


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

Complaint no : 3234 of 2021
First date of hearing : 29.09.2021
Date of decision : 29.09.2021

1.Sanjay Gupta
2.Meenakshi Gupta
R/o: -A-21, Hauz Khas,
New Delhi-110016

Complainants


Versus

Ss Group Private Limited
Regd. office at:- Ss house,
Plot no. 77, sector-44,
Gurugram-122003

Respondent

CORAM:
Shri Samir Kumar
Shri Vijay Kumar Goyal

Member
Member

APPEARANCE:

Ms. Monika Manchanda Advocate for the complainants
Advocate
Shri C.K. Sharma Advocate Advocate for the respondent

ORDER

1. The present complaint dated 06.09.2021 has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for

all obligations, responsibilities and functions as provided under the provision of the Act or the rules and regulations made there under or to the allottees as per the agreement for sale executed *inter se*.

A. Unit and project related details

2. Since, the buyer's agreement has been executed on 13.02.2013 i.e. prior to the commencement of the act *ibid*, therefore, the penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non-compliance of statutory obligation on part of the promoter/respondent in terms of section 34(f) of the act *ibid*.
3. The particulars of unit details, sale consideration, the amount paid by the complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Project name and location	"The Coralwood & Almeria, Sector-84, Gurugram.
2.	Project area	15.28 acres
3.	Nature of the project	Group housing complex
4.	a) DTCP License no.	59 of 2008 dated 19.03.2008
	b) License valid upto	18.03.2025



	c) Name of the Licensee	M/S North Star Apartment Private Limited
5.	a) RERA Registered/ not registered	Registered Registered vide no. 381 of 2017
	b) Registration Certificate no	381 of 2017 dated 12.12.2017
	c) Validity Status	31.12.2019
6.	Unit no.	BLD-27A, flat no. 27A on ground floor. [Page no. 19 of complaint]
7.	Unit measuring	2000 sq. ft.
8.	Date of execution of Flat buyer agreement	13.02.2013 [Page 17 of complaint]
9.	Payment plan	Construction linked payment plan. [Page 45 of reply]
10.	Total consideration	Rs.1,47,12,000/- [Page no. 46 of reply]
11.	Total amount paid by the complainant	Rs.1,21,67,544/- [As alleged in legal notice on page no. 58 of reply]
12.	Due date of delivery of possession as per clause 8.1(a) of the flat buyer agreement 36 months from the date of signing of this agreement & a grace period of 90 days, after the expiry of 36 months, for applying and obtaining the occupation certificate	13.02.2016 [Note- Grace period not allowed]



	[Page no. 20 of complaint]	
14.	Delay in handing over of possession from due date of possession i.e. 13.02.2016 till the date of order i.e. 29.09.2021	5 years 7 months 16 days
13.	Offer of possession	24.08.2018 (Offer of possession for fit-outs dated 24.08.2018 on page no. 38 of reply)
14.	Occupation Certificate	17.10.2018

B. Facts of the complaint

4. That the complainants booked a flat in the "The Coralwood & Almeria" project which was being constructed by M/S SS Group Private Limited. The flat was booked in favour of complainants and were duly allotted flat bearing no. 27A, at ground floor, of building BLD-27A having super area of 2000 sq.ft in the project situated at village sihi, sector-84, Gurgaon. The total value of the flat was INR 1,47,12,000/-
5. That at the time of booking, the builder represented that the unit would be delivered on or before february, 2016. Subsequently the complainants executed builder buyer agreement on 13.02.2013 with the respondent. The complainants have already paid an amount of INR 1,21,67,544/-
6. That the handover of the possession as per builder buyer agreement dated 13.02.2013 was to be within 36 months from the date of the agreement extendable to 6 months. However,



- the flat was not offered for possession at the committed date. The possession for the fit- outs was first offered on 25.08.2018.
7. That the complainants upon the receipt of the letter dated 25.08.2018 wherein the builder had offered the possession for fit outs without occupation certificate. Visited the flat on 03.09.2018 for the inspection and was shocked upon finding the abysmal condition of the flat.
 8. That following no response on the status of the deficiency in services concern, the complainants sought compensation for the works which were not been carried out as per the specifications as well as the delay charges from 13.05.2016 till the date of actual possession vide emails dated 08.04.2019 and sought meeting with the management for amicable settlement of the matter.
 9. That as per the buyer's agreement clause 8.3, in case of delay in handling over the possession by the developer, the developer shall be liable to the compensation @5/- per sq. ft per month of the super area for a period of 12 months.
 10. That it is humbly submitted as no satisfactory response was received from the respondent, the complainants issued a legal notice dated 06.05.2019 which was duly received by the respondent on 08.05.2019 wherein the complainants have called upon the respondent to pay the compensation towards the deficiency in services which the respondent admitted too within 7 days from the date of receipt of notice. However, the respondent failed to respond within the said time and responded only on 06.06.2019. In the reply, the respondent

admitted all the deficiencies and agreed to paid, however, as per the buyer's agreement, which is contrary to the terms, hence it was liable.

11. That it is pertinent to mention that the respondent is accountable to the complainants for the delivery of the project exactly how and when it was promised at the time of signing of the builder agreement dated 13.02.2013. The default in the same, made the respondent liable for the compensation to the complainant.

C. Relief sought by the complainants: -

The complainants have sought following relief(s):

- (i) Direct the respondent to make payment of interest accrued on amount collected by the respondent, on account of delayed offer for possession and with interest should be at prescribed rate from the date as and when the amount was received by the respondent from the complainant till the actual offer of possession and after adjustment, execute the conveyance deed in favour of complainants with respect to the flat.

12. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent

13. The respondent has filed an application for rejection of complaint on the ground of jurisdiction along with reply. The

respondent has contested the complaint on the following grounds.

- (i) That the respondent humbly submits that each and every averment and contention, as made/raised in the complaint, unless specifically admitted, be taken to have been categorically denied by respondent and may be read as travesty of facts.
- (ii) That it is submitted that North Star Apartment Private Limited has amalgamated into SS Group Private Limited, through a scheme of amalgamation approved by the Hon'ble Punjab and Haryana High Court, through its orders dated September 30, 2014 and November 10, 2014, passed in company petition nos.155 of 2003 and 203 of 2013, w.e.f. March 7, 2015.
- (iii) That the complaint filed by the complainants before this authority, besides being misconceived and erroneous, is untenable in the eyes of law.
- (iv) That further, without prejudice to the aforementioned, even if it was to be assumed though not admitting that the filing of the complaint is not without jurisdiction, even then the claim as raised cannot be said to be maintainable and is liable to be rejected for the reasons as ensuing.
- (v) It is a matter of record and rather a conceded position that no such agreement as referred to under the provisions of Act of 2016 and rules, 2017 has been executed between the respondent and the complainants.

- (vi) The adjudication of the complaint for interest as provided under sections 12, 14, 18 and 19 of Act of 2016, if any, has to be in reference to the agreement for sale executed in terms of Act of 2016 and 2017 rules, 2017 and no other agreement. This submission of the respondent *inter alia*, finds support from reading of the provisions of Act of 2016 as well as rules, 2017 including the aforementioned submissions. Thus, in view of the submissions made above, no relief much less as claimed can be granted to the complainants. It is reiterated at the risk of repetition that this is without prejudice to the submission that in any event, the complaint, as filed, is not maintainable before this authority.
- (vii) That the reliefs sought by the complainants appear to be on misconceived and erroneous basis. Hence, the complainants are estopped from raising the pleas, as raised in respect thereof, besides the said pleas being illegal, misconceived and erroneous.
That the complainants have also misdirected in claiming payment of interest on account of alleged delayed offer for possession. It is submitted that there cannot be said to be any alleged delay in offering of the possession.
- (viii) That it has been categorically agreed between the parties that subject to the complainants having complied with all the terms and conditions of the flat buyer's agreement and not being in default under any of the provisions of the said agreement and having complied

with all provisions, formalities, documentation etc., the developer proposed to handover the possession of the unit in question within a period of 36 months from the date of signing of the agreement, which period would automatically stand extended for the time taken in getting the building plan sanctioned. It had been agreed that the respondent would also be entitled to a further grace period of 90 days after expiry of 36 months or such extended period for want of building sanction plans.

- (ix) That in the present case, it is a matter of record that the complainants have not fulfilled their obligation and have not even paid the installments on time that had fallen due. Accordingly, no relief for alleged delayed offer for possession can be said to be maintainable.
- (x) That it is pertinent to mention here that the respondent, after having applied for grant of occupation certificate in respect of the project, which had thereafter been even issued through memo dated 17.10.2018 had offered possession to the complainants vide letter dated 24.08.2018 and email dated 14.12.2018 and 25.12.2018. The complaint filed by the complainants, being in any case belated, is even subsequent to the date of grant of occupation certificate. no indulgence much less as claimed by the complainants is liable to be shown to them.
- (xi) That the respondent through email dated 14.12.2018 and 25.12.2018 informed the complainants that the

respondent has received the occupation certificate and offered the possession to the complainants and also asked them to make the remaining payment. A reminder letter dated 14.12.2018 was also sent to the complainants by the respondent. As per clause 8.2 (a) of the flat buyer's agreement the complainants should have taken the possession within 30 days.

- (xii) That the complainants have till date not taken the possession of their flat. It is pertinent to mention here that as per clause 9 of the flat buyer's agreement the complainants are liable to pay the holding charges @ Rs. 5/- per sq. ft. of the super area for the entire period of such delay. Reference may be made to clause 9 of the flat buyer's agreement.
- (xiii) That in the present case the complainants are liable to pay the holding charges as per the flat buyer's agreement from 13.01.2019 amounting to Rs. 3,20,000/- (pending as on 13.09.2021) till the taking over of possession. It is pertinent to mention here that the complainants in order to escape their liability to pay the holding charges have filed this false and frivolous complaint.

E. Jurisdiction of the authority

14. The application of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observed that it has territorial as well as subject

matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

15. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District, therefore this authority has complete territorial jurisdiction to deal with the present complaint.

E.II Subject matter jurisdiction

The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as per provisions of section 11(4) (a) of the Act leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the objections raised by the respondent

F.1 Whether the promoter can claim holding charges from the complainants?

16. The respondent is contending that the complainant is liable to pay holding charges as per the flat buyer's agreement for the reason that complainant has delayed in taking possession even after offer of possession being made by the respondent. Clause 9 of the agreement is reproduced below: -

“9. Holding Charges

Further it is agreed by the Flat Buyer(s) that in the event of the failure of the Flat Buyer(s) to take the possession of the said FLAT in the manner as aforesaid in Clause 8.2, then the Developer shall have the option to cancel this Agreement and avail of the remedies as stipulated in Clause 15 of this Agreement or the Developer may, without prejudice to its rights under any of the clauses of this Agreement and at its sole discretion, decide to condone the delay by the Flat Buyer(s) in taking over the said FLAT in the manner as stated in this clause on the condition that the Flat Buyer(s) shall pay to the Developer holding charges @ Rs. 5/- (Rupees Five only) per sq. ft. of the super area of the said FLAT per month for the entire period of such delay and to withhold conveyance or handing over for occupation and use of the said FLAT till the holding charges with applicable overdue interest as prescribed in this Agreement, if any, are fully paid It is made clear and the Flat Buyer(s) agrees that the holding charges as stipulated in this clause shall be a distinct charge not related to and shall be in addition to maintenance charges or any other outgoing cess, taxes, levies etc which shall be at the risk, responsibility and cost of the Flat Buyer(s). Further the Flat Buyer(s) agrees that in the event of his/her/their failure to take possession of the said FLAT within the time stipulated by the Developer in its notice, the Flat Buyer(s) shall have no right or any claim in respect of any item of work in the said FLAT which the Flat Buyer(s) may allege not to have been carried out or completed or in respect of any design specifications, building materials, use or any other reason whatsoever and that the Flat Buyer(s) shall be deemed to have been fully satisfied in all matters concerning construction work related to the said Flat/said Block/said Group Housing Complex.”

17. The authority observed that the respondent has offered the possession of the unit vide offer of possession for fit- outs dated 24.08.2018 whereas the occupation certificate which is attached by the respondent is dated 17.10.2018 the date of OC being later than the date of offer of possession clearly implies that the possession was offered without obtaining the OC as



OC is mandatory for offering possession of the unit , therefore, it can be concluded that the offer of possession offered by the respondent is not a valid offer of possession as it has been offered without obtaining the OC. Therefore, the respondent cannot be said to have offered the possession of the unit on 24.08.2018 and is thus not entitled to claim the relief of grant of the holding charges. As per clause 9 of the agreement, in the event the flat buyer delays to take the possession of the unit within the time limit prescribed by the company in its intimation/offer of possession then the promoter shall be entitled to holding charges. However, it is interesting to note that the term holding charges has not been clearly defined in the flat buyer's agreement or any other relevant document submitted by the respondent/promoter. Therefore, it is firstly important to understand the meaning of holding charges which is generally used in common parlance. The term holding charges or also synonymously referred to as non-occupancy charges become payable or applicable to be paid by the allottee if the possession has been offered by the builder to the owner/allottee and physical possession of the unit has not been taken over by the allottee, the flat/unit is lying vacant even when it is in a ready-to-move condition. Therefore, it can be inferred that holding charges is something which an allottee has to pay for his own unit for which he has already paid the consideration just because he has not physically occupied or moved in the said unit.

18. The hon'ble NCDRC in its order dated 03.01.2020 in case titled as "**Capital Greens Flat Buyer Association and Ors. V. DLF Universal Ltd.**, Consumer case no. 351 of 2015" held as under:

"36. It transpired during the course of arguments that the OP has demanded holding charges and maintenance charges from the allottees. As far as maintenance charges are concerned, the same should be paid by the allottee from the date the possession is offered to him unless he was prevented from taking possession solely on account of the OP insisting upon execution of the Indemnity-cum-Undertaking in the format prescribed by it for the purpose. If maintenance charges for a particular period have been waived by the developer, the allottee shall also be entitled to such a waiver. As far as holding charges are concerned, the developer having received the sale consideration has nothing to lose by holding possession of the allotted flat except that it would be required to maintain the apartment. Therefore, the holding charges will not be payable to the developer. Even in a case where the possession has been delayed on account of the allottee having not paid the entire sale consideration, the developer shall not be entitled to any holding charges though it would be entitled to interest for the period the payment is delayed."

19. The said judgment of NCDRC was also upheld by the Hon'ble Supreme Court vide its judgement dated 14.12.2020 passed in the civil appeal filed by DLF against the order of NCDRC (supra). The authority earlier, in view of the provisions of the Rules, 2017 in a lot of complaints decided in favour of promoters that holding charges are payable by the allottee. However, in the light of the recent judgement of the NCDRC and Hon'ble Apex Court (supra), the authority concurring with the view taken therein decides that a developer/ promoter/ builder cannot levy holding charges on a homebuyer/allottee as it does not suffer any loss on account of the allottee taking possession at a later date even due to an ongoing court case.

As far as holding charges are concerned, the developer having received the sale consideration has nothing to lose by holding possession of the allotted flat except that it would be required to maintain the apartment. Therefore, the holding charges will not be payable to the developer. Even in a case where the possession has been delayed on account of the allottee having not paid the entire sale consideration, the developer shall not be entitled to any holding charges though it would be entitled to interest for the period the payment is delayed.

G. Findings on the relief sought by the complainant

I. Delay possession charges: Directs the respondent to make payment of interest accrued on amount collected by the respondent, on account of delayed offer for possession and with interest should be at prescribed rate.

20. In the present complaint, the complainants intend to continue with the project and is seeking delayed possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

"Section 18: - Return of amount and compensation

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

.....

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

21. Clause (8.1) of the flat buyer agreement provides for handing over of possession and is reproduced below: -

8. POSSESSION OF UNIT: -

8.1(a) Subject to terms of this clause and subject to the flat buyer(s) having complied with all the terms and conditions of

this agreement and not being in default under any of the provisions of this agreement and complied with all provisions, formalities, documentation etc., as prescribed by the developer, the developer proposes to handover the possession of the flat within a period of thirty six(36) months from the date of signing of this agreement. However this period will automatically stand extended for the time taken in getting the building plans sanctioned. The flat buyer(s) agrees and understands that the developer shall be entitled to a grace period of 90 days, after the expiry of thirty six(36) months or such extended period(for want of building sanction plans), for applying and obtaining the occupation certificate in respect of the Group Housing Complex.

22. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoters. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoters and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoters may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the flat buyer agreement by the promoters are just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such



mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

23. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment within a period of 36 months from date of signing of this agreement and further provided in agreement that promoter shall be entitled to a grace period of 90 days for applying and obtaining occupation certificate in respect of group housing complex. As a matter of fact, the promoter has not applied for occupation certificate within the time limit prescribed in the flat buyer agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 90 days cannot be allowed to the promoter at this stage.

24. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at the prescribed rate. However, Proviso to section 18 provides that where an allottees does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

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

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the

rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.

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

25. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.
26. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 29.09.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
27. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

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

Explanation. —For the purpose of this clause—

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

payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"

28. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., **9.30%** by the respondent/promoter which is the same as is being granted to the complainants in case of delayed possession charges.
29. On consideration of the documents available on record and submissions made regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 8.1(a) of the agreement executed between the parties on 13.02.2013, the possession of the subject apartment was to be delivered within 36 months from the date of signing of this agreement i.e. 13.02.2016. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession is 13.02.2016. The respondent has failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondent/promoter to fulfil their obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such the allottee shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 13.02.2016 till 17.10.2018

plus two months i.e., 17.12.2018, at prescribed rate i.e., 9.30 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules r/w section 19(10) of the Act.

H. Directions of the authority

30. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations casted upon the promoter as per the functions entrusted to the authority under section 34(f):

- i. The respondent is directed to pay interest at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e., 13.02.2016 till 17.12.2018 as per section 19(10) of the Act.
- ii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period within one month.
- iii. The promoter shall credit delayed possession charges in the account's ledger of the unit of the allottee, if the amount outstanding against the allottee is more than the DPC, this will be treated as sufficient compliance of this order.
- iv. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

- v. The respondent shall not charge anything from the complainants which is not the part of the agreement. However, holding charges shall not be charged by the promoters at any point of time even after being part of agreement as per law settled by hon'ble Supreme Court in civil appeal no. 3889/2020.

22. Complaint Stands disposed of.

23. File be consigned to registry.

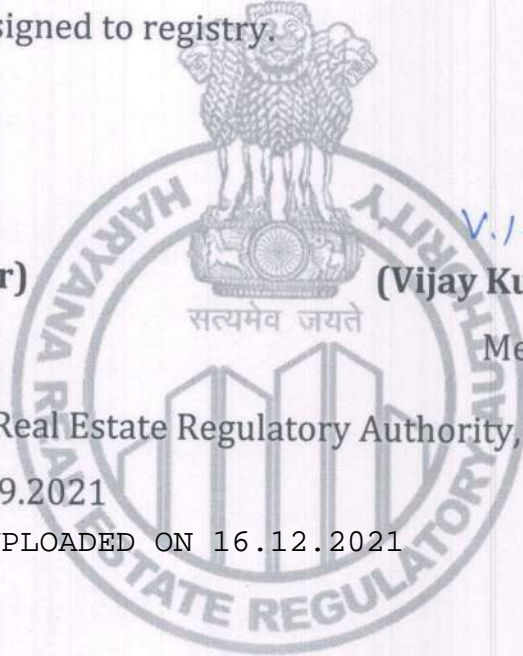

(Samir Kumar)


Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 29.09.2021

JUDGEMENT UPLOADED ON 16.12.2021




(Vijay Kumar Goyal)

Member

HARERA
GURUGRAM