

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

Complaint No. : 2227 of 2018
Date of first hearing : 19.03.2019
Date of Decision : 19.03.2019

Sh. Surendra Singh
R/o House No. 158, Near Main Market,
Sector-5, Gurugram-122001

...Complainant

Versus

Ashiana Landcraft Realty Pvt. Ltd.
Office at: 3H, Plaza, M-6, District Centre,
Jasola, New Delhi-110025

...Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

**Member
Member**

APPEARANCE:

Shri Surendra Singh Complainant in person
Shri S.M. Ansari Advocate for the respondent

ORDER

1. A complaint dated 14.12.2018 was filed 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 by the complainant Sh. Surendra Singh, against the promoter Ashiana Landcraft Realty Pvt. Ltd. on account of violation of clause 11.2 of the apartment

buyer agreement executed on 09.09.2014 for unit no. A-508 on 5th floor, tower T3, admeasuring super area 1565 sq. ft., in the project “The Center Court” for not giving possession on the due date which is an obligation of the promoter under section 11(4)(a) of the Act *ibid*.

2. Since the apartment buyer agreement has been executed on 09.09.2014, i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, therefore, penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non-compliance of contractual obligations on the part of promoter/respondent in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016.
3. The particulars of the complaint are as under: -

1.	Name and location of the project	“The Center Court” in Sector 88A, Gurugram
2.	Nature of real estate project	Residential Group housing colony
3.	Unit no.	A-508, 5 th floor, tower T3
4.	Project area	14.025 acres
5.	Registered/ not registered	Registered (46 of 2017)
6.	Revised date of completion as per RERA registration certificate	30.06.2020
7.	DTCP license	46 of 2013 dated

		08.06.2013
8.	Date of booking	24.06.2013
9.	Date of provisional allotment	09.09.2014
10.	Date of apartment buyer agreement	09.09.2014
11.	Total consideration	Rs. 1,01,42,085/- (as per schedule B of the agreement)
12.	Total amount paid by the complainant	Rs. 99,61,536.86/- (as per the applicant ledger dated 24.11.2017)
13.	Payment plan	Construction linked payment plan
14.	Date of delivery of possession Clause 11.2- 42 months + 6 months grace period from date of agreement,	09.09.2018
15.	Delay of number of months/ years upto 19.03.2019	6 months 10 days
16.	Penalty clause as per apartment buyer agreement dated 09.09.2014	Clause 11.4 - Rs. 5/- per sq. ft. per month of the super build up area

3. The details provided above have been checked on the basis of the record available in the case file which have been provided by the complainant and the respondent. An apartment buyer agreement dated 09.09.2014 is available on record for unit no. A-508 on 5th floor, tower T3, admeasuring super area 1565 sq. ft., according to which the possession of the aforesaid unit was to be delivered by 09.09.2018. The

promoter has failed to deliver the possession of the said unit to the complainant. Therefore, the promoter has not fulfilled his committed liability as on date.

4. Taking cognizance of the complaint, the authority issued notice to the respondents for filing reply and for appearance. The case came up for hearing on 19.03.2019. The reply has been filed on behalf of the respondent and the same has been perused.

Facts of the complaint

5. The complainant submitted that on 24.06.2013, he along with his spouse, Smt. Vijay Singh, registered their expression of interest with the respondent, M/s Viroma Developers Pvt. Ltd. (now known as M/s Ashiana Landcraft Realty Pvt. Ltd.) to seek priority allotment of a residential unit (2 BHK + study room) in their forthcoming project in Gurugram and accordingly paid Rs.5,00,000/-.
6. The complainant submitted that thereafter, the respondent intimated him vide its letter dated 22.03.2014 allotting the complainant his priority no. for choosing his apartment at “The Center Court”. It was also informed that the super area of the unit is 1565 sq. ft. with BSP @ Rs.5675/-.

7. The complainant submitted that on 25.04.2014, he submitted the application form duly filled and signed for the allotment of his residential flat and paid total amount as on that date Rs.18,42,139/- being 20% of the BSP + service tax @ 3.708%.
8. The complainant submitted that he opted for unit as apartment no. A-508 at 5th floor in tower T3 and thereafter, the respondent issued letter dated 09.09.2014 for provisional allotment of residential apartment unit in the said project mentioning the details of the project, price of apartment, payment plan and possession (completion period) as 42 months with grace period of 6 months from execution of agreement. Subsequently, the apartment buyer agreement was also executed on 09.09.2014.
9. The complainant submitted that he paid all instalments without any default as per invoice/ demand note issued by the respondent at various stages as per the agreement and total amount paid by him as on 22.11.2017 is Rs. 99,61,536.86/- as against the total invoice/ demand note of Rs.99,61,437/-. The complainant has paid an amount of 95% of the total cost and only the last instalment is left which is to be paid at the time of possession.

10. The complainant submitted that he sent letter dated 22.09.2018 to the respondent submitting that the respondent has failed to complete the construction of the flat and handover possession on 09.09.2018 which was the completion date as per clause 11.1, 11.2 and 11.3 of the said agreement. It is submitted that in accordance with section 19(4) of the RERA Act, 2016 and rules 15 and 16 of the HARERA Rules, 2017, the complainant wishes to withdraw from the project and therefore, requested the respondent to refund the amount of Rs.99,61,536.86/- paid to them along with prescribed rate of interest. The complainant further communicated to the respondent that the said letter may be treated as a notice for terminating the agreement as per clause 11.6 of the apartment buyer agreement.
11. The complainant submitted that thereafter, he sent a reminder letter dated 01.11.2018 to the respondent again requesting them to refund the amount paid by him along with prescribed rate of interest up to the date of payment as well as compensation.
12. The complainant submitted that the respondent neither refund the amount paid by him along with prescribed rate of interest and compensation nor responded to the

complainant's letters dated 22.09.2018 and 01.11.2018 till date.

13. The complainant submitted that the respondent failed in paying any compensation for delay at the rate of Rs. 5/- per sq. ft. of the super built up area per month of the delay, as per clause 11.4 of the agreement, even though the said compensation was very meagre and unjustified.

14. Issues to be determined

The sole issue as culled out from the complaint is:-

- I. Whether the complainant is entitled to refund of the amount of Rs.99,61,536.86/- paid by him to the respondent along with interest at the prescribed rate?

15. Relief sought

- I. Direct the respondent to refund a sum of Rs.99,61,536.86/- along with interest at the prescribed rate from the date when payments were made till realization of the amount in full.

Respondent's reply

16. The respondent submitted that the complaint filed by the complainant is baseless, vexatious and is untenable in the

eyes of law, therefore the complaint deserves to be dismissed at the threshold.

17. The respondent submitted that the present complaint is barred by the principle of forum shopping. Before approaching the hon'ble authority, the complainant had filed a consumer complaint before the Id. District Consumer Disputes Redressal Forum, Gurugram bearing CC no. 56 of 20158. The said complaint was closed by the Id. District forum by order dated 16.04.2015 on the ground of settlement arrived in between parties vide settlement deed dated 16.04.2015. It is submitted that this material fact is concealed in the captioned complaint. Apart from the above, the complainant has concealed many material facts, which are extremely relevant for proper adjudication of the present dispute. For this reason, the complainant has suppressed material facts from this hon'ble authority which is tantamount to playing fraud upon this hon'ble authority, the complainant does not deserve any relief and the present complaint merits dismissal on this count itself.

18. The respondent submitted that the project in question is registered with the authority vide registration no. 46 of 2017 and the said registration is valid for a period commencing

from 11.08.2017 to 30.06.2020. The answering respondent is duly following all the mandates and provisions of RERA Act, 2016 without any failure.

19. The respondent submitted that the construction works of the project is going on in full swing despite the financial obstacles due to economic slowdown. 72% of the construction cost is already being incurred as on date. Major portion of the construction works are already completed. Therefore the respondent is hopefully expecting that it can complete the construction of the project and can apply for occupancy certificate for the same to DGTCP by June 2019.

20. The respondent submitted that the complainant is not entitled to seek and get any refund of the money from the answering respondent for the following reasons:

(a) In the present case, certain factors like non-availability of construction materials, electric power slowdown, scarcity of water etc. are the main reasons which caused delay in completion of the project within the time mentioned above. Apart from the above, on the direction of Hon'ble Nation Green Tribunal ("NGT"), construction of the project was stopped by Environment Pollution (Prevention and Control) Authority ("EPCA") and Haryana State Pollution Control

Board ("HSPCB") on several occasions in year 2016, 2017, 2018 respectively due to poor air quality. It is pertinent to mention herein that thereafter each time it took about one month to remobilize the construction works at project site.

- (b) Despite the aforesaid circumstances, the respondent has completed the major portion of the construction works. The remaining works are going on at project site with full swing. The construction works are expected to be completed by June 2019 whereupon the respondent can apply for the occupancy certificate before the competent authority. The respondent is ready to offer the possession of the apartment to the complainant immediately on receipt of the occupancy certificate.
- (c) The entire money invested by the complainant and other allottees have been duly invested for the construction works of the project.
- (d) The relationship between the parties are contractual in nature and hence as per the agreed terms and conditions of the flat buyer agreement, the complainant is not entitled to seek refund of the amount or interest.
- (e) In view of the aforesaid circumstances if the complainant is permitted to withdraw from the project at this final stage of

construction, the same will materially affect the remaining works of the project and there are chances that similar allottees will also approach with similar prayers.

21. The respondent submitted that the complainant is not a consumer since he has invested in the project only for commercial purpose. Complainant is only an investor and does not want to retain the unit and is only interested in refund of money.
22. The respondent submitted that the complainant has not disclosed his financial position and the statement of income and assets for the last 5 years prior to the date of booking of the above apartment. Details of the total assets both moveable and immovable together with the value of each asset in the name of the complainant should also be disclosed, which would indicate whether the aforesaid booking was done, like other properties, for investment purposes.
23. The respondent submitted that as per the apartment buyer agreement which is binding between the parties, both have agreed upon their respective liabilities in case of breach of any of the conditions specified therein. In view of the above, the captioned complaint is not maintainable in law and is liable to be dismissed in limine. It is a well settled proposition

of law that the courts cannot travel beyond what is provided in the agreement/contract and generate altogether a new contract; the responsibility of the court is to interpret appropriately the existing contract and decide the rights and liabilities of the parties within the four corners of the contract.

24. The respondent submitted that the complainant is a chronic defaulter in making payment on time contrary to the agreed terms. It is submitted that on many occasions repeated demand letters and reminders were issued to the complainant for payment. A perusal of letter dated 20.01.2015 would show that the respondent has waived the interest on delayed payment amounting to Rs.22,932/- in favour of the complainant. Further vide mail/letter dated 10.09.2015, complainant raised an objection on demand notice dated 03.09.2015 alleging that the said invoice/demand notice is not as per payment plan and sought clarifications w.r.t. status of construction. Vide letter dated 21.09.2015, respondent clarified the doubts of the complainant. Only thereafter the complainant cleared the then outstanding amount of Rs.6,27,014/- vide his letter dated 22.09.2015 that too under protest. Thereafter, again vide letter dated 11.01.2016, complainant raised objection on

demand note dated 06.01.2016 whereby alleging that the said demand was not raised as per payment plan and sought clarification regarding status of construction again. Vide letter dated 19.01.2016, respondent gave clarifications. Thereafter, the complainant sought extension of time for payment of instalment amount due. Vide e-mail dated 15.02.2016, respondent accepted the said request. All the above shows that on many occasions, the complainant has committed severe default in making payment of instalment contrary to the agreed payment plan. Despite of the above defaults, on all occasions, the respondent has given maximum cooperation to the complainant.

25. The respondent submitted that vide the instant complaint, the complainant has sought for refund of the consideration amount paid by him. It is stated that the disputes and differences, if any, between the parties involves various questions of facts and law. The issues raised by the complainant cannot be addressed before this authority and the subject matter cannot be adjudicated without going into the facts of the case which requires elaborate evidence to be led and which cannot be adjudicated upon under the summary jurisdiction of this hon'ble authority. The complaint is liable to be dismissed on this ground alone. .

26. The respondent further denied that in the apartment buyer agreement, the respondent has not mentioned any specific period for handing over possession. It is submitted that the 42 months with grace period of 6 months was mentioned therein for the time period for applying for occupation certificate.

Written arguments on behalf of complainant

The complainant submitted following written arguments in support of his complaint:-

27. The complainant submitted that he had filled a consumer complaint before the Id. District Consumer Disputes Redressal forum, Gurugram bearing CC no. 56 of 2015 against 'The Prithvee Real Estate Services' for not paying the broker discount of 1.5% (1% broker discount after payment of 25% and balance 0.5% on payment of 30%) which they had promised at the time of booking. As the broker discount was linked with the payment to the respondent, Ashiana Landcraft Realty Pvt. Ltd. was also made the second party to confirm that the complainant had made the requisite payment. As it was not related to any dispute for the payment to the respondent, the complainant did not feel the necessity

of mentioning it in the complaint. As such there is no intention of concealing in the material facts in the complaint.

28. The complainant submitted that in the allotment letter dated 09.09.2014, it is very clearly mentioned that the possession of the unit will be 42 months with grace period of 6 months from the execution of apartment buyer agreement. Whereas, in clause 11.2 of the apartment buyer agreement, it is the completion date of the project which is 42 months and grace period of 6 months. Thereafter, they will apply for grant of occupancy certificate and on receipt of the same, they will offer possession of the said apartment.

29. The complainant submitted that although clause 11.3 of the agreement deals with force majeure, the non-availability of construction material, electric power shutdown, scarcity of water etc. as mentioned by the respondent in their reply does not come under force majeure clause. The construction of project was not stopped by Environment Pollution (Prevention & Control) Authority ("ECPA") and Haryana State Pollution Control Board ("HSPCB") due to poor air quality during the period of construction up to the schedule date of completion i.e. 09.09.2018 except for 9 days only from 08.11.2017 to 16.11.2017 vide circular no. ECEA-R/2017/L-

60 dated November 16, 2017 of (“EPCA”). The various circulars of National Green Tribunal, Principal Bench, New Delhi deals mostly for advising concerned agencies to take various preventive measures other than the closer of construction activities to combat pollution due to poor quality of air on several occasions in the year 2016, 2017, 2018. Further, clause 11.3 of the agreement clearly mentions that the company shall keep the allottee informed about the force majeure events which they are subjected to and communicate new estimated completion date. There is no such communication from the company (respondent) to the allottee (complainant) in this regard and as such any excuse for delay in execution of project on the ground of force majeure clause does not hold good.

30. The complainant submitted that the allegation of respondent that the complainant is not the consumer since he had invested in the project for commercial purpose is completely denied and controverted. The respondent mentioned in its reply that the complainant (allottee) have not disclosed his financial position and the statement of income and assets for the last 5 years. It is necessary for the complainant (allottee) to file copies of their income tax returns for 5 years prior to the date of booking. All these were not the requirements for

booking. PAN cards and address proof of the allottees were required which were provided at the time of booking.

31. The complainant denied that he is a chronic defaulter in making payment on time contrary to the agreed terms. It is submitted that he has been very particular in paying the due amounts timely as per agreement, without any default. It is the respondent who used to raise wrong invoice/ demand Note at times and when pointed out the mistake they used to say that once the invoice is raised it cannot be revised and insists for the payment and the interest on delayed payment if wrongly imposed will subsequently be waived off. The interest burden is so much i.e. 12% which is further increased to 18% if not paid for 60 days that it creates a fear element in the minds of allottee that he pays the amount to avoid litigation thereafter. The complainant has neither paid any interest nor it is payable for delayed payment as per clause 3.4 & 3.5 of agreement as on date and no payment is pending as per schedule of payment as per agreement which itself is a sound proof and does not require any further explanation that the complainant has not been the defaulter in execution of the agreement.

32. The complainant submitted that invoice/ demand note TCC/14-15/0262 dated 07.01.2015 was received by the complainant showing an amount of Rs.22,932/- against the interest for the delayed payment. The complainant informed vide their letter dated 14.01.2015 that the amount of Rs. 22,932/- mentioned in their above invoice is wrongly charged. The complainant had received the signed copy of agreement on 30.10.2014 and therefore, the due date of payment, should have been 28.11.2014 instead of 09.10.2014 for the invoice/ demand note TCC/14-15/0019 and the complainant had paid the amount on 15.11.2014. On receipt of above letter of complainant dated 14.01.2015 followed by email dated 14.01.2014 the respondent waived off the payment of interest for the delayed payment i.e. Rs. 22,932/- vide their letter dated 20.01.2015. Thereafter, the complainant paid the due amount against the invoice/ demand note TCC/14-15/0262 dated 07.01.2015.

33. The complainant submitted that he kept making payment after that. Thereafter, the complainant wrote a letter dated 10.09.2015 stating that the payment plan applicable to the applicant is construction linked payment scheme as per schedule B (details of payment plan) as per agreement. Issuing the demand note against item at sr. no.14 is not

correct because in the payment plan there is no mention about the construction of the flat booked instead all items in the payment plan are related to the construction of the tower as a whole and not only for flat booked. Further, it mentions that items at sr. nos. 4 to 13 are related to the construction of the structure of the tower in which the unit is located i.e. “tower 3” as a whole and obviously following items at sr. nos. 14 to 16 i.e. ‘on completion of brick work’, ‘on completion of internal plaster’ and ‘on completion of external plaster’ should also be related to for the whole building, i.e. “tower 3” and not related to flat booked only. The respondent replied to above letter of complainant stating that it is a regular practice of the industry to write ‘completion of brick work of a particular flat’ in short as “on completion of brick work”. They appreciated complainant’s point of view and take it as suggestion for their future communication.

34. The complainant submitted that vide his letter dated 22.09.2015, stated that the respondent should not interpret differently items at sr. nos. 4 to 13 and items at sr. nos. 14 to 16 under the same construction linked payment scheme. They are interpreting ‘completion of brick work’ as “completion of brick work for flat’ because it suits them which is not correct. The complainant was not convinced

with the interpretation of respondent but had no option except to pay the amount against the above invoice and therefore, paid it 'under protest' to avoid imposing interest on delayed payment. The complainant had paid due amount as per last invoice/ demand note against item at sr. no. 8 i.e. on completion of 1^{2th} floor slab.

35. It is submitted that thereafter, the complainant received the invoice/ demand note TCC/01207/15-16 dated 06.01.2016 and found that the same is against the item at sr. no. 15 of the payment plan i.e. on completion of internal plaster. Like in the case of invoice/ demand note for 'on completion of brick work' the complainant again raised objections on TCC/01207/15-16 dated 06.01.2016 too vide their letter dated 11.01.2016 stating that the payment plan applicable to the allottee is construction linked payment scheme as per schedule - b and issuing the demand note against item at sr. no. 15 is not correct because in the payment plan there is no mention about the construction of the flat booked instead all items in the payment plan are related to the construction of the tower as a whole in which the flat is located and not only for flat booked. Further, it mentions that items at sr. nos. 4 to 13 are related to the construction of the structure of tower 3 of the project and the other construction work against items

at sr. nos.14 to 16 such as brick work, internal plaster & external plaster should also be related to the tower -3 and not related to flat booked only. Besides, on physical inspection of the site, the complainant pointed out some discrepancies regarding job related to the internal plaster of the apartment. The respondent again replied vide their letter dated 19.01.2016 in the same manner as in the case of brick work that it is a standard and regular practice of the industry. The complainant was neither satisfied with the justification given by the respondent nor with respect to work carried out for internal plaster. He still paid the amount 'under protest' to avoid imposing interest on delayed payment as per agreement and further complication of litigation.

36. The complainant submitted that he made the last payment on 21.01.2016 against invoice for internal plaster although it was not payable. The respondent raised another invoice/demand note TCC/01293/15-16 dated 09.02.2016 on casting 16th floor slab in an interval of 19 days only. As there was very short notice since the last payment the complainant had requested the respondent to extend the due date for payment of installment against the above invoice (without interest for delayed payment) for 10 days i.e. 05.03.2016 to which respondent accepted. The complainant paid the due amount

against the above invoice on 27.02.2016 only against the due date of 24.02.2016 although extension up to 05.03.2016 was already given by the respondent.

Determination of issues

After considering the facts submitted by the complainant, reply by the respondent and perusal of record on file, the authority decides the issue raised by the parties as under:

37. In respect of the **sole issue** to be determined, as per clause 11.2 of the agreement dated 09.09.2014, the construction should have been completed within 42 months + 6 months grace period from date of agreement, i.e. by 09.09.2018. The grace period was allowed to the promoter by the authority on account of contingencies beyond the control of promoter. However, it has been submitted by the respondent in his reply that they have already incurred 72% of the cost towards the construction of the said project and it is at an advanced stage of construction. Further, the project in question is registered with the authority vide registration no. 46 of 2017 and the said registration is valid till 30.06.2020. Thus, keeping in view the status of the project, other intervening circumstance and the interest of other allottees, the authority is of the considered opinion that refund cannot

be allowed at this stage. However, the complainant is entitled to delayed possession interest at the prescribed rate of 10.75% per annum from the due date of possession, i.e. 09.09.2018 till the final offer of possession.

Findings of the authority

38. **Jurisdiction of the authority-** The project in question is situated in planning area of Gurugram, therefore the authority has complete territorial jurisdiction vide notification no.1/92/2017-1TCP issued by Principal Secretary (Town and Country Planning) dated 14.12.2017 to entertain the present complaint. As the nature of the real estate project is commercial in nature so the authority has subject matter jurisdiction along with territorial jurisdiction.

The preliminary objections raised by the respondents regarding jurisdiction of the authority stands rejected. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as held in *Simmi Sikka V/s M/s EMAAR MGF Land Ltd.* leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

39. As per clause 11.2 of the agreement dated 09.09.2014, the possession of the unit was to be delivered within 42 months plus 6 months grace period which comes out to be 09.09.2018. During the proceeding dated 19.03.2019. Counsel for the respondent has submitted certain photographs which indicate the actual status of the project. He stated at bar that the respondent will apply for the occupation certificate in the month of June 2019 after completing all the works. As such, it is not advisable to allow refund of the amount in the interest of the builder as well as well the complainant. However, complainant is entitled for delayed possession charges at prescribed rate of interest as per the provisions of section 18 (1) of the Real Estate (Regulation and Development) Act, 2016.

40. The complainant made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above.

The complainant requested that necessary directions be issued to the promoter to comply with the provisions and fulfil obligation under section 37 of the Act.

41. The complainant reserves his right to seek compensation from the promoter for which he shall make separate application to the adjudicating officer, if required.

Decision and directions of the authority

42. The authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issues the following directions to the respondent:

- I. The respondent is directed to pay the interest at the prescribed rate i.e. 10.75% per annum for every month of delay on the amount paid by the complainant from due date of possession till the actual offer of possession.
- II. The respondent is directed to pay interest accrued from 09.09.2018 (due date of possession) to 19.03.2019 (date of this order) on account of delay in handing over of possession to the complainant within 90 days from the date of issuance of this order.
- III. The respondent is further directed that the monthly payment of interest till the offer of possession shall be paid on or before 10th of each subsequent month.

43. The complaint is disposed of accordingly.

44. The order is pronounced.

45. Case file be consigned to the registry.

(Samir Kumar)

Member

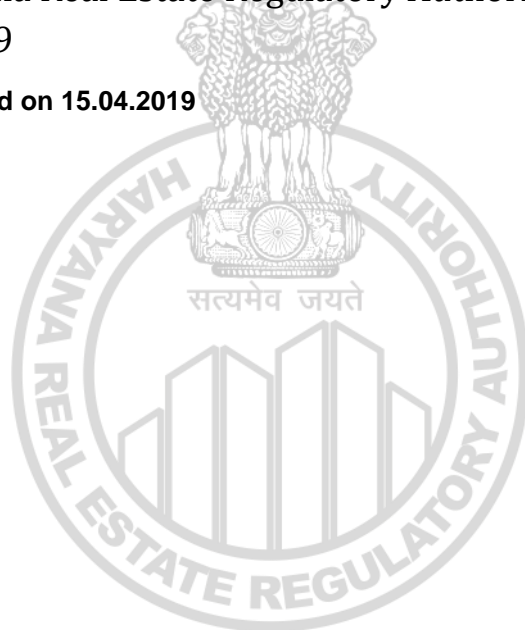
Haryana Real Estate Regulatory Authority, Gurugram

Date: 19.03.2019

Judgement uploaded on 15.04.2019

(Subhash Chander Kush)

Member



HARERA
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