

**REAL ESTATE REGULATORY AUTHORITY,
HIMACHAL PRADESH**

In the matter of:-

1. Sh. Sanjay K Dhingra, S/O Shri Kishen Dhingra, R/O B-204, Kshitij Towers, G.E. Links, CHS, Ram Mandir Road, Goregaon West Mumbai, 400104.
2. Smt. Chetna Dhingra, W/O Sh. Sanjay K Dhingra, R/O B-204, Kshitij Towers, G.E. Links, CHS, Ram Mandir Road, Goregaon West Mumbai, 400104.

.....Complainant

Versus

1. Sh. Sumit Khanna, R/O, B-6/4, 3rd Floor, Safdarjung Enclave, New Delhi-110029.
2. Sh. Vikas Madan, (Partner M/s Pacific Construction and Management) D-64, First Floor, Vikas Marg, Shakarpur, Delhi-110092.
3. Sh. Pankaj Madan, (Partner M/s Pacific Construction and Management) D-64, First Floor, Vikas Marg, Shakarpur, Delhi-110092.
4. M/s. Ansal Buildwell Ltd. Through its MD, 118, Upper First Floor, Prakashdeep Building, Tolestoy Marg, New Delhi-110001.
5. M/s. Kuldevi Pacific Infrastructure (The Himalayan Habitat) through its Managing Director, Sh Bharat Vaidya, 1, Pacific Upper Second Floor, Regal Building, Parliament Street, New Delhi-110001.

.....Non-Complainant/ Respondents



Complaint no. RERA/HPKUCTA/ 01200022

**Present: - Shri Sanjay K Dhingra & Smt. Chetna Dhingra
Complainants along with Shri Ramesh Kumar
Mahaliyan, Advocate,**

**Shri Sumit Khanna with Advocate Shri Amit Gupta for
respondent no.1,**

**Shri Vikas Madan respondent no. 2 & for Respondent
no. 3,**

**Shri Vishal Sehgal, Advocate for respondent no.4, M/S
Ansal Buildwell Ltd.,**

**Shri Vivek Sharma, Advocate for respondent no.5, Shri
Bharat Vaidya.**

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

Final Date of Hearing (Through WebEx): 21.09.2020.

Date of pronouncement of Order: 17.10.2020.

ORDER

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

1. The present matter refers to a Complaint filed under the provisions of the Real Estate (Regulation and



Development) Act, 2016(herein after referred to as the Act)

2. That the Complainants Shri Sanjay K Dhingra and Smt. Chetna Dhingra had filed an online Complaint dated 21st January, 2020 before this Authority in 'Form-M' bearing Complaint no. RERA/HPKUCTA/ 01200022 of the HP Real Estate (Regulation & Development) Rules' 2017. As per the complaint it has been alleged that the Complainants had booked a flat no. DF-4/ 302 in Ansal Meadows, Bajaura, Kullu, HP, (now named as the Himalayan Habitat) for a consideration price of Rs. Forty Nine Lakhs and fifty thousands (Rs. 49, 50, 000/-) which was to be paid in different stages as per the conditions of the agreement to sell As per the allotment letter annexed vide Annexure C-6 of the rejoinder filed by the Complainants, they had advanced a sum of Rs. Seven lakhs and fifty thousands (Rs. 7, 50, 000/-) to respondent no.1. Further the Complainants and respondent no.1 entered into an agreement to sell on dated 21.03.2013, according to which a sum of Rs. Eleven Lakhs and Fifty thousands (Rs. 11, 50, 000/-) had been received by the respondent no.1 at the time of the agreement to sell It was agreed upon between the parties that the remaining amount of Rs.



Thirty Eight Lakhs (Rs. 38, 00, 000/-) shall be paid by the Complainant by paying Rs. Two lakhs (Rs. 2, 00, 000/-) every month. The Complainant has paid Rs. Thirty eight lakhs and Fifty seven Thousands (Rs. 38, 57, 000/-) towards the part payment of the flat, as demanded by the respondent no.1 from time to time.

3. That after making the aforesaid payments, the Complainants had requested the respondent no.1 for the execution of sale deed and possession of flat. It is further alleged by the Complainants that the respondent no. 1 failed to reply satisfactorily. Thereafter, an e-mail dated 22.09.2017 was addressed by respondent no.1 to the Complainants purporting to state that certain formalities for taking of the project and registration of the project with RERA are yet to be confirmed. Even prior to the aforesaid factum, the Complainants have represented to the Hon'ble Prime Minister Office and the matter was taken up by the Director, Town & Country Planning, Himachal Pradesh vide office letter no. HIM/ TP/ APT/ LIC-56-Sh. Bharat Vaidya/ 2016-17079-81 dated 2nd December, 2016. An enquiry was conducted by the Director, TCP, Himachal Pradesh, the respondent Shri Bharat Vaidya was called upon to attend the personal hearing whereby respondent



no. 5, Shri Bharat Vaidya had made a written statement on 28.11.2016 that he will start the construction activities at the project site at the earliest and will also deposit the pending dues regarding fresh registration and renewal of licence.

4. That the Complainants time and again had insisted for the refund of payment advanced to the respondent no.1. However, the respondent no.1, had then demanded an authority letter from the Complainants in his favour to sell the allotted flat assuring the refund of amount by 30th April, 2018. Accordingly, the Complainants issued an authority letter in favour of the respondent no.1. The Complainants being aware of the malafide intents of the respondent no.1 that the since the flats were not in existence, no sale of the alleged flats in question including the allotted one in favour of the Complainants could be done at any cost. The Complainants, at this stage, decided to opt out of the project and filed the complaint with the Authority dated 21st January, 2020 in accordance with the provisions of the Real Estate (Regulation and Development) Act 2016 read with Real Estate (Regulation and Development) Rules 2017 demanding the refund of amount of Rs. Thirty Eight Lakhs and Fifty Seven



thousand (Rs. 38, 57, 000-) paid by them along with interest @ 18 %. w.e.f 21st March, 2013. However, the Complainants in their legal notice dated 9th October, 2019 and in their written synopsis filed before this Authority have sought the refund of amount of Rs. Thirty Eight Lakhs and Fifty Seven thousand (Rs. 38, 57, 000-) paid by them along with interest @ 10 %. w.e.f 1st November, 2014.

5. The parties to the Complaint have filed their written submissions/ replies/ rejoinder before this Authority after issuance of notice for hearing along with additional documents which has been taken on record for proper adjudication of the present Complaint.
6. The Authority has gone through the documents and pleadings of the Complainants and Respondent(s). The following other facts have emerged in the case:-
 - i) That it is an admitted fact that the Respondent no 5, Sh. Bharat Vaidya S/o Late Sh. Arun Vaidya, R/o VPO Bajaura, Tehsil Bhunter, Distt Kullu, Himachal Pradesh is the Lawful "Owner-in-possession" of land measuring .16 Bigha 10 Biswas , comprised in khasra no 1653/691/2, khata khatauni no 125/468 at Mohal and Patti Bajaura Tehsil Bhunter Distt Kullu HP.The land owner,



Respondent no 5, Sh. Bharat Vaidya, applied to Himachal Pradesh Housing and Urban Development Authority. HIMUDA, the competent Authority at that time to register and regulate the Real estate projects and obtained a registration certificate vide registration number 280 dated 30th December, 2008 and a license no. HIMUDA/LIC-56/2010 dated 2nd December, 2011 for setting up a residential complex under the name "Meadows" (Luxury Apartments), as per title in approved drawings.

- ii) That it is per se admitted by the contesting parties, more particularly by respondents no. 2/3 & Sh. Bharat Vaidya, respondent no.5 have signed a collaboration agreement as a sole prop of Kuldevi Pacific infrastructure with Respondent number 2, Sh. Vikas Madan, managing partner Pacific Construction and Management having admn. office at D-64 , First Floor Vikas Marg , Shakarpur Delhi , on 07.02.2008 which was amended and another collaboration agreement in continuation of the previous agreement was executed on 7th November 2009 because of some change in the constitution of Pacific Constructions and Management, that has been referred to as Developer in the said collaboration agreement.



iii) That according to the terms of the collaboration agreement between the land Owner, Respondent no 5, Sh. Bharat Vaidya and Respondent no 2 & 3 Sh. Vikas Madan of Pacific Constructions and Management, the Developer approached the owner of land with a proposal for developing residential apartments along with commercial complex and community centre on the said land. The owner also expressed his interest in the proposal of the Developer and thus the under reference collaboration agreement was signed between the parties, i.e. Respondent no.2/3 & respondent no.5.

The owner, in lieu of his land, was to get share in the developed real estate in the following proportion:-

- i) Commercial Complex as approved in site plan,
- ii) Community service Centre as demarcated in the approved construction plan including restaurant space, bar space, disc space, sauna, and Jacuzzi, steam bath and billiards room.
- iii) 19 residential flats (out of 190 flats) demarcated in the approved plan of construction as per mutual agreement, out of which 10 flats are 2 bed rooms and 9 flats are 3 bed rooms.



iv) Rs. 25.00 Lacs each year for loss due to discontinuation of agricultural activities starting from:-
25 lacs- 1st July 2010,

25 lacs-10June 2011,

25 lacs.... 30 June 2011, besides 25 Lacs security deposit

The Developer was to get remaining apartments as profit in lieu of the cost of construction, external development charges and all other expenses required for the completion of the project and the revenue share in the form of apartments were to be at the absolute discretion of the Developer for using these apartments for commercial gain without any claims from owners, their legal heirs, relatives or any other person.

The construction at site started after obtaining licensee from the Department of Town & Country Planning, Himachal Pradesh on 2nd December, 2010 which was valid up to 1st November, 2013.

iv) That the respondent no.2 and 3, i.e. M/S Pacific Constructions and Management entered into a Project Management Consultancy Agreement (herein referred to as



PMC) with respondent no.4, i.e. M/S Ansal Buildwell Ltd., on 2nd February, 2011 mentioning that the "Developers"(M/s. Pacific Constructions and Management), Respondent no 2/3, are desirous of using the sales organization capabilities of the PMC (Project Management Consultant) and thus requested the PMC to undertake the complete responsibility for disposal of schemes **with or without built up units and other areas/ spaces of the Project on the subject land.** The PMC as agreed upon the terms and conditions clearly mentioned in the said agreement, particularly serial no. **2 ,10 and 11,** which is reproduced herein as under:-

"2. That as per existing sanctioned plan of the project has a total 190 units besides shopping club & parking as detailed in Annexure E. Out of 190 units/ apartments the Developer has already allotted/ sold few apartments in the following manner, i.e.

- i.) 19 apartments (10-Two BHK, 9- Three BHK, Club and Shopping Centre) to the Landowner Mr. Bharat Vaidya, and,*
- ii.) 26 apartments (20- one BHK, 3- Two BHK and 3- Three BHK) have already been sold.*

10. That the PMC will be compensated by the Developer in the following manner:-

- a. The PMC will be entitled to 13.5% of the total sale proceeds of 145 apartments to be sold by PMC.*
- b. The PMC will be further entitled to 5 % of the total sale proceeds of 26 apartments already sold by the*



Developer. However, if any booking out of 26 allotments done by the developer is cancelled/ transferred for any reason then the said unit will get added to the units to be sold by the PMC and the PMC will be entitled to 13.5% of the sale proceeds of said unit as well.

- c. The PMC will further be entitled to 13.5% of the revenue generated out of one time club charges and shopping Centre, Parkings and other saleable/ leasable areas
- d. The taxes such as service tax or any other levies shall be in addition.

11. That the complete Revenue generation from sales will be taken in the name of Ansal Buildwell Ltd A/C Pacific Meadows to be kept in an account to be opened with any bank at Delhi/ Kullu. The account will be opened with joint signatures and any instructions given to the bank will be with joint signatures only. The sale proceeds so collected will be distributed/ transferred in the following ratio:-

a.) 13.5 % from the collection of sale proceed of 145 units and 5% from the collection of sale proceed of 26 units shall be transferred to the account of PMC.

b.) A sum of Rs. 25 Lakhs will be retained every month out of the monthly sales collection in the main account. If collection is less in any month then the short fall will be made up in the following month. The amount so accumulated every month in the main account shall be released to the developer on part completion of the following sub heads. The detailed process of release shall be detailed out in the main agreement:-



- a. Club
- b. Basement.
- c. Interior/ Furnishings.
- d. Roads.
- e. Sewerage and water supply.
- f. Street Light.
- g. Horticulture.
- h. Commissioning of transformer including DG sets & HT Lines.

If the amount still falls short to meet the payment requirement then the Developer shall make the same good from their own resources independent of the project account."

v) That in parallel the respondent no. 2, i.e. M/s. Pacific Constructions and Management entered into a sale purchase agreement on 01.10.2010 with respondent no.1, i.e. M/S Unimexx Builders and Developers Pvt. Ltd. Accordingly both the parties agreed upon to the agreement of sale and purchase of 18 flats in the project of different types, specifically one flat-3 BHK, Two flats- 2 BHK and fifteen flats of 1BHK for a total consideration amount of Rs. Five Crore and Forty Six Lakhs.

vi) That the said respondent no.1, Unimexx builders and developers Pvt. Ltd., booked a flat, numbered DF- 4/ 302, situated at a project namely, "Meadows" subsequently



renamed to "The Himalayan Habitat" for a total sale consideration of Rs. Forty nine Lakhs and fifty thousand (Rs. 49, 50, 000/-) on 21.03.2013 in the name of the Complainant Shri Sanjay K Dhingra/ Smt. Chetna Dhingra and as such the booking was taken by the respondent no.1 solely out of the units which were allotted to him vide agreements executed between the respondent no.1 & 2, by the virtue of which 18 flats were conveyed to the respondent no.1 with the sole selling rights. It is admitted that in a subsequent agreement between the respondent no.1 & 2 the agreement so previously was revised and the units allotted to the respondent no.1 were decreased to 10 from the original 18. It is also admitted by the respondent no.1 & 2/ 3 that respondent no.1 subsequently booked those units to proposed customers, and the unit in question was also sold by respondent no.1 to the present complainant for a sale consideration of Rs. Forty nine Lakhs and fifty thousand (Rs. 49, 50, 000/-)

vii) That the agreement to sell dated 21st March, 2013 was executed between the respondent no. 1 and the Complainants but prior to it, an agreement between M/s. Pacific Constructions and Management and M/S Unimexx Builders and Developers Pvt. Ltd. pertaining to marketing



and developing of the flats was executed on 1st October, 2011.

viii) That the respondent no. 1, i.e. M/s. Unimexx Builders & Developers Pvt. Ltd. through its Director Shri Sumit Khanna had issued an allotment letter vide Annexure C-6 (copy of rejoinder filed by the Complainants in favour of Sh. Sanjay K Dhingra/ Smt. Chetna Dhingra stating that a sum of Rs. Seven lakhs and Fifty thousand (Rs. 7, 50, 000/-) as an installment was received by respondent no.1 for allotment of apartment no. DF-4/ 302 in the project of Ansal- Meadows, Arun Hills. The allotment letter was signed by Shri Sumit Khanna, Director of Unimexx Builders & Developers Pvt. Ltd, respondent no. 1.

ix) That the Complainants have made a total payment of Rs. Thirty Eight lakhs, Fifty Seven thousand for allotted flat DF-4/302.

x) That all the contesting respondents went into multiple disputes and numerous litigations amongst themselves regarding the project delaying the construction activities at the site. During the course of conflicting interests between the aforesaid respondents, a memorandum of Understanding was signed between respondent no.2/3, i.e. M/s. Pacific Construction and Management & respondent



no.1 on 22nd November, 2013 and terms and conditions of the sale and purchase were renegotiated. Later on the respondent no.5 cancelled the General power of attorney given to respondent no.2/3, i.e. M/s. Pacific Construction and Management in December, 2013. The work at site remained stranded.

xi) The respondent no.2/3 M/s. Pacific Construction and Management had moved the Hon'ble High Court of Himachal Pradesh by filing a Civil Suit no. 8 of 2014 seeking specific performance of the collaboration agreement and permanent prohibitory injunction against respondent no.5. Initially the Hon'ble Court issued directions for maintain the status quo vide its order dated 17th October, 2014. But later on after the mediation and outside Court settlement between the respondent no.2/3 and respondent no.5 by entering upon into a compromise deed on 13th May, 2015, the aforesaid Civil Suit attained finality on 19th November, 2015 by order of the Hon'ble High Court.

xii) During the pendency of the aforesaid Civil Suit before the Hon'ble High Court, respondent no.2 had filed an F.I.R no. 2354 of 2014 dated 12.11.2014 at Police Station Shakarpur, Delhi against respondent no. 5, Sh. Bharat Vaidya for cheating, fraud, forgery of documents and criminal



conspiracy. Later on after the respondent no.2 & 5 entered into compromise agreement on 13th May, 2015, the respondent no.5 was enlarged on bail by the Ld. Additional Session Judge, Karkardooma Courts, Delhi vide order dated 25th May, 2015.

xiii) That the respondent no.4, M/s. Ansal Buildwell Ltd. made an exit from the project by terminating the PMC agreement executed on 2nd February, 2011 with the respondent no.2/3, on 8th June, 2015.

xiv) That the Hon'ble High Court of Himachal Pradesh, subsequent to the order dated 17.10.2014 directing a status quo, gave its judgment on 19th November, 2015, on the basis of the compromise deed and NOC from Pacific construction and Management with modified terms and conditions and giving twelve months to start the construction.

xv) That the respondent no. 5, Sh. Bharat Vaidya, applied for the renewal of License on 4th December, 2013 and obtained the same from Department of Town & Country Planning Himachal Pradesh with a change in name of the Project, from Meadows to "The Himalayan Habitat" and respondent no.2/3, M/s. Pacific Construction and Management entered into a new collaboration agreement on 19th February, 2016 and a new General Power of Attorney was issued by



respondent no.5. Sh. Bharat Vaidya in favour of respondent no. 2 & 3.

xvi) That there were further disputes between respondent no.2/3 and respondent no.1 owing to the price, selling and other management issues that resulted in the amended agreements and Memorandum of understanding between them, which as such has no relevance to the case of the Complainant. The actual work at site of work never really restarted/ resumed.

xvii) That the site in question was inspected and a detailed inspection report dated 19.12.2019 submitted by the Town & Country Planner, Divisional Town Planning Office, Kullu according to which the construction work of one inspection unit with columns erected above plinth level has been abandoned from a long time.

7. The final arguments in this case were heard on 21.09.2020. Shri Ramesh Kumar Mahaliyan, Ld. Counsel representing the Complainants has argued before this Authority that the contentions of the Complainant are specific. It has been argued by the Ld. Counsel representing the Complainants that his clients have booked a flat no. DF-4/ 302 in Ansal Meadows, Bajaura, Kullu, HP, (now named as the Himalayan Habitat) for a consideration price of Rs. Forty



Nine Lakhs and fifty thousands (Rs. 49, 50, 000/-) which was to be paid in different stages as per the conditions of the agreement to sell As per the allotment letter dated 13th January, 2013 annexed vide Annexure C-6 of the rejoinder filed on behalf of the Complainants, a sum of Rs. Seven lakhs and fifty thousands (Rs. 7, 50, 000/-) was advanced by the Complainants to respondent no.1. Further the Complainants and respondent no.1 had entered into an agreement to sell on dated 21.03.2013, according to which a sum of Rs. Eleven Lakhs and Fifty thousands (Rs. 11, 50, 000/-) was paid to respondent no.1 at the time of the agreement to sell.

8. Under changed circumstances, it has been prayed by the Complainants before this Authority to pass an order for refund of entire amount paid by the Complainants to the respondent(s) along with interest from the date of its payment till its realization.
9. The ld. arguing Counsel for the Complainants has further argued that the respondent no.2 has per se admitted in his reply submitted before this Authority that the booking of the flat in question has been made by the respondent no.1, which is supported by way of documents namely allotment letter issued by respondent no. 1, i.e. Shri Sumit Khanna,



Director, m/S Unimexx Builders & Developers Pvt. ltd., agreement to sell dated 21.03.2013, proceedings before the Director, Town & Country Planning, HP and letter dated 02.12.2016 along with statement on behalf of respondent no.5, Shri Bharat Vaidya, copy of legal notice dated 09.10.2019, issued on behalf of the Complainants to respondent no.1, which has not been denied by the respondent no.1 and para 2 of the reply of respondent no.2 & 3, which has already been admitted in para 7 supra above. It has been further argued by the Ld. Counsel for the Complainants that as per the agreement dated 21.09.2016 executed between respondent no.1 & 2/3 and referred to at page 106 to page 132 of the reply of the respondent no.2 & 3 that respondent no.1 had entered into a collaboration agreement with respondent no.5 and subsequently the respondent no.1 further executed an agreement to sell of flats with respondent no.1 at the instance of the first party on commission basis, which ultimately was reduced into writing by way of 2 agreements, nomenclatured as "Memorandum of Understanding" both dated 22.11.2013. Therefore, respondent no.1 is a promoter by virtue of the aforesaid MOU and 10 flats were given vide the same MOU to respondent no.1. The respondents' no.1, 2/3 & 5 are all



promoters within Section 2 (zk) of the Act on the basis of aforesaid MOU dated 22.11.2013, irrevocable power of attorney, collaboration agreement dated 03.11.2017 executed between respondents no. 2/3 & respondent no. 5.

10. The Ld. Counsel for the Complainants has further invited our attention to the corresponding functions and duties of the promoter under Chapter III of the Act *ibid*. It has been argued herein that considering the facts and circumstances of the case, the provisions of Section 18 (1) of the Act are invocable to hold the respondent(s) liable for refund of amount with interest. Further the Authority has the jurisdiction to order refund of money with interest thereof. The contesting respondent no.1, 2/3 & 5 are having inter se disputes which have led to the failure of the project to which the Complainants cannot be attributed to.

11. The Ld. Counsel Shri Amit Gupta for respondent no.1, i.e. Shri Sumit Khanna, Director, M/S Unimexx Builders and Developers Pvt. Ltd. has presented his case before this Authority arguing that the Complainants have not come before this Authority with clean hands as they have suppressed material facts. To sustain his contentions, the Ld. arguing Counsel has argued further that as per para 2 of the inspection report dated 19.12.2019 submitted by the



Town & Country Planner, Divisional Town Planning Office, Kullu and appended at page 35 of the reply on behalf of respondent no.5, the construction work of one inspection unit with columns erected above plinth level has been abandoned from a long time. It has been contended by the Ld. Counsel that in view of Annexure C-3 appended at page 5 of the rejoinder filed on behalf of the Complainant, i.e. email dated 22.09.2017, and there is no reference of refund of amount by the respondent no.1 to the Complainant. Further as per the contents of the authority letter (Annexure C-4) it has been clearly specified by the Complainants themselves that the said flat was booked by Unimexx and once the flat is transferred/ sold to any third party and the money, in full and final, is transferred, the Complainant will not hold respondent no.1 responsible for any further refunds concerning the said flat. The respondent no.1 has not taken any undue advantage in the instant matter. To sustain the contention that the complainant has not approached this Authority with clean hands and has carried out the abuse of process of law, the Ld. Arguing Counsel has referred to judicial pronouncements of Hon'ble Supreme Court in the matter of *Criminal Appeal no. 1406 of 2012 titled as Kishore Samriti*



versus State of UP & others decided on 18.10.2012, (Manupatra/ Manu/0392/2012, whereby it has been held under para 29 (iii) that, "The obligation to approach the Court with clean hands is an absolute obligation and has repeatedly been reiterated by this Court." There is no obligation that has ever been undertaken by the respondent no.1 to refund the amount to the Complainant in the instant case. The respondent no.1 is the original allottee vide Annexure R-3 of the additional reply on behalf of respondent no.1, which contemplates the copy of allotment letter dated 27.11.2013 providing that respondent no.1 was an allottee and not a promoter in the present case and is therefore not liable under the governing provisions of the Act *ibid*. Further as per Annexure R-1, i.e. agreement to sale dated 21.03.2013 appended along, it has been vehemently argued by the Ld. Counsel that the respondent no.1 is the seller and therefore the promoter and builder are two distinct identities. The respondent no.1 has purchased the flat from respondent no.2/3 and at the time of purchase, the flat/ apartment and the project was being constructed, therefore, in the interest of full disclosure, it was stated that, "the flat in issue is in developing motion by its promoters and developers."



Therefore, the flat in question was to be developed by its promoters and not by the respondent no.1. In view of Section 2(d) of the Act, the respondent no.1 qualifies him to be an allottee of the flat in question. The transaction between the Complainants and respondent no.1 is in nature of nomination agreement, whereby the exclusive rights of the flats allotted to the respondent no.1 was transferred to in the name of the Complainants. The aforesaid agreement is completely silent on the construction, time line for construction, penalty for non-construction and the refund of amount in case of non-default of possession and delivery as in case of allottee purchaser's agreement.

12. The Counsel has further argued that the respondent no.1 acquired the rights to develop the property under the umbrella of compromise order dated 19.11.2015 passed by the Hon'ble High Court of Himachal Pradesh as detailed in page 65-81 of the reply filed by the respondent no.2/3. The present project in view of the registration accorded by this Authority is to be completed by the year 2022 for which all the necessary formalities including obtaining of license and registration of project was to be done by the respondent no.5. The investments of the respondent no.1 have been



greatly suffered in this case. The respondent no.2/3 & 5 are solely responsible for the excessive delay in the construction of the project. Section 2 (c) of the Act provides the agreement to sell means an agreement entered between the promoter and the allottee. Since, respondent no.1 in the present case is himself a allottee, there is no cause of action against the respondent no.1 in the instant case. Further, the Ld. Counsel has contended specifically that in terms of Section 19 (4) of the Act,

“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 to sell 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.”

The agreement to sell as entered upon between the Complainants and respondent no.1 is not an agreement to sell under Section 2(c) of the Act. Moreover, as per Section 19 (4) of the Act, there is no breach or violation of the



agreement done by the respondent no.1. Since there are no provisions prevalent in the agreement to sell for refund, there is no absolute liability for the respondent no.1, being an allottee to refund the aforesaid amount to the Complainants. In case any project has encountered the problem, the developers are intended to show their bonafide interest. Likewise, the concern of the respondent. No.1 is genuine. There is a technical error in the instant complaint filed by the Complainants as the same has been instituted against the "**Himalayan Habitat**", which itself is no entity. At the time of booking of the apartment, the respondent no.1 was not a developer. Therefore; the complaint deserves to be dismissed as non-tenable in the eyes of law.

13. Shri Vikas Madan appearing in person on behalf of respondent no.2 & 3, Partners M/S Pacific Construction and Management has argued the matter before this Authority. At the outset Shri Vikas Madan has objected before this Authority that the entire amount in the present case has been paid to respondent no.1, i.e. Shri Sumit Khanna, Director, M/S Unimexx Builders and Developers Pvt. Ltd. and not to their company. The same fact has been admitted by the Complainants during the course of hearing. It is further submitted by Shri Vikas Madan that



as per his reply filed before this Authority, it is mentioned at page 41 that the unit in question was agreed to be sold to the Complainants and was not allotted to the Complainants. The Complainants have deliberately concealed this fact from this Authority with a view to mislead and gain favorable order in his favour. As per Annexure C-6 of the rejoinder to the reply so filed, the respondent no.2/3 had no knowledge that such allotment letter has been issued by the respondent no.1 to the Complainants. The respondent no.2/3 have contended before this Authority that the MOU that was executed between respondent no.2/3 and respondent no.1 on 22.11.2013, barred the respondent no.1 from entering into any sale agreement previously. The aforesaid MOU was later superseded by an agreement dated 21.09.2016, referred to at page 106 to page 132. It has been argued that the Complainant had deliberately chosen to mislead this Ld. Authority by distorting facts and raising patently false allegations against the Respondents. Thus, the present complaint is liable to be dismissed at the threshold on this ground alone. Further, the arguing respondent has also stated referring to page 51 to 53 of their written submissions/ reply to the complaint that the Hon'ble High



Court of Himachal Pradesh vide its order dated 17th January' 2014 in Civil Suit no. 8 of 2014 had passed directions prohibiting the respondent no.5, Shri Bharat Vaidya from selling the land to any other party and conferring the right to raise construction in their favour.

This Authority while hearing arguments has sought a specific query from the respondent that, 'Why no construction was carried out at the site from the year 2010 to 2013?' On the query sought by the Authority, the respondent no.2 & 3 through Shri Vikas Madan had responded that due to financial constraints, the construction at the site was stalled. Later in the year 2016, an agreement has been executed between the Shri Sumit Khanna, Director, M/S Unimexx Builders and Developers Pvt. Ltd and them. According to the covenants of the aforesaid agreement, 85% of the construction and handing over the possession of flats was to be done at the end of Unimexx Builders through Shri Sumit Khanna and rest 15% by them. Shri Vikas Madan had further invited attention of the Authority to page number 54 of the reply to the complaint which relates to the FIR no. 2354 of 2104 dated 12.11.2014 at P.S. Shakarpur, New Delhi against respondent nos. 5 for fraud, cheating, forgery of documents



and criminal conspiracy. It is the admitted version of the respondent no.2/3 before this Authority that after the registration of the aforesaid FIR against the respondent no.5, he has entered into a compromise deed on 13th May, 2015 with respondent no. 2/3. (at page 60 of reply). It has been further contended by Mr. Madan that as per covenant no. 10 of the very compromise deed, specifically at page 62, *“In case of non- cooperation or cancellation of collaboration or new irrevocable power of attorney by the first party or project is delayed or scrapped in between them in that case the first party will be liable for all the losses in the project and will return all money along with 12 % per annum interest from the date of investment of money to the second party and buyers.”*

Therefore, in view of the same it is submitted before this Authority by respondent no. 2 & 3 that respondent no. 5 is absolutely liable for the entire matter in issue. The respondent no.2 & 3 further admit while arguing that after the compromise deed dated 13th May, 2015 was entered upon, the respondent no.5 was implicated as an accused in FIR no. 2354 of 2014 was enlarged on bail by the Delhi Court on 25th May 2015 vide page 63 as referred during arguments today.



The respondent no.2/3 has further contended that as per order and decree dated 19th November, 2015, referred at page 64-81, the matter is issue regarding Civil Suit no. 8 of 2014 was decreed in their favour by the Hon'ble High Court and an irrevocable power of attorney dated 19th December, 2016 was executed in their favour by respondent no.5 expressly. Due to act and acquiescence of the respondent no.5 even after the due execution of this irrevocable General power of attorney, the respondent no.5 failed to abide by the terms and conditions imposed upon him regarding construction of the project along with requisite sanctions from the competent authorities including completion and registration process of the project. Henceforth, the entire liability is at the end of respondent no.5. Further reliance has been placed by the respondent no. 2 & 3 upon the detailed status report filed by the Delhi Police on 26th August, 2020 for cancellation of the bail of the respondent no.5 as accused in case FIR no. 2354 of 2014. (pp. 162-171) which stands placed on record.

14. Arguments have been advanced on behalf of respondent no.4, M/s. Ansal Buildwell Pvt. Ltd. through their ld. Counsel Shri Vishal Sehgal. At the outset the Ld. Counsel has submitted before this Authority that no specific



contravention of the RERA provisions by the respondent no.4 has been pleaded by the Complainant. There is no privity of any contractual obligations between the respondent no. 4 & the Complainant in the present case. The role of the respondent no. 4 has only been restricted to a Project Management Consultant (herein referred to as 'PMC' in short) in the present project and they have entered into a PMC agreement with on 2nd February, 2011 with the respondent no.2 & 3. The Ld. Counsel further contends that even prior to the PMC agreement; the respondent no.2/3 had already appointed respondent no.1, i.e. M/s Unimexx Builders and Developers Pvt. Ltd. as official broker for the sale of the units in the said project. It is vehemently argued before this Authority that as per Clause 8 of the PMC agreement, the PMC was to permit Developer to use its brand name with the present project with a name as 'MEADOWS.' The Developer had no right to use the PMC's name or brand in any manner with the project. After the growing mistrust and dispute between the respondent parties and more in particular between the respondent no.2/3 & 5, the respondent no.4 had terminated the PMC agreement on 8th June, 2015 with the respondent no. 2. One other contention the arguing counsel for respondent



no.4 has made before this Authority is that they do not fall within the definition of promoter or real estate agent as defined by Section 2 (zk) of the Act ibid, therefore the present Authority cannot adjudicate upon the present claim against them. It is however admitted that the respondent no. 4 was in percentage sharing but strictly in accordance with the PMC agreement. The duty to sell the flats in the present project was neither entrusted to the respondent no.4, nor any amount has ever been taken by the respondent no.4 from the Complainant(s)

15. The respondent no.5 has been represented by Shri Vivek Sharma, Advocate. According to Ld. Counsel, the respondent no. 5 is the owner of the plot where the project was to be constructed. The respondent had entered into agreement with respondent no. 1 & 2/3 for developing the land, which has not been done due to malafide intents of the respondent no. 1 & 2/3. The respondent no.5 has no privity of contract with the Complainants. Rather, a collaboration agreement was executed between respondent no 5, Sh. Bharat Vaidya, as a sole proprietor of M/s. Kuldevi Pacific Infrastructure and Respondent no 2 ,Sh Vikas Madan as Managing Partner of M/s. Pacific Construction and Management on 7th February, 2008. The



aforesaid agreement was further amended by way of execution of an another collaboration agreement in continuation of the previous agreement on 7th November, 2009 on account of certain changes in the nomenclature and constitution of M/s. Pacific Constructions and Management, which has been referred to as "Developer" in the aforesaid agreement and was to get possession of 19 residential flats and other benefits in cash and kind at the time of completion of the project. The Ld. Counsel contends further herein that his client was only a signatory to the collaboration agreement executed between him and respondent no.2. The arguing Counsel has also countered the arguments raised by the other respondents as well as the Complainant. The later part regarding construction and getting all the statutory requirements including approval from the competent Authorities were to be fulfilled by the respondent no.2/3 in specific. The respondent Counsel said that there was no dispute between the parties between the year 2009 to 2013. The delay to carry out construction activities is due to the inaction of respondent no.2 & 3. The Ld. Counsel to support his contention heavily relies upon the report of the Town & Country Planning Department, HP which purports to show that no construction activities at



the site were there during the aforesaid tenure. The arguing counsel has stated that in accordance with the terms and conditions of the Collaboration agreement dated 7th November, 2009, the substantive clause no 16 makes it clear that the owner shall not in any case be responsible for any kind of liability that may arise because of litigation of any kind in the matter, as reproduced here below,

“Financial liabilities of all kind whether in terms of financing the project, advertisement of the project, taking of booking amount from the customer, damages or costs claimed by customers shall be on the developer exclusively. The owner shall not in any case be responsible for any kind of such liability. Any representation by the customer regarding advance on booking or sale of flats will be that of the developer. All transactions regarding sale of flats, advances or any other issues related to the flats shall be made through the account of developer directly. In case of any dispute arising in respect of selling flats, all the liabilities of such litigation will be borne by the developer arising due to the above mentioned land will be that of the owner.”

The arguing counsel further has appraised this Authority that against the irrevocable power of attorney, a Civil Suit no. 169 of 2019 has been filed before the Civil Judge (Senior Division) District Kullu, Himachal Pradesh by the replying respondent and the same has been stayed. Also it has been



contended in a previous Civil Suit no. 8 of 2014, the order by the Hon'ble High Court has been done ex-parte.

16. Thus the entire issue in matter has been vehemently argued by the contesting parties. The Ld. Counsel for the Complainants has rebutted the stance of the respondent no.1 that the Complainants have not come before this Authority with clean hands is strongly refuted by the arguing Counsel for the Complainants stating that despite the period of six years from the date of execution of the agreement to sell in the year 2013, no significant construction activities are carried out at the site, which is also affirmed by the site inspection report dated 19.12.2019 of the Town & Country Planner, Kullu, H.P. Henceforth, the above said contention of the respondent no.1 is totally incorrect and contrary to the facts and circumstances of the present case. In fact the act, conduct and acquiescence of the respondent no.1 tends to show that he himself has suppressed many material facts before this Authority and in fact tends to show that the respondents who rather fulfilling their own commitments and obligations to deliver the flat to the Complainants are making baseless allegations even while arguing the case before this Authority.



17. In order to establish the fact that the respondent no.1 has suppressed and concealed material facts before this Authority, the Ld. Counsel for the Complainants has referred to the written submissions made by the respondent no.2/3 at page 169, which is a copy of status report dated 26.07.2020 filed before the Session Court, Delhi by Delhi Police, which reads as under:-

"It submitted that during the course of the investigation, it is also revealed that a company named Unimexx Builders & Developers Pvt. Ltd. who had previously entered into various agreements since 2010 with the Complainant Shri Vikas Madan. Earlier they had taken 18 apartments from the Complainant Shri Vikas Madan which converted into 10 fully paid apartments. Besides this Unimexx Builders & Developers Pvt. Ltd. approached the Shri Vikas Madan for ratifying there acts of taking Rs. 80, 43, 000/- from 15 home buyers without the knowledge and consent of the complainant Shri Vikas Madan. On request, the Complainant Shri Vikas Madan entered into the agreement with Unimexx Builders & Developers Pvt. Ltd. with terms and conditions. It was also decided in the agreement that in case of cancellation, the amount taken by the Unimexx Builders &



Developers Pvt. Ltd. from the home buyers will be returned by them only."

18. Further, while making submissions before this Authority, the Ld. Counsel for complainants has made reference to the contents of para 3 to 5 of the reply filed by the respondent no.5 at para 3 to 5, which clearly establishes that respondent no.5 had revoked the agreement in December, 2013 as respondent no.2 & 3 had collected huge amount of money from prospective buyers and had misappropriated the same without paying respondent no.5 his legal dues under the agreement and thereby abandoned the project.
19. On the issue as argued upon by the respondent no. 1 that he is not a promoter but an allottee in the present project, the arguing Counsel for the Complainants have submitted before this Authority that as per the contents of Annexure R-4 appended to the reply filed by respondent no.1, which relates to irrevocable power of attorney dated 03.11.2017, it has been categorically stated that the land in question was to be developed by the respondent no.1 as a promoter. The contents regarding that the respondent no.1 was not a developer till the year 2013, the Ld. Counsel for the Complainants have strongly rebutted by referring to a



Memorandum of Understanding executed between respondent no.1 & respondent no. 3 on 22.11.2013 at page 21 to 26 of the written submissions on behalf of respondent no.2. As per the contents of the aforesaid MOU, it has been clearly stipulated that the respondent no.1 was in fact the developer of the property in question. Furthermore the same MOU specifies that after the transfer of 10 numbers of flats, no flat will remain in promoter quota with the second party, i.e. respondent no.1. Further as per Annexure R-3 allotment letter dated 27.11.2013 annexed to reply of respondent no.1, it becomes apparently clear that the allotment of the flat in question to the Complainants was made prior to the allotment to the respondent no.1 by respondent no.2.

20. The Arguing Counsel for the Complainant further argued by referring to the provisions of Section 54 of the Transfer of Property Act, 1882, which defines the term Sale. As per the contents of Section 54, Sale is a transfer of ownership in exchange for a price paid or promised or part paid and part promised. In order to make sale, transfer of immovable property may be made by registered instrument along with delivery of property. In the present case, there is neither



delivery of property through possession nor there is any registered document.

21. While arguing before this Authority, the Complainants Counsel has made a reference of explanation to Section 2 (zk) of the Act *ibid*, it postulates that where the person who constructs or converts a building into apartments or develops a plot for sale and the person who sells apartments or plots are different person, 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 thereunder. The preamble of the Act further provides that the it is an Act to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto.



22. While contesting the case before this Authority, the Id. Counsel for the Complainant(s) has referred to 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 court." The Complainants is therefore entitled to refund of amount in the present case due to delayed delivery of possession. The arguing Counsel for the Complainants has further argued and submitted before this Authority that the payments that were advanced to the respondent no.1 have not been denied by the respondent no.1. The fact that the authorization letter issued by the Complainant(s) has to be read in entirety which clearly stipulates the issue of refund of amount.

23. On to an issue this Authority has asked upon from respondent no.2/3 & 5 regarding delay in the entire construction, per se the parties have been trying to shift the burden of onus over the facts for one reason or the other. The answering respondents in fact fail to explain it satisfactorily before this Authority that for what reasons the construction activities at the site could not be commenced since 2009 to 2013, when none of the respondent parties had disputes amongst themselves.

24. 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 four 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. By whom the refund of money along with interest is to be paid?
- D. Other Issues and directions including imposition of Penalty.

25. 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 the matter by explaining various provisions of the Act in this regard.

Section 31 of the Act prescribes that any aggrieved person can file a Complaint before the Authority or the Adjudicating Officer as the case may be for any violation of the provisions of the Act. Thus this Section provides that a separate Complaint be lodged with the Authority and the Adjudicating Officer, "as the case may be." Accordingly Rule 23 of the Himachal Pradesh Real Estate (Regulation



and Development) Rules 2017 provides the procedure of filing Complaint with the Authority and prescribes 'Form M' for filing a Complaint. In this case, the Complainant has filed the Complaint in 'Form-M.'

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

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

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*.

26. Coming to the question that whether the Complainant is entitled for the relief of refund of amount of Rs. Thirty Eight lakhs, fifty seven thousands along with interest and compensation, under provisions of the Act and the Rules made there under. The Complainant(s) Shri Sanjay K Dhingra and Smt. Chetna Dhingra in the present case had booked a residential apartment with the respondent no.1. 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 promoters and rejoinder thereof that the respondent no.1 & 2 bounded themselves to complete the construction work and hand over possession of the apartment to the Complainant within 36 months from the date of execution of the agreement dated 21.03.2013, the respondent no. 1 & 2/3 have failed to do so and none of the reasons given by the respondent promoters are justified.



27. Before this Authority adjudicate upon the fact in issue that whether the Complainant is entitled to relief along with interest, it becomes important to adjudicate the fact that whether respondent no.1 to 5 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, coloniser, 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.

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 analyze the fact that whether respondent no. 1 to 5 are promoters within the definition under the Act, this Authority has deliberated upon the issue one by one.

28. That the respondent no.1, Shri Sumit Khanna, who is the Director of the M/s. Unimexx Builders and Developers Pvt. Ltd. had a vested interest in the project by entering into agreement with the Complainants and as per the allotment letter dated 13th January, 2013 annexed vide Annexure C-6 of the rejoinder filed by the Complainants, they had advanced a sum of Rs. Seven lakhs and fifty thousand (Rs. 7, 50, 000/-) to respondent no.1. Further the Complainants and respondent no.1 entered into an agreement to sell on dated 21.03.2013, according to which a sum of Rs. Eleven Lakhs and Fifty thousand (Rs. 11, 50, 000/-) had been received by the respondent no.1 at the



time of the agreement to sell. It was agreed upon between the parties that the remaining amount of Rs. Thirty Eight Lakhs (Rs. 38, 00, 000/-) shall be paid by the Complainant by paying Rs. Two lakhs (Rs. 2, 00, 000/-) every month. The Complainant has paid Rs. Thirty eight lakhs and Fifty seven Thousands (Rs. 38, 57, 000/-) towards the part payment of the flat, as demanded by the respondent no.1 from time to time. The claim is further supported by the fact that the amount of Rs. Thirty eight lakhs fifty seven thousands was paid by the Complainant to the respondent no.1. The plea of the respondent that he is a mere allottee and not a promoter is not substantiated on the basis of the facts of the case. He sold the flat to the Complainants, when no flat was existing on the spot. He took money from the Complainants to construct and then handover the same to the Complainants. Further, the respondent no.1 purporting to argue before this Authority that he is mere allottee is devoid of merits for the reasons that in case respondent no.1 was an allottee, it was always open for him to invoke the provisions of Section 19 (4) of the Act before this Authority and sought refund from respondent no.2 to 5. The plea of the respondent no.1 that he was an allottee is being taken at this belated and a later stage



before this Authority merely in order to escape his part of liability and to avoid the rigors of law against him. In view of the Authority, respondent no.1 is clearly a promoter under Section 2 (zk), 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*

The respondent no 1, after entering into an agreement to sell with the Complainant on 21.03.2013 subsequently entered into a memorandum of Understanding with respondent no.2/3 on 22.11.2013, signing of a new collaboration agreement with land owner, Respondent no 5 being the confirming party in the said deed dated 19.02.2016, and further took over the development of the project along with Respondent 2/3 in respective proportions, albeit under the changed name of the firm as agreed upon between them in accordance with the terms of the supplementary deed, drafted within the said agreement dated 31st October, 2017 which clearly goes on to show that Respondent no 1 is a



developer. Thus all dealings of Respondent no 1, 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.

29. That the role of respondent no.2/3 in the present case is also important regarding the sale of the flats. It is an admitted fact that the respondent no.2/3 & 5 have entered into a collaboration agreement in continuation of the previous agreement on 7th November, 2009 which has been referred to as "Developer" in the aforesaid agreement. The respondent no. 2 as "Developer" approached the owner of land, i.e. Respondent no.5 with a proposal for developing residential apartments along with commercial complex and community Centre on the said land. The respondent no 5, gave a general Power of Attorney to Respondent no 2, for the smooth execution of the project and in accordance with the definition as prescribed in Section 2 (zk) (v) of the Real Estate(Regulation and Development) Act 2016, the holder of power of Attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale, is a Promoter. It is respondent no.2/3 who had introduced respondent no.1 and respondent no.4



into the project by executing different agreements including Project Management Consultant (PMC) agreement with the respondent no.4. This Authority is of firm view that respondent no.2/3 are promoters in view of Section 2 (zk) of the Act *ibid*.

30. That the Respondent no.4 has contended during the course of arguments before this Authority is that they do not fall within the definition of promoter or real estate agent as defined by Section 2 (zk) of the Act *ibid*, therefore the present Authority cannot adjudicate upon the present claim against them. It is clearly established in the instant case that the respondent no.4 was involved in profit and revenue sharing of the project with respondent no.2/3. Being a PMC alone, the respondent no.4 should have no rights to get the profit sharing. The clauses 2, 10 & 11 of the PMC agreement as detailed clearly indicate that the role of respondent no.4 was not only restricted to PMC but as developer of the land as well as revenue sharer. They also had role in selling various flats. Therefore this Authority declines to accept the submissions of the respondent no.4 that they are not promoters in the present case.



31. That the Respondent no 5, Sh. Bharat Vaidya S/o Late Sh Arun Vaidya, R/o VPO Bajaura , Tehsil Bhunter, Distt Kullu, Himachal Pradesh is the Lawful "Owner-in-possession" of land measuring 16 Bigha 10 Biswas , comprised in khasra no 1653/691/2 , khata khatauni no 125/468 at Mohal and Patti Bajaura Tehsil Bhunter Distt Kullu HP, applied to Himachal Pradesh Housing and Urban Development Authority. HIMUDA, the competent Authority at that time to register and regulate the Real Estate projects and obtained a registration certificate vide registration number 280 dated 30th December, 2008 and a license no. HIMUDA/LIC-56/2010 for setting up a residential complex under the name "Meadows" (Luxury Apartments) on 2nd November, 2010. The Respondent no 5 applied for and got registration as a promoter and a license for setting up a Residential complex under the name "Meadows" (Luxury Apartments). As per title in approved drawings, the Respondent no 5 is still registered as a promoter with this Authority for the project named as "The Himalayan Habitat" much before signing the collaboration agreement which goes on to prove that he intended to work as promoter and for the same took registration as well as License for developing the Residential complex the name of



the Complex later changed to The Himalayan Habitat, himself as a promoter. So the plea of the defense counsel seeking the respondent no. 5 as only the land owner is not acceptable to this Authority.

32. That it is admitted by the contesting parties, more particularly respondent no. 2/3 & Sh. Bharat Vaidya, respondent no 5, signed a collaboration agreement as a sole prop of Kuldevi Pacific infrastructure with Respondent number 2, Sh. Vikas Madan, managing partner Pacific Construction and Management , on 7th February, 2008, which was amended and another collaboration agreement in continuation of the previous agreement was executed on 7th November,2009 because of some change in the constitution of pacific Constructions and Management. The respondent no 5, Sh Bharat Vaidya was also to get revenue share in the project in accordance with the terms of the collaboration agreement, in the following manner:-

“The owner , in lieu of his land, was to get share in the developed real estate in the following proportion,

- i) *Commercial Complex as approved in site plan*
- ii) *Community service Centre as demarcated in the approved construction plan including restaurant space,*



bar space, disc space, sauna, and Jacuzzi, steam bath and Billiards room.

iii) 19 Residential flats (out of 190 flats) demarcated in the approved plan of construction as per mutual agreement, out of which 10 flats are 2Bed rooms and 9 flats are 3 bed room

iv) Rs. 25.00 Lacs each year for loss due to discontinuation of agricultural Activities starting from

25 lacs-1st July 2010,

25 lacs- 10June 2011,

25 lacs-30 June 2011, besides 25 Lacs security deposit.

The argument of the defense counsel on behalf of respondent no 5, that substantive clause no 16 of the collaboration agreement makes it very clear that the owner shall not in any case be responsible for any kind of liability that may arise because of litigation of any kind in the matter, is non-tenable in the eyes of law as the governing provisions of Section 2 (zk) of the Act *ibid* postulates the definition of the word promoter and clear cut determines that whether a person is a promoter or not. Therefore, the contentions of the respondent no. 5 that he was immune



and covered by the aforesaid clause of the agreement cannot evade his liability as a 'promoter' under the Act. It is a cardinal principle of law that the *agreement in persona* cannot, either expressly or impliedly supersede the statutory provisions of any Law, Act or Statue. Any agreement or contract which confers to take away the statutory powers of any Act or law is non-est in the eyes of law being void ab-initio.

33. This Authority is primarily concerned with the protection of the interests of the Complainants/ Allottees and not the ongoing dispute between the respondent parties either over the monetary issues or over the suit land and construction of the aforesaid real estate project thereof. Thus keeping in view all the above facts, particularly that the respondent has declared himself as promoter of the project registered with the Authority, we have no reasons, not to accept that Respondent no 5, is a Promoter.

34. The Authority, on the basis of the documents, pleadings and contents of the definition of promoter as detailed in Section 2 (zk), is of firm opinion that the Respondent 1 to 5 fall under the ambit of "Promoter" and all obligations as prescribed in Section 11 of the Act read with other relevant



provisions of The Real Estate (Regulation & Development) Act 2016 read with the Himachal Pradesh Real Estate (Regulation & Development) Rules 2017, are to be fulfilled jointly and severally by them.

35. Coming to the question that whether the Complainant(s) are entitled for the relief of refund of amount of Rs. Thirty Eight lakhs, fifty seven thousands along with interest, under provisions of the Act and the Rules made there under. The respondent Promoters have failed to fulfill their contractual obligations and none of the reasons given by the respondent promoters are justified.
36. In the present case, there exist, clear and valid reasons for holding down the flat buying Complainant(s) are entitled to refund. There has been a breach on the part of the developer/promoters/ respondents no.1 to 5 in complying with the contractual obligation to hand over possession of the flats after executing the agreement to sell. The failure of the respondent no. 1to 5 promoters to hand over possession within the contractually stipulated period amounts to contravention of the provisions of the Real Estate (Regulation & Development) Act, 2016. The respondent no. 1 to 5 promoters failed miserably in fulfilling all obligations as stipulated in Section 11 of the



Act *ibid*. There has been a gross delay on the part of the Respondents no. 1 to 5 promoters in completing construction for almost nine years. The nature and quantum of the delay on the part of the respondents no.1 to 5 promoters are of such a nature that the refund of amount along with interest would be grossly insufficient considering the hardship and mental agony that they have been subjected to all these years and judicial notice ought to be taken of the fact that a flat purchaser who is left in the lurch as a result of the failure of the respondent no. 1 to 5 promoters to provide possession within the contractually stipulated date suffers for no fault of his. Having paid a substantial amount of the consideration price to the respondent no. 1 to 5 and being required to service the debt towards loan installments the purchaser is unable to obtain possession of that flat as the same has not been constructed even after such a long period which is the subject matter of present case.

37. The flat purchasers/ Complainants 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 agreement to sell. But the submission of the respondents



jointly and severally due to their 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. Counsels for the respondents no.1 to 5 promoters thereof.

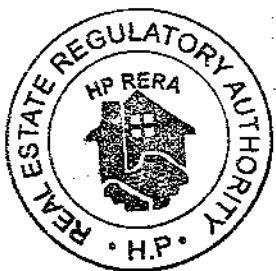
38. In the present case the Complainant(s) have paid Rs. Thirty Eight lakhs fifty seven thousands and has asked for the refund due to inordinate delay of possession of the flat. The Hon'ble Supreme Court in case "*Pioneer Urban Land and Infrastructure Ltd. versus Govindan Raghavan, 2019 SCC Online SC 458*", has held that the inordinate delay in handing of the flat clearly amounts to deficiency of service. The Apex Court further held that a person cannot be made to wait indefinitely for possession of the flat allotted to him and is entitled to seek refund of the amount paid by him. None of the Respondents, from Respondent no 1 to Respondent no 5, have objected to the refund, sought by the Complainant.

39. In the present case there is an inordinate delay of 7 years in the delivery of the flat. Further, as per the report of the Town & Country Planner, Divisional Town Planning Office, Kullu, showing the physical status of the building/flats clearly show that the construction activities at the site are



almost negligible. Therefore, there is no option with the Authority but to order the refund of the amount of Rs. Thirty Eight lakhs, fifty seven thousands.

40. The issue is about the interest that the Complainant has sought @ 18% in his initial complaint and then @ 10% in his written synopsis submitted before this Authority along with copy of legal notice dated 09th October, 2019. 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.

41. The Authority has taken a serious view of the developments pertaining to inter se disputes between the Respondents 1 to 5 because of which the allottees have suffered for no fault of theirs. He has in fact suffered on more than one ground, by investing his hard earned money and making regular payments of the home loan instalments for a flat which have not been delivered to them on one count and involving himself with a prolonged legal battle on the second count, not to mention about the humiliation that they have faced in requesting the Respondent Promoters 1 to 5 for completing the construction and giving them possession of their promised flat. The Respondent Promoters 1 to 5 have not shown any sincerity in delivering to them possession of the flat booked by the Complainants



and all these while were busy protecting their commercial interests to satisfy their greed for more money. The Authority is of this firm view that the Respondent Promoters 1 to 5 have done an Act of fraud on them and forced them to run from pillar to post to recover their hard earned money and for the same these Respondents Promoters must be held accountable and penalised under Section 61 of the Act *ibid* for their failure to fulfil their obligations as promoter as prescribed in Section 11 of the Act *ibid* which should Act as a deterrent for all the Respondent Promoter for repeating such Act with any other allottee/ prospective buyer in future in any of their existing or proposed real estate projects in future. In this case, there are glaring violations of Section 11 of the Act *ibid*, committed by the Respondent Promoter 1 to 5 that call for imposition of a penalty under Section 61.

42. 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 Respondents number 1 to 5 are directed to refund a sum of Rs. Thirty Eight lakhs, fifty seven thousands 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 no. 1 to 5.

- ii. The refund along with interest is to be paid by the respondent no.1 to 5 jointly and severally to the Complainant within 60 days from the date of this order.
- iii. 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 total estimated cost of the project in this case, when calculated on the basis of average price of Rs. Forty lakhs per apartment, for 196 apartments, comes to Rs. Seventy eight Crores approximately and a penalty at a rate of five percent of the total estimated cost works out to Rs. three Crores and ninety lakhs. The Authority, considering all facts of the case, deems appropriate to impose a penalty amounting to Rs. Twenty Lakhs under Section 61 read with Section 18 (1)



and Section 38 of the Real Estate (Regulation & Development) Act, 2016 on the Respondent Promoter 1 to 5 for failing to meet their obligations as prescribed under Section 11 of the Act *ibid*. The penalty imposed shall be borne jointly and severally by the Respondent promoter 1 to 5 and 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, within a period of two months, failing which the amount of Penalty shall be enhanced to Rs. Thirty five lakhs in case of any further default.

- iv.* 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, the Authority may take under Section 40 or other relevant provisions of the Act.
- v.* It is further ordered that the respondents no.1 to 5 are barred from selling/ allotting/ booking any flats/ land in the present project, till the compliance of this order.



Further the bank accounts of the respondent no. 1 to 5 pertaining to this project shall remain frozen/ unusable till payment as ordered is made to the Complainant and Authority and there shall not be any sort of alienation of any movable or immovable assets of the project till the time the amount along with interest is refunded to the Complainant and penalty amount deposited in the account of the Authority.

- vi. All the respondents are directed to submit the details of the Bank accounts pertaining to this project within fifteen days.

skani
Dr. Shrikant Baldi
CHAIRPERSON

Badalia
B.C. Badalia
MEMBER

Rajeev Verma
Rajeev Verma
MEMBER

