

**REAL ESTATE REGULATORY AUTHORITY,
HIMACHAL PRADESH**

In the matter of:-

Sh. Arun Kumar Sharma, S/O Late Sh. M.R. Sharma, R/O B-201,
Shubhkamana Apartment, Sector 50 Noida, Uttar Pradesh, PIN-2201301

.....Complainant

Versus

Himland Executive Residences, (Himland Housing Pvt. Ltd.) Divya
Kunj, Officers Colony, Rajgarh Road, Solan H.P through its
Promoters/ Directors Smt. Ambika Kanwar Kainthla & Sh. Ashok Singh

.....Respondent/ promoter

Complaint no. HPRERA/OFL/ 2021-47

**Present: - Shri Vijay Kumar Arora, Advocate for the Complainant,
Sh. Arun Kumar Sharma**

**Sh. Arvind Kumar Singh, Advocate for respondent
promoter M/s Himland Housing Pvt. Ltd.**

Final date of hearing (Through WebEx): 22.11.2021.

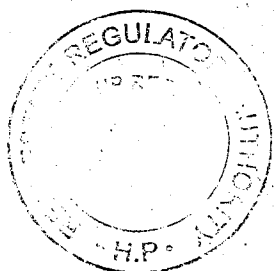
Date of pronouncement of Order: 28.12.2021.

ORDER

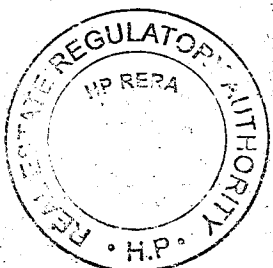
CORAM: - Both Members

1. BRIEF FACTS OF THE CASE:-

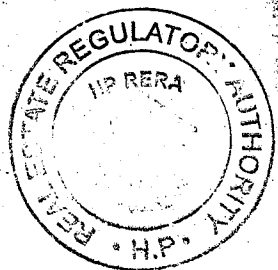
The present matter refers to an offline complaint bearing complaint
no. HPRERA/OFL/ 2021-47 which was received in this Authority on



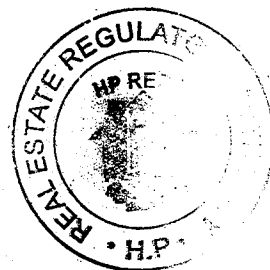
19th July, 2021. As per the complaint, the respondent company is controlled and managed by its Directors namely Sh. Vikram Singh, Smt. Ambika Kanwar Kainthla and Sh. Pradeep Kumar Pathak. It has been alleged in the complaint that the complainant had booked a flat no. A-306 at Himland Executive Residences situated at Damrog, District Solan, Himachal Pradesh, having a super area of 650 sq. ft., with the respondent promoter and paid 5% of the total cost as booking advance amount of Rs 66,539/- on 30.7.2008 vide cheque no. 138245 at the time of submitting his application form. (Copy of the receipt is appended as Annexure C-1). It is further submitted that the copy of the original application form submitted by the complainant is with the Opposite party/ respondent. It was further submitted that as per the terms and conditions of the application form the possession was to be given to the complainant within a period of 18 months from the date of the submission of the application. It was further submitted that the respondent had supplied the copy of the price list along with defined area and the payment schedule to the complainant and the same are attached with the complaint. It was further submitted that in terms of the above said payment plan the complainant has made the total payments of Rs. 6,66,539/- (Through cheques and cash) against total cost of Rs 13,30,780/- and the rest of the amount was to be paid at the time possession to be offered to him. The detail of money paid to the opposite party i.e receipts



are attached for ready reference as Annexure (C-2). It was further submitted that all the payments were made in time as per demand and the last payment of cash was made on April 21, 2011. It was further pleaded that the complainant had waited till 2012 for completion of the project and to take possession of the Flat. After waiting for long period the complainant approached the opposite party to know the status of construction of the project. It was further submitted that the opposite party expressed their inability and informed that they had failed to take necessary permission from various authorities to start and complete the project. It was further submitted that it then transpired that the opposite party has cheated him and other buyers with false promises. It was pleaded that the complainant again approached the opposite party in the year 2015 for refund of advance amount of Rs.6,66,539/- along with interest for the default period i.e, from 30/07/2008 till date. It was pleaded that the complainant had waited till the end of 2015 and when after several attempts to ascertain the status of construction, the complainant along with other buyers met the authorized representative of the opposite Party and after strenuous efforts made by the complainant and others he agreed to give possession by 15th October, 2016 and get the registration of apartments done by November, 2016 in terms of MOU signed on 13th January 2016. It was further pleaded that due to lack of trust the payments were not made by other buyers and Mr. Ashok Singh, authorized representative agreed to complete the project without insisting on balance amounts due from them. It is further

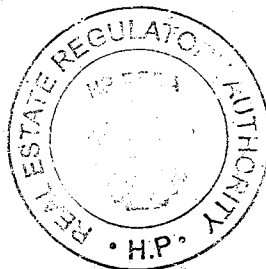


submitted that in this MOU itself the project proponent has also mentioned the details of payment received by it from the complainant and other buyers and the details of the balance amount. The copy of the MOU dated 13/01/2016 is attached with complaint as Annexure C-3. It was pleaded that when the promoters of the project had again not abided by the MOU signed by its representative and not handed over the possession on the date fixed to the complainant and others, the complainant has again raised this issue with the promoters of the project but they failed to deliver the possession to the complainant. The complainant numerous times contacted the promoters of the project through emails and telephonically but there was no positive response from the other end and at last the complainant was forced to knock the door of this Ld. Authority by submitting a complaint. With these facts it was prayed that the Promoter may be directed to pay to the *Complainant Rs. 6,66,539/-* along with interest @ 24% p.a. from 30/07/2008 till date as refund of the advance money paid to the opposite Party. It was further prayed that the respondent be directed to pay to the Complainant Rs. Five lakh for deficiency in services. It was further prayed that respondent be directed to pay to the Complainant Rs. Five lakh for mental agony / harassment. It was further prayed that the respondent be directed to pay to the Complainant Rs. One Lakh towards the cost of legal expenses and in the alternative it was prayed that the respondent be directed to hand over the possession of the premises in question to the complainant.

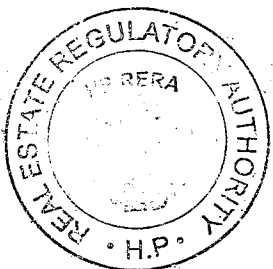


2. REPLY TO THE COMPLAINT.

The Respondent filed detailed reply wherein it was submitted that the Respondent Company was incorporated in the year 2006. The Respondent Company took Housing Project at Damrog, District- Solan in a Plot of 3 Bighas and 3 Biswas under H.P. Apartment and Property Act, 2005. The company applied for and obtained several NOCs from various Departments for obtaining license for the above project from HIMUDA. The Company submitted the drawings to the office of TCP, Solan, which were duly approved. Thereafter, the Respondent Company commenced the work of construction as per then prevalent practice. As per payment schedule the Complainant had to pay entire amount of Rs. 13,30,780/- (Rupées Thirteen Lakh Thirty Thousand Seven Hundred & Eighty only) upto 01.04.2010. It was further pleaded that upto 01.04.2010, the complainant paid only Rs. 4,66,539,00/- i.e. approximately 35% of the total amount. It was then submitted that till date, the Complainant has paid only Rs. 6,66,539/- (Rupees Six Lakh, Sixty Six Thousand Five Hundred & Thirty Nine only), i.e. approx 50% amount. It was therefore submitted that in the aforesaid manner it was the Complainant, who himself is responsible for delay in the completion of project of the Respondent Company by not adhering to agreed/admitted payment schedule and therefore he cannot be allowed to take advantages of his own wrongs. It was submitted that none of the Flat Buyers, including the Complainant,



raised issue about delay in the completion of the Project upto 20.11.2015, neither they demanded refund of their invested amount nor they issued any Demand Notice as they were very well aware about the fact that said delay is due to reasons/factors, beyond the control of the Respondent Company. It was further pleaded that, the Complainant and other Flat Buyers did not make payment in terms of the agreed MOU dated 13.01.2016 despite being satisfied about the progress of the project in terms of the said MOU. It was submitted that the Complainant was informed/ made aware about the progress of the Project as well as problems faced by the respondent in carrying out the work of construction on account of changes of Laws/Acts, including repeal of the H.P. Apartment and Property Regulation act, 2005 (repealed on 21.09.2013) and amendment in Himachal Pradesh Town and Country Planning Act, 1977 (amended upto 2013). It was specifically submitted that all the aforesaid changes in Laws/Acts were beyond the control/ contemplation of the JD and amounted to 'force majeure' as laid by the Hon'ble Supreme Court in Satyabrata Ghosh vs Mugneeram Bangur & Co. 1954, wherein it has been held that the determination whether a 'force majeure' event has actually occurred does not centre around its impossibility alone, a mere impracticality of performance (given the subject matter of contract) would also suffice. It was further submitted that total amount deposited by the Complainant and other buyers comes out to be less than 50% of the total price of their Flats, whereas 80% work has been completed by the



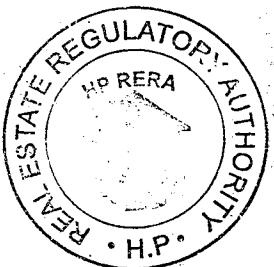
Respondent Company and material for remaining work has been lying on the site. It was submitted that had the said complainant and other buyers paid balance amount in terms of said MOU, the entire work of the Project would have been completed. By not making balance payment initially in terms of the agreed/ admitted Payment Schedule and thereafter in terms of the agreed MOU dated 13.01. 2016 and filing the Complaint before the Authority without giving any notice/opportunity for refund of their amount, it was submitted that it had caused substantial damage to the reputation of the Company. It was specifically submitted that it was/is nowhere mentioned in the said MOU dated 13.01.2016 that the Respondent Company would carry out completion of the Project/Flats without taking agreed payment from the Flat Buyers, including the Complainant. It was pleaded that the present complaint has been filed not for ventilation of grievances but with profit motive, malafide intention, and for satisfaction of their inflated ego and therefore the same is liable to be dismissed. It was further submitted that as per certificate dated 11-05-2020 granted by this Authority, the Respondent Company is required to complete the project by 10-05-2024 and in view of the same, the present complaint is immature and is liable to be dismissed. It was submitted that Sh. Pradeep Kumar Pathak had already resigned from the Respondent Company w.e.f 26.06.2014, Sh. Vikram Singh also resigned from the Respondent Company w.e.f 22.07.2021 and Ms.Ambika Kanwar Kainthla also resigned from the Respondent Company w.e.f 02.09.2021. It



is further specifically submitted that the Complainant made payment of Rs. 6,66,539/- against the total price of the Flat, i.e. Rs. 13,30,780/- and the same is only 50% of the total price. The complainant failed to make balance payment in terms of the MOU dated 13.01.2016. In view of the aforesaid pleadings it was prayed to dismiss the complaint.

3. Rejoinder to the reply-

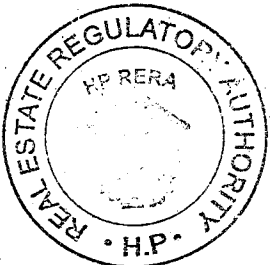
The Complainant has responded to the reply so filed by the respondent by submitting a para-wise detailed rejoinder. It has been submitted in the rejoinder by the Complainant that when the respondent promoter had failed to deliver the possession of the respective flats to him as well as to other buyers in due time as per the terms of application forms and the apartment buyer's agreements, they had taken up the issue with its authorized representative from time to time but to no avail. It has been further submitted that it is evident from the reply itself that the respondent promoter did not have permissions from the competent authorities at the time when it had offered the flats to the complainant and other buyers. It has been further submitted by the complainant that he could not have paid any additional money in terms of MOU (signed only on behalf of the respondent promoter) dated 13.01.2016 because in spite of him having already invested a sum of Rs 6,66,539/-



(Rupees Six Lakh Sixty Six Thousand Five Hundred and Thirty Nine), the construction of the flat in question was incomplete till 2016. It has been further submitted that it is evident from the reply itself that the construction work is still ongoing and that the respondent promoter even after a lapse of 13 long years has failed to provide possession of the flat to the complainant. It has been submitted that the respondent promoter is liable to refund the amount paid by the complainant alongwith the interest and also to compensate the complainant in terms of section 18 of the Real Estate (Regulation and Development) Act, 2016 as the respondent promoter has failed to complete and give the possession of the flat in question in accordance with the agreement for sale. In view of the above, the complainant has prayed the Authority to pass necessary orders for the refund of entire amount of Rs. 6,66,539/- (Rupees Six Lakh, Sixty Six thousand, Five Hundred and Thirty Nine) along with 24% interest from the date of advancement of amount along with other reliefs as mentioned in the complaint.

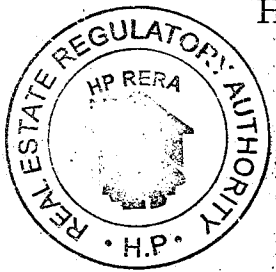
4. ARGUMENTS ADVANCED

The final arguments in this case were heard on 22.11.2021. Sh. Vijay Kumar Arora, Ld. Counsel representing the Complainant has submitted that the matter is covered by the Judgments passed by the



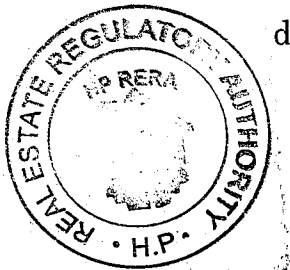
Authority in Ghanshyam Gupta versus M/s Himland Executive Residencies complaint no. RERA/HPSOCTA/072000036, Gajraj Singh Sahrawat versus M/s Himland Executive Residencies complaint no. HPRERA/OFL/2021-30, Sanjiv Gupta versus M/s Himland Executive Residencies complaint no. RERA/HP/SOCTA 06190018, Anurag Khaitan versus M/s Himland Executive Residencies and Dalip Kumar versus M/s Himland Executive Residencies complaint no. RERA/HPSOCTA/062000035. Therefore it was prayed that the Authority may pass similar orders in the present case.

5. The Ld. Counsel for the respondent company has admitted that a sum of Rs. 6,66,539/- has been paid by the complainant. He has further submitted that most of the buyers of flats in project in question have deposited about 50% of the amounts they were supposed to pay in respect of the respective flats and that the respondent promoter cannot give them the flats until the balance amounts are paid. The Ld. Counsel, while arguing further on behalf of the respondent promoter has highlighted the genesis and the requisite parameters that were involved for the registration of the project under the then prevailing provisions of Section 5 (3) of the Himachal Pradesh Apartment & property Regulation Act, 2005 and



HP Tenancy & Land Reforms Act 1972 since February, 2006 till the registration under the Real Estate (Regulation & Development) Act, 2016 read with Himachal Pradesh Real Estate (Regulation & Development) Rules, 2017, whereby the registration certificate has been accorded by this Authority on 11th May, 2020 whereby due to pending statutory approvals, the project could not be completed. The Ld. Counsel representing the respondent promoter has further argued that in view of the Memorandum of Understanding (herein referred to as MOU), it is clearly provided under the last clause that the Complainant is yet to make the remaining payment worth Rs. Six lakh and Sixty Four Thousand Two Hundred and Forty One to the respondent promoter. The Ld. Counsel representing the respondent promoter contends herein that the respondent in his reply submitted before this Authority has admitted specifically that almost 80% of the construction work has been completed and remaining 20% of the work of the flat shall be completed on payment of remaining amount.

6. The Ld. Counsel representing the respondent promoter has further argued that on account of want of approvals and necessary sanctions from the competent authority since 2006, the construction work could not be completed at the site. The construction could not be completed due to events that fall with in the ambit of the term '*force majeure*'.



which is evident on account of pending permissions of their project with the competent authority.

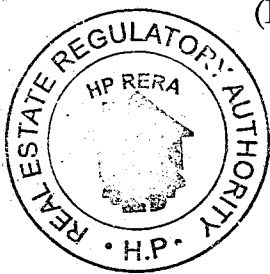
7. CONCLUSION/ FINDINGS OF THE AUTHORITY:-

We have heard the arguments advanced by the Ld. Counsels for the Complainant & Respondent and perused the record pertaining to the case. We have duly considered the entire submissions and contentions submitted before us during the course of arguments. This Authority is of the view that there are three issues that requires the consideration and adjudication, namely:-

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

8. 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.'

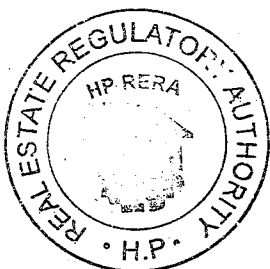
The Section 34 (f) of the Act prescribes that the function of Authority shall include

"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 or to the 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.”

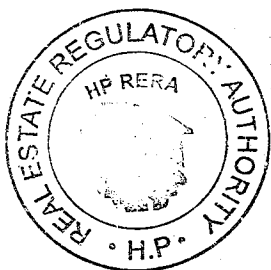
Section 19 (4) of the Act provides as under:

“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.”

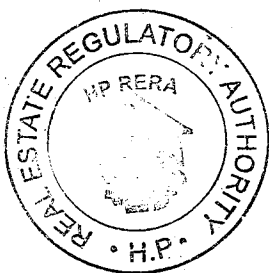
Thus Section 34(f) of the Act empowers the Authority to ensure compliance of the obligations cast upon the promoters and Section



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.’

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 in para 86 of the judgment as under:

“86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the

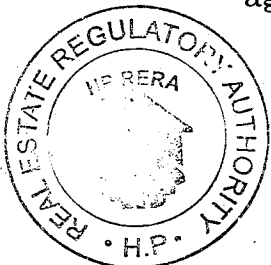


regulatory authority which has the power to examine and determine the outcome of a complaint....”

Thus, from the reading of the above provisions of the Act as well as law laid down by the Hon'ble Supreme Court, 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.*

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

Coming to the question that whether the Complainant is entitled for the relief of refund of amount of Rs. Six Lakh Sixty Six Thousand Five Hundred and Thirty Nine (Rs. 6,66,539/-) along with interest, under provisions of the Act and the Rules made thereunder. The complainant in the present case had booked a residential Flat no. A-306 in the Himland Executive Residences, Solan with the respondent promoter. It is the case of the complainant that possession was to be given within a period of 18 months from the date of submission of application from but no application form or apartment buyers agreement has been filed along with the case or by respondent to



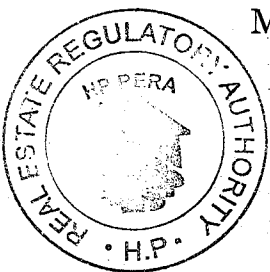
substantiate the actual date of delivery of possession. Further this fact has been specifically denied by the respondent in his reply. However, in the preliminary submission no. 3 of his reply, respondent has specifically submitted that

“3. That **none of the flat buyers, including the complainant, raised issue about delay in the completion of the project upto 20.11.2015** nor they demanded refund of their invested amount nor they issued any demand notice as they were well aware about the fact that said delay is due to reasons factors beyond the control of respondent company.....”

Perusal of the above para of the pleadings by respondent goes to show that admittedly the construction of the project was not complete upto 20.11.2015. In case of **Fortune Infrastructure versus Travor Dlima MANU/SC/0253/2018; (2018) 5 SCC 442** Hon'ble Supreme Court has held that,

When no date of possession is mentioned in the agreement the promoter is expected to hand over the possession within reasonable time and the period of three years is held to be reasonable time.

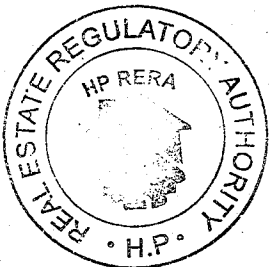
It is per se admissible from the record of the case that the possession was not handed over upto 20.11.2015 and thereafter admittedly an MOU was signed between the parties on 13.1.2016 and as per this



MOU as well as pleadings of both the parties the remaining construction work was to be completed within 9 months commencing w.e.f 15th January, 2016 and by 15th October, 2016 but the respondent has failed to do so and none of the reasons given by the respondent promoter are justified.

10. This Authority while adjudicating upon the issue of refund is guided by the judgment of the Hon'ble Apex Court in Civil Appeal nos. 3207-3208 of 2019 titled as "Marvel Omega Builders Pvt. Ltd. versus Shrihari Gokhale and Anotherr." Dated 30.07.2019, whereby the Hon'ble Court under para 10 has observed as under,

"10.The facts on record clearly indicate that as against the total consideration of Rs.8.31 crores, the Respondents had paid Rs.8.14 crores by November, 2013. Though the Appellants had undertaken to complete the villa by 31.12.2014, they failed to discharge the obligation. As late as on 28.05.2014, the Revised Construction Schedule had shown the date of delivery of possession to be October, 2014. There was, thus, total failure on part of the Appellants and they were deficient in rendering service in terms of the obligations that they had undertaken. Even assuming that the villa is now ready for occupation (as asserted by the Appellants), the delay of almost five years is a crucial factor and the bargain cannot now be imposed upon



the Respondents. The Respondents were, therefore, justified in seeking refund of the amounts that they had deposited with reasonable interest on said deposited amount. The findings rendered by the Commission cannot therefore be said to be incorrect or unreasonable on any count.” The Complainant is therefore entitled to refund of amount in the present case due to delayed delivery of possession.

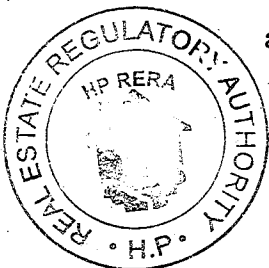
11. In the present case, there exists, clear and valid reasons for holding down that the Complainant is entitled for refund of total payment advanced to the respondent promoter. There has been a breach on the part of the developer/promoter/ respondent in complying with the obligation to hand over possession of the flat to the complainant upto 20.11.2015 (when the first payment was made on 30.07.2008) and further within 9 months (i.e. 15th October, 2016) from 13th January, 2016, the date of execution MOU between the contesting parties. The failure of the respondent promoter to hand over possession amounts to contravention of the provisions of the Real Estate (Regulation & Development) Act, 2016. The respondent promoter failed miserably in fulfilling all obligations as stipulated in Section 11 read with Section 14 of the Act *ibid*. There has been a gross delay on the part of the Respondent promoter in completing construction as the construction was not complete even by 15th October, 2016 when the initial booking



amount was admittedly paid on 30.7.2008. A total of Rs 6,66,539/- was paid to the respondent out of the total sale consideration of Rs 13,30,780/-. Having paid a substantial amount of the consideration price to the respondent, the purchaser is unable to obtain possession of that flat as the same has not been completed even after such a long period which is the subject matter of present case.

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

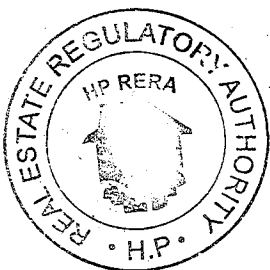
13. In the present case the Complainant has paid Rs. Six Lakhs, Sixty Six Thousand and Five Hundred Thirty Nine (Rs. 6,66,539/-) and has asked for the refund due to inordinate delay of possession of the flat along with 24% interest from the date of advancement of amount. The Hon'ble Supreme Court in case "*Pioneer Urban Land and Infrastructure Ltd. versus Govindan Raghavan, 2019 SCC Online SC 458*", has held that the inordinate delay in handing of the flat clearly amounts to deficiency of service. The Apex Court further held that a



person cannot be made to wait indefinitely for possession of the flat allotted to him and is entitled to seek refund of the amount paid by him.”

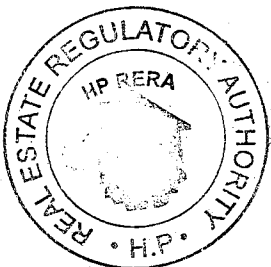
14. In the present case there is an inordinate and gross delay in the delivery of the flat. Therefore, there is no option with the Authority but to order the refund of the amount of Rs. Eight Lakh Ninety Thousand (Rs. 6,66,539/-).

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



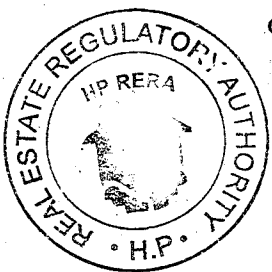
period.....”The Hon’ble Supreme Court in *“Pioneer urban land & infrastructure case”* has also held that the flat purchaser is entitled to get refund of the entire amount deposited by him with interest.” Thus, the Complainant is entitled to get interest as prescribed as per the Section 18 of the Act read with rule 15 of Himachal Pradesh Real Estate (Regulation and Development) Rules, 2017 that clearly states that the rate of interest payable by the promoter to allottee or by the allottee to the promoter, as the case may be, shall be the highest marginal cost of lending rate of SBI, plus two percent.

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



17. The functions of this Authority established under the Act is to safeguard the interest of the aggrieved persons, may it be the allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The respondent promoter cannot be allowed to take any undue advantage of his dominant position and to exploit the needs of the home buyer. This Authority is duty bound to take into consideration the legislative intent i.e. to protect the interest of consumers/allottees in real estate sector. Thus, the contentions of the respondent promoter are ex-facie one sided, unfair and unreasonable, which constitute the unfair trade practice on the part of the respondent. There is no denial to the fact that respondent promoter was in dominant position. The Complainant on the contrary has already parted with his hard earned money, so he had no option but to abide by the MOU on the dotted lines. The discriminatory terms and conditions of such MOU will not be final and binding. The respondent has utterly failed in fulfilling his obligation to deliver the flat for unreasonably long period and even as per the MOU executed in the year 2016 possession has not been delivered even till today.

18. The plea taken by the respondent promoter that their case is covered by terms and conditions of the MOU, which provides that the completion and possession of the flat was to be delivered to the



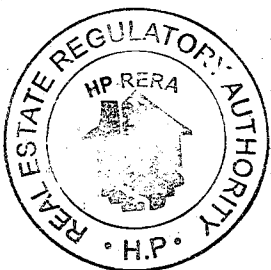
Complainant by the respondent after the complete payment of the flat which is still due and payable at the end of the Complainant. The said terms and conditions form part and parcel to the 'force majeure', on account of pending permissions of their project with the competent authority is also devoid of merits. Pending permissions or delayed permissions of a project cannot be construed to be interpreted as 'force majeure', since the explanation appended to Section 6 of the Real Estate (Regulation & Development) Act, 2016 provides that

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

19. The plea that the project of the respondent could not be completed on account of pending permissions with the competent authority cannot be said to construe as 'force majeure' as the same is beyond the scope and purview of the aforesaid expression.

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 in para 25 of the judgment as under:

“25. The unqualified right of the allottee to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the

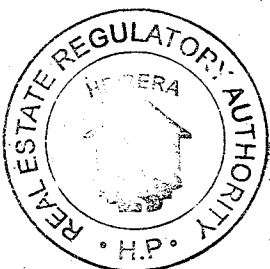


allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed.”

Even otherwise this Authority finds no merit in the submissions of the respondent promoter that on account of outspread of COVID-19 in the entire Country including the State of Himachal Pradesh the completion of the project has been delayed. The delay for completion of the project from the last so many years cannot be attributed to the issue of '*force majeure*'. Hence, the plea of '*force majeure*' is hereby declined by this Authority.

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

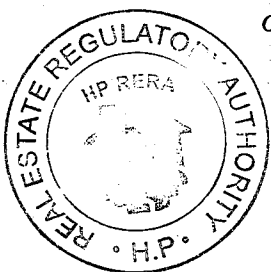
The Respondent Promoter has not shown any sincerity in delivering possession of the flat booked by the Complainant. The Authority is of this firm view that Respondent Promoter must be held accountable and penalised under Section 61 of the Act *ibid* for his failure to fulfil his obligations as promoter as prescribed in Section 11 and 14 of the Act *ibid* which should act as a deterrent for all the Respondent Promoters for repeating such Act with any other allottee/ prospective



buyer in future in any of his existing or proposed real estate projects in future. In this case, there are glaring violations of Section 11 & 14 of the Act *ibid*, committed by the Respondent promoter that calls for imposition of a penalty under Section 61 of the Act *ibid*.

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

"Para 141. It goes to indicate how at large-scale middle-class home buyers have been defrauded of their hard-earned money, taken away by the affluents and the officials in connivance with each other. Law has to book all of them. We are hopeful that law will spread its tentacular octave to catch all culprits responsible for such kind of fraud causing deprivation to home buyers. It is shocking and surprising that so many projects have remained incomplete. Several Lakh of home buyers have been cheated. As if there is no machinery of law left to take care of such situation and no fear left with the promoters/builders that such acts are not perceivable in a civilised society. Accountability is must on the part of everybody, every institution and in every activity. We fail to understand the standard of observance of the duties by public authorities has gone so down that

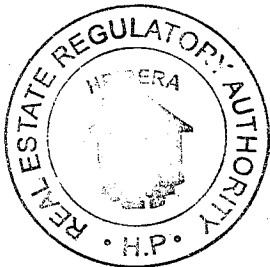


such frauds take place openly, blatantly, and whatever legal rights exist only on papers and people can be cheated on such wide scale openly, brazenly and with the knowledge of all concerned. There is duty enjoined under the RERA, there has to be a Central Advisory Council as well as the role of the State Government is not ousted in order to protect against such frauds. We direct the Central Government and the State Government to take appropriate steps on the time-bound basis to do the needful, all other such cases where the projects have remained incomplete and home buyers have been cheated in an aforesaid manner, it should be ensured that they are provided houses. The home buyers cannot be made to suffer when we are governed by law and have protective machinery. Question is of will power to extend the clutches of law to do the needful. We hope and trust that hope and expectation of home buyers are not going to be belied.”

22. RELIEF:-

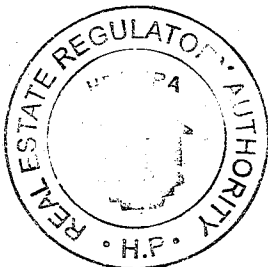
Keeping in view the abovementioned facts, this Authority in exercise of power vested in under various provisions of the Act issues the following orders/directions:

- i. The Complaint is allowed and the Respondent promoters are directed to refund a sum of Rs. Six Lakh Sixty Six Thousand




Five hundred and Thirty Nine (Rs. 6,66,539/-) 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 till date the amount and interest thereon is refunded.

- ii. The refund along with interest is to be paid by the respondent promoter to the Complainant within 60 days from the date of this order.
- iii. That in view of Section 61 of the Act which prescribes the maximum penalty that could be imposed for the contravention of any other provision of the Act other than Section 3 and 4, as five percent of the total cost of the project. The Authority, considering all facts of the case, deems appropriate to impose a penalty of Rs. Three Lakh in case the respondent promoter fails to comply with the present order/directions passed by this Authority within stipulated period of sixty days.



- iv. It is further ordered that no withdrawal from the bank account of the projects to be made till payment as ordered is made to the complainant and penalty is deposited into the account of Authority. Further, there shall not be any alienation of any movable and immovable assets of this project till compliance of this order.
- v. The respondent promoter is directed to intimate the details of their bank accounts pertaining to this project within fifteen days.
- vi. The Complainant shall be at liberty to approach the Adjudicating Officer for compensation under Section 71 of the Act *ibid*.


B.C. Badalia
MEMBER


Rajeev Verma
MEMBER

