REAL ESTATE REGULATORY AUTHORITY,
HIMACHAL PRADESH

In the matter of:-

Dr Arun Kumar son of Jageshwar Sahai, Resident of village- Tharu, Tehsil- Nagrota Bagwan, District- Kangra, H.P. Pin - 176047

.....Complainant

Versus

1. M/s Shri Builders through its proprietor Uday Swaroop Bhardwaj resident of shop no. 122, First floor Old Bus Stand Market, Tehsil- Nagrota Bagwan, Distict- Kangra, H.P. Pin- 176047
2. Dr. Naresh Virmani son of Sh. Dayal Dass along with Smt. Kalpna Virmani wife of Dr. Naresh Virmani, resident of Panchsheel, Upper Nagrota Bagwan, District- Kangra, H.P.

.....Non-Complainants/ Respondent promoters

Complaint no. RERA/HP/KACTA11180007

Present: - Shri Arun Kumar, the complainant

Sh. Uday Swaroop Bhardwaj prop. M/s Shri Builders, respondent no. 1 with Sh. Munish Kaotch Advocate.

Sh. Naresh Virmani and Kalpna Virmani with Sh. Kunal Dawar Ld. Advocate.

Sh. Abhishek Sood, Assistant District Attorney, RERA Himachal Pradesh.

Final date of hearing (Through WebEx): 29.10.2021.

Date of pronouncement of Order: 29.11.2021.

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ORDER

CORAM: - Chairperson and both Members

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

Dr. Arun Kumar filed an online complaint" on 14th of November, 2018 in "Form M with the following reliefs. Brief facts of the case are that the complainant had booked a flat No. S-5 measuring 1293 square feet on the Second Floor of the "Shri Panchsheel Complex" situated at Mauza Palampur Khas, NH-22, Tehsil Palampur, District Kangra, Himachal Pradesh and paid Rs. 2,00,000/- on 27.08.2010 as the booking amount out of the total sale consideration of Rs. 23,70,000/- . It has been further alleged that despite repeated requests on behalf of the complainant for the execution of an agreement for sale, the respondent no. 1 kept on postponing the same on one pretext or the other. The complainant paid a total of Rs. 8,00,000/- (Rupees Eight Lakh) before the signing of the agreement for sale. The respondent no. 1 prepared an agreement for sale on 09.09.2010 without consulting the complainant, and the terms of the aforesaid agreement were totally in favour of respondent no.1. It has been further pleaded that the complainant objected to the terms of the 'agreement for sale' time and again, but had to sign the same as respondent no. was in a dominant position after having accepted huge amount

of money (Rs. 8,00,000/-). The respondent no. 1 assured the complainant that the possession of the flat in question will be delivered to him within nine months of the signing of agreement for sale. The complainant has paid full sale consideration of Rs. 23,70,000/- (Twenty Three Lakhs Seventy Thousand) but the builder did not deliver the possession even after elapse of eight years from the date of booking of the flat in question. The project in question is not registered with the Authority despite it being an ongoing project which should have been so registered by 31.07.2017.In view of the above, the complainant has sought possession of flat along with the occupation certificate, interest on the delayed possession at the rate of 18 % from date of first payment till the date of possession , Rs. 5,00,000/- on account of harassment and mental agony, cost of complaint and other relief as the Authority deems fit. It is pertinent to mention here that after the filing of the present complaint, the possession of the flat in question has been delivered to the complainant and the sale deed dated 08.03.2019 has been registered in the name of the wife of the complainant.

The respondent no. 2 was impleaded as a necessary party vide order of this Authority dated 04.03.2021.

2. **REPLY TO THE COMPLAINT BY RESPONDENT NO. 1**

The respondent no. 1 filed reply to the complaint on 1st of March, 2021. The respondent has raised certain preliminary objections in his reply and has contended that the complainant has not come before the Authority with clean hands as he has not paid the amount for the extra work as well as balance sale consideration and also that the complaint is time barred. He has further contended the complainant is estopped by his act and conduct from filing the present complaint. It has been contended that the complaint needs to be dismissed on the ground of non-pleading of necessary party. On merits, the respondent no. 1 has denied that the total cost of the flat is Rs. 23,70,000/- (Rupees Twenty Three Lakh Seventy Thousand). It has been alleged that the cost of the flat and payment schedule is mentioned in the agreement for sale and the payment was received as per the agreement and the sale deed. The respondent no. 1 has alleged that there was no delay in completion of the flat in question and the delivery of the possession of the same was delayed as the complainant failed to make the payment in time. This respondent has further submitted that the structure of the project was complete before agreement in the year 2009 which is evident from the sale deed. It has been averred that the complainant has been blackmailing the respondent by filing false complaints. One such complaint was filed before the District Consumer Forum, Dharamshala in 2013

and the same was dismissed. The respondent has further submitted that he is not responsible for the delay in the completion of the project. It has been further submitted that the dispute arose only when respondent no. 1 demanded payment for extra works done amounting to Rs. 2,00,000/- (Rupees Two Lakhs) as well as 1,00,000/- (Rupees One Lakh) against the less payment made at the time of registration of sale deed. The replying respondent has alleged that the cost of the aforesaid extra work was borne by the respondent out of his own pocket. The respondent has further submitted that there was a penal clause in the agreement for sale (clause 6) which was never resorted to by the complainant. It has been further alleged that the present complaint has been filed by the complainant to avoid his liability to make the pending payments. The respondent has further submitted that the relief qua the delivery of possession of the flat in question has become infructuous as the same has already been delivered and a sale deed has been registered in favour of the wife of the complainant long before the filing of the complaint. It has been alleged that the flat has been registered in the name of the wife of the complainant to get the benefit of less charge for registration. The respondent no. 1 has further sought compensation for the loss of good will and harassment caused to him by the complainant.

3. **REPLY TO THE COMPLAINT BY RESPONDENT NO. 2/ LANDOWNER**

The Authority impleaded respondent no. 2/ landowners as necessary parties vide its order dated 04.03.2021 and asked them to file reply/response to the present complaint. The landowners have filed a detailed reply to the complaint. In their reply, the landowners have submitted that the complainant has neither filed the complaint against them nor any relief has been sought against them. It has been further submitted by the landowners that they are not part of any agreement between the complainant and the respondent no. 1 qua the flat in question and thus, there is no privity of contract between the complainant and the landowners. It has been submitted in the reply that no averment has been made against the landowners in the entire complaint and admittedly no amount has been received by them from the complainant in respect of the flat. The landowners have submitted that no reference of landowners with regard to transaction in question have been made in the complaint and all the claimed by the complainant is only against the respondent no. 1. The landowners have averred in their reply that they were owners of land measuring 5 kanals 12 Marlas, situated at Main Bazar Road Palampur, Tehsil Palampur, District Kangra, Himachal Pradesh vide registered sale deed dated 10.02.2005 & 04.01.2006

executed in their favour. It has been alleged that respondent no. 1 approached the landowners for developing the said land into the residential/commercial complex. A Memorandum of Understanding (MOU) dated 21.08.2006 was executed between the landowners and M/s Shri Builders through its proprietor Sh. Uday Swaroop Bhardwaj (respondent no. 1). As per the conditions of the said MOU, the respondent no. 1 was to construct the commercial cum residential complex over the land of the landowners and it was the obligation of the respondent no. 1 to get the plans of the said complex sanctioned from the local authority. The landowners have further submitted that in terms of the MOU, they were to be given 35 percent of the total covered area being developed and had no profit sharing with the respondent no. 1. They have claimed that they themselves are allottees in the project being developed by respondent no. 1. The abovementioned MOU has been appended as Annexure R-1 to the reply. The landowners have further submitted that respondent no. 1 had full rights to book, sell, lease or mortgage or dispose its allocation of the complex to any person/persons of its choice on such rate or rates as it deemed fit and that the landowners were not to have any concern with the same. The landowners have averred that in terms of the MOU and the right vested with the respondent no. 1, it had allotted the flat in question to the

petitioner. All documents/agreement/receipts were entered into between respondent no. 1 and the complainant with the landowners having no concern with the same in any manner. Further, the entire sale consideration has been received by the respondent no. 1 and thus, the landowners are not open to any claim from the complainant. The landowners have reiterated that as per clause 7 of the said MOU, it was the sole responsibility of respondent no. 1 to obtain all the required permissions and sanctions of the plans qua the project in question from the relevant competent authorities and such further permissions which may be required from time to time under any law, rule or regulation for the time being in force at his own costs and expenses. It has been further submitted in the reply that the landowners have been themselves at the receiving end by entering into the said MOU, as not only the utilisation of the land was blocked but despite the MOU providing delivery of possession of their share within 36 months from the approval of building plans, they were handed over their share only in the end of the year 2016-2017, that too after repeated requests having been made to the respondent no. 1. It has been further submitted that the said MOU has been entered between the landowners and the respondent no. 1 on a principal to principal basis and it was not a partnership between them. It has been submitted that said

MOU does not provide for any profit sharing in the project in question being developed by respondent no. 1 and would on perusal, show that the landowners do not fall under the definition of promoter. Lastly, the landowners have reiterated that due to the aforesaid reasons and since the complaint has only been filed against the respondent no. 1 and has not raised any grievance against them, the landowners cannot be made party to the present complaint. The landowners have prayed to hold the present complaint as non-maintainable qua the landowners and that the landowners be held to be not necessary or proper party for the adjudication of the present complaint.

4. REJOINDER TO THE REPLY FILED BY RESPONDENT NO. 1

The complainant filed a detailed rejoinder to the reply so filed by the respondent no. 1. The complainant, in his rejoinder, has denied all the preliminary objections taken by the respondent no. 1 in his reply. He has vehemently denied that the possession of apartment was delivered in time and also that the structure was complete before the execution of the agreement in 2009. The complainant has denied that the reason for delay in possession was the complainant's failure to make timely payments. It has been submitted by the complainant in his rejoinder that while, as per condition no. 4 of the agreement for sale signed between the complainant and the respondent no. 1 on 9.09.2010, the

possession of the apartment was to be delivered within 9 months of the date of signing of the aforesaid agreement i.e. by 09.06.2011,the actual possession was delivered to the complainant on 08.03.2019.It has been further submitted that the aforesaid delay in delivery of possession was despite the fact that the last payment was made by the complainant on 25.06.2011 (as is evident from the receipts issued by the respondent no. 1), around the time when the possession of the flat in question was promised to be delivered. The complainant has reiterated that final payment made by him to the respondent no. 1 was Rs. 23,70,000/- (Rupees Twenty-Three Lakh, Seventy Thousand)as is evident from the formal and hand-written receipts signed by the respondent no. 1 which have been annexed to the main complaint. It has been submitted that the payments made in cash and acknowledged by the respondent through the hand written receipts annexed with the complaint were over and above the sale amount mentioned in the sale agreement. It has been averred that prior to the booking of the flat in question, the total consideration was agreed at Rs, 23,70,000/- (Rupees Twenty-Three Lakh, Seventy Thousand). It has been submitted that the terms qua the consideration amount of Rs. 18,00,000/- (Rupees Eighteen Lakh), the payment schedule and other clauses were incorporated in the lopsided sale agreement by the respondent no.

1 after having received Rs. 8,00,000/- (Rupees Eight Lakhs) in advance, and were forced upon the complainant. The complainant has further refuted the claim of the respondent that possession has been delivered to all other flat owners. It has been submitted that the construction is still on-going and some flat owners are still waiting for their flats to be completed. To substantiate the aforesaid claim, the complainant has annexed the proceedings of the meeting of the flat owners of the project in question as annexure 1 as well as photographs of incomplete flats as annexure 2 to the rejoinder. The complainant has alleged that the respondent no. 1 accepted an amount of Rs 8,00,000/- (Rupees eight Lakhs) prior to the signing of the agreement for sale in violation of section 13 of the Act which prohibits a promoter to accept more than ten percent of the cost of the apartment before entering into an agreement of sale. The complainant has further submitted that the construction of the flat in question was not complete at the time of filing of the present complaint and that the project in question is far from being complete. It has been stated that the fact of non-completion of the project is evident from the photographs annexed as annexure 3 to the rejoinder. The complainant has admitted that the he had filed a complaint before the District Consumer Forum, Dharamshala in 2013 but has denied that the same was dismissed by the Ld. Forum. In

fact, the complainant has submitted that the aforesaid complaint was returned for presentation in the appropriate forum on account of the lack of pecuniary jurisdiction of the Ld. Forum to adjudicate that complaint. The order of the Ld. Forum has been annexed as annexure 4 to the rejoinder. The complainant has submitted that he did not resort to the penal clause (Clause 6) of the agreement for sale despite the default in the delivery of possession on behalf of the respondent no. 1 as the aforesaid clause is one-sided and in favour of the respondent no. 1 and thus untenable in the eyes of law. The complainant has submitted that the flat in question has been registered in the name of his wife in accordance with the provisions of the relevant laws. The complainant has further denied that he owes any money to respondent no. 1 on account of any extra works done by the respondent or on account of non- payment of balance sale consideration by him. He has specifically submitted that the respondent no. 1 has not done any extra/additional work in the flat in question. The complainant has submitted that the respondent has not provided any evidence in support of his contention regarding any money owed to him by the complainant. The complainant has further denied the claim of the respondent no. 1 that he was forced to do the additional work by the complainant. On the contrary, the complainant has alleged in his

rejoinder that he had to make payments to the carpenter and painter to get the finishing works done in the flat. The complainant has submitted that the respondent has not been able to obtain the completion certificate in respect of the project. The complainant has submitted that the fact, that the possession of the flat has been delivered and the sale deed qua the same has been registered, does not make the complaint infructuous. He has given the following reasons for the aforesaid submission: firstly, that the possession has been accepted for the flat only while the project is still incomplete and the respondent no. 1 has failed to obtain the completion certificate qua the same. Secondly, the quality of construction of the flat is poor and possession has been taken under protest. Thirdly, the sale deed has been registered on 08.03.2019 while the complaint was filed on 14.11.2018 much before the registration of the sale deed. Lastly, as has been held by the National Consumer Disputes Redressal Commission in Ghaziabad Development Authority V/s Gurudutt Pandey (RP No. 152 of 2000, accepting possession does not bar the complainant from filing a complaint. The complainant has further submitted in his rejoinder that respondent is silent about the fact of non-receipt of completion/occupancy certificate qua the project and non-registration of the project with the Authority. The complainant has claimed by citing certain rulings of the Hon'ble

Supreme Court that the customers are entitled for interest which shall be counted from the date of possession given in the original contract.

5. REJOINDER TO THE REPLY FILED BY RESPONDENT NO. 2 / LANDOWNERS

The complainant filed a short rejoinder to the reply of the landowners. The complainant chose to make no comments on the reply of the landowners except regarding the facts presented in para 13 of the reply. The complainant relied on the submission of the landowners in para 13 of their reply qua the delay in delivery of possession by the respondent no. 1 to support his contention.

6. ARGUMENTS ON BEHALF OF COMPLAINANT -

It was argued that one agreement for sale between the complainant and respondent no. 1 was signed on 9thSeptember,2010 and an amount of Rs 8,00,000/- was given as advance prior to the signing of the afore mentioned agreement for sale, the receipt of which are appended along with complaint. It was further argued that it was mentioned in the agreement for sale that possession of the flat/ apartment was to be handed over within 9 months of the signing of the aforesaid agreement. There is penalty clause in the agreement which said that if the builder failed to give possession to the allottee within six months the allottee was entitled to claim damages at the rate of Rs2000/- per month and beyond the period

of six months the allottee will build the flat and bill the expenses to the respondent on. 1. This one sided clause had to be agreed by the complainant because the complainant had already invested a huge amount in the project and despite the protest there was no option but to sign the agreement for sale. It was further argued that there has been delay in the execution of agreement for sale. It was further also argued that the agreement for sale also mentions that there is MOU between respondent no. 2 and respondent no. 1 which was never shown to the allottee. The possession was given to the allottee after nine years and even then the project was not complete and the possession was taken under protest. It was further argued that the main point of contention is that the builder may be asked to complete the remaining work in the project and hand over the completion certificate of the project to the complainant. It was further argued that there are many works that are pending in the building such as the roof work which is incomplete and also there is an issue of dampness in the building especially in the flat of the complainant. There are issues of drainage and construction in the building. There is no boundary wall. The photographs to demonstrate the same have been appended along with the rejoinder. The complainant has also included in the rejoinder minutes of meetings wherein it has been mentioned that some of the flat buyers have not been handed over

the possession even till today. The prayer of the complainant was that there has been delayed possession on account of the defaults committed by respondent on.1. The builder may be directed to complete all the works and submit completion certificate. The complainant also prayed for interest on the delayed possession at the rate of 18 % from the date of first payment till the date of possession was delivered by the builder to the complainant. A further payment of 5 lakhs on account mental harassment and agony be also paid by the respondent no. 1 to the complainant.

7. ARGUMENTS ON BEHALF OF RESPONDET NO. 1

It was argued on behalf of respondent no. 1 that the project was started in the year 2006 when the MOU was signed between respondent no. 1 and respondent no. 2. The title to the land was not clear so some of the left over formalities were completed in the year 2007 whereas they were to be completed within a period of 30 days. The plan of the project was sanctioned in the year 2008. The project was named as 'Shri Panchsheel Complex'. Respondent no. 1 completed the construction work of framework i.e. column, beam and brick structure as per the sanction plan approved by the competent Authority by the end of year 2009. Thereafter respondent no. 1 started executing agreement with prospective buyers such as the complainant. There has been delay/ default on

the part of complainant to make the balance payments and therefore the possession was delayed to him. There was a penalty clause in the agreement according to which in case the builder defaults in delivering possession within the stipulated period, the builder as per clause 6 of the agreement for sale was to pay Rs 2,000/- for six months and then in case there is further delay then the flat buyer shall complete the project and raise the bill to the buyer. In case flat buyer wants to get extra work done as per agreement for sale, then advance payment has to be made by the flat buyer for getting the work done. There is no delay in the execution of agreement for sale. It was argued that the complainant has been shown the flat and only after his satisfaction he gave the booking amount and builder has given proper receipts for it. It was argued that the builder has handed over the possession of the flat much prior to the filing of the complaint. It was further argued that the complainant has got done the interiors of the flat from respondent no. 1 as per his desire but the payment has not been given by him and to shun his liability, he has filed this false complaint. A complaint was also filed in the consumer court on similar lines merely to harass the respondent no. 1 in December 2012 and the same was dismissed in June 2013. No appeal has been preferred against that order. The builder/ respondent no. 1 has done extra work in the flat of the

complainant to the tune of Rs 2,00,000/- as well as 1,00,000/- against the less payment made at the time of registration of sale deed. Therefore it was argued that the complaint has been filed without merits with sole purpose to harass the complainant. The complainant is hand in glove with respondent no.2/ landowner and collectively they are trying to harass respondent no. 1. The building was ready in the year 2009 as is mentioned in the sale deed executed in the year 2019 wherein it is mentioned that the building is more than 10 years old. It was further argued that the total cost of the project was denied to be 23,70,000/- lakhs and was Rs 18 lakhs according to agreement for sale and the sale deed. It was further argued that complainant has not paid any thing extra than 18.00 lakhs and the complainant still has to make the balance payment for extra work done. It was further argued that relief sought by the complainant is infructuous as possession has already been delivered to him and the sale deed has also been executed.

8. ARGUMENTS ON BEHALF OF RESPONDENT NO. 2-

In support of his reply, respondent no. 2 has pleaded that he was impleaded by the Learned Authority being landowner of the project in question. He further argued that there is no averment in the complaint against the respondent no. 2 and therefore his

impleadment in the case was done only to facilitate the registration of the project under the Act with the Authority. He further argued that his plight is similar to that of the allottee as he has not received his share in the developed project as per the MOU signed between the parties. It was further argued that there is no privity of contract between the allottee and the respondent no. 2 and he has invested his land in the project. He further argued that qua the liability of delayed possession he has no role to play as according the MOU it was respondent no. 1,being builder, who was to deliver the possession of the flats to the allottees in time and he had invested his land into the project. For this he also relied on the judgment of the Hon'ble Bombay High Court in Vaidehi Akash Housing Pvt. Ltd. vs New D.N. Nagar Co-op Housing Society Union Ltd. & others decided on 1st December, 2014. He further argued that he did not receive any money from the allottees and the entire sale consideration was received by the respondent no. 1 therefore liability to pay interest on delayed payment if any shall be imposed on the respondent no. 1 being builder and developer. It was further argued that respondent no. 2 gained title to the land of the project in the year 2005 when the sale deed took place and thereafter respondent no. 1 approached respondent no. 2 /landowner with a proposal to develop the project and in return as consideration the landowner will get 35% share in the developed

project. Further he relied upon para 2 of the memorandum of understanding wherein it is mentioned that the respondent no. 1 will develop the said property by erecting a commercial and residential complex at his own cost and expense. He further relied on para no. 4 of the MOU wherein it is mentioned that the respondent no. 1 will prepare drawings, layout, designs necessary for construction and development on the said site & shall submit the same to the local authority for approval. He further relied on para no. 7 of the MOU where in it was mentioned that it is the sole responsibility and liability of respondent no. 1 to supply and obtain all the required permissions or sanctions from the government and other concerned authorities. He also relied upon para 13 of the MOU wherein it was mentioned that respondent no. 1 shall have full right to book, sell, lease or mortgage or dispose of 65 % share in the project along with proportionate share of land to any person of its choice on such rates as respondent no. 1 may consider for sale. It was further mentioned that consideration of sale of 65% share shall exclusively belong to respondent no. 1 and respondent no. 2 shall have no right in the same. It was further argued that respondent no. 2 himself was a sufferer in the case as he was to be delivered 35 % share in the developed project within 36 months of the execution of the MOU but the same has not been delivered even till today. He further relied on para 20 of the MOU wherein it

was mentioned that respondent no. 1 and respondent no. 2 have entered into this agreement on principal to principal basis only and nothing contained in the MOU shall be construed as partnership or a joint venture or association of persons between the parties. It was then argued that delivery of possession was not the responsibility of respondent no. 2. He argued that there may be some cases where as per agreement landowner had some share in the consideration received by the builder from the allottee but in the present case no such amount has been received by the landowner therefore he is not a promoter.

9. FINDINGS AND CONCLUSION 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 issues that requires the consideration and adjudication, namely:-

A. Jurisdiction of the Authority?

B. Whether the Act of 2016 is retrospective or retroactive in its operation?

C. What was the due date of delivery of possession and when was possession offered/ given?

D. What was the consideration of the flat on which interest for delayed has to be paid?

E. Whether the complainant has waived his right to file and maintain the present complaint in view of the subsequent taking over of possession of the flat by him from the respondent no. 1?

F. Who are the promoters and by whom the interest on delayed possession is to be paid?

This Authority after careful examination of the statutory provisions of the Real Estate (Regulation & Development) Act, 2016 along with judicial pronouncements of various Courts including the Hon'ble Apex Court, deliberates on the different issues one by one by taking into consideration facts as well as law applicable to the present case.

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 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.'

Section 11(4)(a) of the Act provides that the promoter shall be responsible to fulfil the obligation towards the allottee as per the terms and conditions of the agreement for sale. Once this obligation has been incorporated in the substantive provision of

the Act, its non-compliance may invite the violation of the provision of the Act. As per section 34(f) the Authority is competent to ensure the compliance of the obligations casted upon the promoter under this Act and the Rules and Regulations made there under. Thus for awarding the interest under Section 18(1) proviso of the Act due to non-fulfilment of the obligations/responsibilities as per the terms and conditions of the agreement by the promoter, the Authority will be competent to award interest simplicitor by taking the aid of the provision of section 11(4)(a), 34(f) and 37 of the Act. .

Section 13 of the Act provides for an obligation on the promoter qua the different specifications to be mentioned in an agreement for sale and the section is reproduced herein below:

> "13. No deposit or advance to be taken by promoter without first entering into agreement for sale.—
> (1) A promoter shall not accept a sum more than ten per cent. of the cost of the apartment, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force.
> (2) The **agreement for sale** referred to in sub-section (1) shall be in such form as may be prescribed and **shall specify** the particulars of development of the project including the construction of building and apartments, along with specifications and internal development works and external development works, the dates and the manner by which payments towards the cost of the

apartment, plot, or building, as the case may be, are to be made by the allottees and **the date on which the possession of the apartment**, plot or building is to be handed over, the rates of interest payable by the promoter to the allottee and the allottee to the promoter in case of default, and such other particulars, as may be prescribed."

Section 17 of the Act provides for an obligation on the promoter qua transfer of title and possession and reads as

"17. Transfer of title.—

(1) The promoter **shall execute a registered conveyance deed in favour of the allottee** along with the undivided proportionate title in the common areas to the association of the allottees or the competent authority, as the case may be, and **hand over the physical possession of the plot, apartment of building, as the case may be, to the allottees** and the common areas to the association of the allottees or the competent authority, as the case may be, in a real estate project, and the other title documents pertaining thereto within specified period as per sanctioned plans as provided under the local laws:

Provided that, in the absence of any local law, conveyance deed in favour of the allottee or the association of the allottees or the competent authority, as the case may be, under this section shall be carried out by the promoter within three months from date of issue of occupancy certificate."

On the above backdrop let us turn to Section 18 of RERA Act, 2016 which reads as under.-

18 : Return of amount and compensation.

(1) if the promoter fails to complete or is unable to give possession of an apartment plot or building-

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(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.

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

After carefully reading of the above provision, it is revealed that it consists of three different clauses. At first let us see clause No. (1). If the promoter fails to complete or is unable to give possession of an apartment, plot or building in accordance with the terms of agreement for sale or as the case may be, duly completed by the dates specified therein or due to discontinuance of his business on account of suspension or revocation of registration under this Act or for any other reason, then it is the obligation on promoter to return the amount received from complainant with interest at such a rate as may be prescribed including the compensation, in case complainant

wishes to withdraw from the project. Now, proviso says that if complainant does not intend to withdraw from the project then, promoter shall pay interest for every month of delay till the handing over of possession of the flat to the complainant at a such rate as may be prescribed.

Now the case of complainant falls under option second as he decided to continue with the project. So, as per proviso of Section 18, interest is to be calculated for every month of delay till the possession is handed over to the complainant. Thus, the moment due date for handing over possession is over the claim of interest for delay of every month is accrued to the complainant as per Section 11 of RERA Act, 2016. Right to claim interest is statutory right once it is accrued it lasts till the possession is handed over. Once delay is caused in handing over possession, it is continuous cause of action to get possession and consequently interest on period of delayed possession. It is further obligation and duty of the promoter to pay the interest for the period of delayed possession.

Section 34(f) of the Act provides that it is the function of the Authority to ensure the compliance of the obligations casted upon the promoter, allottee and the real estate agent under the Act, rules and regulations made thereunder. Section 37 of the

Act authorises the Authority to issue certain directions for the purpose of discharging its functions.

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.

B. WHETHER THE ACT OF 2016 IS RETROSPECTIVE OR RETROACTIVE IN ITS OPERATION?

This issue concerns the retroactive application of the provisions of the Act 2016 particularly, with reference to the ongoing projects. Under Chapter II of the Act 2016, registration of real estate projects became mandatory and to make the statute applicable and to take its place under Sub-section (1) of Section 3, it was made statutory that without registering the real estate project with a real estate regulatory authority established under the Act, no promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner a plot, apartment or building, as the case may be in any real estate project but with the aid of proviso to Section 3(1), it was mandated that such of the projects which are ongoing on the date of commencement of the Act and more specifically the

projects to which the completion certificate has not been issued, such promoters shall be under obligation to make an application to the authority for registration of the said project within a period of three months from the date of commencement of the Act. With certain exemptions being granted to such of the projects covered by Sub-section (2) of Section 3 of the Act, as a consequence, all such home buyers agreements which have been executed by the parties inter se has to abide the legislative mandate in completion of their ongoing running projects.

The term "ongoing project" has not been so defined under the Act while the expression "real estate project" is defined Under Section 2(zn) of the Act which reads as under:

> **2(zn)** "**real estate project**" means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartments, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto;

The Act is intended to comply even to the ongoing real estate project. The expression "completion certification" has been defined Under Section 2(q) and "occupancy certificate" Under Section 2(zf) of the Act which reads as under:

2(q) "completion certificate" means the completion certificate, or such other certificate, by whatever name called, issued by the competent authority certifying that the real estate project has been developed according to the sanctioned plan, layout plan and specifications, as approved by the competent authority under the local laws;

2(zf) "occupancy certificate" means the occupancy certificate, or such other certificate, by whatever name called, issued by the competent authority permitting occupation of any building, as provided under local laws, which has provision for civic infrastructure such as water, sanitation and electricity;

Looking to the scheme of Act 2016 and Section 3 in particular of which a detailed discussion has been made, all "ongoing projects" that commence prior to the Act and in respect to which completion certificate has not been issued are covered under the Act. It manifests that the legislative intent is to make the Act applicable not only to the projects which were yet to commence after the Act became operational but also to bring under its fold the ongoing projects and to protect from its inception the inter se rights of the stake holders, including allottees/home buyers, promoters and real estate agents while imposing certain duties and responsibilities on each of them and to regulate, administer and supervise the unregulated real estate sector within the fold of the real estate authority.

A bare perusal of the object and reasons manifest that the Act does not take away the substantive jurisdiction, rather it

protects the interest of homebuyers where project/possession is delayed and further that the scheme of the Act has retroactive application, which is permissible under the law. The literal interpretation of the statute manifest that it has not made any distinction between the "existing" real estate projects and "new" real estate projects as has been defined Under Section 2(zn) of the Act.

The key word, i.e., "ongoing on the date of the commencement of this Act" by necessary implication, ex-facie and without any ambiguity, means and includes those projects which were ongoing and in cases where only issuance of completion certificate remained pending, legislature intended that even those projects have to be registered under the Act. Therefore, the ambit of Act is to bring all projects under its fold, provided that completion certificate has not been issued.

The clear and unambiguous language of the statute is retroactive in operation and by applying purposive interpretation Rule of statutory construction, only one result is possible, i.e., the legislature consciously enacted a retroactive statute to ensure sale of plot, apartment or building, real estate project is done in an efficient and transparent manner so that the interest of consumers in the real estate sector is protected by all means and Sections 13, 18(1) and 19(4) are all beneficial provisions for

safeguarding the pecuniary interest of the consumers/allottees. In the given circumstances, if the Act is held prospective then the adjudicatory mechanism under Section 31 would not be available to any of the allottee for an on-going project.

Further in the case of **Newtech Promoters and Developers Pvt. Ltd. Vs. State of U.P. and Ors MANU/SC/1056/2021 it was held by the Hon'ble Supreme Court as under:**

> "54. From the scheme of the Act 2016, **its application is retroactive** in character and it can safely be observed that the projects already completed or to which the completion certificate has been granted are not under its fold and therefore, vested or accrued rights, if any, in no manner are affected. At the same time, **it will apply after getting the on-going projects and future projects registered Under Section 3 to prospectively follow the mandate of the Act 2016.**"

In the instant case, though the agreement for sale between the parties was executed on 9th Day of September, 2010 i.e. prior to the Act came into force but the transaction is still incomplete and the contract has not concluded. The possession of the unit was not delivered and the conveyance-deed was also not executed on the date of filing of the complaint. Thus, the concept of retroactivity will make the provisions of the Act and the Rules applicable to the agreements for sale entered into between the parties to the case before the coming into operation of the Act.

It is an admitted fact that the present project is an ongoing project. The promoter/ respondent no 1 has initiated the process of registration of the real estate project and has uploaded the application on the web portal of the Authority for getting the project registered.

C. WHAT WAS THE DUE DATE OF DELIVERY OF POSSESSION AND WHEN WAS POSESSION OFFERED/ GIVEN?

The complainant submitted that the possession was to be delivered within nine months from the execution of agreement for sale. The agreement for sale between the parties was executed on 9thSeptember, 2010. Clause 4 of the agreement for sale that deals with delivery of possession is as under

> *" 4. That the possession of the above said Flat no. S-5 of Shri Panchsheel Complex shall be given to the second party by the first party within 9 months from the date of agreement"*

Therefore in the present case, in view of clause 4 of the agreement for sale executed interse the complainant and respondent no. 1, the execution of which has been admitted by both of them, the due date of possession was nine month from the date of execution of agreement for sale. Agreement for sale was executed on 9th Day of September, 2010. Nine months from

this date would be 9thJune, 2011. So the due date of delivery of possession was 9thJune, 2011. During arguments, on the query of The Authority, about the actual date of possession of the flat, both the parties failed to give the date of possession .Since the sale deed has been executed on 08.03.2019, the Authority holds that the date of possession will be considered as the date of the sale deed.

D. WHAT WAS THE CONSIDERATION OF THE FLAT ON WHICH INTEREST FOR DELAYED HAS TO BE PAID?

It was contended on behalf of the complainant that a total of Rs 23,70,000/- was fixed as sale consideration for the execution of sale deed. It was further pleaded that entire consideration was paid within one year of the signing of the agreement for sale but the possession was not handed over to him within the time stipulated in the agreement for sale. It was contended that the agreement for sale was executed on 09.09.2010 and by this time the complainant had already paid a sum of Rs. 8,00,000/- in advance. It was pleaded on behalf of the complainant that possession of the flat was to be delivered after receipt of the balance payment in stipulated time. It was contended that the formalized consideration was Rs 18 lakhs, the payment schedule and other clauses were incorporated in the sale agreement

afterwards by respondent no. 1 as per his convenience. On the other hand, respondent no. 1 has contended that complainant has not paid anything extra than amount of Rs 18 lakhs and rather has submitted that the complainant still has to make the balance payment for extra work done by respondent no. 1 in the premises of the allottee. It was further contended on behalf of the builder that the total sale consideration as per the agreement for sale and the sale deed is Rs 18 lakhs.

There is no discrepancy or confusion with respect to the total consideration agreed upon by the parties and it was Rs 18,00,000/- which was mentioned in the agreement for sale which also was the final sale consideration amount as mentioned in the sale deed. The sale deed being the best evidence available with the Authority says that the total sale consideration of Rs 18,00,000/- has been received by seller i.e. respondents and there is nothing due to be paid on the part of the complainant. From the aforesaid it is clear that the total consideration mentioned in the sale deed is Rs 18,00,000/-

E. WHETHER THE COMPLAINANT HAS WAIVED HIS RIGHT TO FILE AND MAINTAIN THE PRESENT COMPLAINT IN VIEW OF THE SUBSEQUENT TAKING OVER OF POSSESSION OF THE FLAT BY HIM FROM THE RESPONDENT NO. 1?

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According to Ld. counsel of the Promoter, principle of Waiver applies to the present case and the complainant by taking possession of the flat has waived his right to file and maintain the present complaint. It was submitted on behalf of respondent no. 1 that complainant accepted the possession of the flat out of his free will and volition and without any protest. The Ld. advocate for the respondent no. 1 submitted that in view of the principle of waiver as well as the concept to discharge of contract by performance, the complainant is not entitled to claim interest on the delayed period of possession as complainant received the possession without any protest and thereby waived his right of interest and also discharged the contract by his performance.

The Learned **Maharashtra Real Estate Appellate tribunal in case tilted Rekha Sinha Vs Larsen and Turbo Ltd. MANU/RT/0047/2019** in para no. 26 has held that :

> "26. In view of above discussion I am of the opinion that allottee not only demanded the possession of the flat from time to time by pursuing the said matter with promoter but also claimed the recovery of compensation and promoter had not denied such claim in reply to the mail of allottee. So it cannot be said that there was a waiver of the right to claim interest on the part of allottee in the present case. There is no authenticate document to show that allottee waived the right to claim interest on delayed possession or while making the last payment of the price at the time of getting the possession. **Whenever, allottee has paid life earnings and hard money and some time also borrowed**

money as loan for purchasing his home, allottee will give first preference for getting the possession of the home and thereafter, allottee will pursue his right in respect of any monetary relief such as interest for which allottee is entitled on account of delay in handing over the possession. If we apply the principle of waiver on the basis of facts and circumstances of the case and in absence of any authenticate evidence of Allottee of waiver to that effect on record, the very object of enactment of RERA Act particularly Section 18 for awarding interest to the allottee for delayed period of possession will be frustrated. It is not expected that, once there is a delay allottee should take the possession at belated date and always waived his right to claim the interest an the period of delay in possession. In ordinary course of nature every allottee will prefer to accept the possession of the flat at first and thereafter, allottee will proceed to exercise his right for getting interest on the delayed period if any. So, the ratio laid down in above referred case laws are not attracted to the present matter and it cannot be said that allottee has waived The right to claim interest on delayed period of possession."

In the present facts, the complainant has paid hard earned money for purchasing the flat and he will obviously give first preference for getting the possession of the home and thereafter, complainant will pursue his right in respect of any monetary relief such as interest for which complainant is entitled on account of delay in handing over the possession. If we apply the principle of waiver on the basis of facts and circumstances of the case and in absence of any authenticate evidence of complainant of waiver to that effect on record, the very object of enactment of RERA Act particularly Section 18 for awarding interest to the

complainant for delayed period of possession will be frustrated. It is not expected that, in case of delay allottee who takes possession at belated date will always waive his right to claim the interest on the period of delay in possession. In ordinary course of nature every allottee will prefer to accept the possession of the flat at first and thereafter, allottee will proceed to exercise his right for getting interest on the delayed period if any. The execution of conveyances or settlement deeds would not operate to preclude the flat buyers from claiming compensation. So in view of the present facts and the ratio laid down in above referred case law principle of waiver is not attracted to the present matter and it cannot be said that complainant has waived his right to claim interest on delayed period of possession. There is no authenticate document to show that complainant waived the right to claim interest on delayed possession or while making the last payment of the price or at the time of getting the possession. Therefore his complaint before the Authority qua interest on delayed possession even after taking over of possession is maintainable.

F. WHO ARE THE PROMOTERS AND BY WHOM THE INTEREST ON DELAYED POSSESSION IS TO BE PAID?

It becomes important to adjudicate the fact that whether Respondent no.1 & 2 fall within the ambit of definition of promoter under Section 2 (zk) of the Act ibid or not?

Section 2 (zk) defines the term 'promoter' as:-

> "Promoter" means,—
> (*i*) a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees; or
> (*ii*) a person who develops land into a project, whether or not the person also constructs structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon; or
> (*iii*) Any development Authority or any other public body in respect of allottees of—
> (*a*) Buildings or apartments, as the case may be, constructed by such Authority or body on lands owned by them or placed at their disposal by the Government; or
> (*b*) plots owned by such Authority or body or placed at their disposal by the Government, for the purpose of selling all or some of the apartments or plots; or
> (*iv*) an apex State level co-operative housing finance society and a primary co-operative housing society which constructs apartments or buildings for its Members or in respect of the allottees of such apartments or buildings; or (*v*) any other person who Acts himself **as a builder**, colonizer, contractor, developer, estate developer or by any other name or claims to be Acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale; or
> (*vi*) Such other person who constructs any building or apartment for sale to the general public.

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Explanation.—For the purposes of this clause, where the person who constructs or converts a building into apartments or develops a plot for sale and the persons who sells apartments or plots are different persons, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified, under this Act or the rules and regulations made there under."

To substantiate the fact that whether Respondent no. 1 &2 are promoters within the definition under the Act, this Authority has deliberated upon the issue one by one.

Now so far as respondent no. 1 is concerned he being the developer/ builder in the present case, is certainly a promoter for the propose of the Act as per clause (v) of Section 2 (zk) of the Act which says that any person who acts himself as builder is also a promoter for the purpose of the Act.

Now the Authority has to discuss whether respondent no. 2 being landowner falls with the definition of the word promoter or not.

The landowner Sh. Naresh Virmani and Kalpna Virmani were impleaded by the Hon'ble Court vide its order dated 04.03.2021. After putting in appearance they filed reply. He contended that it is upon land of respondent landowners that M/s Shri Builders respondent no. 1 had raised construction of the project, and the unit in question has been sold to the complainant by the respondent no. 1 as has been stated in the complaint

itself.Further it was contended that respondent no. 2 was owner of the land measuring 5 kanals 12 Marlas, situated at Main Bazaar road Palampur, District Kangra, Himachal Pradesh via registered sale deed no. 10.2.2005 & 04.01.2006 executed in their favour. He contended that the builder/ respondent no. 1 approached the landowner/respondent no. 2 for developing the said land into a residential/ commercial complex. The landowners are practicing medicine and are working professionals who have their clinic in Nagrota Bagwan, District-Kangra, therefore, neither did they have the knowhow of the construction work nor did they have any requisite finances to develop the land. A memorandum of understanding dated 21.8.2006 was executed inter se landowners/respondent no. 2 with M/s Shri Builders respondent no. 1 through its proprietor Uday Bhardwaj. As per the conditions stated in the MOU, M/s Shri Builders was to construct the commercial cum residential complex over the land of respondent no. 2/landowners and it was the obligation of respondent no. 1 M/s Shri Builders to get the commercial cum residential plans sanctioned from local Authority and to carry out the construction/ development of the complex. It was contended that respondent no. 2/landowners are in no manner concerned with the construction/ development of the complex. It was further contended that Landowners as

per the terms of the MOU were only to be given 35% of the total developed area in the project being their allotment and had absolutely no profit sharing with the respondent no. 1. He contended that in this manner the respondent no. 2 is himself an allottee in the project being developed by Respondent no. 1. It was further contended that all the obligations to construct and develop the said land was upon respondent no. 1 who was to apply for approvals, permissions, sanctions from the competent Authority and complete the construction as per the prevalent rules and bye laws, at its own cost and expenses and landowners/respondent no. 2 have no concern/ obligation with regard to the same. Respondent no. 2 has submitted that no cause of action has ever accrued to complainant against the respondent no. 2. He further contended that his relation with respondent no. 1 was on principle to principle basis and he had no privity of contract with the complainant. It was further contended on his behalf that no amount has been received by the respondent no. 2 nor are they party to the agreement for sale. It was further contended that respondent no. 1 had complete rights to book, sell, lease, mortgage or dispose his allocation of the complex to any person of his choice on such rate as he may consider appropriate for the purpose of sale and respondent no. 2 had no concern with the same. All the

documents/ agreements/ receipts were entered into between respondent no. 1 and the complainant. It was further contended that complete sale consideration from the complainant was received by respondent no. 1 and respondent no. 2 had no share in the same. Further it was pleaded that it was the sole duty of the respondent no. 1 to proceed with corporate drawings, layout, designs necessary for the construction and development of the said site by submitting the same to the local Authority for obtaining approval and sanction. It was contended that the respondent no. 1 as per the agreement for sale was given a free hand in alterations as per site situation in the building. It was further contended that as per the agreement for sale, as per clause 7 of the MOU it was the sole responsibility and liability of the respondent no. 1 to supply and obtain all the required permissions and sanctions of the plan for the development of the property from the Government and all concerned Authorities at his own expense. It was further contended that landowners/respondent no. 2 were at the receiving end by entering into an MOU with respondent no. 1 as not only the utilization of land was blocked but despite the MOU providing delivery of possession of their share within a period of 36 months from the approval of building plans, the land owners/ respondent no. 2were handed their share only in the end of year

2016-17 that too after repeated requests. It was further contended that complete liability to develop, construct etc was solely of the said respondent no. 1. It was further contended that obligation to register the project under provisions of the Act was of Respondent no. 1 as per the MOU. Further it was also contended that the obligation to complete the project in question in time was of respondent no. 1 as per the agreement for sale. It was also contended that the MOU between respondent no. 1 and 2 is on principle to principle basis and it has been expressly written in the MOU that it is not a partnership between them as the said clause does not provide for any profit sharing in the project by the respondent no. 1 with respondent no. 2. It was further contended that land owners in the form of sale consideration were only receiving specific share in the project and thus would rather fall within the category of an allottee. It was further contended that the respondent no. 1/ builder by selling half constructed plots and shops has committed a fraud on the allottees. It was contended that aggrieved by the acts of respondent no. 1 in duping all the allottees and also respondent no. 2, respondent no. 2 has filed criminal case in the Police Station Palampur and an FIR has been registered under Section 406 & 420 Indian Penal Code. It was further contended that the

respondent no. 2 had sent a legal notice to respondent no. 1 asking him to complete the project and handover the same.

To further delve into the matter as to whether respondent no. 2 is a promoter or not and jointly liable along with respondent no. 1 under the Act for interest on delayed possession it becomes necessary to discuss in detail the various clauses of the MOU signed between them wherein inter se liability of respondent no. 1 & 2 is spelt out. The contents of the MOU are reproduced herein below

"1.That the subject matter of Memorandum of Understanding is a freehold plot measuring 2150 sq mts (5 Kanal 12 mulra) more specifically defined at the foot of this agreement and shown (Red)."

2. *That in consideration and subject to the terms and conditions hereinafter specified the second party shall and hereby agrees to develop the said property by erecting a Commercial and Residential complex at its own cost and expenses thereon subject to approval of plans and designs by the concerned authorities as specified hereinafter.*
3. *That the first party shall handover possession to second party soon after the execution of this agreement and approval of the map/ plan by the local Authority.*
4. *That simultaneously with the signing of this agreement, the second party will proceed with the preparation of corporation drgs, layout, designs necessary for construction and development of the said site & shall submit the same to the local authority at Palampur for obtaining approval and sanction and the entire cost incurred thereof shall be borne by the second party.*
5. *That the plans design vide Annexure (no. 1,2,3,4) (pages no. 13, 14, 15 and 16) specification vide annexure (no. 5 & 6) (pages no. 17 & 18) and proportionate share division on each floor have prepared by Second Party and have been acknowledged and agreed upon by First Party all cost to be incurred in respect thereof shall be borne and met by the second party. Further second party shall have free hand in alterations as per site situation in the building considering the validity of project.*

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6. *That the said proposed design drawing prevailing by law of Local Authority i.e. maximum coverage on each floor 55% and 175% FAR with provision maximum 4 stories and parking facility on stilts. Land use commercial/ residential.*
7. *That it shall be the sole responsibility and liability of the second party to supply and obtain all the required permissions or sanctions of the plan for the above property from the Government and all concerned authorities and department and such further permission which may be required from time to time under any law, rule and regulation for the time being in force, at its own cost and expenses. The first party shall co-ordinate with the second party for its representations being owner of the said land as and when informed by second party.*
8. *That the first parry undertakes to execute all documents/ applications/ affidavits etc which may be necessary for the construction of the proposed complex at the cost and expense of the second party.*
9. *That the second party shall be entitled to apply for and obtain, temporary and permanent connection of water and electricity for the said complex at the site of the said premises. The cost of same shall be proportionately shared y both parties.*
10. *That the total cost of construction of the proposed commercial cum residential complex, including the parking lot, water supply system, sanitary and plumbering, landscaping, boundary wall, lift, if installed, water storage tanks as per requirement, shall be borne and paid by the second party. It is further agreed that incase any penalty is imposed by the local authorities for excess coverage beyond the permissible limit, the same shall be brone by second party and the first party in the ration of 50%-50% respectively.*
11. *That as a consideration for the second party agreeing to develop and raise the said commercial cum residential complex in the manner specified herein, the second party shall be entitled to retain 65 % of the total built up area and the first party shall be entitled to retain the remaining 35% the built up area and every floor at pro rata basis as shown in them map annexed to this agreement deed. However, if the total area of the shops on ground floor & first floor and flats on second floor and third floor as shown in the aforesaid map coming to the share of first party falls short of his 35% share, the second party in that event shall compensate by making payment at the market rare prevailing at the time when the entire building is ready for occupation, at the price of the area falling short of 35% and vice- versa. While setting final accounts, where aswhat ever is decided on the annexed maps mentions nos of shops/ flat stand final.*

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The aforesaid ration will also apply to parking lots, common areas ext except the space left for common privileges. Further, the second party shall make constructions as per the specifications detailed in the schedule to this agreement (Annexure no. 5.6 page no., 17, 18).

12. *That the second party on the said premises shall construct, parking lost ground floor, first floor, second floor and every built up area shall be of similar make, pattern, design and workmanship and similar material and accessories shall be used in making the entire complex. All these acts shall be essential and performed by the second party at its expense and cost and further the first party or his representatives shall at all time be entitled to inspect the work.*
13. *That the second party shall have full right to book, sell, lease or mortgage or dispose as and when desired the 65 % share as indicated in the map annexed to this agreement relating to the proposed complex, in part or as whole, alongwith proportionate share of land to any person / persons of its choice on such rate or rates as the second party may consider for the sale. Consideration of such position shall exclusively belong to the second party and the first party shall have no share or right in the same. Further the first party shall have no right to interfere in the rights of the second party to dispose of its 65% share as aforesaid. However the first party shall in no way be responsible for any liability of the second party.*
14. *That the first party shall also have the right to sell, lease mortgage or transfer as and when desired, his share of 35% as aforesaid, in the proposed complex in part or as a whole, to any person(s) of his choice on such rates or terms as he may consider and the sale proceeds of his share of 35% will exclusively belong to his and the second party shall have no right or share in the same.*
15. *That all agreements/ contracts which may be entered with by the second party with regard to the constructions and sale in respect of the 65% share (or as shown in the map) of the second party, in the proposed complex shall always be attorned by the first party as and when desired by the second party after laying hands on this agreement and shall be binding on the first party provided that the first party shall never be deemed to attorn any financial or other liability imposed upon such agreement or contracts the responsibility of the payment of which may be fastened on the first party.*
16. *That it is agreed and convented by the parties hereto that the second party shall commence start construction of the said complex within six months of the approval and release the building plans accorded by the local authority and/or all the other concerned authorities and shall complete the entire*

structure or the share of the first party in accordance with this agreement within a period of 36 months of the approval of the said building plan/map of the local development authority/ other concerned authorities subject to occurrence of any natural calamity making execution either slow or impossible or delay caused due to official restrictions and circumstances entirely beyond the control of the second party and any loss of time caused by such unknown/ unexpected reasons in continuing the construction shall be sell off from aforesaid time period. It is further agreed that in case the second party fails to deliver possession of his share (the first party) within the stipulated period, the second party shall pay to the first party damages @ Rs 15,000/- per month for a period of six months. In case after six months the second party still fails to hand over possession to the first party share of the constructed area, the first party shall have the right to take possession of his share and impose charges to complete his share on second party.

17. *That the first party shall not interfere or, obstruct in any, manner in the execution, construction and completion of the development of the said property in accordance with terms of the agreement.*
18. *That the first party agrees and undertakes to execute all documents and agreements in connection with the sale of the share of the second party as and when requested by the second party. All expenses incurred in execution of these documents shall be paid by the purchasers or transferees and in no manner the same shall be recoverable from the first party. It is made clear that the first party shall have right to retain or sell his share of the property and second party shall have no concern with it other than sharing Lift equipment (if proposed) the common maintenance, installation of electric and water supply etc in proportion of shares.*
19. *That all persons, workers and labour etc employed or engaged by the second party in the construction of the said proposed complex shall be entirely under the control of the second party and shall always and at all times and for all purposes be deemed to be the employees of the second party and the first party shall have no concern with them in any manner whatsoever. The first party shall under no circumstances be deemed to be the employer of the workers/ laborers / employees etc of the second party engaged in the said construction work. It is also clearly agreed between the parties thereto that the second party shall keep the first party fully indemnified and harmless of any mishap or accident against any demand or claim by any workman/labour or employee engaged by the second party, in the construction of the building*

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at the site by any contractor/ sub- contractor appointed by the second party to construct the proposed building.

20. *That the first party and the second party have entered into this agreement on a principal to principal basis only and nothing contained herein shall be deemed or construed as constituting a partnership between them or as a joint venture between them nor the second party and the first party in any manner shall constitute as association of persons.*
21. *That the first party undertakes that except what is expressly provided herein, he shall not in any way transfer encumber or mortgage his rights, title or interest in the said land in whole or in part, which may cause interruption in the construction of the said complex."*
22. *That the proposed name of the said commercial cum residential complex a "SHRI PANCHSHEEL COMPLEX".*
23. *That the first party undertakes at all times to attorn the proportionate land share (65%) for and on behalf of second party relating to particular project in favour of any individual/ institution, the second party desires.*
24. *That all the common portions exterior to the building and common services shall be maintained and provided by the second party in the said complex for which the second party shall be entitled to collect or charge the said expenses from the owners/occupiers of the said complex at such rates as may be considered just and proper.*
25. *The first party hereby authorizes the second party that if during the course of construction of the proposed complex any alteration, changes, deviations from the sanctions pplan become necessary, desirable or convenient, the same may be carried out by the second party after notice to the first party alongwith his consent.*
26. *That all disputes and differences touching or arising in connection with this agreement or interpretation of the provisions of this agreement shall be subject to the Arbitration and Conciliation Act 1997 and subject to the jurisdiction of District Courts and the reference shall be made to any arbitrator jointly names by both parties and in case of disagreement one nominated by the court.*
27. *That the owner undertakes that except what is expressly provided herein shall not in any way transfer encumber or mortgage his rights, title or interest in the said land in whole or in part which may cause interruption in the construction of the project.*
28. *That this deed is being executed in two parts one to be retained by the first party and the other by the second party and both parts shall be deemed to be the original agreement.*

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IN WITNESS WHEREOF the parties hereto have set their respective hands on the day, month and year first mentioned above."

To summarize and concluded the various relevant clauses of the MOU it is clear that respondent no. 1 shall develop the said project by erecting a commercial and residential complex at his own cost and expense and the possession of the property shall be with the respondent no. 1 after execution of the MOU. The respondent no. 1 will prepare drawings, layout, designs required for construction and development of project and submit the same for obtaining approvals and sanction from the local authority at his own cost. Total cost of construction of the project shall be borne by respondent no. 1 and any penalty imposed by the local authorities for excess coverage beyond the limit shall be borne by both the parties in equal ratio. Respondent no. 1 shall be entitled to retain 65% of the total built up area and respondent no. 2 as consideration for giving land to the project shall be entitled to 35 % of the total built up area in each and every floor. Respondent no. 1 shall construct the entire project as per the specifications at his owns cost and expenses. Respondent no. 1 shall have full right to book, sell, lease or mortgage or dispose his 65% share in the project to any person of his choice and on such rate as respondent no. 1 may consider deem fit. Consideration received from disposal of his share of

65% shall exclusively belong to respondent no.1 and respondent no. 2 has no share in the same. Further any liability with respect to disposal of 65 % share of respondent no. 1 in the project shall also be of respondent no. 1 and respondent no. 2 shall have no responsibility in the same. All the transaction with respect to 65 % percent of the share belonging to respondent no. 1 shall attorned by respondent no. 2 but it was also agreed by this clause that respondent no. 2 shall not bear any financial or other liability imposed for such transaction. Further respondent no. 1 will commence construction within six months of the execution of the MOU and the project shall be completed within 36 months of the approval of the plans by the competent authorities. Respondent no. 2 shall not interfere or obstruct in the execution, construction and completion of the development of the project by the respondent no. 1. The MOU entered between the parties shall be on principal to principal basis and there is no partnership, joint venture or association of persons between them. All common services shall be maintained by respondent no.1 at such rates from the owners/ occupiers as he deems fit.

As per the definition under Section 2 (zk) of the Act a promoter is any person who constructs or causes to be constructed a building or building consisting of apartment, etc with the purpose of selling . Any person who just constructs a building or

building consisting of apartments etc without the purpose of selling, will not fall within definition of promoter. Further more, even if some of the apartments are not sold, such person who is constructing the apartments shall fall within the definition of promoter. The test here is of the intent to sale and not actual sale.

The definition of promoter is extremely relevant for the determination of who is going to be a promoter in case when the land is owned by one person and the construction is carried out by someone else. In most joint development agreements, the owner pools in the land, while the builder constructs the apartments which are then sold in a particular ratio of the total number of apartments. The explanation to the definition clearly provides that when the person constructing and the person selling apartments or plots are two separate persons, then both of them shall be jointly liable for the function and responsibilities of the promoter as provided under the Act and shall be considered as co- promoter.

In the present case, the Respondent no 2 is the Lawful "Owner-in-possession" of land measuring 5 kanals 12 Marlas, situated at Main Bazaar road Palampur, District Kangra, Himachal Pradesh via registered sale deed no. 10.2.2005 & 04.01.2006 executed in their favour .

Respondent no. 2 is a promoter as the consideration for the conveyance of possession to respondent no. 1 and development of entire project at the cost and expense of respondent no. 1, respondent no. 2 was getting 35% share in the developed project and had liberty dispose of the same in the manner he wants which means that revenue sharing was involved. Thereforerespondent no 2 was to get revenue share in the shape of 35 % share in developed project.Respondent no. 2 has constructed a commercial block adjoining to the land of the project under reference therefore he will be equally liable along with respondent no. 1/ builder in case there is ever any issue of approval of completion/ issue of NOC of service connections as in case of deviations in the project. Meaning thereby that in case there is any deviation in the project beyond what is sanctioned then as per the MOU both the parties have undertaken themselves to be equally liable therefore in case a complaint is made for any deviations in the project or qua issue of NOC for services, in that case as per clause 10 of the MOU respondent no. 2 shall also be held liable along with respondent no. 1 in the project. Thus all dealings of Respondent no 2 in the light of definition of promoter, as prescribed in Section 2 (zk) (ii) and (v) read with Explanation in the Real Estate (Regulation and

Development) Act 2016, clearly put him as "Promoter " in the present complaint matter.

So far as liability for delayed delivery of the project is concerned the liability is solely of respondent no. 1 as the complainant had booked the flat by signing an agreement for sale with the respondent no.1/ builder and the time for delivery of possession was 9 months from the execution of the said agreement. As per the MOU particularly the second clause, it was respondent no. 1 who shall develop the said property by erecting a commercial and residential complex at his own cost and expense. As per the MOU total cost of construction of the project shall be borne by respondent no. 1he shall be entitled to retain 65% of the total built up area and he shall have full right to book, sell, lease or mortgage or dispose his 65% share in the project to any person of his choice and on such rate as respondent no. 1 may consider deem fit in the interest of justice and consideration received from disposal of his share of 65% shall exclusively belong to respondent no.1 and respondent no. 2 has no share in the same. Further in the MOU clause thirteen it was also agreed between both the parties that any liability with respect to disposal of 65 % share of respondent no. 1 in the project shall also be of respondent no. 1 and respondent no. 2 shall have no responsibility in the same and as per clause Fifteen qua sale of

65 % share in the project belonging to respondent no. 1, respondent no. 2 shall not bear any financial or other liability imposed for such transaction. From the perusal of the above it is clear that it is respondent no. 1 is responsible for delay in the delivery of possession and respondent no. 2 though held to be promoter in para, had no concern with issue of delayed possession and liability with respect to same had to be borne by respondent no. 1 alone.

10. RELIEF:-

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

i. The Complaint is allowed and the Respondents no. 1 (M/s Shri Builders through its proprietor Uday Swaroop Bhardwaj) is directed to pay the delayed possession charges in the form of simple 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% per annum on the amount paid by the complainant i.e. 18,00,000/- for every month of

delay from the due date of possession till the date when possession was delivered (08.03.2019), total 81 months, as per the proviso of section 18(1) of the Act read with Rule 15 of the Himachal Pradesh Real Estate (Regulation & Development) Rules 2017 within a period of 60 days.

ii. Non-compliance or any delay in compliance of the above direction shall attract a penalty of Rupees one lakh under Section 63 and Section 38 of the Act ibid, apart from any other Action; the Authority may take under Section 40 or other relevant provisions of the Act.

iii. That the penalty imposed shall be deposited in the bank account of this Authority, operative in the name of "Himachal Pradesh Real Estate Regulatory Authority Fund" bearing account no."39624498226", in State Bank of India, HP Secretariat Branch, Shimla, having IFSC Code SBIN0050204.

iv. It is further ordered that no withdrawal from the bank accounts of the Respondent no. 1/ promoter pertaining to this project shall be made till the direction no. 1 passed by this Authority in para supra is fully complied with.

v. 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

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