



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

Complaint no.:	81 of 2021
First date of hearing:	27.04.2021
Date of decision:	12.01.2022

Jai Prakash Tayal

R/o: - D-37, Block D, Kamla Nagar, New Delhi

Complainant

Versus

M/s ADTV Communication Pvt. Limited
Having Regd. office at: 8-B, Basement Floor, Jangpura,
Main Mathura Road, New Delhi-110014

Respondent

CORAM:

Dr. K.K. Khandelwal
Shri Vijay Kumar Goyal

**Chairman
Member**

APPEARANCE:

Sh. Rishabh Jain (Advocate)
None

**Complainant
Respondent**

HARERA
GURUGRAM
EX-PARTE ORDER

1. The present complaint dated 05.02.2021 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions as provided under the



provision of the Act or the Rules and regulations made there under or to the allottee as per the agreement for sale executed *inter se*.

A. Unit and project related details

2. 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	"Aloha", Sector 57, Gurugram
2.	Project area	4.50 acres
3.	Nature of the project	Group Housing Colony
4.	DTCP license no. and validity status	34 of 1996 dated 21.03.1996 valid up to 20.03.2015
5.	Name of licensee	SM Towers Pvt. Ltd.
6.	RERA registration details	Not registered
7.	Unit no.	1004, Tower D6, 10 th floor [page 39 of complaint]
8.	Unit measuring	2244 sq. ft.
9.	Date of execution of flat buyer agreement	17.11.2009 [page 34 of complaint]
10.	Date of agreement to sell between original buyer and subsequent buyer	21.07.2011 [page 65 of complaint]
11.	Payment plan	Construction link
12.	Total consideration	₹ 42,83,560/-



		[as per calculation sheet dated 29.12.2017 at page 69 of complaint]
13.	Total amount paid by the complainant	₹ 31,43,747/- [as per calculation sheet dated 29.12.2017 at page 69 of complaint]
14.	Due date of delivery of possession as per clause 10 of the flat buyer agreement: within 36 months from the date of the start of the construction of the tower in which the said flat is located or from the execution of this agreement whichever is later [Page 41 of complaint]	17.11.2012 [Note: Due date calculated from date of execution of agreement as the date on which demand on start of construction on basement roof slab is 23.01.2006 and start of construction will be prior to the same. Further this date is earlier to date of execution of BBA]
15.	Occupation certificate	Not yet obtained
16.	Handing over- Taking over (Offer of possession for fit-out)	29.12.2017 [page 70 of complaint]
17.	Delay in handing over possession till the Offer of	5 years 1 month 12 days



	possession for fit-out i.e., 29.12.2017	
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B. Facts of the complaint

3. The complainant has pleaded the complaint on the following facts:

- a) The grievance of the complainant relates to breach of contract, false promises, gross unfair trade practices and deficiencies in the services committed by the respondent in regard to flat no. 1004, 10th floor, tower d-6, measuring approximately super area 2491 square feet (hereinafter referred to as “flat”) bought by the complainant, paying his hard earned money, in the “Aloha” (hereinafter referred to as “complex”) complex of the project ‘Aez Inspirations’ (hereinafter referred to as “project”) at sector 57, Gurugram, Haryana.
- b) The company, ADTV Communications Pvt. Ltd. (formerly known as Aez Infratech Pvt. Ltd.) Has collected a huge amount from gullible and naïve buyers from 2009 to 2017 and kept on promising the complainant to deliver the possession of their flat by 17th November 2012 as per flat buyers’ agreement. Even after a delay of more than eight (8) years and two (2) months, till date, the respondent has failed in offering the legitimate and lawful possession of the flat. The respondent has also failed to get the conveyance deed of the flat executed till date.
- c) The original allottees were approached by the representatives of the company. The sale representatives claimed and boasted of the complex in the project as the world class. The original allottees were invited to the sales office and were lavishly entertained and promises was made to them that the complex would be completed



by November 2012 including parking, horticulture, parks, club, and other common area facilities. The original allottees were impressed by their statements and oral representations and ultimately lured to pay ₹ 10,00,000/- as booking amount of the flat on 3rd November 2009.

- d) In the flat buyers' agreement, the respondent has fraudulently and illegally charged from the complainant such charges separately which ought to be inclusive in basic sale price as the maintenance security charges, club membership charges, common charges, electrical charges, firefighting charges, administration charges, contingency/sinking fund deposits, advance maintenance charges (6 months) etc. Thereby violates the basic nature of the agreement between the parties.
- e) The respondent neither informed nor sought permission from the complainant about an increase in the super area from 2244 square foot to 2491 square foot, which is around 11% (eleven per centum) increase in the super area, thereby increasing substantial cost of the flat. However, all of a sudden, a letter acknowledging the full and final payment, dated 29th December 2017 is received by the complainant whereby the letter showcases an increase of more than eleven per centum increase in the super area of the flat which was a great shock to the complainant. This is a clear violation of section 14 of the Act, 2016.
- f) The completion of the construction of the flat has been delayed by more than eight (8) years and two (2) months which has ultimately resulted in the difficulties for the complainant and many other such buyers. Till date, no legitimate possession has been handed over to



the complainant and he is not even aware when the occupation certificate will be received by the respondent. The respondent has offered possession for fit-out without receiving the occupation certificate, thus, putting at stake the life of the complainant, and the possession offered is illegal and unlawful proving the mala fide intention of the respondent. The respondent has intentionally escaped his liability of timely completion and handing over the legitimate possession to the complainant. Further, the respondent has tried to escape his duty to complete the construction of the flat because even after taking the complete cost of the flat, the respondent has asked the complainant to complete those basic fit-out for which the respondent has already charged.

- g) The respondent has in an unfair manner siphoned off funds meant for the complex in the project and utilised the same for company's own benefit for no cost. The respondent being builder and developer, whenever in need of funds from bankers or investors ordinarily has to pay heavy interest per annum. However, in the present scenario, the respondent utilised funds collected from the complainant and other such buyers for company's own good in other projects, being developed by the respondent, due to which the complex in the project has not been completed and failed to get occupation certificate from the appropriate authorities. Presently, it is not known to the complainant as when the occupation certificate will be received by the respondent, for which the respondent moved a farce application in 2013. The complex is not yet complete as the basic amenities and facilities, which were the



duty of the respondent to complete, have been fraudulently and illegally transferred to the complainant.

- h) The common area facilities and amenities in the project are not up to the commitments made by the respondent at the time of buying the flat. Lifts are either not working properly or are defunct. Parks are not maintained properly. Water seepage & leakage in the building is damaging the structure and particularly the basement of the tower. Club and swimming pool are not constructed and made functional. Internal roads are pathetic and are non-motor able. Sewerage treatment plant and solar lights, as per the government guidelines are not installed. Firefighting equipment are not operational. Power back-up and generators are not installed as per the requirements of the existing electricity loads and above all power charges are exorbitant. Thus, the respondent has not fulfilled his promises and commitments as per the flat buyer's agreement.

C. Relief sought by the complainant:

4. The complainant has sought following reliefs:

- a) Direct the respondent to complete the requisite formalities for getting the occupation certificate and offer a legitimate and lawful possession of the flat to the aggrieved complainant.
- b) Direct the respondent to prepare and execute a conveyance deed to convey the title of the flat in favour of the allottee/complainant (as per clause 22 of the agreement).
- c) Direct the respondent to pay interest for every month of delay, since 17th November 2012, for failing in offering legitimate and lawful possession of the flat to the complainant, on the amount

taken from the complainant at the prescribed rate as per the act, 2016 till the respondent handovers the legitimate and lawful possession of the flat to the complainant.

- d) Direct the respondent to complete the construction of common areas infrastructural facilities and amenities like club, lifts, sewerage treatment plants, solar system, electricity, firefighting equipment, internal roads, gymnasium, parks etc. For the complainant and other buyers of the complex.
 - e) Direct the respondent to withdraw/cancel/revoke charges on extra super area for increase in the super area which is around eleven per centum (11%) increase in the super area of the flat, as it was charged by the respondent illegally and unlawfully.
 - f) Direct the respondent to pay legal expenses of Rs.1,00,000/- (one lakh) incurred by the complainant.
5. The present complaint was filed on **05.02.2021** and registered as **complaint no. 81 of 2021**. As per the registry, complainant has sent copy of complaint along with annexures through speed post as well as through email. The tracking report of the same has been submitted by the complainant at page A of the complaint. The proof regarding the delivery of the complaint along with annexures made to the respondent, has been submitted by the complainant as available in the file. The registry of the authority sent a notice with a copy of the complaint along with annexures through speed post and the same returned unclaimed. The tracking report of the speed post is available in the file. Registry has also sent the notice along with a copy of the complaint through email and the mail was bounced back.



6. The registry also issued fresh noticed to the respondent on new addresses, but they also returned unclaimed. The tracking for the same is also available in the file. Lastly, on 03.12.2021 the authority before proceeding ex-parte against the respondent ordered to issue public notice in the daily newspaper. But despite this the respondent failed to submit any reply till date therefore authority is left with no option but to proceed ex-parte against the respondent.
7. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided based on these undisputed documents and submission made by the complainant.

D. Jurisdiction of the authority

8. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

D.I. Territorial jurisdiction

9. 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.

D.II. Subject matter jurisdiction

10. 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 complainant at a later stage.

E. Findings on the relief sought by the complainant

E.I. Direct the respondent to complete the requisite formalities for getting the occupation certificate and offer a legitimate and lawful possession of the flat to the aggrieved complainant.

11. The respondent is legally bound to meet the pre-requisites for obtaining occupation certificate from the competent authority. It is understood that the application for OC was made in the year 2013 to the competent authority but so far promoter is unable to get OC may be on account of application not being complete, dues against the promoter, not meeting the pre-requisite for grant of OC etc. The promoter is duty bound to obtain OC and hand over possession only after obtaining OC. The department may take cognizance of the fact that large number of units have been given physical possession by offering possession for fit-outs without actually obtaining occupation certificate. The competent authority i.e., Director, Town and Country Planning may take requisite action as per law. Copy be endorsed to DTCP, Haryana Chandigarh.

E.II. Direct the respondent to complete the construction of common areas infrastructural facilities and amenities like club, lifts, sewerage treatment plants, solar system, electricity, firefighting equipment, internal roads, gymnasium, parks etc. for the complainant and other buyers of the complex.

12. As the respondent has offered possession for fitouts on 29.12.2017 and thereafter no valid offer of possession has been issued by the



respondent. Also as reflected from the LC report dated 28.07.2021 the finishing works with respect to tower D6 are still pending. The concluding paragraph of the LC report is reproduced as under: -

"The site of project namely "Aloha" sector-57, Gurugram being developed M/s ADTV Communication Pvt. Ltd. has been inspected and it is concluded that:

- 1. The promoter has completed all the work in the four towers i.e., B3, B4, B5, D5 towers and handed over the possession to mostly allottees of respective towers. Further the primary works (i.e., Structure work, brick works, plaster works, door frames, windows) are completed whereas balance finishing works (i.e., flooring, painting, electrical fitting, plumbing etc.) in the units of tower D6, are pending. The work in common area for tower D6 has been completed except out of three lifts only two lifts have been installed. The promoter has offered possession of units to the allottees on the fit-out basis in this particular tower.*
- 2. The internal development works in the projects i.e., internal roads, entrance gate, streetlights, boundary wall, landscaping, STP and WTP are completed and are operational. Further the works for the swimming pool and clubhouse are pending.*
- 3. As per the information furnished by the residents of the project and available on the website of DTCP, Haryana no occupation certificate/ completion certificate has been received by the promoter for the project till date. Further as per status of the project recorded from site, it is clear that the project is incomplete. Therefore, the projects fall under the definition of ongoing project and the promoter is liable for registration of the project under the section 3 of the Real Estate (Regulation & Development) Act, 2016."*

13. Accordingly, it can be interpreted from the LC report that the construction works of the tower are still incomplete. Therefore, the authority directs the respondent to complete the pending construction works and then apply for a fresh occupation certificate with the competent authority and thereafter, offer a valid and lawful possession letter to the allottee.

E.III. Direct the respondent to prepare and execute a conveyance deed to convey the title of the flat in favour of the allottee/complainant.

14. The respondent/promoter is directed to obtain occupation certificate from the competent authority and then make a valid and lawful offer of possession post that execution of conveyance deed be done within 3 months from the valid offer of possession as per provisions of section 17 of the Act, 2016.

E.IV. Direct the respondent to withdraw/cancel/revoke charges on extra super area for increase in the super area which is around eleven per centum (11%) increase in the super area of the flat, as it was charged by the respondent illegally and unlawfully.

15. The complainant in its complaint have annexed letter of allotment dated 17.11.2009 as per which the super area is 2244sq. ft. further as per the BBA dated 17.11.2009 also the super area is 2244 sq. ft. moreover in the calculation sheet dated 29.12.2017 no extra charges with regard to increase in area has been charged by the respondent. In light if the above-mentioned facts and documents placed on the record, the respondent has not charged anything illegal or unlawful.

E.V. Direct the respondent to pay legal expenses of Rs. 1,00,000/- incurred by the complainant.

16. The complainant is claiming compensation in the above-mentioned reliefs. The authority is of the view that it is important to understand that the Act has clearly provided interest and compensation as separate entitlement/rights which the allottee can claim. For claiming compensation under sections 12, 14, 18 and section 19 of the Act, the



complainant may file a separate complaint before Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.

E.VI. Direct the respondent to pay interest for every month of delay, since 17th November 2012, for failing in offering legitimate and lawful possession of the flat to the complainant, at the prescribed rate as per the Act, 2016 till the respondent handovers the legitimate and lawful possession of the flat to the complainant.

17. In the present complaint, the complainant intends 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

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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."

18. Clause 10 of the flat buyer agreement (in short, agreement) provides for handing over of possession and is reproduced below: -

"10 SCHEDULE FOR POSSESSION OF THE SAID PREMISES:

The possession of the said premises is likely to be delivered by the Company to the Allottee within 36 months from the date of the start of the construction of the tower in which the said flat is located or from the execution of this agreement whichever is later, subject to force majeure circumstances, & on receipt of all payments punctually as per agreed terms and on receipt of complete payment of the basic sale price and other charges due and payable up to the date of possession according to the Payment Plan applicable to the Allottee. The company would pay penalty to its customers @ Rs 5/- per sq. ft. per month for handing over the flat beyond the committed period as stated herein above subject to punctual payment of instalment the allottee."

19. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds



of terms and conditions of this agreement and application, and the complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favor of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of 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.

20. **Admissibility of delay possession charges at prescribed rate of interest:** Proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoters, 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.

21. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.
22. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., **12.01.2022** is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
23. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

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

Explanation. —For the purpose of this clause—

(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;

(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"

24. Therefore, interest on the delay payments from the complainant 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 complainant in case of delayed possession charges.

25. 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. As the respondent has offered possession for fit outs on 29.12.2017 and thereafter no valid offer of possession has been issued by the respondent. Also as reflected from the LC report dated 28.07.2021 the finishing works with respect to tower D6 are still pending.
26. Considering the above-mentioned facts, the authority calculated due date of possession according to clause 10 of the agreement dated 17.11.2009 i.e., 36 months from the date of start of construction or date of execution whichever is later. The authority has already held in the complaint bearing no. **4031 of 2019** titled as **Varun Gupta V/s Emaar MGF Land Ltd.** that in cases where subsequent allottee had stepped into the shoes of original allottee before the expiry of due date of handing over possession the subsequent allottee shall be entitled to delayed possession charges w.e.f. the due date of handing over of possession. Since, in the instant matter the complainant is the subsequent buyer/purchaser vide agreement to sell dated 21.07.2011 i.e., before the expiry of the due date of possession accordingly, the subsequent buyer/purchaser is entitled for DPC with effect from due date of possession i.e., 36 months from the date of execution of agreement which comes out to be 17.11.2012. It is a very interesting situation where allottee on one side is demanding completion of all requisite



infrastructure and amenities and then offer physical possession in the name of legally valid physical possession whereas he has already taken over the physical possession on 29.12.2017 as confirmed by the counsel for the complainant although offer was for fit-out possession. The allottee is certainly entitled for delayed possession charges under proviso to section 18 (1) of the Act but only upto the date on which he has taken physical possession and allottee is enjoying the fruit of the property for which he has invested with the promoter. Although the promoter has given physical possession and allottee has accepted physical possession on the basis of offer for fit-out possession which may not be the legally valid offer of possession without obtaining occupation certificate. Both the promoter and the allottee have acted not as per the spirit of law but as per their own convenience. The promoter is liable for action for offering physical possession without obtaining OC and allottee cannot be allowed to take benefit of delay possession charges beyond the time he has taken physical possession. Accordingly, it is the failure of the respondent/promoter to fulfil its 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., 17.11.2012 till the date of taking over the physical possession of the said unit i.e., 29.12.2017, 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.



F. Directions of the authority

27. 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 promoters 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., 17.11.2012 till the date of taking over the physical possession of the said unit i.e., 29.12.2017.
- ii. The respondent is directed to obtain occupation certificate from the competent authority and then make a valid and lawful offer of possession post that execution of conveyance deed be done within 3 months from the valid offer of possession as per provisions of section 17 of the Act, 2016
- iii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- iv. The rate of interest chargeable from the allottee by the promoters, 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 promoters shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.
- v. The respondents shall not charge anything from the complainant which is not the part of the agreement. However, holding charges shall not be charged by the promoter at any point of time even



HARERA
GURUGRAM

Complaint No. 81 of 2021

after being part of agreement as per law settled by hon'ble
Supreme Court in civil appeal no. 3864-3889/2020.

28. Complaint stands disposed of.
29. File be consigned to registry.

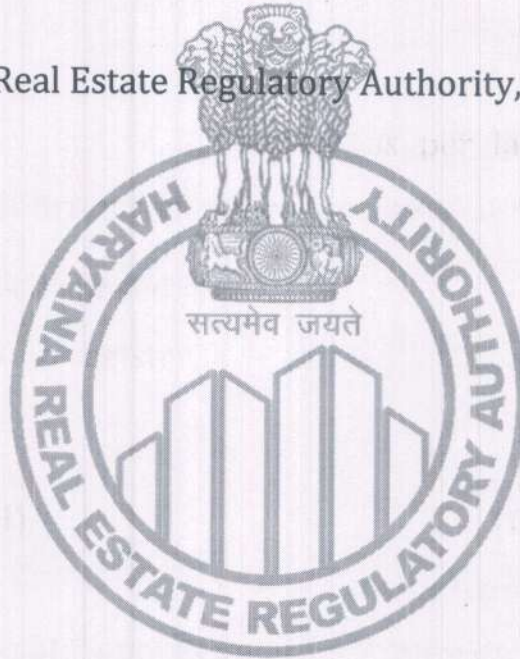
V.1 -

(Vijay Kumar Goyal)
Member

(Dr. K.K Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 12.01.2022



HARERA
GURUGRAM