

BEFORE THE HARYANA REAL ESTATE APPELLATE TRIBUNAL

Date of Decision: 09.11.2021

Appeal No.650 of 2019

Shri Mohan Singh, Proprietor, EmEss Developers, B-229,
Sushant Lok-3, Sector 57, Gurugram (Haryana)
...Appellant-Promoter

Versus

Haryana Real Estate Regulatory Authority, Gurugram, New PWD
Rest House, Civil Lines, Gurugram, Haryana

... Respondent-Authority

**Coram: Justice Darshan Singh (Retd), Chairman
ShriInderjeet Mehta, Member (Judicial)
Shri Anil Kumar Gupta, Member (Technical)**

**Argued by: Shri Rajiv Tyagi, Advocate, Ld. counsel for the
appellant-promoter.**

**Ms. Geeta Rathi, Ld. Senior Legal Officer for the
respondent-Authority.**

ORDER

Anil Kumar Gupta, Member (Technical)

The present appeal has been preferred by the appellant-promoter under Section 44 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter called, 'the Act') against the Order dated 19th June, 2019 passed by the respondent-Ld. Haryana Real Estate Regulatory Authority, Gurugram (hereinafter called, 'the learned Authority') imposing a penalty of Rs.1,00,00,000/- (Rupees one crore) for violation of provisions of

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Section 3(1) of the Act as the promoter EmEss Developers has advertised for sale of 24 units of 4BHK flats situated in Sector 56, Gurugram on behalf of 'Heritage Royale'.

2. The facts and circumstances of the case can be summed up as under:-

2-a. An advertisement dated 26.05.2019 was published in the newspaper "Hindustan Times" on behalf of the Heritage Royale by M/s EmEss Developers, Heritage Royale, E-1, Florence Club Road, Sushant Lok-II, Sector 56, Gurugram and also a brochure was got published with respect to the sale of independent flat unit numbering 24, under construction on Plots No.E-1, E-2, E-3, E-27 and E-28 in Sector 56, Sushant Lok-II, Gurugram at a price of Rs.2.35 crores (approximately Rs.7800 per sq. ft.) onwards. The advertisement gave a very charming view with respect to sale of 24 units of 4BHK each flat (approximately 3000 sq. ft.) of sheer luxury per unit with many added features.

2-b. The learned Authority issued a show cause notice dated 04.06.2019 to the appellant-company for violation of Section 3(1) of the Act for imposing penalty under Section 59 of the Act directing to show cause within 15 days and to attend the personal hearing before the learned Authority on 19.06.2019 at 03:00 pm.

2-c. Shri Mohan Singh, Proprietor of EmEss Developers made himself present before the learned Authority for hearing and submitted his reply dated 19.06.2019 (the date is wrongly mentioned in the reply as 19.05.2019) intimating therein that the promoter had started construction on 2 plots, Plot No. E-1 and

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E-2, Sushant Lok, Sector 56, area 372 sq. mts., each owned by two parties i.e. E-1 by Mr. Sanjay Sood and E-2 by Mrs. Veena Misra. It was also admitted that the other three plots E-3, E-27 and E-28 are owned by Mrs. Rajshree Sood, Mrs. Veena Misra and Dr. Arun Misra and Veena Misra respectively having area of 372 sq. mts. each. The work on these three plots had started just three months ago. It was also submitted that all above five plots were purchased by aforesaid owners from M/s Ansal Buildwell Ltd. The sale deeds of all five owners were also enclosed with the reply. It was also submitted that the notice regarding the advertisement given in 'Hindustan Times' newspaper on 26.05.2019 was given by mistake/ignorance of HRERA laws, though, the ignorance of law is no excuse and felt sorry for the same and thereafter they had immediately discontinued the advertisement and removed the hoarding from the site after receiving the notice. It was also promised and ensured that no such newspaper advertisement will be published nor pamphlets/handbills about the same project will be disturbed in future. It was also informed that the promoter has not done any advance booking/sale/collected money against the same from any buyer for the above stated construction.

2-d. The learned Authority after perusal and analysing of all the three documents (advertisement, brochure, show cause notice and reply) held that the promoter M/s EmEss Developers and Collaborators have violated Section 3(1) of the Real Estate (Regulation and Development) Act 2016 and has also pleaded guilty in this respect by stating that it had committed an error in this

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regard and also has requested the learned Authority for taking lenient view. The learned Authority after viewing the pros and cons of the case, imposed the penalty of Rs.1,00,00,000/- (rupees one crore) for violation of under Section 3(1) of the Act.

2-e. The learned Authority also directed the appellant to apply for registration of the above mentioned project in the prescribed REP-1 & II and DPI along with required documents and fee as per provisions of the Act, Rules and Regulations within a period of 90 days failing which the penal action as per Section 63 of the Act *ibid* shall be initiated without any further notice. It was also directed that the penalty should be deposited with the learned Authority within 10 days so as to avoid further penal action in this regard. It was also directed that till such time, the above mentioned project is not registered with the learned Authority, the promoter is directed not to issue any advertisement, circulate any pamphlet or display any hoarding and receive any booking amount against 24 units in violation of Section 3(1) of the Act *ibid* so as to avoid penal proceedings under Section 59 of the Act. Aggrieved with the impugned order dated 19.06.2019 of the learned Authority, the appellant has preferred the present appeal.

3. We have heard Shri Rajiv Tyagi, Advocate, Ld. counsel for the appellant and Mrs. Geeta Rathi, Ld. Senior Legal Officer for the learned Authority. Ld. counsel for the appellant has also filed approval of building plans vide e-mail dated 12.01.2020 and challans/bills vide e-mail dated 11.12.2021 along with certain documents and written submissions. The learned Authority has

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also filed copy of the brochure and advertisement by the appellant vide e-mail dated 12.01.2020, the inquiry report of Engineer Executives of the learned Authority vide e-mail dated 23.09.2021 and the report of the fact finding inquiry of Engineer Executive vide e-mail dated 01.10.2021.

4. Initiating the arguments, the Ld. counsel for the appellant contended that in pursuit of the business, in or around January, 2019, the appellant came across the respective owners of the Plot No.E-1 by Shri Sanjay Sood; Plot No.E-2 by Smt. Veena Misra; Plot No.E-3 by Smt. Rajshree Sood; Plot No.E-27 by Smt. Veena Misra and Dr. Arun Misra; and Plot No.E-28 by Smt. Veena Misra at Sushant Lok-II, Sector 56, Gurugram, Haryana. The said owners were constructing apartments on their respective plots of land which are at various stages of constructions. Whilst, the shell and structure of the building on the Plot No.E-1, Sushant Lok-II, Sector 56, Gurugram, Haryana was already ready, the buildings on the Plot Nos.E-2 and the E-3 were still under various stages of construction. The building of the Plot No.E-2 was at an advanced stage of constructions and E-3 was at middle stage. The building on Plot No.E-27 and E-28 was at the stage of first level.

5. Ld. counsel for the appellant further contended that the appellant informed the owners of the above said plots about the nature of his business and offered his services as facilitator for the sale of various apartments. The owners of plots informed him that they would not like to involve any third person, but the appellant would be free to independently solicit consumers for the sale of the

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floors of the building when constructed and approved. As the aforesaid properties are situated in the prime and much sought after area of Gurugram, the appellant did not want to lose the opportunity of earning handsome profits by facilitating the sale of constructed portions of these plots and, therefore, visited the property almost daily.

6. Ld. counsel for the appellant further contended that in the month of April 2019, the owner of Plot no.E-1, Sushant Lok-II, Sector 56, Gurugram, Haryana was expecting the completion of the building on his plot and in this connection he wanted to put up an advertisement by way of sign boards, distribution of pamphlets etc. for publicizing the availability of built-up space of his plot of land. The appellant offered to get the pamphlets printed and the sign boards were put up at a conspicuous location and while doing so as the facilitator for the sale of the built-up portions, the appellant in his enthusiasm got his phone number printed on the sign board, pamphlets and advertisement etc.

7. Ld. counsel for the appellant further contended that the aforesaid plots owners have not authorised the appellant as their sole selling agent, advisor, consultant dealer and developer for the sale of constructed portions on the respective plots. As per customs of the realty trade, the real estate consultants, real estate agents advertise free of cost for the sale of the various properties, to their customers against the commission on the deal if finalised, which are owned by third parties. It was further contended that the appellant was acting in his individual capacity and not under

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any contractual relationship of partnership, developer, projector, construction contractor, agent, co-sharer or promoter whatsoever with the owners of the respective plots. The appellant has no right, title or interest in the aforesaid plots except entertaining the fond expectation of facilitating the sale of built-up portions on these plots by the respective owners and of earning some profit by arranging the sales thereof.

8. It was also contended that the advertisements were given by the appellant in over enthusiasm without any knowledge of the provisions of the Act. The appellant has made certain factually incorrect statements in the reply to the show cause notice. The appellant had used the expression "WE" for himself as if he had constructed the building on the said plots, whereas the true fact is that the land belongs to third parties and they were themselves carrying out the construction of the building on their respective plots.

9. It was further contended that the appellant in its reply before the learned Authority regarding show cause notice has erroneously described the construction of the various building as 'the project'. It was further contended that as per Sub-Section (2) of Section 3 registration is not required where the area of the land does not exceed 500 sq. mts. or the number of apartments proposed does not exceed 8. In the present case, as per the title documents of the plots filed by the appellant before the learned Authority, each of the plot was less than 500 sq. mts. in area and, thus, falls outside the scope of the Act.

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10. It was also contended that the entity/unit for taking cognizance of non-compliance or violation of the provision of RERA is the “Real Estate Project” and in case of any such non-compliance or violation of ‘Promoter’ or the ‘Real Estate Project’ as the case may be, shall be penalized and in the present case no specific finding of the existence of a “Real Estate Project” has been made by the learned Authority, in the impugned order, which qualifies for registration under the provisions of the Act, 2016, and, therefore, the respondent erred in law in assuming combined land holding of five different plots and assessing the appellant to be the promoter without first determining that there was actually a “Real Estate Project” in relation to which the appellant could be said to be the ‘Promoter’ or a “Real Estate Agent”.

11. Further it was contended that merely because the construction of five plots was being carried out in different stages would not give rise to the presumption that the appellant had undertaken the construction on the said plots with intent to create a “Real Estate Project”.

12. It was also contended that there was no admission by the appellant with respect to the either existence of a conjoined “Real Estate Project” or a common development of all the different plots of land through the appellant or that there was a “Real Estate Project” registerable under the provisions of the RERA Act. The learned Authority was required to enquire, investigate and make additional enquiries and then return a positive finding that five different owners of the five different plots had a meeting of minds

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with the appellant to undertake to construct a “Real Estate Project”. Even the photographs obtained by the learned Authority from the appellant showed that separate construction was going on the five different plots. Although, two of the Buildings i.e. Plot Nos.E-1 and E-2 are adjacent, yet learned Authority has deliberately kept silent if the construction of the Plot Nos.E-1 and E-2 were interconnected or not, so as to bring it out of the purview of Section 3(2) Haryana RERA Act. In absence of any such finding there cannot be any presumption that the construction on all five plots were interconnected so as to constitute one integrated “Real Estate Project”.

13. It was further contended that commercial advertisement has been held to be a part of Article 19 pertaining to the ‘Freedom of Speech’. Advertising *per se* cannot be absolutely prohibited, subject to reasonable restrictions. The Advertiser is entitled to make puffed up claims about its projects. Mere advertisement could not have been prohibited without returning the positive finding of the existence of the “Real Estate Project”. The appellant has relied upon the judgments in **Tata Press [Yellow Pages] Limited v. Mahanagar Telephone-Nigam Limited & Ors. [AIR 1995 SC 2438; 1995 SCC (5) 139]** and **Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd., (1999) 7 SCC 1.**

14. It was further contended that the impugned order dated 19.06.2019 is based on the alleged admission of the appellant made in its reply to the show cause notice dated 04.06.2019. The learned Authority latched upon the said statement and closed all

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its proceedings and hurriedly passed the impugned order without following due procedure as prescribed under Rule 28(2)(i) of the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter called as, 'the Rules') 'Consideration of Evidence and Satisfying' itself that the appellant was in contravention of the Act and Rules. Under the Rule 28(2)(f) of the Rules, the learned Authority is entitled to call for production of documents or other evidence which the learned Authority ought to have done but not done to satisfy itself on its jurisdiction. Under Rule 28(2)(i) of the Rules, the learned Authority has the power to impose penalty or to dismiss the complaint.

15. It was further contended that the learned Authority acted without jurisdiction by proceeding against the appellant on the basis of alleged admission of the appellant under Rule 28(2)(d)(i), while failing to examine that Rule 28 applies to a case where 'any person' aggrieved in relation to the "Real Estate Project" files a complaint with the learned Authority. Under Rule 28 of the Rules, the learned Authority has not been conferred any power to act of *suo moto*. The said Rule 28 of the Rules corresponds to Section 31 of the Act whereas the learned Authority can take *suo moto* cognizance under Section 35 of the Act wherein the learned Authority can call upon the 'Promoter' or the 'Allottee' or the 'Real Estate Agent', as the case may be, for the information prescribed in relation to the compliance of the Act or the Rules and Regulations made thereunder. Section 35 corresponds to Rule 21 of the Rules which though empowers the learned Authority to act *suo moto*, but

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does not expressly provide for the learned Authority to take into account any “Admission” or act upon any “Admission” as such. For this purpose Section 35(2) of the Act confers the powers of Civil Court under the Code of Civil Procedure, 1908 upon the HRERA Authority which necessarily mandates the learned Authority to summon and seek attendance of the persons or examination of witnesses and documents etc.

16. It was further contended that the learned Authority is bound to pass the reasoned order after due examination of the evidence even if there is an admission. Section 35 coupled with Rule 21 mandates an enquiry by learned Authority including obtaining of an expert opinion and seeking the appointment of one or more persons to make an inquiry in relation to the affairs of any promoter, or allottee, or the real estate agent, as the case may be. However, the learned Authority did not choose to invoke its powers while examining the case of the appellant and instead waded into impermissible exercise of jurisdiction, shirking its responsibility and passing the impugned Order solely based on an alleged “admission” of the appellant. It was incumbent under Rule 3(i)(f) of the Rules upon the learned Authority to inquire and obtain the details of the consent of the owner of the land along with the copies of the Registered Collaboration Agreement or any other Agreement entered into between the appellant and such Owner(s) along with the copies of the title documents of the such owners. However, the learned Authority completely abdicated its authority by not

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enquiring into these mandatory points of investigation and seeking details thereof from the appellant.

17. It was also contended that the appellant in its reply dated 19.06.2019 had filed the separate Sale Deeds of the five Plots which contained the names of the respective owners and the area of the plots with each individual plots of land being less than 500 sq. mts. in measurement. It was thus clear that, the appellant is not the owner of the five pieces of land on which incidentally, the constructions were going on, when the impugned show cause notice was issued, therefore, the requirements of prior registration stood excluded under Section 3(2) of the Act.

18. It was also contended that as per Income Tax Returns of the last three years filed by the appellant also demonstrate that he did not have the financial resources to undertake constructions on even one plot of land much less on all the five plots together.

19. It was also contended that the learned Authority ought to have found that the appellant had 'agreed' with the owners of the five plots of land to combine their Land Capital and Financial Capital along with the appellant to develop the "Real Estate Project" or that they had leased or loaned their Land Capital to the appellant to use his finances to promote the "Real Estate Project" or to act as the Real Estate Agent in relation to the "Real Estate Project".

20. It was also contended that as per Section 38(2) of the learned Authority is bound to follow the principles of natural justice, and, therefore, the learned Authority was duty bound to

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conduct an exhaustive enquiry with due opportunity to the appellant to disprove the alleged presumption or admission of guilt. The fair opportunity of hearing cannot be denied by alleging admission of guilt.

21. It was also contended that the alleged admission of guilt was only in relation to the issue of the said advertisement in future while confirming that the said advertisement had already been withdrawn.

22. It was also contended that the computation of penalty itself is highly irrational and far from reality as for merely issuing an advertisement and making tall claims, ought not to have been punished with the penalty of 10% of the project cost as the appellant is merely a real estate agent/property dealer and it being borne out from the records the appellant did not have the capacity to undertake the project of magnitude of Rs.10,00,00,000/- (rupees ten crore).

23. It was also contended that the inquiry report dated 31.05.2019 of the Engineer Executives of the learned Authority which was submitted in the Tribunal on 24.09.2021 is back dated as no reference of the same is made in the impugned order.

24. With these submissions, it was contended that the learned Authority has clearly acted in an arbitrary, irrational and high handed manner and has failed to exercise the powers conferred upon it by Sections 35 and 38 of the Act and Rules 21 and 28 of the Rules, and, therefore, prayed for setting aside the impugned order.

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25. *Per contra*, Ms. Geeta Rathi, Ld. Senior Legal Officer for the respondent-Authority contended that the penalty of Rs.1,00,00,000/- has been imposed on the appellant vide impugned order dated 19.06.2019 which was conveyed to the appellant by the learned Authority vide letter dated 26.06.2019. The above said penalty was imposed as per the provisions of the Act and Rules.

26. She further contended that advertisement published by the appellant in 'Hindustan Times' newspaper on 26.05.2019 for the Real Estate Project, namely, 'Heritage Royale' Sector 56, Gurugram came to the notice of the learned Authority. The hoardings for the same project installed by the promoters also came to the notice of the learned Authority. The appellant has advertised and offered for sale and invited persons to purchase the ultra luxury upscale apartments comprising of 24 units of 4BHK each (approximately 3000 sq. ft. of sheer luxury per unit) in Heritage Royale, Sector 56, Gurugram. Therefore, taking the cognizance of the above, the learned Authority took a *suo moto* cognizance and issued a show cause notice dated 04.06.2019 for issuing advertisement and offering for sale of apartments in the real estate project without registration and directed the appellant to immediately remove all hoardings and also withdraw the publicity material and further directed the appellant to submit information within 15 days i.e. by 19.06.2019 regarding the name of real estate agent: copy of the conveyance/sale deed of the plots on which these apartments are being developed along with their size and approved

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plan; name of the directors of the promoter-company along with their addresses and mobile/contact numbers liable for criminal prosecution in case default continues; name of purchasers and details of the bank account of the project and other banking details.

27. She also contended that learned Authority had directed the team of engineers to visit the site of the project 'Heritage Royale' of the appellant and submit status report. The report dated 31.05.2019 of the Engineer Executives of the learned Authority was supplied to this Tribunal vide e-mail dated 23.09.2021. She contended that the impugned order has been passed by the learned Authority after considering the said report of Engineer Executives. She contended that in one of the photographs, the vehicle of the learned Authority is seen to be parked in front of one of the apartment being built by the appellant which authenticates the report to be true and correct.

28. She further contended that in Para No.5 of the show cause notice it is mentioned that the area of the land proposed to be developed exceeds 500 sq. mtr. and also the number of apartments to be developed exceeded eight, and, therefore, registration is required for this real estate project with the Authority. It was also mentioned in the show cause notice that issuing of advertisement and offering for sale is violation of Section 3(1) read with Section 59 of the Act.

29. She further contended that the documents such as advertisement in the newspaper and brochure of the said project

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show that these have been issued by the appellant-company as its name EmEss Developers stood imprinted in the above said documents. It is also mentioned in the advertisement that brokers/facilitators will be incentivised with minimum 6.0 lac commission. This clearly shows that the appellant-company is a promoter developer and not a real estate agent or facilitator as is being project by the appellant in the present appeal.

30. She also contended that in para 6 of the show cause notice it is mentioned that as per Section 3 of the Act a penalty up to 10% of the estimated costs of the real estate project can be imposed on the appellant. The minimum estimated costs is assessed to Rs.56.40 crore on the basis of the figures given in the advertisement and 10% of the estimated costs comes out to Rs.5.60 crore.

31. She further contended that the learned Authority also gave an opportunity of being heard in person in the matter and asked the appellant to appear before the learned Authority at New PWD Rest House, Civil Lines, Gurugram at 03:00 pm on the same date i.e. 19.06.2019.

32. She further contended that the learned Authority under Section 37 of the Act for the purpose of discharge of its functions under the provisions of the act, directed that the promoter shall not withdraw any amount from the account where the money received from the allottees has been deposited till project is registered with the learned Authority. The amount realized so far shall be kept in

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a single account or if it is received in different account, the same shall be freezed till further orders.

33. She further contended that it was also conveyed through the above said show cause notice that in case the violation continues and the promoter does not comply with the above said order of the learned Authority, the promoter shall be liable for action as per Section 59(2) of the Act.

34. She further contended that the appellant in its reply to the show cause notice issued had admitted that they had started construction on two plots i.e. Plots No.E-1 and E-2, Sushant Lok-II, Sector 56, area 372 sq. mts. each. Both these plots were owned by two parties E-1-Mr. Sanjay Sood and E-2-Mrs.Veena Misra. Photocopies of the ownership sale deeds were also provided by the appellant. It was also admitted by the appellant that the other three plots i.e. E-3, E-27 and E-28 are owned by Mrs. Rajshree Sood, Veena Misra & Dr. Arun Misra and Veena Misra respectively with area of 372 sq. mts. each. The work on those plots was started just three months ago. It was also submitted by the appellant in its above said reply that all above plots were purchased by owners from M/s Ansal Buildwell Ltd. and provided copies of sale-deeds of all the plots. It was also admitted by the appellant that advertisement given in 'Hindustan Times' newspaper of 26.05.2019 was given by mistake/ignorance of RERA laws, though the ignorance of law, is no excuse and felt sorry for the same and, thereafter, stated to have immediately discontinued the advertisement and removed the hoardings at site after receiving the

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notice. The appellant also promised and ensured that no such newspaper advertisements will be published nor pamphlet/handbills about the same will be distributed in future. It was also informed by the appellant that they have not done any advance booking or collected any money against the sale from any buyer for the above stated construction and promised that in future they shall abide by all Rules and Regulations of the learned Authority.

35. She further contended that on perusal and analysing of all three documents (advertisement and brochure, show cause notice and reply), it is rightly held by the learned Authority that M/s EmEss Developers and Collaborators have violated Section 3(1) of the Act. The appellant has also pleaded guilty in this respect by stating that they have committed an error in this regard and also has requested the learned Authority for taking lenient view. In view of the above, the learned Authority after viewing the pros and cons of the case has rightly imposed the penalty of Rs.1,00,00,000/- for violation of under Section 3(1) of the Act.

36. With the above submissions, it was contended that the learned Authority has rightly passed the impugned order and the appeal may be dismissed.

37. We have duly considered the aforesaid contentions. It emerges from the facts of the case and contentions raised by both the parties that the learned Authority took *suo moto* cognizance of the advertisement published by M/s EmEss Developers 'Hindustan Times' newspaper on 26.05.2019 for 'real estate project', namely, Heritage Royale, Sector 56, Gurugram. It also came to the notice of

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the learned Authority that the Brochure was got published by the appellant with respect to the sale of the flat/units and hoardings were also installed at various places. M/s EmEss Developers (promoter) had advertised and offered for sale and invited persons to purchase the ultra luxury upscale apartments in Heritage Royale, Sector 56, Gurugram. It has been mentioned in the publicity material that a unique exclusive high-end residential complex comprising of 24 units of 4BHK each with respect to sale of independent flat units numbering 24, under construction on plot Nos.E-1, E-2, E-3, E-27 and E-28 in Sector 56, Sushant Lok-II, Gurugram at a price of Rs.2.35 crores (approximately 7800 per sq. ft.) on wards. The advertisement gave a very charming view with respect to sale of 24 units of 4BHK each flat (approximately 3000 per sq. ft.) of sheer luxury per unit with below noted added features:-

- *“200 Mtrs. (30 second drive) from Golf Course Extension Road.*
- *700 mts. (900 second drive from 16 lane signal*
- *Free golf course road and sector 55/56 rapid metro station.*
- *Exactly east facing; perfectly Vastu compliant.*
- *Club Florance, Pratiksha Hospital, Shalom School, several markets within 100 mts distance.*
- *Completely gated and secured*
- *Fully air conditioned: All rooms INCLUDING all bathrooms and kitchen equipped with Daikin AC and Sony LED TVs.*

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- *Power backup by generators and inverters.*
- *Embellished exclusively with top-end Brands like Daikin, Sony, Schindler, Grohe, Jaguar and the likes.*
- *Picturesque, Limitless, Expensive view till the horizon.*
- *Air-conditioned lobbies to greet visitors.*
- *A compact in-house club.*
- *No red light from Heritage Royale to NH-8 and IGI Airport.*
- *Worth your visit because. Seeking is believing.”*

38. The learned Authority has supplied the copy of the Inquiry Report dated 31.05.2019, of the project ‘Heritage Royale’ being developed by the appellant, conducted by the Engineer Executives (Shri Nikhil Sharma and Shri Sumeet) of the learned Authority vide its e-mail dated 23.09.2021. The contents of the above said inquiry report are reproduced as below:

“Site inspection report of the project “Heritage Royal” located in Sector-56, Gurugram being developed by M/s EmEss Developers

S. no.	Particulars	Details
1.	<i>Name of developer</i>	<i>M/s EmEss Developers</i>
2.	<i>Name of project</i>	<i>Heritage Royale</i>
3.	<i>Location of project</i>	<i>E-1, Florance Club Road, Sushant Lok-II, Gurugram</i>
4.	<i>Nature of project</i>	<i>Residential floors</i>
5.	<i>No. of units</i>	<i>24</i>
6.	<i>Type of units</i>	<i>4BHK</i>

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The promoter has given advertisement in the Hindustan Times newspaper dated 26.05.2019 for advertising/marketing/selling/booking of units in the real estate project namely "Heritage Royale" located in sector-56, Gurugram and also issued pamphlet of the project for selling of 24 units of 4BHK in the high-end residential complex. The advertisements and the pamphlets came to the notice of the authority wherein it was observed that as on today the no. of units being developed exceeds eight in the project. Therefore, the project is not saved under section 3(2)(a) of the Real Estate (Regulation and Development) Act, 2016 and as per the proviso to section 3(1) of the Real Estate (Regulation and Development) Act, 2016 and the promoter is required to register their project with the authority before advertising the same.

The authority has taken suo moto cognizance against the promoter for non-registration of the project and directed the team of engineers to visit the site of the project and submit the status report of the project. Therefore, as per the directions of the authority, the site of the project is visited on 31.05.2019 and detailed report of the site is discussed below:

- *During the site visit it was observed that the promoter has placed hoarding at various location in sector-56,*

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Gurugram for marketing of the project wherein it is clearly mentioned that the project heritage royale, a luxury residential complex of 24 units of 4BHK apartments. The hoardings are also placed at entrance of the project. The photograph of one of the hoardings is attached herewith.

- The site of the project is visited as per the information furnished in the advertisement wherein it is observed that the promoter is has constructed 3 towers having stilt plus 4 floors (i.e., total 12 units in these three towers and work for 8 unit is about to be finished). Further the promoter has started the construction of other two towers wherein the shuttering for casting the slab of the stilt floor has been fixed. The space for construction of 6th tower has been left vacant as on date.*
- The promoter has developed an office in the stilt area of one of the towers wherein the representatives on behalf of the promoter describes the features of the project having the pamphlets which are being distributed in the newspaper for marketing.*

The site photographs captures during the inspection are attached herewith for reference and further necessary action please.

*Sd/-
Nikhil Sharma
(Engineer Executive)*

*Sd/-
Sumeet
(Engineer Executive)”*

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39. A show cause notice dated 04.06.2019 mentioning therein that the area of land proposed to be developed exceeds 500 sq. mtr. and also the number of apartments to be developed exceeded eight, and, therefore, registration is required for this real estate project with the learned Authority being under its jurisdiction. The said show cause notice dated 04.06.2019 was issued to appellant company M/s EmEss Developers for violation of Section 3(1) of the Act for imposing penalty under Section 59 of the Act directing to show cause within 5 days and to attend personal hearing before the learned Authority on 19.06.2019 at 03:00 pm.

40. Shri Mohan Singh, Proprietor of EmEss Developers presented himself for hearing before the learned Authority and submitted the reply dated 19.06.2019 to the show cause notice dated 04.06.2019, which reads as under:-

- *“That we had started construction on 2 plots, plot no E1, E2, Sushant Lok - 2, Sector 56, area 372 sq mts. Both these plots are owned by 2 parties. E1 by Mr. Sanjay Sood and E2 by Mrs. Veena Misra, Photocopies of ownership sale deeds are enclosed for your ready reference.*
- *The other 3 plots E3, E27 and E28 are owned by namely: E3-Mrs Rajshree Sood, E27 Mrs. Veena Misra and Dr. Arun Misra and E28 Mrs. Veena Misra with areas as 372 sq. mts. Their work was started just three months ago.*

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- *Therefore, we again would like to bring to your kind notice that all above 5 plots are purchased by owners from M/s Ansal Buildwell Ltd. All the 5 owners sale deeds are enclosed for your reference.*
- *As stated in the notice regarding the advertisement given in 'Hindustan Times' newspaper on 26.05.2019 was given by mistake/ignorance of HARERA laws, though the ignorance of law, is no excuse, and they feel sorry for the same and thereafter they have immediately discontinued the add and removed the Hoardings at the site after receiving the notice.*
- *We also promise and ensure that no such newspaper ads will be published and pamphlets/handbills about the same project will be disturbed in future.*
- *Also we like to inform that we have not done any advance booking/sale/collected money against the sale from any buyer for the above stated construction.*
- *We also promise that in future, we shall abide by all rules and regulations of HRERA Regulatory Authority.”*

41. The relevant part of Section 3(1) and Section 3 (2)(a) of the Act reads as under:-

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Section 3 Prior Registration of real estate project with real Estate Regulatory Authority.

“(1) No promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project or part of it, in any planning area, without registering the real estate project with the Real Estate Regulatory Authority established under this Act:

3(2) Notwithstanding anything contained in sub-section (1), no registration of the real estate project shall be required—

(a) where the area of land proposed to be developed does not exceed five hundred square meters or the number of apartments proposed to be developed does not exceed eight inclusive of all phases:

(b) xxxx xxxx xxxx

(c) xxxx xxxx xxxx”

42. As per advertisement in ‘Hindustan Times’ newspaper on 26.05.2019 by the Appellant, Brochure published and Hoardings installed by the appellant company, details of which are already brought out in the above said paras, the appellant Company is constructing for sale upscale apartments 24 units of 4BHK (approximately 3000 per sq. ft.) each, which are under construction on plot Nos.E-1, E-2, E-3, E-27 and E-28 (each

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measuring 372 sq mtrs) in Sector 56, Sushant Lok-II, Gurugram at a price of Rs.2.35 crores (approximately 7800 per sq. ft.) on wards for 'real estate project', namely, Heritage Royale, Sector 56, Gurugram.

43. As per inquiry report dated 31.05.2019 conducted by the Engineer Executives of the learned Authority, it was observed by them that promoter has constructed 3 towers having stilt plus 4 floors (i.e., total 12 units in these three towers and work for 8 unit is about to be finished). Further, the promoter has started the construction of other two towers wherein the shuttering for casting the slab of the stilt floor has been fixed. The space for construction of 6th tower has been left vacant as on date.

44. As per para no.5 of the show cause notice dated 04.06.2019 issued by the learned Authority it is mentioned that the area of land proposed to be developed exceeds 500 sq. mts. and also the numbers of apartments to be developed exceed eight. Accordingly, registration is required for this real estate project with the learned Authority being under its jurisdiction.

45. In the reply dated 19.06.2019 of the appellant to the show cause notice dated 04.06.2019, it is mentioned "That we had started construction on 2 plots, plot no E1, E2, Sushant Lok - 2, Sector 56, area 372 sq mts. Both these plots are owned by 2 parties. E1 by Mr. Sanjay Sood and E2 by Mrs. Veena Misra, Photocopies of ownership sale deeds are enclosed for your ready reference. The other 3 plots E3, E27 and E28 are owned by namely: Mrs Rajshree Sood, Mrs. Veena Misra and Dr. Arun Misra and Mrs.

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Veena Misra respectively with area of 372 sq mts. each. Their work was started just three months ago.”

46. In the present case, the total area of land being developed of five plots of 372 sq. mts. each exceeds five hundred square meters and also the number of apartments being developed exceed eight in the said project ‘Heritage Royale’ by the Appellant company. Therefore, the project is not saved under Section 3(2)(a) of the Act and as per the proviso to Section 3(1) of the Act the appellant is required to register the project with the learned Authority before advertising the same.

47. The Appellant has contended that he is not a promoter and is only a real estate agent. To adjudicate this controversy the definition of promoter as given in Section 2(zk) is reproduced, which reads as under:

2(zk) “promoter” means,—

- (i) a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees; or
- (ii) a person who develops land into a project, whether or not the person also constructs structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon; or

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- (iii) XXXX XXXX XXXX
- (iv) XXXX XXXX XXXX
- (v) *any other person who acts himself as a builder, coloniser, contractor, developer, estate developer or by any other name or claims to be acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale; or*
- (vi) *such other person who constructs any building or apartment for sale to the general public.*

Explanation.—*For the purposes of this clause, where the person who constructs or converts a building into apartments or develops a plot for sale and the ¹[person] who sells apartments or plots are different persons, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified, under this Act or the rules and regulations made thereunder;”*

48. It emerges from the advertisement in ‘Hindustan Times’ newspaper on 26.05.2019, Brochure published, Hoardings installed by the appellant company and per report dated 31.05.2019 of the Engineer Executives of the learned Authority as brought out in the afore said paras and reply of the Appellant dated 19.06.2019 to the show cause notice dated 04.06.2019 that the appellant Company is constructing for sale upscale apartments 24 units of 4BHK (approximately 3000 per sq. ft.) each, under construction on plot Nos.E-1, E-2, E-3, E-27 and E-28 (each measuring 372 sq. mtrs.)

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in Sector 56, Sushant Lok-II, Gurugram at a price of Rs.2.35 crores (approximately 7800 per sq. ft.) on wards for 'real estate project', namely, Heritage Royale, Sector 56, Gurugram.

49. Thus, from the aforesaid discussions, it is very clear that the Appellant company is constructing and causing to construct for sale of upscale apartments 24 units of 4BHK (approximately 3000 per sq. ft.) each, under construction on plot Nos.E-1, E-2, E-3, E-27 and E-28 (each measuring 372 sq. mtrs.) in Sector 56, Sushant Lok-II, Gurugram at a price of Rs.2.35 crores (approximately 7800 per sq. ft.) on wards for 'real estate project', namely, Heritage Royale, Sector 56, Gurugram and therefore the appellant company is very much covered in the definition of a promoter as given at Section 2 (zk) of the Act.

50. The Appellant has contended that the learned authority has proceeded with imposing penalty without defining the project. The learned Authority should have first decided whether the project being under taken by the appellant is a project or not as per the definition of 2 (zn) of the Act. Section 2(zn) reads as under:

“2(zn) “real estate project” means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or ¹[apartment], as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and

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structures thereon, and all easement, rights and appurtenances belonging thereto;”

51. It emerges from the advertisement in ‘Hindustan Times’ newspaper on 26.05.2019, Brochure published, Hoardings installed by the appellant company, reply of the Appellant dated 19.06.2019 to the show cause notice dated 04.06.2019 and as per report dated 31.05.2019 of the Engineer Executives of the learned Authority as brought out in the afore said paras, that the appellant Company is developing a building consisting of 24 apartments of 4BHK (approximately 3000 per sq. ft.) each, under construction on plot Nos.E-1, E-2, E-3, E-27 and E-28 (each measuring 372 sq. mtrs.) in Sector 56, Sushant Lok-II, Gurugram for selling at a price of Rs.2.35 crores (approximately 7800 per sq. ft.) on wards for ‘real estate project’, namely, Heritage Royale, Sector 56, Gurugram. Thus, from the aforesaid discussions, it is very clear that the Appellant company is developing for sale of 24 apartment of 4BHK (approximately 3000 per sq. ft.) each, under construction on plot Nos.E-1, E-2, E-3, E-27 and E-28 (each measuring 372 sq. mtrs.) in Sector 56, Sushant Lok-II, Gurugram at a price of Rs.2.35 crores (approximately 7800 per sq. ft.) on wards for ‘real estate project’, namely, Heritage Royale, Sector 56, Gurugram and therefore the development work being executed by the Appellant is a “real estate project” in terms the definition of a real estate project given at section 2 (zn) of the Act.

52. The appellant has contended that the learned Authority has passed the impugned order dated 19.06.2019 merely on the

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alleged admission of the appellant without following the due procedure. The Rule 28 relates to Section 31 which are not applicable to the *suo moto* complaints. In the *suo moto* complaints, Rule 21 is applicable as it relates to Section 35 under which the *suo moto* complaints are to be filed and adjudicated. Thus the contention of the appellant is that the learned Authority has not acted as per the provisions of act and the rules made thereunder and proper inquiry has not been conducted which lead to the wrongful conclusion by the learned Authority to impose a penalty on the appellant. To examine the this controversy relevant part of Sections 31, 35 and 38 of the Act and Rules 21 and 28 are reproduced as under:

“Section 31. Filing of complaints with the Authority or the adjudicating officer.

(1) Any aggrieved person may file a complaint with the Authority or the adjudicating officer, as the case may be, for any violation or contravention of the provisions of this Act or the rules and regulations made thereunder against any promoter allottee or real estate agent, as the case may be.

(2) xxxx xxxx xxxx”

Section 35. Power of the Authority to call information, conduct investigation.

(1) Where the Authority considers it expedient to do so, on a complaint or suo motu, relating to this Act or the rules of regulations made thereunder, it may, by

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order in writing and recording reasons therefor call upon any promoter or allottee or real estate agent, as the case may be, at any time to furnish in writing such information or explanation relating to its affairs as the Authority may require and appoint one or more persons to make an inquiry in relation to the affairs of any promoter or allottee or the real estate agent, as the case may be.

(2) Notwithstanding anything contained in any other law for the time being in force, while exercising the powers under sub-section (1), the Authority shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit, in 5 of 1908. respect of the following matters, namely:-

(i) the discovery and production of books of account and other documents, at such place and at such time as may be specified by the Authority;

(ii) summoning and enforcing the attendance of persons and examining them on oath;

(iii) issuing commissions for the examination of witnesses or documents;

(iv) any other matter which may be prescribed.

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Section 38. Powers of Authority.

(1) The Authority shall have powers to impose penalty or interest, in regard to any contravention of obligations cast upon the promoters, the allottees and the real estate agents, under this Act or the rules and the regulations made thereunder.

(2) The authority shall be guided by the principles of natural justice and, subject to the other provisions of this Act and the rules made thereunder, the Authority shall have powers to regulate its own procedure.

(3) xxxx xxxx xxxx

(a) xxxx xxxx xxxx

(b) xxxx xxxx xxxx

Rule 21. Additional powers of Authority. Section 35. - (1) In

addition to the powers specified in clause (iv) of sub-section (2) of section 35, the Authority may require the promoter(s), allottee(s) or real estate agent(s) to furnish in writing such information or explanation or produce such documents within such reasonable time, as it may deem necessary.

(2) The Authority may call upon such experts or consultants from the fields of urban planning, economics, commerce, accountancy, real estate, competition, construction, architecture, law or engineering or from any other discipline as it deems

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necessary, to assist the Authority in the conduct of any inquiry or proceedings before it.

- (3) xxxx xxxx xxxx
- (a) xxxx xxxx xxxx
- (b) xxxx xxxx xxxx
- (c) xxxx xxxx xxxx
- (4) xxxx xxxx xxxx”

Rule 28 Filing of complaint with the Authority. Section 31 – (1)

Any aggrieved person may file a complaint with the Authority for any violation of the provisions of the Act or the rules and regulations made thereunder, save as those provided to be adjudicated by the adjudicating officer, in Form ‘CRA’, in triplicate, which shall be accompanied by a fees as prescribed in Schedule III in the form of a demand draft or a bankers cheque draw on a Scheduled bank in favour of “Haryana Real Estate Regulatory Authority”.

(2) The Authority shall for the purposes of deciding any complaint as specified under sub-rule (1), follow summary procedure for inquiry in the following manner, namely:-

- (a) xxxx xxxx xxxx
- (b) xxxx xxxx xxxx
- (c) xxxx xxxx xxxx

(d) on the date so fixed, the Authority shall explain to the respondent about the contravention alleged to have been

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committed in relation to any of the provisions of the Act or the rules and regulations made thereunder and if the respondent:—

(i) pleads guilty, the Authority shall record the plea, and pass such orders including imposition of penalty as it thinks fit in accordance with the provisions of the Act or the rules and regulations, made thereunder;

(ii) does not plead guilty and contests the complaint, the Authority shall demand an explanation from the respondent;

(e) in case the Authority is satisfied on the basis of the submissions made that the complaint does not require any further inquiry, it may dismiss the complaint with reasons to be recorded in writing;

(f) in case the Authority is satisfied on the basis of the submissions made that there is a need for further hearing into the complaint, it may order production of documents or other evidence(s) on a date and time fixed by it;

(g) the Authority shall have the power to carry out an inquiry into the complaint on the basis of documents and submissions;

53. Section 38 of the Act empowers the Authority to impose penalty or interest for any contravention of obligations cast upon the promoter under the Act or the Rules. Also, as per provisions in this Section, the Authority is to be guided by the principle of

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natural justice. Section 35 empowers the Authority to call for information and conduct investigation, where the Authority considers it expedient to do so in both the cases i.e. where the complaint is filed by any person or the Authority takes a suo moto cognizance. Rule 28 relates to Section 31, wherein the complaint is filed by the aggrieved person. Rule 28(2)(d)(i) stipulates that if the respondent (appellant in the present case) pleads guilty, the Authority after recording its plea can impose penalty. The penalty imposed upon the appellant in this case is not merely based on his admission in the reply to the show cause notice. Rather, the ld. Authority has taken into consideration the material available on record i.e. copy of the advertisement, copy of the brochure, issued by the appellant in addition to the reply to the show cause notice. The issuance of notice and collecting the material will also satisfy the requirement of conducting the enquiry as provided in Section 35 of the Act and Rule 21 of the Rules. The conjoint reading of the Sections 31, 35 and 38 of the act, Rules 21 and 28(2)(d)(i) of the Rules, the advertisement dated 26.05.2019, brochures issued by the appellant and hoarding installed by the appellant the site visit and report dated 31.05.2019 of Engineer Executives of the learned Authority, show cause notice dated 04.06.2019, opportunity of personal hearing to the appellant on 19.06.2019 by the learned Authority and filing of the reply dated 19.06.2019 by the Appellant company admitting guilt and admitting the charges framed in the show cause notice leave us with no doubt that there was any lapse of not having followed the procedure as laid down in the Act, rules

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and regulations made therein on the part of the learned Authority in proceeding for imposing penalty for violation of section 3(1) by the Appellant.

54. The appellant has also contested the order of the learned Authority on the ground that each of the five plots of land were owned by five different persons and there were no meeting of minds of such persons individually or collectively to demonstrate that all the owners of the respective plots had agreed to combine their land holdings to develop the alleged project jointly with the appellant acting as the developer for all the respective owners. It is also contended that appellant, at no point in time, has claimed that he had issued the advertisement at the instance of the owners of the respective plots or there is common development at all the different plots of land. It was contended that in the reply dated 19.06.2019 to the show cause notice the appellant has by mistake used the word 'WE' for himself, whereas the fact is that the different plot holders are carrying out the construction themselves.

55. As per the advertisement in 'Hindustan Times' newspaper on 26.05.2019, Brochure and the Hoardings installed by the appellant company, the appellant is constructing for sale of 24 apartments of 4BHK (approximately 3000 per sq. ft.) each, on the said five plot Nos.E-1, E-2, E-3, E-27 and E-28 (each measuring 372 sq. mtrs.) in Sector 56, Sushant Lok-II, Gurugram under the title Heritage Royale, Sector 56, Gurugram. As per inquiry report dated 31.05.2019 conducted by the Engineer Executives of the learned Authority, there is an office of the

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Appellant company in the stilt area of one of the towers of the said project where the representative of the Appellant company works. The work on all these towers is being done by the appellant simultaneously under the project 'Heritage Royale'. In the reply dated 19.06.2019 of the appellant to the show cause notice dated 04.06.2019, it was admitted that 'WE' had started construction on 2 plots, plot no E1, E2, Sushant Lok - 2, Sector 56, area 372 sq mts. It was also admitted that the work on other towers had started about three months ago. This clearly shows that on five different plots, though owned by different persons, the work was being executed simultaneously and common advertisement was issued by a single Agency (Appellant company) for a project 'Heritage Royale'. There is nothing left to be proved that all these owners had instructed the appellant company to execute the work and had offered the appellant company to sell the apartment so being constructed. The Appellant is denying in the appeal the admissions made during the adjudication of the complaint with the learned Authority and using all these pleas and excuses to escape from the penal action and penalty imposed on him by the learned Authority.

56. The appellant has contended that as per Rule 3(1)(f) of the Rules, it is incumbent upon the Authority to enquire and obtain the details of consent of the owners of the land along with copies of the registered collaborations agreement or any other agreement entered into between the appellant and such owners along with copies of the titled documents of such owners, which has not been

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done by the Ld. Authority. Rule 3(1)(f) of the Rules reads as under:-

3. Application for registration. Section 4.—(1) *An application to the Authority for registration of the real estate project shall be made in writing in Form ‘REP-I’, in triplicate to furnish the following information and documents alongwith those specified under section 4 of the Act, for registration of the project with the Authority, namely.-*

(a) xxxx xxxx xxxx

(b) xxxx xxxx xxxx

(c) xxxx xxxx xxxx

(d) xxxx xxxx xxxx

(e) xxxx xxxx xxxx

(f) *where the promoter is not the owner of the land on which development of project is proposed, details of the consent of the owner(s) of the land along with a copy of the registered (wherever applicable) collaboration agreement, development agreement, joint development agreement or any other agreement, as the case may be, entered into between the promoter and such owner and copies of title and other documents reflecting the title of such owner on the land on which project is proposed to be developed;”*

57. We find no force in these arguments of the appellant as Rule 3 of the Rules corresponds to Section 4 of the Act which deals with the application for registration of ‘real estate project’ and documents to be enclosed with an application to the Authority for

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registration of the 'real estate project'. A list of number of documents such as copy of registered collaboration agreement and other agreement between the promoters and the land owners etc. is given to be attached with the said application. Thus, these documents provided in Section 3(i)(f) are to be produced at the time of filing of registration of the project. At this stage, no benefit of these pleading can be granted to the appellant in this appeal.

58. Ld. counsel for the appellant has contended that the inquiry report dated 31.05.2019 of the Engineer Executives of the learned Authority is back dated as this finds no mention in the impugned order.

59. We do not subscribe to the above said contention of the appellant as the status of the construction of the project matches with the photographs attached with date of site visit and date of inquiry report. The Ld. Senior Legal Officer of the respondent-Authority brought to our notice that a photograph attached with the Inquiry Report dated 31.05.2019 reflects the car belonging to the learned Authority bearing registration No.HR 88 A 0004 was parked in the partially constructed unit of the appellant and 'Government of Haryana' is also written on that car. The status of construction and the presence of the car of the learned Authority and the date on which the inquiry conducted matches, and, therefore, we have no doubt in accepting that the inquiry is not ante dated. Moreover, we find no reason that a duly constituted body under a statute would do such an unlawful thing and a create document illegally.

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60. The appellant is trying to contest the impugned order on the contention that the advertisement was published on puffed up claims and the penalty has been imposed on the basis of alleged admission made by the appellant in the reply to the show cause notice before the Ld. Authority. The appellant contends that advertiser is entitled to make puffed up claims about its project. The appellant has relied upon the following Hon'ble Supreme Court judgments to assail his assertions:

1. **Tata Press [Yellow Pages] Limited v. Mahanagar Telephone-Nigam Limited & Ors. [AIR 1995 SC 2438; 1995 SCC (5) 139];**
2. **Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd., (1999) 7 SCC 1.**

The judgments being relied upon by the appellant are not applicable in the present case as facts in the present case are entirely different from the matter relating to the said judgments. In the present case, the action has been taken by the Ld. Authority on the advertisement published in the newspaper which was supported by the reply to the show cause notice and the report of the Engineer Executives of the Ld. Authority. We are afraid that the appellant cannot drive any benefit on account of reference of the above said judgments of the Hon'ble Supreme Court.

61. Ld. counsel for the appellant has contended that he is only an real estate agent and not a promoter. The appellant has supplied the approval of Building Plans and occupancy certificate

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vide e-mail dated 01.12.2020 as an evidence to his contention with his following covering particulars :-

<i>S. no.</i>	<i>Particulars</i>
1.	<i>Approval dated 28.08.2018 of the Building Plans for the House E-01, Sushant Lok-II, Gurugram, belonging to Shri Sanjay Sood.</i>
2.	<i>Approval dated 28.08.2018 of the Building Plans for the House E-02, Sushant Lok-II, Gurugram, belonging to Mrs. Veena Misra.</i>
3.	<i>Occupancy certificate dated 27.06.2019 for the House E-01, Sushant Lok-II, Gurugram, belonging to Shri Sanjay Sood.</i>
4.	<i>Occupancy certificate dated 04.06.2020 for the House E-02, Sushant Lok-II, Gurugram, belonging to Mrs. Veena Misra.</i>

These are the copies of Building Plans and occupancy certificates issued by the competent authority of the State Government in the name of the plot owners. These documents are of no help to the appellant as the occupancy certificates and Building Plans are to be issued only to the plot owners and do not absolve the appellant in any way from fulfilling the responsibility of registration of the project under the Act.

62. The appellant has also submitted the copy of following additional documents on dated 11.08.2021 with following particulars:-

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<i>Sr. no.</i>	<i>Description</i>	<i>Particulars</i>	<i>Amount in Rs.</i>
1.	<i>Challan (mentioned as Bill) no.678 dated 01.06.2018 of M/s RK Building Material Supplier for Rodi</i>	<i>Gaadi Rodi 900</i>	
2.	<i>Challan (mentioned as Bill) no.680 dated 04.06.2018 of M/s RK Building Material Supplier for Dust</i>	<i>Items not readable 1350</i>	
3.	<i>Bill no.420 dated 06.07.2018 of M/s Rakesh Kumar Yogi for Rodi and Dust</i>	<i>Gaadi Rodi</i>	<i>103950</i>
4.	<i>Challan (mentioned as Bill) no.688 dated 02.10.2018 of M/s RK Building Material Supplier for Rodi</i>	<i>Gaadi Rodi, dust 2300</i>	
5.	<i>Challan(mentioned as Bill) no.691 dated 10.10.2018 of M/s RK Building Material Supplier for Dust and Rodi</i>	<i>Dust, Rodi 2050</i>	
6.	<i>Bill no.434 dated 15.10.2018 of M/s Rakesh Kumar Yogi for Rodi and Dust</i>	<i>Gaadi Rodi, dust</i>	<i>195700</i>
7.	<i>Challan (mentioned as Bill) no.388 dated 08.02.2019 of</i>	<i>Bricks 16000</i>	

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	<i>M/s RK Building Material Supplier for Bricks</i>		
8.	<i>Challan (mentioned as Bill) no.390 dated 12.02.2019 of M/s RK Building Material Supplier for Bricks</i>	<i>Bricks 24,000</i>	
9.	<i>Cash memo (mentioned as Bill) no.451 dated 18.02.2019 of M/s Rakesh Kumar Yogi for Bricks and Sand</i>	<i>Bricks, dust</i>	<i>324000</i>
10.	<i>Quotation dated 09.08.2019 of M.s Prakash Building Contractor for Labour rates etc.</i>	<i>13,05,000</i>	
11.	<i>Cash memo (mentioned as Bill) no.066 dated 07.09.2019 of M/s Gaurav Malik for Bricks and Dust</i>	<i>Brick, dust</i>	<i>196400</i>
12.	<i>Cash memo (mentioned as Bill) no.073 dated 08.11.2019 of M/s Gaurav Malik for Dust, Rodi, Bricks, Sands</i>	<i>Dust, bricks</i>	<i>324900</i>
13.	<i>Cash memo (mentioned as Bill) No.087 dated 09.12.2019 of M/s Kuntal Electricals for wiring, Switch Plate, Light</i>	<i>Wiring, Switch Plate, Light point Fan</i>	<i>492000</i>

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	<i>point Fan etc.</i>		
14.	<i>Cash memo (mentioned as Bill) no.080 dated 10.01.2020 of M/s Gaurav Malik for Bricks, Rodi, Dust</i>	<i>Bricks, Rodi, Dust</i>	<i>334740</i>
15.	<i>Cash memo (mentioned as Bill)No.Nil dated 04.02.2021 of M/s SK Air Conditioning & Refrigeration for Copper Piping.</i>	<i>Copper piping</i>	<i>540000</i>
		<i>total</i>	<i>1888040</i>

63. The appellant wants to show that plot owners have purchased the material from the supplier and building/apartment has been constructed by the plot owners themselves and not by the appellant.

64. We have perused the Challans/bills submitted by the appellant. All Challans and cash memo are hand written in very bad hand writing in Hindi/English and are not even properly readable. Most of the Challans don't show the quantity, rate and amount of the material purchased. On the cash memo no GST number of the firm selling goods is mentioned. The Amount of GST payable is neither mentioned on the Challans nor on the bill/cash memo. Thus, these bills appear to be created and cannot be relied upon. These Challans/ bills are of brick, dust, sand, rodi etc. The value of these bills produced before this Tribunal is only Rs. 1888040/- i.e. very less amount as compared to the overall

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construction costs of the project. We find that there is no bill of cement and steel or wood, which are major constituent of the building construction. Thus, these challans/bills supplied by the appellant can't be relied upon and, therefore, are also no help to the appellant.

65. It was contended by the appellant that the appellant is merely a real estate agent/property dealer and did not have the financial resources to undertake and execute the project of such magnitude and the penalty imposed on him is highly irrational. The appellant has submitted copy of Income Tax Return verification form (ITR) for the Assessment Year 2016-17, 2017-18 and 2018-19 showing the gross total income as Rs.8,03,431/-, Rs.8,53,210/- and Rs.4,31,105/- respectively, in order to show capacity to execute the project in question of such magnitude and to pay penalty of Rs.1,00,00,000/- (rupees one crore) imposed by the learned Authority vide impugned order dated 19.06.2019. The said (ITR) forms are in the name of 'Mohan Singh ASSI' (the name of the Proprietor of EmEss Developers is Mohan Singh) and the status mentioned is 'Individual'. The ITR forms of the 'M/s EmEss Developers' the Appellant company on whose behalf, the work of 'Heritage Royal Project' is being executed, have not been placed on record. So, no benefit of said copy of ITR forms of so submitted can be granted to the appellant.

66. As per the contentions raised by ld. counsel for the appellant, the appellant was merely a real estate agent. The appellant has not produced before us any documentary evidence to

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show that actually he is carrying out the profession of the real estate agent. As per section 9 of the Act even a real estate agent is required to be registered with the Id. Authority. There is no plea or the proof to show that the appellant was registered as a real estate agent for facilitating the sale or purchase of any plot, apartment or a building, as the case may be. So, the plea raised by the appellant that he was merely a real estate agent has no legs to stand.

67. During the course of arguments on 24.09.2021, as to what action has been taken against the plot owners, it was disclosed by Ld. Senior Legal Officer of the respondent-Authority that some fact finding inquiry was ordered with respect to the owners of the plots. We had sought copy of the said report, and it was also asked that if the inquiry is still not completed, the reasons thereof also be communicated to this Tribunal. We have received the copy of the fact finding inquiry dated 26.10.2020 of the Engineer Executive-Sh. Sumeet of the learned Authority regarding the project 'Heritage Royale' through e-mail dated 01.10.2021. The above said fact finding inquiry is reproduced as below:-

“Sub: Fact finding enquiry into the matter of project Heritage Royale.

Pl. on the subject cited above it is submitted that the authority has directed the undersigned that the actual owners of the project should be got located by holding a fact-finding enquiry into the matter. Therefore, as per the advertisement and based on the site inspection conducted on 31.05.2019 it is stated that there are 24 units in the project which are to be constructed in

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six towers having stilt plus four floors to be constructed on six plots. On detailed scrutiny of record (sale deed and transfer deed) available with the authority and as per the site inspection construction on five plots is being carried out and record of ownership of plots is with respect to five plots also. Further as per four sale deeds and one transfer deed of the plots in question, the details of plot and their respective owners is provided further.

S. no.	Plot no.	Name of owner	Area of plot
1.	E-01	Mr. Sanjay Sood s/o Late Sh. Sushil Kumar Sood	372 sqm
2.	E-02	Mrs. Veena Misra w/o Dr. AK Mishra	372 sqm
3.	E-03	Mrs. Rajyashri Sood d/o Dr. AK Mishra	372 sqm
4.	E-27	Mrs. Veena Mishra w/o Dr. AK Mishra and Dr. AK Mishra s/o Late Sh. OP Mishra	372.225 sqm
5.	E-28	Mrs. Veena Mishra w/o Dr. AK Mishra	372.225 sqm

Further the pamphlet being issued for marketing the project contains the name of EmEss developers not the landowners. The copies of the sale deeds and transfer deed are flagged in the file with plot numbers for reference please.

Sd/-
Sumeet
(Engineer Executive)

68. We find that the details of the plots and the respective owners is given in the above said fact finding inquiry. It is also

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mentioned in the above said fact finding inquiry that the pamphlet being issued for marketing the project contains the name of EmEss developers and not of the land owners. Vide the above said fact finding inquiry, the sale deeds and transfer deed were also placed in the file. It appears that the learned Authority has not proceeded further for taking action against the plot owners on the said report dated 26.10.2020. Prima facie it is not possible that a person can carry out the development works and issue the advertisement for sale of units without the implied or express consent of the owners. These aspects should have been examined /investigated by the ld. Authority even at the stage of passing the impugned order. But the ld. Authority has failed in its duty to effectually discharge its functions but still this lapse can be remedied without being influenced by anything observed by this Tribunal in this order. It is, therefore, directed that action against the plot owners may be proceeded further to the conclusive end as per provisions in the Act, Rules and in accordance with the law.

69. In the said advertisement dated 26.05.2019 published in Hindustan times and the said brochure issued by the appellant himself, it is mentioned that costs of per unit is Rs.2.35 crore onwards (Rs.9850 per sq. ft.). It is mentioned in para 7 of the show cause notice that as per advertisement the area of the each unit is approximately 3000 sq ft and the sale price is indicated is Rs 7800/- per sq ft. Also the total cost of the apartment is mentioned as 2.35 crores onwards. Thus, the minimum costs of 24 units are Rs.56.40 crores. As per Section 59 of the Act if any promoter

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contravenes the provisions of Section 3, he shall be liable to pay the penalty which may extend upto 10% of the estimated costs of the real estate project as determined by the learned Authority. Ten per cent of the estimated costs comes out of Rs.5.65 crores. The learned Authority has imposed a penalty of Rs.1,00,00,000/- (rupees one crore).

70. The imposition of penalty is an important function of the authority. As per section 59 of the Act, the contravention of provision of section 3 invites the penalty which may extent up to 10% of the estimated cost of the real estate project as determined by the Authority. So, the ld. Authority has discretion to impose the penalty to any extent but not exceeding 10% of the estimated cost of real estate project. It is settled principle of law that when a judicial authority is invested with discretionary powers the same are expected to be exercised judiciously. While determining the quantum of penalty all the factors including the mitigating circumstances in favour of the violator are to be taken into consideration.

71. The reply filed by the appellant to the show cause notice has been taken into consideration as an admission on the part of the appellant. Once, the reply filed by the appellant is being relied upon along with other evidence to determine the violation of Section 3 of the Act. The whole of the reply has to be considered. It is not legally permissible to use/rely upon the part of the reply and to reject/ignore the remaining portion. In the reply, the appellant has categorically mentioned that they have immediately

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discontinued the advertisement and removed the hoardings at the site after receiving the notice, that they also promised and assured that no such newspaper advertisement shall be published and pamphlets/handbills about the project will be distributed in future. It was also categorically mentioned in the reply that they have not done any advance booking/sale/collected money against the sale from any buyer for the above stated construction and had ensured to abide by all rules and regulations of the act. This portion of the reply shows that on realizing that the appellant has committed the wrong, the incriminating advertisement was discontinued. It was assured that in future no such advertisement shall be published in the newspaper nor the pamphlet/handbills with respect to the project in question shall be distributed. It has also been mentioned that they have not received any money against any advance booking/sale from any buyer in consequence of the said advertisement. The respondent authority has not placed on file any document/evidence to show that even after issuance of show cause notice the appellant continued with the violation of the provisions of the act. There is also no material on record to show that the appellant in consequence of the aforesaid advertisement had made any advance booking/sale of any unit. There is also no material at file to show that the appellant has indulged in any such activities prior to present violation.

72. Taking into consideration these mitigating circumstances and conduct of the appellant, it will be just and appropriate to take the lenient view in the matter of the penalty,

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Thus, the penalty imposed by the ld. Authority seems to be excessive, irrational and harsh and deserve to be reduced. In our view, the penalty of Rs.30 Lakh will suffice the ends of the justice.

73. Consequently, the appellant is directed to pay the penalty of Rs. 30 Lakh instead of Rs. 1,00,00,000/- (rupees one crore) as imposed by the ld. Authority in the impugned order. The amount of penalty imposed by this Tribunal i.e. Rs. 30 lakh has already been deposited with this Tribunal in order to comply with the provisions of proviso to Section 43(5) of the Act.

74. Resultantly with the aforesaid modification in the amount of the penalty, the present appeal has no merit and the same is hereby dismissed. The amount of penalty deposited by the appellant be transferred to the consolidated fund as provided in Section 76(2) of the Act.

75. Copy of this order be communicated to the appellant/Ld. counsel for the appellant and Ld. Haryana Real Estate Regulatory Authority, Gurugram.

76. File be consigned to the record.

Announced
November 09, 2021

Justice Darshan Singh (Retd.)
Chairman,
Haryana Real Estate Appellate Tribunal,
Chandigarh

Inderjeet Mehta
Member (Judicial)

Anil Kumar Gupta
Member (Technical)

Manoj Rana

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Shri Mohan Singh, Proprietor, EMESS Developers
Vs.
HRERA, Gurugram
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Present: None.

Vide our separate detailed order/judgment of the even date, the appellant is directed to pay the penalty of Rs.30 Lakh instead of Rs.1,00,00,000/- (rupees one crore) as imposed by the ld. Authority in the impugned order. With the aforesaid modification in the amount of the penalty, the present appeal has no merit and the same is hereby dismissed.

Copy of the detailed order/judgment be communicated to the parties/learned counsel for the parties.

File be consigned to record.

Justice Darshan Singh (Retd.)
Chairman,
Haryana Real Estate Appellate Tribunal,
Chandigarh

Inderjeet Mehta
Member (Judicial)

Anil Kumar Gupta
Member (Technical)

09.11.2021
Manoj Rana