

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

Complaint no. : 1630 of 2023
Date of complaint : 20.04.2023
Order pronounced on: 20.02.2025

Audhesh Kumar Pandey

R/o: 141 Ixia Street-5, Vatika City, Sohna Road, Sector-49,
South City-II, Gurugram, Haryana-122018.

Complainant

Versus

M/s Vatika Limited

Registered office: Vatika Triangle, 4th Floor, Sushant Lok,
Phase 1, Block -A, Mehrauli - Gurugram Road, Gurugram -
122002.

Respondent

CORAM:

Shri Vijay Kumar Goyal

Member

APPEARANCE:

Shri Nitin Jaspal, Advocate

Complainants

Shri Anurag Mishra, 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 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provisions of the Act or the Rules and regulations made thereunder or to the allottees as per the agreement for sale executed *inter se*.

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A. Project and unit related details.

2. The particulars of the unit, 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.no.	Particulars	Details
1.	Name of the project	"Xpressions" by Vatika, situated at sector-88B, Gurugram.
2.	Project area	133.022 acres
3.	Nature of the project	Residential Plotted Colony
4.	DTCP license no. and validity status	1. 94 of 2013 dated 31.10.2013 Valid upto 30.10.2019 2. 11 of 2015 dated 01.10.2015 Valid upto 30.09.2020
5.	Name of licensee	C/o M/s Vatika Limited
6.	RERA Registered	Un-registered
7.	Allotment letter	03.02.2016 (page 14 of complaint)
8.	Unit no.	HSG-028-Sector-88B, Plot no.16, ST, H-22, Level-2 (page 18 of complaint)
9.	Unit area	1550 sq. ft. (super area) (page 18 of complaint)
10.	Date of builder buyer agreement	02.06.2016 (Page 17 of complaint)
11.	Possession clause	13. Schedule for possession of the said residential floor. <i>"The developer based on its present plans and estimates and subject to all just exceptions contemplates to complete constructions, contemplates to complete construction of the said Residential Floor within a period of 48 (forty eight) months from the date of execution of this agreement unless there shall be failure of allottee(s) to pay in time the price of the said residential floor along with all other charges and dues in accordance with the schedule of payments given in Annexure-1 or as per the demands raised by</i>

		<i>the developer from time to time or any failure on the part of the allottee(s) to abide by any of the terms and conditions of this agreement."</i>
12.	Due date of possession	02.12.2020 02.06.2020 + Grace period of 6 months allowed as per HARERA notification no. 9/3-2020 dated 26.05.2020 (Note: The due date is calculated from the date of execution of BBA).
13.	Total sale consideration	Rs.98,62,725/- (page 18-19 of complaint)
14.	Amount paid	Rs.18,77,936/- (As per SOA dt. 24.05.2018 at page 36 of complaint)
15.	Occupation certificate	Not obtained
16.	Offer of possession	Not offered
17.	Demand/ reminders	05.01.2018, 28.02.2018 (as alleged in cancellation letter dated 30.03.2021 at page 10 of reply)
18.	Final Opportunity for payment of installment	24.05.2018 (page 39 of complaint)
19.	Notice for termination	04.07.2018 (page 40 of complaint)
20.	Demand letter	30.09.2020 (as alleged in cancellation letter dated 30.03.2021 at page 10 of reply)
21.	Mails from complainant (as bank did not sanctioning the loan to the project)	14.10.2020, 23.10.2020 & 02.11.2020 (page 43-45 of complaint)
22.	Cancellation letter	30.03.2021 (page 10 of reply)
23.	Mails from complainant (for refund as bank did not sanctioning the loan to the project)	25.03.2023 & 27.03.2023 (page 41-43 of complaint)

B. Facts of the complaint:

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



- a. That the complainant is a 52 years old person, a 'Law abiding citizen' and presently staying at the above-mentioned residence.
- b. That the complainant came to know about the project namely "Xpressions" through the brochures which specifically developed by the Vatika Limited. Presently, the complainant and the respondent are not in talking terms due to under-mentioned immovable property dispute.
- c. That on 23.10.2015 the complainant had booked a unit in a project namely "Xpressions", situated at sector 88B, Street No H-22, Gurugram, Haryana. The unit number 14 in the said project admeasuring an area of 1550 sq. ft. as super area was allotted to the complainant via allotment letter dated 03.02.2016 to the complainant.
- d. Thereafter, on 02.06.2016 a builder buyer agreement was executed between the complainant and respondent. It is pertinent to mention here that before the execution of the BBA the has already paid complainant an amount of Rs.4,63,808/- to the respondent.
- e. That the total sale consideration of the said project was Rs.98,62,725/-. It is worthy to mention here that the complainant has applied for the loan after signing and executing the BBA with various banks and, unfortunately the complainant came to know that said project was not RERA approved till 2019 and when it came to the knowledge of the complainant that the project in question does not have the pre-requisite approvals for a loan to be sanctioned as the project was not RERA approved then the complainant confronted the builder and requested for a refund payment in lieu in respect of the said project.
- f. That it is also pertinent to briefly point out here that as per the payment plan issued to the complainant promptly and regularly paid the instalments for the said plots to the respondent. It is also pertinent to mention here that

- the complainant has made the payment of Rs.18,77,936/- vide the various modes and at various point of time including the RTGS, Cheques, cash etc as demanded by the respondent.
- g. That the complainant intimated the respondent of his wish to not proceed with the said agreement as the facts of the project were concealed and not communicated at the time of the booking. As the loans were not being approved the complainant was no condition to continue with an unapproved project with a fear of incompleteness in the future. A termination letter was issued by the respondent on 04.07.2018 against an outstanding payment of Rs.20,45,424/-.
- h. That it came to the utter shock and surprise of the complainant when he received a recovery notice in lieu of the outstanding payment was sprung upon the complainant on 30.03.2021 demanding an outstanding amount of Rs.4,95,512/-, even after it was communicated to the respondent that the said project does not fill in the pre-requisites and clearance of various bank loan as the project was not approved by RERA until 2019 and the same was concealed from the complainant at the initial stage.
- i. That the complainant had been regularly following up with the respondent over calls and in person but to no avail. Rather the complainant was being given an assurance by the respondent on approval of the loans in due time. However, as the approvals were not in place the formalities for the loan amount could never be proceeded.
- j. That in March 2020 the country went into a state of complete lockdown and the projects in question were halted. The complainant in all fairness understanding the limitations of the pandemic agreed to give the respondent the needed time for initiating the refund. In the month of September and October'20 the complainant tried to reach out to the



respondent but couldn't through as the respondent did not take any calls leaving the complainant with no intimation of the requested refund. An email follow up was initiated by the complainant requesting the respondent to settle the refund amount amicably to no response

- k. That it is also worthy to mention here that as per the builder buyer agreement possession date was 02.06.2020 and clause 13 of BBA specifically dealing with the possession date by the respondent to handover the said units to the complainant.
- l. The complainants have been patient for almost several years, investing their hard-earned money in this project. However, in these several years, they have experienced immense mental and physical distress due to the delay and harassment by the respondent.

C. Relief sought by the complainant: -

4. The complainant has sought following relief(s): -
 - i. It is therefore, humbly prayed that the respondent may very kindly be directed to refund the amount of Rs.18,77,936/- along with an interest at the rate of 18% and to honor the builder buyer agreement without incurring any charges that are not part of the builder buyer agreement as the respondent has violated or contravened the provisions of the act, rules or regulations made thereunder the aforesaid applications or agreement dated 02.06.2016.
 - ii. Also, litigation fee of Rs.1,00,000/- be awarded in favor of the complainant and against respondent.
 - iii. Any other relief that the Hon'ble court may think fit.
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.

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D. Reply by the respondent.

6. The respondent contested the complaint on the following grounds: -
- a. That the complaint is liable to be dismissed as the complainants has come before this Hon'ble Authority, with unclean hands and has hidden facts with an attempt to mislead this Hon'ble Authority. The complainants have tried to mislead this Hon'ble Authority by false and frivolous averments.
 - b. That the project namely "Xpressions - by Vatika" is a residential group housing project being developed by the respondent in sector 88A & B, Gurugram, Haryana on the licensed land admeasuring 133.022 acres. It is submitted that the license no.94 of 2013 dated 31.10.2013, license no. 11 of 2015 dated 01.10.2015 were issued by the authority and approval of building plan and other approvals granted for the said project has been obtained on 17.10.2013 by respondent and the construction whereof was started in terms thereof.
 - c. That the present reply is being filed by Mr. Nitish, authorized representative of the respondent, who is duly authorized to act on behalf of the respondent vide board resolution dated 29.01.2024.
 - d. It may be noted that despite the challenges on account of huge default by buyers and demonetization affecting the development of the project, the construction of project was undertaken by the respondent in right earnest and the same proceeded in full swing.
 - e. That the complainant had booked unit bearing No. HSG-028-Sector-88B, Plot No. 16, ST. H-22, Level -2 admeasuring tentative super area of 1550 sq. ft. vide agreement to sale dated 02.06.2016 for a total consideration of Rs.98,62,725/- excluding the EDC/IDC, stamp duty, registration charges, service tax, VAT, labour cess and other taxes imposed by the government from time to time. Apart from the above the complainant was also required

to pay interest free monthly security deposit @ Rs.50/- per sq. ft. of the super area as electricity connection charges, sewage charges, water connection charges, cable connection charges, gas connection charges, gas meter, electricity meter & water meter, STP charges, club membership charges, legal and administrative charges or any other charges as may be applicable and payable by the complainant in addition to the basic sale price.

- f. It is submitted that as per clause 8 of the said builder buyer agreement the complainant was required to make timely payment of the outstanding dues and payment failing which the respondent had all the right to cancel the said unit and forfeit the earnest money.
- g. That as per clause 13 of the said builder buyer agreement the respondent was required to complete the construction of the said unit within a period of 48 months from the date of execution of the said builder buyer agreement unless there shall be any delay due to subject to force majeure circumstances mentioned in clause 16, 17 & 18 of the said agreement thereof which provided for extension of time.
- h. That the complainant was in breach of the terms of the builder buyer agreement and as such had not followed the agreed schedule of payment resulting which the respondent has suffered huge loss. Taking similar example, many of the other homebuyers have also refrained to the make timely payment of their payments resultantly the entire project of the respondent company has suffered. It is pertinent to submit that the complainant had taken "Construction Linked Plan". The pace of construction and timely delivery of apartments in a project where the majority of buyers have opted for construction linked payment plan is solely dependent on timely payment of demand raised by the developer. If



the buyers of apartments in such projects delay or ignore to make timely payments of demands raised, then the inevitable consequence is the case of construction getting affected and delayed.

- i. It is submitted that the complainant has delayed and defaulted in making timely payments of instalments to the respondent. The said delay by the complainant in payment of the timely instalments has also contributed to the delay in completion and possession of the apartment in addition to other factors beyond the control of the respondent.
- j. That the respondent issued various letters dated 24.05.2018, 04.07.2018 & 03.09.2020 to the complainant asking for making the payment of the dues however all was in vain. It is pertinent to mention that the complainant is deliberately misleading this forum by stating that the respondent has terminated the said unit vide reminder letter dated 04.07.2018 however plain reading of the said letter shall clearly demonstrate that the said in the said letter the respondent had granted 7 days' time to make good the partial payment as per the agreed schedule of payment however, the complainant defaulted in making the same.
- k. That it was only after waiting for almost 2 years, when the respondent did not receive any further payment from the complainant, the respondent had no other option but to terminate the said unit of the complainant. Therefore, it can be seen that the complainant has been defrauding this hon'ble forum only to extort money from the respondent for the defaults that was made on the part of the complainant itself. And as per the calculation sheet attached along with the said termination letter it can be seen that the respondent has valid recovery of its rightful dues to the tune to Rs.4,95,512/- from the complainant as per the terms of the said builder buyer agreement.

- l. That the emails annexed by the complainant along with its complaint also can explicitly demonstrate that the complainant did not make the payment of the outstanding dues to the respondent only because the loan was not sanctioned to him by the bank. It is submitted that the respondent had no role to play in getting the loan sanctioned to the complainant and it was the responsibility of the complainant to make the payment of the agreed consideration in a timely manner, therefore it is sole and absolute option of the complainant whether he wanted to make the payment of the respondent out of his own pocket or by taking a loan from the bank. Further, the respondent had neither forced the complainant to book the said unit nor had forced the complainant to enter into the said agreement. The complainant had executed the said builder buyer agreement and had agreed to pay the total consideration against the said unit as per the agreed payment schedule however making such frivolous allegations that he is not able to make the payment as loan has not been sanctioned to him does not give him any valid reason of defaulting the terms of the said agreement. Thus, the said complaint is false and frivolous and therefore liable to be dismissed.
- m. It is an established law, that if one party to the agreement defaults in its obligation under an agreement, he cannot expect the other party to fulfil its obligation in a timely manner. A defaulter under an agreement cannot seek remedy for default against the other for delay. Needless to say, that obligation for payment of the instalments (consideration) was first on the complainant and then the obligation of the respondent was to complete and hand over the apartment. Therefore, the complainant cannot allege delay in completion under the camouflage of refined wordings and misuse of the process of law. Therefore, the complainant is not entitled to any relief under

the Consumer Protection Act, under the camouflage of refine wordings for their own use, will end up getting relief if it is so granted by the Hon'ble Authority. It is submitted that for the aforesaid reason itself this complaint initiated by the Complainant should be dismissed as non-maintainable.

7. All other averments made in the complaint were denied in toto.
8. 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 based on these undisputed documents and submission made by the parties.

E. Written submission made by the complainant:

9. The counsel for the complainant has filled written submissions on 17.01.2025 and no additional fact apart from the complaint and reply have been states in written submission.

F. 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.

F. 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.

F. 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 flat buyer's agreement. 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 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 leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

G. Findings on the relief sought by the complainant.

- G.I Direct the respondent to refund the amount of Rs.18,77,936/- along with an interest at the rate of 18% and to honour the builder buyer agreement without incurring any charges that are not part of the builder buyer agreement as the respondent has violated or contravened the provisions of the act, rules or regulations made thereunder the aforesaid applications or agreement dated 02.06.2016.**
- G.II Pass any order the Hon'ble Authority may deem fit.**
14. The above-mentioned relief sought by the complainant are being taken together as the findings in one relief will definitely affect the result of the other relief and the same being interconnected.
15. In the present complaint, the complainant intends to withdraw from the project and is seeking refund as provided under the proviso to section 18(1) of the Act. Section 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"

16. The complainant is claiming refund of amount paid to the respondent-promoter under the provision 18(1) of the Act, 2016. Though, after the request for refund from the complainant-allottee through letter and email dated 25.03.2023, the respondent-promoter failed to refund the amount paid by the complainant, failing which the complainant-allottee filed the present complaint and hence, the complainant-allottee is seeking for the refund with interest.
17. The complainant was allotted a residential floor bearing no. HSG-028-Sector-88B, Plot no.16, ST, H-22, Level-2, having tentative super area 1550 sq. ft., in project "Xpression" being developed by M/s Vatika Limited under construction linked payment plan and thereafter, a builder buyer agreement was executed between the parties on 02.06.2016, on the above-mentioned unit. The complainant has paid an amount of Rs.18,77,936/- (i.e.,19.04% of total sale consideration) against the total sale consideration of Rs.98,62,725/- (i.e., inclusive of BSP, PLC & Car parking). As per clause 13 of the agreement, the respondent was required to complete the construction of the residential floor within a period of 48 months from the date of execution of this agreement. Further, as per HARERA notification no.9/3-2020 dated 26.05.2020, an extension of 6 months is granted for the

projects having completion date on or after 25.03.2020. The completion date of the aforesaid project in which the subject unit is being allotted to the complainant is 02.06.2020 i.e., after 25.03.2020. As far as grace period of 6 months as is concerned, the same is allowed. Therefore, the due date of possession comes out to be 02.12.2020 (including grace period).

18. The respondent has raised a plea in its reply that the complainant has sought the relief of refund. The respondent submitted that the complainant is defaulter and has failed to make payment as per the agreed payment plan. Therefore, various demand letters, reminders and final opportunities were given to the complainants. Accordingly, the complainant failed to abide by the terms of the builder buyer's agreement dated 02.06.2016 executed inter-se parties by defaulting in making payments in a time bound manner as per payment schedule.
19. Upon examining the documents submitted by both parties, the Authority observes that the various demands reminders were sent by the respondent to the complainant before cancelling the unit to clear the outstanding dues. However, the complainant never cleared the outstanding dues.
20. It is observed that as per Section 19(6) & (7) of the Act, 2016, the allottee was under an obligation to make timely payment as per the payment plan towards consideration of the allotted unit. The respondent sent demand/ reminder letter dated 05.01.2018, 28.02.2018, 24.05.2018, 04.07.2018 and 03.09.2020 to the complainant regarding payment of outstanding dues towards the subject unit. However, the complainant did not pay the outstanding dues. Therefore, the respondent issued a cancellation letter dated 30.03.2021 to the complainant against the subject unit.

21. In view of the above findings, the Authority observes that the unit of the complainant was cancelled by the respondent after issuing proper reminders to pay outstanding dues. Therefore, the cancellation letter dated 30.03.2021 is hereby held to be valid in the eyes of law. However, in the present complaint, the complainant is not challenging the cancellation of subject unit but is instead seeking a refund of the amount paid. Notably, the respondent has failed to comply with the agreed terms regarding the deduction of earnest money upon cancellation, as it has not refunded the remaining balance amount. Accordingly, the cause of action remains continued.
22. 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/438/2019 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 the name of "earnest money". Keeping in view the principles laid down in the first two cases, a regulation known as the Haryana Real

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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.”

23. So, keeping in view of 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 complainants after deducting 10% of the sale consideration and return the remaining amount along with interest on such balance amount at the rate of 11.10% (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 letter i.e., 30.03.2021 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

H.III. That the litigation charges to the tune of Rs.1,00,000/- towards this complaint.

24. The complainant is seeking above mentioned relief w.r.t. litigation expenses. The Hon’ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as ***M/s Newtech Promoters and Developers Pvt. Ltd.***



V/s State of Up & Ors. (supra), has held that an allottee is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses.

H. Directions of the authority:

25. 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 of Rs.18,77,936/- after deduction of 10% of the sale consideration as earnest money along with interest on such balance amount at the rate of 11.10% p.a. as prescribed under rule 15 of the Rules, 2017, from the date of cancellation letter i.e., 30.03.2021 till its actual realization.
 - 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.
26. Complaints stand disposed of.
27. File be consigned to registry.

Dated: 20.02.2025


(Vijay Kumar Goyal)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram