

**REAL ESTATE REGULATORY AUTHORITY,  
HIMACHAL PRADESH**

**In the matter of:-**

Anurag Khaitan

.....Complainant

Versus

M/S Himland Housing Pvt. Ltd.

.....Non-Complainant/ Respondents

**Complaint no. RERA/HP/ SOCTA/06190019**

**Present: - Shri Anurag Khaitan, Complainant with Advocate Shri Vijay Arora.**

**Shri K.S. Dhaulta & Shri Rakesh Dhaulta, Advocates for M/S Himland Housing Pvt. Ltd.**

**Shri Mayank Manta, Assistant District Attorney for State of Himachal Pradesh/ RERA Himachal Pradesh.**

**Date of Hearing (Through WebEx): -18.07. 2020**

**Date of pronouncement of Order: - 07.08.2020**

**ORDER**

**CORAM: - Shrikant Baldi ----- Chairperson  
B.C. Badalia ----- Member  
Rajeev Verma ----- Member**

**BRIEF FACTS OF THE CASE**

1. The present matter refers to a Complaint filed under the provisions of the Real Estate (Regulation and Development) Act, 2016( herein after referred as the Act ) whereby the

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Complainant Shri Anurag Khaitan had filed a Complaint dated 05.06.2019 before the Designated Officer cum Director, Town & Country Planning, Himachal Pradesh under 'Form-M' bearing Complaint no. RERA/HP/SOCTA/06190019 of the HP Real Estate (Regulation & Development) Rules' 2017. As per the Complaint it has been alleged that the Complainant had booked a flat in Himland Housing Pvt. Ltd., Solan, HP on 04.11.2006 remitting a total amount of Rs. Eleven lakhs and Twenty thousand in favour of respondent through various periodical payments, last payment having been made in October 2008, as per payment schedule, attached with the Complaint as Annexure C-3. It has been alleged by the Complainant that even after expiry of 13 years, neither the project has been constructed nor the possession of the flat has been given to the Complainant. The Complainant had sought this Authority to pass necessary orders for the refund of entire amount of Rs. Eleven Lakhs & Twenty thousand along with 24% interest and Rs. 10 Lakhs as compensation.

2. The parties to the Complaint have filed their written submissions/ replies/ rejoinder before this Authority after issuance of notice for hearing. An Application for placing on record certain documents for proper adjudication of the

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Complaint has been filed by the Complainant, which has been taken on record and admitted on behalf of the respondent.

3. Shri Vijay Arora, Ld. Counsel representing the Complainant has contended that the Complainant had booked one flat in the project of respondent for a consideration amount of Rs. 14 Lakhs, measuring 760 square feet in the year 2006. The Complainant Shri Anurag Khaitan has paid a total amount of Rs. Eleven Lakhs and twenty thousand out of total consideration amount of Rs. 14 Lakhs as per payment schedule fixed/ provided by the respondent, attached as Annexure C-3 , a fact that has not been disputed by the Respondent and remaining sum of Rs. Two lakhs and eighty thousand is to be paid. The Counsel arguing for the Complainant invited the attention of this Authority to the copy of apartment buyer's agreement, annexed as Annexure R-11 to the reply filed by the respondent which under Clause 21 clearly provided that the completion and possession of the flat was to be given to the Complainant within 18 months from the date of execution of the aforesaid agreement dated 20.04.2007. The respondent even after a lapse of 13 long years have failed to provide possession of the flat to the Complainant. It is further

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argued by the counsel representing the Complainant that he has run from pillar to post to meet and request the respondent many times for the delivery of the said flat but nothing happened. One of the authorized signatory of the respondent namely Shri Ashok Singh had assured the Complainant that the possession of the flat to the Complainant will be provided within nine months from the date of execution of a memorandum of understanding (MoU) dated 13.01.2016, i.e. on or before 15.10.2016, copy of which is annexed as Annexure C-4 to the application filed by the Complainant. It is further contended by the counsel representing the Complainant that vide Annexure R-12, the photographs appended to the reply filed by the respondent, the construction work is not yet completed at the site. There is no concealment of the facts ever done by the Complainant before this Authority. Therefore in view of the submissions made by the counsel for the Complainant, the Complainant is entitled for a refund of the entire amount of Rs. 11, 20, 000/- along with 24% interest/ penalty and Rs. 10 Lakhs as compensation. The Ld. Counsel for the Complainant has referred to the provisions of Section 18 of the Real Estate (Development and Regulation) Act 2016, which envisages the provisions for the return of amount

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and compensation. Section 18 (1) of the Act provides as under,

*"If the promoter fails to complete or is unable to give possession of an apartment, plot or building,-*

- (a) in accordance with the terms of the agreement for sale or, as the case may be duly completed by the date specified therein; or*
- (b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason , he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act."*

Therefore, the Complainant is entitled for the refund of the entire amount. The Id. Counsel for the Complainant has further contended that the present project being an ongoing project and registered with this Authority is duly covered under the statutory provisions of Real Estate (Regulation & Development) Act, 2016.

4. The Ld. Counsels appearing on behalf of the respondent promoter, at its outset has submitted before this Authority that they are ready and willing to give the possession of the flat booked by the Complainant within a period of one year, provided that the remaining amount payable to them in

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accordance with the terms and conditions of the apartment buyer's agreement executed between them is paid to them. The Complainant however, has refused to accept the proposal submitted by the respondent during the course of hearing before this Authority. It has been further contended by the respondent's Counsel that the present Complaint filed under 'Form M' before this Authority has two fold aspects. One aspect refers to refund of the amount that has been given to the respondent promoter and the second aspect relates to the delivery of possession of the flat booked by Complainant. The Counsel, while arguing further on behalf of the respondent promoter has highlighted the genesis and the requisite parameters that were involved for the registration of the project under the then prevailing provisions of Section 5 (3) of the Himachal Pradesh Apartment & property Regulation Act, 2005 since February, 2006 vide Annexure R-1 to R-10 till the registration under the Real Estate (Regulation & Development) Act, 2016 read with Himachal Pradesh Real Estate (Regulation & Development) Rules, 2017 which are valid up to December, 2020. The Ld. Counsel representing the respondent promoter has further argued that in view of the Memorandum of Understanding (herein referred to as MoU)

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appended at Annexure R-6, it is clearly provided under the last clause that the Complainant is yet to make the remaining payments to the respondent promoter. At this stage, a query was sought from the Complainant by this Authority that whether MoU is agreed upon by him or not? It was contended by the Complainant that the said MoU is not binding upon him as he has not signed the MoU between the parties. The Ld. Counsel representing the respondent promoter contends herein that the respondent in his reply submitted before this Authority has admitted specifically that almost 80% of the construction work has been completed and remaining 20% of the work of the flat shall be completed on payment of remaining amount with an interest of 24% which is a contingent condition imposed as per Clause XVIII of the MoU. There is no concealment of facts apparent at the end of the Complainant.

5. The Counsels appearing on behalf of the respondent promoter has further contended that as per the preliminary objections in their detailed reply, the Complainant is not entitled for any compensation or interest as this Authority is not competent to adjudicate upon such claim of the Complainant by virtue of Section 71 of the Act *ibid*. The claim as to interest or compensation is to be considered by

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the Adjudicating officer appointed under the Act *ibid*. The respondent promoter counsels has further argued that on account of approvals and necessary sanctions from the competent authority since 2006, the construction work could not be completed at the site. This Authority while hearing arguments has sought a specific query from the respondent that whether there was/is any stay or injunction granted by any Authority/ Competent Court of Law regarding construction of work or not? The same is answered in negative by the Counsels representing respondent promoter. Also this Authority asked the respondent promoter during the course of hearing, whether any information regarding the pending approvals from the Competent Authorities were ever conveyed to the Complainant by them to which the answering respondent has admitted that no information of such factum was conveyed to the Complainant. The respondent promoter has further placed reliance upon the Annexure R-1 to Annexure R-8, which relates to the details of the sanction, approval & registration under Himachal Pradesh Apartment & Property Regulation Act, 2005, renewal of registration, issuance of license, approval of revised drawings and registration under the Act *ibid* before this Authority. The counsels

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representing the respondent promoter has then contended that their case is covered under the clause 21 of the terms and conditions of the apartment buyer's agreement executed between the parties which clearly provides that the completion and possession of the flat was to be delivered to the Complainant by the respondent upon the complete payment which is still due and payable at the end of the Complainant. The said terms and conditions form part and parcel to the '*force majeure*', which is evident on account of pending permissions of their project with the competent authority. The same has been rebutted by the Complainant's counsel contending that in case the respondent had no specific approvals, then on what basis the amount of money has been taken by them. At this stage, the issue governing '*force majeure*' as contended by the respondent promoter has been subjected to a query by the Authority. It has been sought by the Authority that, whether pending permissions or delayed permissions of a project can be construed to be interpreted as '*force majeure*', since the explanation appended to Section 6 of the Real Estate (Regulation & Development) Act, 2016 provides that

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*“The expression ‘force majeure’ shall mean a case of war, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature affecting the regular development of the real estate project.”*

The answering respondent didn't reply to the query sought. Rather, the respondent's counsels contend that the construction of project has been affected on account of spread of COVID-19 in the entire Country including the State of Himachal Pradesh. Ld. Counsels further submit that in view of Section 19 (6) of the Real Estate (Regulation & Development) Act, 2016,

*“Every allottee, who has entered into an agreement for sale to take an apartment, plot or building as the case may be, under section 13, shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent, and other charges, if any.”*

The respondent promoter is ready and willing to give possession of the apartment within a year provided the remaining amount is remitted in his favour by the Complainant.

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6. We have heard the arguments advanced by the Ld. Counsels and perused the record pertaining to the case. We have duly considered the entire submissions and contentions submitted before us during the course of arguments. The foremost question for consideration which arises in this case is whether the Authority has the power to order refund of the money along with interest or not?
7. To arrive to a conclusion, we would like to discuss various provisions of the Act in this regard. Section 31 of the Act prescribes that any aggrieved person can file a Complaint before the Authority or the Adjudicating Officer as the case may be for any violation of the provisions of the Act. Thus this Section provides that a separate Complaint be lodged with the authority and the Adjudicating Officer, "as the case may be." Accordingly Rule 23 of the Himachal Pradesh Real Estate (Regulation and Development) Rules 2017 provides the procedure of filing Complaint with the Authority and prescribes 'Form M' for filing a Complaint. In this case, the Complainant has filed the Complaint in 'Form-M.'

The Section 34 (f) of the Act prescribes that the function of authority shall include

*"to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the Rules and regulations made there under"*

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Section 11(4) (a) of the Act prescribes as follows:

The promoter shall—

*“be responsible for all obligations, responsibilities and functions under the provisions of this Act or the Rules and regulations made there under of allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings as the case may be to the allottees, or the common areas to the association of allottees or the competent authority as the case may be: Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed.”*

Section 19 (4) of the Act provides as under:

*“The allottee shall be entitled to claim the refund of amount paid along with interest at such rate as may be prescribed and compensation in the manner as provided under this Act, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be in accordance with the terms of agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of his registration under the provisions of this Act or the Rules or regulations made there under.”*

Further Section 38 (1) of the Act says

***“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 there under.”***

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Thus the Section 34(f) of the Act empowers the authority to ensure compliance of the obligations cast upon the promoters and Section 11(4) (a) (Supra) cast obligation on the promoter to implement "agreement for sale". Further, section 37 of the Act empowers the authority to issue directions in discharge of its function provided under the Act. The Authority also has power to impose penalties under Section 59 to 63 for various contraventions of the provisions of the Act. Moreover, Section 38 (1) of the Act in unambiguous terms empowers the Authority to impose 'penalty or interest.'

Thus from the reading of the above provisions of the Act, it is very clear that the authority has power to adjudicate various matters, including refund and interest under section 18 of the Act whereas the compensation is to be adjudged by the Adjudicating Officer under Section 71 of the Act *ibid*.

8. It is admitted fact that both the parties have entered into apartment buyer's agreement of flat in the year 2006/2007. Agreement for sale has been defined in Section 2 (c) as under:-

*"Agreement for sale" means an agreement entered into between the promoter and the allottee;* As per the above

definition agreement for sale means an agreement entered into between the promoter and allottee. This definition does not exclude the agreements entered into between the promoter and the allottee prior to the Act came into force. The definition of the agreement for sale as mentioned above will cover both the pre-RERA as well as the post-RERA agreements. The claim of the Complainant is based on the remedies provided under Section 18 of the Act. Section 18(1) (a) also mentions "*the agreement for sale*". In this provision of law it is no where mentioned that it will only cover the agreements as provided in Section 13(2) of the Act read with Rule 17(1) of the Himachal Pradesh Real Estate (Regulation and Development) Rules, 2017, meaning thereby the operation of the provisions of the Act cannot be restricted only to the post-RERA agreements. The Authority is of the view that the Act is to protect the rights of the stakeholders i.e. the promoter, allottee and the real estate agent as provided under the Act and to balance their interest as per its provisions. This Authority is guided by the landmark judgment passed by the Hon'ble Bombay High Court in "**Neelkamal Realtors Suburban Private Ltd. & another versus Union of India & others AIR 2017 SCC Online Bom. 9302**", wherein it has been held that the

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provisions of the Act are quasi retroactive to some extent in operation and are applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in process of completion.

9. Coming to the question that whether the Complainant is entitled for the relief of refund of amount of Rs. Eleven lakhs and twenty thousand along with interest and compensation, under provisions of the Act and the Rules made there under. The Complainant Shri Anurag Khaitan in the present case had booked a residential apartment with the respondent promoter. In furtherance to booking a residential apartment with the respondent promoter, the promoter had issued a letter of intent for booking dated 01.07.2007 to the Complainant. Additionally, the parties entered into an apartment buyer's Agreement on 20.04.2007 according to which the respondent promoter was to complete the construction within 18 months from the date of agreement i.e. the possession was to be delivered by October, 2009. The possession however was not offered to the Complainant by the said date and he was informed that the possession would be given before or on 15<sup>th</sup> October' 2016 on the basis of MoU executed. The aforesaid deadline is also over. It is *per se* admissible from the

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perusal of the record placed before us in shape of pleadings including the copy of Complaint, application for filing additional documents, reply on behalf of respondent promoter and rejoinder thereof that the respondent promoter was under a contractual obligation to complete the construction work and hand over possession of the apartment to the Complainant within 18 months from the date of execution of the agreement to sale firstly and then on or before 15<sup>th</sup> October' 2016 on the basis of MoU and the respondent Promoter had failed to do so and none of the reasons given by the respondent promoter are justified.

10. The respondent promoter, while arguing had placed reliance on major pleas in his favour primarily the relief sought by the Complainant is dual fold, i.e. either refund of the amount or delivery of possession of the flat booked by Complainant to which the respondent promoter is ready and willing to give possession of the apartment within a year provided the remaining amount is remitted in their favour by the Complainant. In relation with the present case, the Complainant no longer want the delivery or possession of flat. Therefore, he cannot be compelled to take possession of the flat at this juncture.

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11. We do not find any substance in the plea raised by Ld. Counsels for the respondent promoter that the Complainant shall be entitled to claim possession as per the contents of agreement to sale along with MoU and only after realization of the remaining sum thereof within a year. This declaration is given unilaterally by the respondent promoter based upon a contingent condition, which is not legally tenable. The Complainant had no opportunity to raise any objection at that stage, so this unilateral act of mentioning the terms and conditions of the covenant/ clauses to the apartment buyer's agreement and MoU including the date of completion of project by the respondent promoter will not abrogate the rights of the Complainant under the apartment buyer's agreement entered into by the parties.

12. This Authority seeks to place reliance upon the judgment of the **Hon'ble Bombay High Court in Neelkamal Realtors Suburban Private Ltd. & another versus Union of India & others AIR 2017 SCC Online Bom. 9302** has laid down as under:-

*"256. Section 4(2)(I)(C) enables the promoter to revise the date of completion of project and hand over possession. **The provisions of RERA, however, do not rewrite the clause of completion or handing over possession in agreement for sale.** Section 4(2)(I)(C) enables the promoter to give fresh time line independent of the time period stipulated in the agreements for sale entered into between him and the allottees so that he is not visited with penal consequences*

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*laid down under RERA. In other words, by giving opportunity to the promoter to prescribe fresh time line under Section 4(2)(I)(C) he is not absolved of the liability under the agreement for sale.”*

13. The Hon'ble Bombay High Court by taking note of the provisions of Section 4(2) (I)(c) of the Act has categorically laid down that the provisions of the Act will not re-write the clause of completion or handing over of the possession mentioned in the agreement for sale. The fresh time line independent of the time stipulated in the agreement is given in order to save the developer from the penal consequences but he is not absolved of the liability under the agreement for sale. Thus the respondent promoter was required to offer the possession of the unit to the Complainant as per the terms and conditions of the agreement, failing which the Complainant will be entitled to claim the remedies as provided under Section 18 of the Act. To support this view reference can be made to case **Pioneer Urban Land and Infrastructure Ltd. Versus Govindan Raghavan, 2019 SCC Online SC 458**, wherein the Hon'ble Apex Court has laid down as under:

*“A term of a contract will not be final and binding if it is shown that the flat purchasers had no option but to sign on the dotted line, on a contract framed by the builder. The contractual terms of the Agreement dated 08.05.2012 are ex-facie one-sided, unfair, and unreasonable. The incorporation of such one-sided clauses in an agreement constitutes an unfair trade practice as per section 2(r) of the Consumer*

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*Protection Act, 1986 since it adopts unfair methods or practices for the purpose of selling the flats by the Builder.*

*7. In view of the above discussion, we have no hesitation in holding that the terms of the Apartment Buyer's Agreement dated 08.05.2012 were wholly one-sided and unfair to the Respondent-Flat Purchaser. The appellant-Builder could not seek to bind the Respondent with such one-sided contractual terms."*

14. The functions of this Authority established under the Act is to safeguard the interest of the aggrieved persons, may it be the allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The respondent promoter cannot be allowed to take any undue advantage of his dominant position and to exploit the needs of the home buyer. This Authority is duty bound to take into consideration the legislative intent i.e. to protect the interest of consumers/allottees in real estate sector. Thus, the contentions of the respondent promoter are ex-facie one sided, unfair and unreasonable, which constitute the unfair trade practice on the part of the respondent. There is no denial to the fact that respondent promoter was in dominant position. The Complainant on the contrary has already parted with his hard earned money, so he had no option but to abide by the MoU on the dotted lines. The discriminatory terms and conditions of such MoU will not be final and binding. The respondent has utterly failed in fulfilling his obligation to deliver the flat as per the

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agreement for sale and even under the MoU and has failed to offer possession even till today.

15. The plea taken by the respondent promoter that their case is covered by the clause 21 of the terms and conditions of the apartment buyer's agreement executed between the parties, which clearly provides that the completion and possession of the flat was to be delivered to the Complainant by the respondent upon the complete payment, which is still due and payable at the end of the Complainant. The said terms and conditions form part and parcel to the '*force majeure*', on account of pending permissions of their project with the competent authority is also devoid of merits. This Authority has already sought a query regarding the plea of '*force majeure*' from the respondent in view of terms of explanation appended to Section 6 of the Act *ibid*, which defines the expression '*force majeure*'. The plea that the project of the respondent could not be completed on account of pending permissions with the competent authority cannot be said to construe as '*force majeure*' as the same is beyond the scope and purview of the aforesaid expression. Even otherwise this Authority finds no merit in the submissions of the respondent promoter that on account of out spread of COVID-19 in the

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entire Country including the State of Himachal Pradesh the completion of the project has been delayed. The delay for completion of the project from last thirteen long years cannot be attributed to the issue of 'force majeure'. Hence, the plea of 'force majeure' is hereby declined by this Authority.

16. In the present case the Complainant has paid Rs. Eleven lakhs and twenty thousand and has asked for the refund due to inordinate delay of possession of the flat. The Hon'ble Supreme Court in case "**Pioneer Urban Land and Infrastructure Ltd. versus Govindan Raghavan, 2019 SCC Online SC 458**", has held that the inordinate delay in handing of the flat clearly amounts to deficiency of service. The Apex Court further held that a person cannot be made to wait indefinitely for possession of the flat allotted to him and is entitled to seek refund of the amount paid by him.

17. In the present case there is an inordinate delay of 13 years in the delivery of the flat whereas in accordance with the terms and conditions of the apartment buyer's agreement, the possession was to be delivered in 18 months i.e. from the date of agreement dated 20.04.2007 whereas, as per annexure R-12, the photographs showing the physical status of the building/flats clearly show that the flat is not

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yet ready for possession. Therefore, there is no option with the Authority but to order the refund of the amount of Rs. Eleven lakhs and Twenty thousand.

18. The second issue is about the interest that the Complainant has sought @ 24%. The Hon'ble Bombay High Court in the landmark judgement of "*Neel Kamal realtors*" in para 261 of judgment has held "*In my opinion Section 18 is compensatory in nature and not penal. The promoter is in effect constructing the apartments for the allottees. The allottees make payment from time to time. Under the provisions of RERA, 70% amount is to be deposited in a designated bank account which covers the cost of construction and the land cost and has to be utilized only for that purpose. Interest accrued thereon is credited in that account. Under the provisions of RERA, 30% amount paid by the allottees is enjoyed and used by the promoter. It is, therefore, not unreasonable to require the promoter to pay interest to the allottees whose money it is when the project is delayed beyond the contractual agreed period.....*"

19. The Hon'ble Supreme Court in "*Pioneer urban land & infrastructure case*" has also held that the flat purchaser is entitled to get refund of the entire amount deposited by him with interest."

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Thus, the Complainant is entitled to get interest as prescribed as per the Section 18 of the Act.

20. Keeping in view the above mentioned facts, this Authority in exercise of power vested in under various provisions of the Act issues the following orders/directions:

- i. The Complaint is allowed and the respondent is directed to refund a sum of Rs. Eleven Lakhs and twenty thousand along with interest at the SBI highest marginal cost of lending rate plus 2 % as prescribed under Rule 15 of the Himachal Pradesh Real Estate (Regulation & Development) Rules 2017. The present MCLR of SBI is 7.3 % hence the rate of interest would be 7.3 %+2 % i.e. 9.3%. It is clarified that the interest shall be payable from the dates on which different payments were made by the Complainant to the respondent.
- ii. The refund along with interest is to be paid by the respondent to the Complainant within 60 days from the date of this order.
- iii. Non-compliance or any delay in compliance of the above directions shall attract penalty and further interest on the ordered amount of refund under Section 63 and Section 38 of the Act *ibid*, apart from

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any other action the Authority may take under Section 40 or other relevant provisions of the Act.

- iv. The charge on the amount to be paid shall remain on booked flat till realisation of the amount to be refunded along with interest. It is further ordered that the respondent is barred from selling/ allotting/ booking any unsold/ unbooked flats in the present project, till the compliance of this order.
- v. The Complainant shall be at liberty to approach the Adjudicating Officer for compensation under Section 71 of the Act *ibid.*

  
**Dr. Shrikant Baldi**  
**Chairperson**

  
**B.C. Badalia**  
**Member**

  
**Rajeev Verma**  
**Member**