

**REAL ESTATE REGULATORY AUTHORITY,
HIMACHAL PRADESH**

In the matter of:-

Shri Dilip Kumar, S/O Shri Harinder Tiwari, R/O Flat no. 904/A,
Tarika Apartments, Sector 43, Chakarpur (74) Gurgaon, Haryana,
Pin -122002.

.....Complainant

Versus

Himland Executive Residences, (Himland Housing Pvt. Ltd.) Divya
Kunj, Officers Colony, Rajgarh Road, Solan H.P through its
promoters/ Directors

.....Non-Complainant/ Respondent

Complaint no. RERA/HPSOCTA/ 062000035

**Present: - Shri Vijay Arora Advocate for the Complainant
Shri Dilip Kumar,**

**Smt. Sangeeta Jalal, Advocate for respondent M/S
Himland Housing Pvt. Ltd.**

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

Final date of hearing (Through WebEx): 18.12.2020.

Date of pronouncement of Order: 18.01.2021.

ORDER

CORAM: - Chairperson and both Members



1. **BRIEF FACTS OF THE CASE:-**

The present matter refers to an online complaint dated 24th June, 2020 before this Authority under 'Form-M' bearing Complaint no. RERA/HPMACTA/ 062000035 of the H.P Real Estate (Regulation & Development) Rules, 2017. As per the Complaint it has been alleged that the Complainant had booked a flat no. A-004 on first floor of Himland Housing Pvt. Ltd., Solan, H.P having a carpet area of 760 sq. ft. with the respondent and had also advanced a sum of Rs. Thirty seven Thousand, three hundred and thirteen (Rs. 37, 313/-) on 2nd July, 2007. It is further alleged that as per the terms and conditions of the application form the possession was to be handed over to the Complainant within a period of 18 months from the date of the submission of application for booking the flat as mentioned above. The Complainant had remitted a total amount of Rs. Nine Lakh, seventy four Thousand, six hundred and thirty five (Rs. 9, 74, 635/-) in favor of respondent through various periodical payments, last payment having been made on 30th September, 2009 as per payment schedule, attached with the Complaint (Annexure C-2). It has been further alleged in the Complaint that the respondent had agreed to give the possession of the flat by 15th October, 2016



and registration of apartment by 15th November, 2016 in terms of Memorandum of Understanding (MOU) signed on 13th January, 2016, which has been appended as Annexure C-4 with the Complaint. 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 delivered to the Complainant. The Complainant had sought this Authority to pass necessary orders for the refund of entire amount of Rs. Nine Lakh, seventy four Thousand, six hundred and thirty five (Rs. 9, 74, 635/-) along with 24% interest from the date of advancement of amount, Rs. Five Lakh for deficiency in services, five Lakh for mental harassment, one lakh for cost of legal expenses.

2. **REPLY TO THE COMPLAINT.**

The respondent has filed a detailed reply to the Complaint on 28th October, 2020. It has been contended in the reply by the respondent that the Complainant is himself responsible for the delay in the completion of the present project. It has been further submitted in the reply that the delay in the instant project has occurred due to the reasons which were beyond the control of the respondent and is duly covered under the condition of '*force majeure*', which is evident on account of



pending permissions of present project with the competent Authority. Further it has been evidently stated in the reply that since the Complainant had entered into a memorandum of Understanding dated 13th January, 2016 and due to his own default for non-payment of the pending amount as principally agreed upon between the contesting parties, the Complainant is himself responsible for the non-completion of the project. Moreover, in view of the registration certificate issued by this Authority dated 11th May, 2020 the present project is supposed to be completed by 10th May, 2024. Therefore the present Complaint is liable to be dismissed.

3. **REJOINDER TO THE REPLY.**

The Complainant has responded to the reply so filed by the respondent by submitting a para-wise detailed rejoinder on 25th November, 2020. It has been submitted in the rejoinder by the Complainant that the entire contents of the reply are wrong, contrary and have been denied including the preliminary objections submitted therein. It has been further submitted that the project of the respondent is held up on account of his own acts of omission and commission and till date the flat which was allotted to the Complainant is not complete. The Complainant cannot be asked to wait for



eternity for completion of the project and therefore is entitled to withdraw from the project and claim refund of the amount paid to the respondent along with interest @ 24 % along with compensation and additional cost be imposed on the respondent for unnecessarily harassing the Complainant as per the Real Estate (Regulation and Development) Act,2016.

4. After perusing the entire record in shape of pleadings and documents placed on record before this Authority by the Complainant and Respondent, the following additional facts have come out in the present case:-

i) That it is submitted by the Complainant that he had booked one flat in the project of respondent for a consideration amount of Rs. Fourteen Lakh, ninety two Thousand and seven hundred, measuring 760 square feet in the year 2007. The Complainant Shri Dilip Kumar has paid a total amount of Rs.Nine Lakh, seventy four Thousand, six hundred and thirty five (Rs. 9, 74, 635/-) as per payment schedule fixed/ provided by the Complainant attached as Annexure C-2, a fact that has not been disputed by the Respondent.

ii) It has been contended by the Complainant that in view of copy of application form annexed as Annexure C-1 to the Complaint, that the completion and possession of the flat was supposed to



be handed over to the Complainant within 18 months w.e.f from 02.07.2007 as detailed at page 30 of the main case file.

iii) That it has been contended by the Complainant that the respondent even after a lapse of 13 long years have failed to provide possession of the flat to the Complainant. It has been contended further by 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.

iv) That it has been submitted by the Complainant that vide Annexure R-12, the photographs appended to the reply filed by the respondent at page nos.158-159 of the main case file, the construction work is not yet completed at the site.

v) That it has been proposed by the respondent promoter 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 accordance with the terms and conditions of the MOU dated 13th January, 2016.

vi) That it has been *per se* submitted as per the case file by the respondent promoter that 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 & HP Tenancy & Land Reforms Act, 1972 since February, 2006 vide Annexure R-1 to R-8 & Annexure R-13 & 14 till the registration under the Real Estate (Regulation & Development) Act, 2016 read with Himachal Pradesh Real Estate (Regulation & Development) Rules, 2017, whereby this Authority has issued the registration certificate to the respondent promoter on dated 11th May, 2020 vide Annexure R-9. Due to pending statutory approvals, the project could not be completed.

vii) That it has been submitted by the respondent promoter in his reply submitted before this Authority that around 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 due and payable at the instance of the Complainant.



5. **ARGUMENTS ADVANCED**

The final arguments in this case were heard on 18.12.2020. Shri Vijay Arora, Ld. Counsel representing the Complainant has argued before this Authority that the contentions of the Complainant are specific. It has been argued by the Ld. Counsel representing the Complainant that his client has booked a flat no. A-004 on first floor measuring approximately 760 sq.fts. with the respondent promoter and had advanced a sum of Rs. Thirty seven Thousand, three hundred and thirteen (Rs. 37, 313/-) on 2nd July, 2007 vide Annexure C-2. It is further argued by the Ld. Counsel that the Complainant has paid a total amount of Rs. Nine Lakh, seventy four Thousand, six hundred and thirty five (Rs. 9, 74, 635/-) out of total consideration amount of Rs. Fourteen Lakh, ninety two Thousand and seven hundred, as per payment schedule fixed/ provided by the respondent, attached as Annexure C-2, a fact that has not been disputed by the Respondent. The Counsel arguing for the Complainant invited the attention of this Authority to the copy of draft of apartment buyer's agreement, annexed as Annexure R-16 to the reply filed by the respondent which under Clause 21 clearly provides that the completion and possession of the flat was to be given to the Complainant



within 18 months from the date of date of submission of application form dated 02.07.2007. The respondents even after a lapse of 13 long years have failed to provide possession of the flat to the Complainant. It is further 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. Nine Lakh, seventy four Thousand, six hundred and thirty five (Rs. 9, 74,



635/-) along with 24% interest/ penalty. The Ld. Counsel for the Complainant has referred to the provisions of Section 18 of the Real Estate (Development and Regulation) Act 2016, for the return of amount 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 of paid to the respondent for the purchase flat in question. The ld. 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.



6. The Ld. Counsel 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 worth Rs. Five Lakh and seventeen Thousand, three hundred and sixty five is made payable to them in accordance with the terms and conditions of the Memorandum of Understanding dated 13th January, 2016 entered into 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 remitted to the respondent promoter and the second aspect relates to the delivery of possession of the flat booked by Complainant. The Ld. 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 and H.P Tenancy & Land Reforms Act



1972 since February, 2006 vide Annexure R-1 to R-8 & Annexure R-13 & 14 till the registration under the Real Estate (Regulation & Development) Act, 2016 read with Himachal Pradesh Real Estate (Regulation & Development) Rules, 2017 whereby the registration certificate has been accorded vide Annexure R-9 by this Authority on 11th May, 2020. Due to pending statutory approvals, the project could not be completed. The Ld. Counsel representing the respondent promoter has further argued that in view of the Memorandum of Understanding (herein referred to as MOU), it is clearly provided under the last clause that the Complainant is yet to make the remaining payment worth Rs. Five Lakh, seventeen Thousand, three hundred and sixty five to the respondent promoter. At this stage, a query was sought by this Authority from the Ld. respondent Counsel, whether MOU dated 13th January, 2016 has been signed by both the parties? The respondent Counsel replied that though the MOU has not been signed by the Complainant yet the terms and conditions of the same have been agreed upon by the Complainant. It was also contended by the Ld. Counsel for the Complainant that the said MOU is not binding upon him as his client has not signed the MOU and even otherwise the Complainant had no choice but to agree to



the same MOU unilaterally executed by the respondent promoter. 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.

7. The Ld. Counsel representing the respondent promoter has further argued that on account of want 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 further sought a specific query from the respondent that whether there is/was 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 Ld. Counsel 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 Ld. counsel further argued that due to non approval of the statutory compliances required in the present project, there was a delay in the completion of the project, which itself is a part and parcel to the 'force majeure'. 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

"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 respondent counsel while arguing further has vehemently contended that as per the contents of the MOU dated 13th January, 2016 executed between both the parties, the possession of the flat has to be handed over to the complainant after the payment of entire balance amount on mutually agreed terms and conditions.

8. **REBUTTAL:** The Ld. Counsel for the Complainant has rebutted the stance of the respondent by arguing before this Authority that in the present case the respondent had no specific approvals, then on what basis the amount of money has been received by respondent promoter from his Client. The arguing Counsel has further rebutted that his client had no choice but to abide by the terms and condition of the Memorandum of Understanding. Also the Ld. Counsel has rebutted herein before this Authority that his client has had no option except to abide by the terms and conditions of the MOU keeping in view the payment advanced to the respondent and delivery of possession of flat in the prescribed timeline. It has also been contended herein by the Ld. Counsel in rebuttal that the construction activities at the site were commenced after the MOU dated 13th January, 2016 was executed by the respondent promoter. Therefore, the complainant is duly



entitled for the refund of the entire paid amount along with interest at the rate of 24 % w.e.f 2nd July, 2007 from the different dates, the payments have been advanced to the respondent for the purchase of flat.

9. **CONCLUSION/ FINDINGS OF THE AUTHORITY:-**

We have heard the arguments advanced by the Ld. Counsels for the Complainant & Respondents 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. This Authority is of the view that there are three issues that requires the consideration and adjudication, namely:-

- A. Jurisdiction of the Authority.
- B. Whether the Complainant is entitled to get the refund of the money along with interest or not?
- C. Other Issues and directions including imposition of Penalty.

10. **A. Jurisdiction of the Authority.**

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".

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.”

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*.

11. B. Whether the Complainant is entitled to get the refund of the money along with interest or not?



Coming to the question that whether the Complainant is entitled for the relief of refund of amount of Rs. Nine Lakh seventy, four Thousand, six hundred and thirty five (Rs. 9, 74, 635/-) along with interest, under provisions of the Act and the Rules made there under. The Complainant in the present case had booked a residential Flat no. A-004 on first floor of Himland Housing Pvt. Ltd., Solan with the respondent promoter. It is *per se* admissible from the 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 has bound himself to complete the construction work and hand over possession of the apartment to the Complainant within 18 months commencing from 2nd July, 2007, i.e. the date on which the application form was submitted, the respondent has failed to do so and none of the reasons given by the respondent promoter are justified.

12. This Authority while adjudicating upon the issue of refund is guided by the judgment of the Hon'ble Apex Court in Civil Appeal nos. 3207-3208 of 2019 titled as "Marvel Omega Builders Pvt. Ltd. versus Shrihari Gokhale and anr." Dated



30.07.2019, whereby the Hon'ble Court under para 10 has observed as under,

"10.The facts on record clearly indicate that as against the total consideration of Rs.8.31 crores, the Respondents had paid Rs.8.14 crores by November, 2013. Though the Appellants had undertaken to complete the villa by 31.12.2014, they failed to discharge the obligation. As late as on 28.05.2014, the Revised Construction Schedule had shown the date of delivery of possession to be October, 2014. There was, thus, total failure on part of the Appellants and they were deficient in rendering service in terms of the obligations that they had undertaken. Even assuming that the villa is now ready for occupation (as asserted by the Appellants), the delay of almost five years is a crucial factor and the bargain cannot now be imposed upon the Respondents. The Respondents were, therefore, justified in seeking refund of the amounts that they had deposited with reasonable interest on said deposited amount. The findings rendered by the Commission cannot therefore be said to be incorrect or unreasonable on any count." The Complainant is therefore entitled to refund of amount in the present case due to delayed delivery of possession.



13. In the present case, there exist, clear and valid reasons for holding down that the flat buying Complainant is entitled for refund of total payment advanced to the respondent promoter. There has been a breach on the part of the developer/promoter/ respondent in complying with the contractual obligation to hand over possession of the flat within 18 months from the date of submission of application form dated 2nd July, 2007 and then from 13th January, 2016, at the time when MOU was executed between the contesting parties. The failure of the respondent promoter to hand over possession amounts to contravention of the provisions of the Real Estate (Regulation & Development) Act, 2016. The respondent promoter failed miserably in fulfilling all obligations as stipulated in Section 11 read with Section 14 of the Act *ibid*. There has been a gross delay on the part of the Respondent promoter in completing construction for almost 13 years. Having paid a substantial amount of the consideration price to the respondent, the purchaser is unable to obtain possession of that flat as the same has not been completed even after such a long period which is the subject matter of present case.



14. The flat purchaser/ Complainant invested hard earned money. It is only reasonable to presume that the next logical step is for the purchaser to perfect the title to the premises which have been allotted under the terms of the application form dated 2nd July, 2007. But the submission of the respondent promoter's own issues cannot abrogate and take away the rights of the Complainant under the Act *ibid*. We do not find any substance in the pleas raised by Ld. Counsel for the respondent thereof.

15. In the present case the Complainant has paid Rs. Nine Lakh, seventy four Thousand, six hundred and thirty five (Rs. 9, 74, 635/-) and has asked for the refund due to inordinate delay of possession of the flat along with 24% interest from the date of advancement of amount. 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.



16. In the present case there is an inordinate delay of 13 years in the delivery of the flat. Therefore, there is no option with the Authority but to order the refund of the amount of Rs. Nine Lakh seventy four Thousand six hundred thirty five (Rs. 9, 74, 635/-)

17. The issue is about the interest that the Complainant has sought before this Authority in addition to refund of amount. The Hon'ble Bombay High Court in the landmark judgement of "*Neel Kamal realtors*" in para 261 of judgment has held that "*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.....*" 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." Thus, the Complainant is entitled to get interest as prescribed as per the Section 18 of the Act read with rule 15 of Himachal Pradesh Real Estate (Regulation and Development) Rules, 2017 that clearly states that the rate of interest payable by the promoter to allottee or by the allottee to the promoter, as the case may be, shall be the highest marginal cost of lending rate of SBI, plus two percent.

18. We do not find any substance in the plea raised by Ld. Counsel for the respondent promoter that the Complainant shall be entitled to claim possession as per the contents of 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 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.



19. 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 can not 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 agreement for sale and even under the MOU and has failed to offer possession even till today.

20. The plea taken by the respondent promoter that their case is covered by the clause 21 of the terms and conditions of the



format of apartment buyer's agreement annexed as Annexure R-16 of the reply, which clearly provides that the completion and possession of the flat was to be delivered to the Complainant by the respondent after the complete payment of the flat 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 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.

21. C. Other Issues and directions including imposition of Penalty.

The Respondent Promoter has not shown any sincerity in delivering to them possession of the flat booked by the Complainant. The Authority is of this firm view that Respondent Promoter must be held accountable and penalised under Section 61 of the Act *ibid* for his failure to fulfil his obligations as promoter as prescribed in Section 11 and 14 of the Act *ibid* which should act as a deterrent for all the Respondent Promoters for repeating such Act with any other allottee/ prospective buyer in future in any of his existing or proposed real estate projects in future. In this case, there are glaring violations of Section 11 & 14 of the Act *ibid*, committed by the Respondent promoter that calls for imposition of a penalty under Section 61 of the Act *ibid*.

22. The Hon'ble Apex Court in ***Writ Petition (C) no. 940 of 2017 along with connected matters titled as "Bikram Chatterji & ors. Versus Union of India & ors."*** ***Vide its judgment dated 23rd July, 2019*** has observed as under:-



"Para 141. It goes to indicate how at large-scale middle-class home buyers have been defrauded of their hard-earned money, taken away by the affluents and the officials in connivance with each other. Law has to book all of them. We are hopeful that law will spread its tentacular octave to catch all culprits responsible for such kind of fraud causing deprivation to home buyers. It is shocking and surprising that so many projects have remained incomplete. Several Lakh of home buyers have been cheated. As if there is no machinery of law left to take care of such situation and no fear left with the promoters/builders that such acts are not perceivable in a civilised society. Accountability is must on the part of everybody, every institution and in every activity. We fail to understand the standard of observance of the duties by public authorities has gone so down that such frauds take place openly, blatantly, and whatever legal rights exist only on papers and people can be cheated on such wide scale openly, brazenly and with the knowledge of all concerned. There is duty enjoined under the RERA, there has to be a Central Advisory Council as well as the role of the State Government is not ousted in order to protect against such frauds. We direct the Central Government and the State Government to take



appropriate steps on the time-bound basis to do the needful, all other such cases where the projects have remained incomplete and home buyers have been cheated in an aforesaid manner, it should be ensured that they are provided houses. The home buyers cannot be made to suffer when we are governed by law and have protective machinery. Question is of will power to extend the clutches of law to do the needful. We hope and trust that hope and expectation of home buyers are not going to be belied."

23. RELIEF:-

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 promoters are directed to refund a sum of Rs. Nine Lakh, seventy four Thousand, six hundred and thirty five (Rs. 9, 74, 635/-) 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 highest 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 promoter 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 further attract penalty and interest on the ordered amount of refund under Section 63 and Section 38 of the Act *ibid*, apart from any other action of the Authority may take under Section 40 or other relevant provisions of the Act.
- iv. That in view of Section 61 of the Act which prescribes the maximum penalty that could be imposed for the contravention of any other provision of the Act other than Section 3 and 4, as five percent of the total cost of the project. The Authority, considering all facts of the case, deems appropriate to impose a penalty of Rs. Three Lakh in case the respondent promoter fails to comply with the present order/directions passed by this Authority within stipulated period of sixty days.

- v. It is further ordered that the respondent promoter is barred from selling/leasing/allotting/booking any



remaining flats/land in the present project, till the compliance of this order. Further, no withdrawal from the bank account of the projects to be made till payment as ordered is made to the complainant and penalty is deposited into the account of Authority. Further, there shall not be any alienation of any movable and immovable assets of this project till compliance of this order.

- vi. The respondent promoter is directed to intimate the details of their bank accounts pertaining to this project within fifteen days.
- vii. The Complainant shall be at liberty to approach the Adjudicating Officer for compensation under Section 71 of the Act *ibid*.


B.C. Badalia
MEMBER


Dr. Shrikant Baldi
CHAIRPERSON


Rajeev Verma
MEMBER

