 is Rs.50,68,054/-. The respondent no.1 paid /reimbursed till 09.02.2022 after which it stopped paying the Pre-EMIs.
 - V. That, even till date i.e., after expiry of approx. 4 years from the due date of possession (14.09.2019) respondent no.1 has miserably failed to even remotely complete construction of the project and it seems a far possibility in the future as well. Due to this reason, the complainant is no

longer interested in continuing with the same and seeks refund of his hard-earned money.

4. **Relief sought by the complainant: -**

5. The complainant has sought following relief(s)

- i Direct the respondent no. 1 to refund a sum of Rs.16,00,000/- along with interest from the date of payment in respect of the unit.
- ii Direct the respondent no. 1 to refund the loan amount disbursed by the respondent no.2 till the date of order and make payments of the pending Pre-EMIs amounts to respondent no.2.

6. The present complaint was filed on 11.08.2023 in the authority. Despite proper service of notice, the respondent no. 1 and 2, failed to file reply. In view of the same, vide order dated 07.08.2024, the defence of respondent no.1 and respondent no. 2 was struck off. However, in the interest of justice, the parties were given an opportunity to file written submissions within a period of 3 weeks. That respondent no. 2 filed the written submissions on 22.08.2024 and respondent no.1 filed the same on 28.08.2024 in the Authority.

C. **Written submissions on behalf of respondent no. 1.**

7. The respondent no.1 has contested the complaint on the following grounds:

- I. That respondent no. 1 is M/s Agrante Developers Pvt. Ltd. a company duly constituted and incorporated under the Companies Act, 1956. The project in question "BEETHOVENS 8" is situated at Sector-107, Gurugram, Haryana and is being developed by respondent no. 1.
- II. That respondent no. 1 acknowledges the receipt of Rs.16,00,000/- as self-contributions towards the sale consideration of the subject matter unit. An allotment letter dated 14.03.2016 was issued by the

- respondent no. 1 confirming the allotment of the unit/flat no. Harmony-1/KE/1903 having super-area of 2261 sq.ft. for a total sale consideration of Rs.1,61,66,985/-. The balance towards the sale consideration was financed by the allottee from respondent no. 2 i.e., India Bulls Housing finance.
- III. The respondent no. 2 disbursed first installments towards the loan facility of Rs.50,04,349/- however an amount of Rs. 14,62,445/- was deducted owing to upfront interest on the disbursed amount and respondent no. 1 received an amount of Rs.35,41,904/- only.
 - IV. That as per Clause 18(a) of the agreement, respondent no.1 undertook to complete the construction within 42 months from the due date of allotment, due date being 14.09.2019.
 - V. That a Quadripartite Agreement dated 15.03.2016 was executed between the parties. The respondent no. 1 undertook to pay Pre-EMI for the subvention period for the loan facility availed by the allottee.
 - VI. The respondent no.1 has been diligently paying the said Pre-EMI by paying directly to respondent no. 2 till the year 2022 and no financial loss could have been caused to the allottee till then. The respondent no. 1 has paid huge amount towards Pre-EMI in additional to upfront interest deducted at the time of disbursal by respondent no. 2.
 - VII. That respondent no. 1 faced certain force majeure circumstances which delayed the project. It is submitted that since there are other allottees in the project who want to retain their units an order of refund at this stage would frustrate the completion of the project and hamper the interest of other allottees as well. In the interest of justice it would be appropriate if an amicable settlement can be arrived between the

parties and the respondent no. 1 is willing to adjust the allotment of the present unit in other project of the respondent builder.

D. Written submissions on behalf of respondent no.2 .

8. The respondent no.1 has contested the complaint on the following grounds:
- I. That the present complaint qua the respondent no. 2 is not maintainable as respondent no 2 is neither a promoter nor a developer or a real estate agent. It is a financial institution and is a housing finance company providing loan against the property to its customers.
 - II. That the complainant approached the respondent no. 2 for grant of home loan against mortgage of Flat no. Harmony-I, K/E/1903, Tower K, Beethoven, S 8, Sector-107, Gurugram.
 - III. Consequently, based upon the representations and documents furnished, respondent no. 2 admittedly approved/sanctioned vide Sanction Letter dated 12.03.2016 and executed the Loan Agreement dated 16.03.2016 for an amount of Rs.1,25,00,000/- . However, out of the total sanctioned amount of Rs.50,68,054/- was thereby disbursed as per the request of the complainant and the same was directly transferred to respondent no. 1.
 - IV. That the parties entered into the Quadrapartite Agreement dated 15.03.2016 whereby it was agreed that there would be no repayment default of loan amount for any reason whatsoever including but not limited to any concerns/issues by and between the complainant and respondent no.1. It was further agreed that the complainants' obligation to repay the loan shall be distinct and independent of any issues/concern/dispute of whatsoever nature.

- V. That only upon the terms and conditions of the Loan Agreement having being agreed and accepted by the complainant, the loan was processed and consequently respondent no. 2 acceded to granting the loan facility in question to the complainant.
- VI. That the loan account of the complainant has been classified as Non-performing Asset on 09.02.2024 as the complainant committed default in repayment of the loan amount along with interest as agreed as per the guidelines issued by the RBI. Pursuant thereto, the complainant has been served with the demand notice dated 05.03.2024 under Section 13(2) of the SARFAESI Act. At present, the total amount outstanding is of Rs.55,83,432.24/- against the complainant.
- VII. That admittedly in case the Authority allows the refund then first the outstanding loan amount of the respondent no. 2 be paid off and then balance if any be ordered to be given to the complainant as per the terms of the Quadrapartite Agreement.
9. 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**
10. 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**
11. 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

12. 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.

13. 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. 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."

14. 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 delay in completion of construction of project due to force majeure situation.

15. In the present case, the respondent was obligated to complete the construction of the project and handover possession of the unit by 14.09.2019. As on today, this obligation remains unmet, as the respondent has not yet obtained the occupation certificate for the unit. The respondent, through written submissions, has raised an objection citing force majeure circumstances as the cause of the delay. However, the respondent has not provided sufficient details regarding these circumstances. Consequently, the authority determines that this claim cannot serve as a valid excuse for the respondent's failure to fulfill its obligations.

G. Findings on the relief sought by the complainant

- G.I Direct the respondent no. 1 to refund a sum of Rs.16,00,000/- along with interest from the date of payment in respect of the unit.**

G.II Direct the respondent no. 1 to refund the loan amount disbursed by the respondent no.2 till the date of order and make payments of the pending Pre-EMIs amounts to respondent no.2.

16. The above-mentioned reliefs sought by the complainant are being taken tighter as the findings in one relief will definitely affect the result of the other relief and the same being interconnected.
17. In the present case, the complainant intend to withdraw from the project and is seeking return of the amount paid by him in respect of subject unit along with interest at the prescribed rate as provided under section 18(1) of the Act. Sec. 18(1) of the Act is reproduced below for ready reference.

"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:"

(Emphasis supplied)

18. As per clause 18(a) of the agreement provides for handing over of possession and is reproduced below:

"18(a).

*Subject to other terms of this Agreement/Agreement, including but not limited to timely payment of the Total Price, stamp duty and other charges by the Vendee(s), the Company shall endeavour **to complete the construction of the Said Apartment within 42 (Forty-two) months from the date of Allotment, which is not the same as date of this Agreement.** The Company will offer possession of the Said Apartment to the Vendee(s) as and when the Company receives the occupation certificate from the competent authority(ies). Any delay by the Vendee(s) in taking possession of the Said Apartment from the date of offer of possession, would attract holding charges @ Rs.05 (Five) per sq. ft. per month for any delay of full one month or any part thereof."*

19. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the complainants not being in default under any provisions of these agreements and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottees and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.
20. **Admissibility of refund along with prescribed rate of interest:** The complainant is seeking refund the amount paid by him at the prescribed rate of interest. However, the allottee intends to withdraw from the project and is seeking refund of the amount paid by him 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.

21. 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.
22. 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., 11.09.2024 is **9.10%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **11.10%**.
23. 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;"*

24. On consideration of the documents available on record and submissions made by the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondent no. 1 is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date

as per the agreement. By virtue of clause 18 of the agreement dated 15.03.2016, the possession of the subject apartment was to be delivered within a period of 42 months from the date allotment which is not the same as date of this agreement. The due date is calculated 42 months from date of allotment letter i.e., 14.03.2016. Accordingly, the due date of possession comes out to be 14.09.2019.

25. It is pertinent to mention over here that even after a passage of more than 7 years (i.e., from the date of allotment till date) neither the construction is complete nor the offer of possession of the allotted unit has been made to the allottee by the respondent/promoter. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the unit which is allotted to him and for which he has paid a considerable amount of money towards the sale consideration. It is also to mention that complainant has paid considerable amount of total consideration. Further, the authority observes that there is no document placed on record from which it can be ascertained that whether the respondent has applied for occupation certificate/part occupation certificate or what is the status of construction of the project. In view of the above-mentioned facts, the allottee intends to withdraw from the project and are well within the right to do the same in view of section 18(1) of the Act, 2016.

26. Moreover, the authority 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 allottees 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....."

27. Further, 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."

28. 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 him in respect of the unit with interest at such rate as may be prescribed.
29. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such, the complainant is entitled to refund of the entire amount paid by him at the prescribed rate of interest i.e., @ 11.10% p.a. (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana

Real Estate (Regulation and Development) Rules, 2017 from the date of deposit till its realization after adjustment of amount paid by the respondent on account of pre-EMI from the refundable amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

30. Out of total amount so assessed, the amount paid by the bank i.e., respondent no. 2 be refunded first in the bank and the balance amount along with interest if any will be refunded to the complainant.

H. Directions of the authority

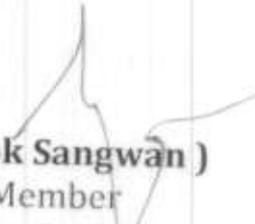
31. Hence, the Authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

- i. The respondent/promoter is directed to refund the paid-up amount received by it from the complainant along with interest at the rate of 11.10% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of deposit till its realization.
- ii. Out of total amount so assessed, the amount paid by the bank i.e., respondent no. 2 be refunded first in the bank and the balance amount along with interest if any will be refunded to the complainant. Further the respondent no.1/promoter is directed to provide the NOC to the complainant after getting it from respondent no. 2.
- iii. A period of 90 days is given to the respondent no.1 to comply with the directions given in this order and failing which legal consequences would follow.
- iv. The respondent/builder is directed not to create third party right against the unit before full realization of the amount paid by the

complainants. If any transfer is initiated with respect to the subject unit, the receivable from that property shall be first utilized for clearing dues of the complainant-allottee.

32. The complaint stands disposed of.
33. File be consigned to registry.

Dated: 11.09.2024



(Ashok Sangwan)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram

