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**REAL ESTATE REGULATORY AUTHORITY,
HIMACHAL PRADESH**

In the matter of:-

Sh. Kanwarjeet Singh, S/O Shri Nanha Ram, R/o 97 A, 1st Floor,
Arjun Nagar, Safdarjung Enclave, New Delhi-110092.

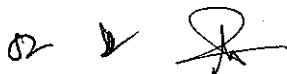
.....Complainant

Versus

1. Sh. Sumit Khanna, R/O, B-6/4, 3rd Floor, Safdarjung Enclave,
New Delhi-110029.
2. Sh. Pankaj Madan, (Partner M/s Pacific Construction and
Management) D-64, First Floor, Vikas Marg, Shakarpur, Delhi-
110092.
3. Sh. Vikas 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, Prakash deep Building, Tolestoy Marg, New Delhi-110001.
5. M/s. Kuldevi pacific Infrastructure through its Managing
Director, Sh Bharat Vaidya,1, Pacific Upper Second Floor, Regal
Building, Parliament Street, New Delhi-110001.
6. M/s. Housing Development Finance Corporation Ltd. (Through
its General Manager/ Principal Officer) having its registered
Office at Raman House-169, Backbay Reclamation, Mumbai-
400020

.....Non-Complainant/ Respondents

Complaint no. RERA/HP/ OFL-2019-04



(43) (2)

Present: - Shri G.D. Sharma, Advocate for Complainant,

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.

None for the Respondent no.6 M/S Housing Development Finance Corporation Ltd

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

Final Date of Hearing (Through WebEx): 29.08.2020.

Date of pronouncement of Order: 21.09.2020.

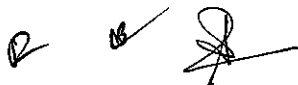
ORDER

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)



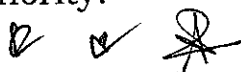
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2. That the Complainant Shri Kanwarjeet Singh had filed an offline Complaint dated 22nd April, 2019 before the Designated Officer cum Director, Town & Country Planning, Himachal Pradesh in 'Form-M' bearing Complaint no. RERA-OFL-2019-04 of the HP Real Estate (Regulation & Development) Rules, 2017. As per the complaint it has been alleged that the Complainant had booked a flat in Meadows, Bajaura, Kullu, HP, for a consideration price of Rs. Sixty Seven Lakhs (Rs. 67, 00, 000) which was to be paid in different stages as per the conditions of Allotment letter and Builder Buyer Agreement. The Complainant has paid Rs. Thirty eight lakhs, Seventy Seven Thousand and six hundred sixty (Rs. 38, 77, 660) towards the part payment of the flat as demanded by the promoters from time to time. The Complainant paid Rs. Thirteen Lakhs and forty thousand (Rs.13, 40,000) from his own funds and the balance amount of Rs. Twenty Five Lakhs, thirty seven thousand and six hundred sixty (Rs.25, 37,660) was remitted by Housing Development Finance Corporation Ltd as part of home loan. The total paid amount of Rs. Thirty eight lakhs, Seventy Seven Thousand and six hundred sixty (Rs. 38, 77, 660) works out to 58% of the total consideration amount of Rs. Sixty Seven Lakhs

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(Rs. 67, 00, 000). The possession of the flat was to be delivered by 31st March 2014 but despite many reminders and requests the Respondents did not respond except Respondent no 4, who responded vide letter dated 8th January 2015 and disclosed that due to inter-se disputes between the Respondents there was litigation in the Hon'ble High Court of Himachal Pradesh as well as status quo order. The Complainant pursuant to this information again made efforts to get in touch with Respondents but did not get any response from them. Ultimately in the end of year 2018, he visited the site of work and was stunned to see that only a fraction of work has been done on site and there was no construction activity at site. The Complainant at this stage decided to opt out of the project and filed the complaint with the Authority dated 22nd April 2019 by offline mode. The Complainant in his complaint has made it clear that he has lost all hopes of getting the flat and thus in accordance with the provisions of the Real Estate (Regulation and Development) Act, 2016 read with Real Estate (Regulation and Development) Rules, 2017 has demanded the refund of amount paid by him with all consequential benefits and sought following relief from this

Authority:



- a. Pass order for refund of entire amount paid by the Complainant to the Respondent No. 1 to 5 of Rs. Thirty Eight Lakhs, Seventy Seven thousand six hundred and sixty.
 - b. Pass order to pay penal + compounding interest @ 24% p.a (as the Respondent No. 6 is charging the said interest on defaulted amount) on the sum of Rs. Thirty Eight lakhs, Seventy Seven thousand six hundred and sixty from the date of its payment i.e. 08.10.2011 till its realization.
 - c. Pass order for compensation amount of Rs. 20 lakhs on account of mental pain, agony, harassment etc. against the Respondent No. 1 to 5.
 - d. Pass order against the Respondent No. 6, thereby restraining him to recover the EMI from the Complainant against the said loan till the time the Respondent No. 1 to 5 did not pay/return the entire amount with interest and compensation.
3. The parties to the Complaint have filed their written submissions/ replies/ rejoinders 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.



4. The Authority has gone through the documents and pleadings of the Complainant and Respondent(s). The following 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 Bighas, 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 project 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 contesting Respondents no. 2/3 & Respondent no.5 that Sh Bharat Vaidya signed a collaboration agreement as a sole prop. of Kuldevi Pacific

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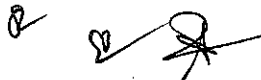


Infrastructure with Respondent number 2, Sh.Vikas Madan, managing partner Pacific Construction and Management having admn office at D-64 , First Floor Vikas Marg , Shakarpur Delhi , on 07.02.2008 which was amended and another collaboration agreement in continuation of the previous agreement was executed 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, 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.

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,

Handwritten signature and initials, likely representing the owner or developer.

- 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-10th June 2011,

25 lacs- 30th 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.

- v) 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 is 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.

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- 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.




- vi) 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 crores and forty six lakhs.

vii) That the said official broker, Unimexx builders and developers Pvt. Ltd. , booked a flat numbered as DS-1/302 having an area of 1550 sq. ft. , a 3BHK flat in the name of Sh Kanwarjeet Singh and Smt. Nirmala Devi, the Complainant(s), and accepted two cheques, bearing nos. 331966 dated 9th July 2011 and 331967 dated 19th July 2011, each amounting to Rs. Six lakhs and Seventy Thousands (Rs. 6, 70, 000) drawn at P & S Bank, Karol Bag, New Delhi equivalent to sum of Rs. Thirteen Lakhs and forty thousands (Rs. 13, 40, 000)The flat Buyer's Agreement dated 18th October 2010 was executed between the Respondent no. 2/ 3 and the Complainant 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 of the flats was executed on 1st October, 2011.

viii) That before the execution of the flat buyers agreement between the Complainant and Respondent no.2/3, the Respondent no. 4, i.e. M/s. Ansal Buildwell Ltd. had issued an allotment letter dated 29th July 2011 in favour of Sh. Kanwarjeet Singh and Smt. Nirmala Devi asking for a sum

of Rs. Thirteen Lakhs and forty thousand as an installment that was due on the Complainant which had already been paid to Respondent no.1 by the Complainant. The aforesaid letter clearly specified the tentative area of flat as 1750 sq. ft., net BSP (Basic sale Price) as Rs. Sixty Seven lakhs, previous outstanding as nil, 50% amount due towards booking & installment (within 7 days of booking) as Rs. Thirty Three Lakhs and Fifty thousand amount received as Rs. Thirteen Lakhs and forty thousand and balance payable as on date as Rs. Twenty Lakhs and ten thousand with a dead line for making the payment was mentioned as 7th August 2011. The letter was signed by authorized signatory for Respondent no. 4 M/s. Ansal Buildwell Ltd.

- ix) That another letter dated 19th September 2011 addressed to the Complainant by Respondent no. 2/3 was issued demanding due payment of 3BHK flat in Meadows at Kullu. The said letter clearly mentioned the tentative area of flat as 1550 sq. ft. (Approx.), net BSP (Basic sale Price) as Rs. Sixty Seven lakhs, previous outstanding as nil, 20% amount due towards booking as Rs. Thirteen Lakhs and forty thousand, amount received as Rs. Thirteen Lakhs and forty thousand and balance payable as on 7th August 2011 as Rs. Twenty lakhs and ten thousands and the dead line

for making the payment was mentioned as 17th August, 2011, which is not legible. The letter was signed by authorized signatory for Respondent no. 2/3, i.e. M/s. Pacific Constructions and Management.

- x) That on 18th October, 2011, a tripartite builder buyer agreement was executed between the Complainant Sh. Kanwarjeet Singh & Smt. Nirmala Devi, Respondent no.2/3 M/s. Pacific Constructions and Management and Respondent no. 6, Housing Development Finance Corporation Ltd. (herein referred to as HDFC). On 22nd November 2011, HDFC released part of the loan disbursement by way of Banker's cheque bearing no. 130787 amounting to Rs. Twenty One lakhs issued in favour of Respondent no. 2/3, M/s. Pacific Construction and Management A/c Ansal Meadows. Further, as per the detailed reply of Respondent no. 6, a total disbursement of Rs. Twenty five lakhs thirty seven thousand six hundred and sixty was made to the Respondent no.2 , as a home loan disbursement on behalf of the Complainant. The replying Respondent no 6, HDFC, has stated in its reply that a total disbursement of Rs. 25,37,660 was made to the replying Respondent 2 , Pacific Construction and Management A/C Ansal Meadows as home loan



disbursement on behalf of Sh Kanwarjeet Singh and Smt. Nirmala Devi.

- xi) That the Complainant along with Smt. Nirmala Devi had made a total payment of Rs. Thirty Eight lakhs, Seventy Seven thousand six hundred and sixty (Rs. Thirteen Lakhs forty thousand + Rs. Twenty five lakhs thirty seven thousand six hundred and sixty) for allotted flat DS-1/302.
- xii) That even after making such huge payment there was not much development at site of work and very little work was executed which is exhibited in the report received from the Department of Town & Country Planning that comprises of a few foundations and RCC frame skeleton of one block and even after that the actual construction at site never started in full steam and project remained almost stranded. The license for the project issued by the Department of Town & Country Planning to Respondent no. 5 expired on 1st November 2013 for which the Respondent no. 5 i.e. the land owner Sh. Bharat Vaidya had applied for renewal of the same on 4th December, 2013.
- xiii) That all the contesting Respondents except Respondent no. 6 went into multiple disputes and numerous litigations amongst themselves regarding the project delaying the

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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. Meanwhile, 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.

- xiv) 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.

- xv) 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 released on bail by the Ld. Additional Session Judge, Karkardooma Courts, Delhi vide order dated 25th May 2015.
- xvi) 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.
- xvii) 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.
- xviii) 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.

xix) 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.

xx) That the Complainant visited the site of work, as per his complaint, in the end of 2018 and was stunned to see that there was no progress of work at site and thus decided to take the legal recourse and filed a complaint with the Authority.

5. The final arguments in this case were heard on 29.08.2020. Shri G.D. Sharma, Ld. Counsel representing the Complainant has argued before this Authority that the

contentions of the Complainant are specific. It has been argued by the Ld. Counsel representing the Complainant that his client had booked a flat in Meadows, Bajaura, Kullu, HP in the year 2011 and till date remittance amount of Rs. Thirty Eight Lakhs seventy seven thousands and six hundred and sixty (Rs. 38, 77, 660) in favour of Respondent no. 1 to 5 have been made. In spite of fact that the Respondent no. 1 to 5 has taken almost 58% of the cost of the flat, the Respondents have failed to hand over the possession of the flat in question. Under changed circumstances, it has been prayed by the Complainant before this Authority to pass an order for refund of entire amount paid by the Complainant to the Respondent No. 1 to 5 along with penal + compounding interest the date of its payment till its realization. It has also being argued by the Complainant that the details of the EMI of the loan taken to purchase/ book the flat for Respondents have already been placed on record.

6. 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 that the entire payment for the booking of the flat has been given to Respondent no. 2, 3

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and 4, i.e. Shri Vikas Madan & Pankaj Madan, partners M/s Pacific Construction and Management and M/s Ansal Buildwell Ltd by the Respondent no.1. During the commencement of the project in question, the Respondent no. 5 i.e. Mr. Bharat Vaidya, MD of M/s Kuldevi Pacific Infrastructure had obtained a stay from the Ld. Court over the suit land. It has been further vehemently argued by the Respondent no.1 that even after the sincere efforts of this Ld. Authority to reconcile the matter amongst the parties, nothing fruitful could be achieved, which is apparent on the default of the other parties to the present proceedings/ complaint. The Counsel representing the Respondent no.1 has contended that the present complaint is not maintainable before this Authority by virtue of Section 38 of the Real Estate (Regulation & Development) Act, 2016 as the Authority does not have the requisite powers to adjudicate upon the present claim and hence the complaint is liable to be dismissed. The Counsel has further requested this Authority to delete them as party from the list of Respondents as they are not the necessary party to the case at all. The contentions raised by the Respondent no. 1 have been rebutted by the Counsel for the Complainant purporting to state that it was Respondent no.1 who had





introduced his client to other Respondents. The entire claims have been initiated at the outset of Respondent no.1. The arguing Counsel for Respondent no.1 had invited our attention towards the Flat Buyer's agreement dated 18th October, 2011 whereby the Respondent no.1 is neither the executing party nor is the beneficiary to the aforesaid agreement. Further it has been argued that the present complaint is not maintainable as Smt. Nirmala Devi has not been impleaded as the Complainant party in the instant case. The Counsel appearing on behalf of the Respondent no.1 has further contended that as per the preliminary objections in their detailed reply that the Complainant is guilty of concealment of the facts that he has instituted multiple proceedings in respect of the same transaction including a FIR no. 53 of 2017 dated 19.04.2017 at P.S. Barakhamba, New Delhi against all the Respondents. The arguing Counsel for the Respondent no.1 further contended that a legal notice through Advocate Yogesh Kalra dated 6th May 2015 had been issued to all the remaining Respondents and not to the Complainant for providing of possession of the flat. Therefore, in view of the same and foregoing submissions, it was submitted by the Respondent

no.1 that the present complaint is liable to be dismissed as non-tenable in the eyes of law.

7. Shri Vikas Madan appearing in person on behalf of Respondent no.2 & 3, partners M/s Pacific Construction and Management had argued the matter before this Authority. At the outset Shri Vikas Madan had objected before this Authority that initially the cheques for the remittance of amount of Rs Thirteen lakhs and forty thousand have 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 Complainant during the course of hearing. It is further submitted by Shri Vikas Madan that he is not personally known to the Complainant and it was during the course of hearing before this Authority that he met the Complainant for the first time. A FIR (First information report) was then lodged at Police Station Barakhamba, New Delhi against the Respondent no. 1 to 5 in the year 2017 for fraud, cheating and embezzlement of money which is a separate story concocted by the Complainant which is referred to at page 214 of his written submissions/ reply to the complaint. The Respondent no. 2 & 3 has brought into the notice of this

Authority that the Complainant had misled this Ld. Authority by filing the present complaint by concealing the act that a FIR has been registered in the present case concerning the entire monetary transaction. 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 Respondent 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 130-131 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 'by whom the possession of the flat in question was to be delivered to the Complainant ?' On the query sought by the Authority, the Respondent no. 2 / 3 through Shri Vikas Madan had responded that as per the earlier agreement held in 2011, the possession of the flat in question was to be delivered by



them. But in the year 2016, a compromise 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 48 of the additional documents 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, the Respondent no.5 has entered into a compromise deed on 13th May 2015 with Respondent no. 2/3. (at page 229 of reply). It has been further contended by Mr. Madan that as per covenant no. 10 of the very compromise deed, specifically at page 232, *"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*

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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.”


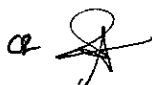
Therefore, in view of the same it is submitted before this Authority by Respondent no. 2 & 3 that Respondent no. 5 is absolutely liable for the entire matter in issue. The Respondent no. 2 & 3 further admits while arguing that after the compromise deed dated 13th May 2015 was entered upon, the Respondent no.5 was implicated as an accused in FIR no. 2354 of 2014 was released on bail by the Delhi Court on 25th May 2015 vide page 133 as referred during arguments today.

The Respondent no. 2/3 through Shri Vikas Madan has further argued that 18 numbers of flats were allowed to be sold by Respondent no.1 out of total 190 units. There was a joint account of Respondent no.2/3 & 4 where initially an amount of Rs. Twenty one Lakhs was disbursed by Respondent no.6 through cheque/.DD no 130787 dated 22nd November 2011. Out of the aforesaid amount, the Respondent no.2 took Rs Fifteen Lakhs one thousand and five hundred and the remaining amount of Rs. Five lakhs, ninety eight thousands and five hundred was given to Respondent no,4, M/s. Ansal Buildwell Pvt. Ltd. The



Respondent no.2/3 has further contended that as per order and decree dated 19th November, 2015, referred at page 219, 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 July 2020 for cancellation of the bail of the Respondent no.5 as accused in case FIR no. 2354 of 2014. (pp. 275-283) which stands placed on record.

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

contravention of the provisions of the Act, 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' for short) in the present project and they have entered into a PMC agreement with on 2nd February 2011 with the Respondent no.2. 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 misunderstanding 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

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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. Also a contention in specific has been made by the Ld. Counsel before this Authority that no proceedings in any Court of Law are pending against them except the present one.

9. 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 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 Complainant. 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 corroboration agreement executed between him and Respondent no.2. The Respondent no.5 doesn't even know the factum and whereabouts of the Complainant. 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. It has been rather put by the Respondent Counsel before this Authority during the course of hearing that there was no dispute between him and Respondent no. 2/3, then on what account the delay has



been there regarding carrying out the construction activities at the site from the year 2009 to 2013. The Ld. Counsel to support his contention heavily relies upon the report of the Town & Country Planning Department, 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.”

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The arguing Counsel further has appraised this Authority that 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.

10. That the entire issue in matter has been vehemently argued by the contesting parties. The Ld. Counsel for the Complainant has stated before this Authority that in spite of the fact that the Respondent no. 1 & 2/3 entered into a tripartite agreement between Respondent no. 6 for according the home loan to the Complainant, no physical possession of the property/ flat in question has been delivered to the Complainant since 2014. It is the case of the Complainant that possession of the flat was to be delivered within thirty six months from the date of Flat Buyer's Agreement dated 18th October 2011 till July 2014, which is nowhere in the picture as here contended by the Ld. Counsel before us. Now, so far as the issue governing the PMC agreement between Respondent no. 2 / 3 & 4 is concerned, the Ld. Counsel for the Complainant has rebutted with a fact that the Respondent no. 4 has not only





enter into agreement as Commission agent but as Sharing agent. The Ld. Counsel for the Complainant has further rebutted before this Authority that regular interest has been paid to the Respondent no 6, HDFC since 2011 till date. Another grievance that has been rebutted here before this Authority is very case specific that the Respondent no. 6 failed to verify that good will of Respondent no. 4 before getting into tripartite agreement dated 18th October 2011 and subsequently making the Loan agreement dated 24th November 2011 executed with the Complainant. It has been specifically averred by the Complainant during the course of hearing before this Authority that the amount in the sum of Rs. Six Lakhs Seventy Thousands multiplied twice were advanced to Respondent no.1. It has been admitted further that the letter of allotment and for remaining dues and payments were equivalently issued on the letter head on Respondent no. 2/3 & 4 through authorized signatory, time and again, either unilaterally or multilaterally.

11. 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 Respondent in fact fails 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.

12. That the Respondent no.6 did not appear before this Authority over subsequent date of arguments fixed. However the detailed reply on behalf of Respondent no. 6, i.e. M/S Housing Development Finance Corporation Ltd. stands placed on record. As per the reply, it has contended that no allegation of deficiency in services is apparent at the end of the Respondent no. 6 and the grievance of Complainant is directed against Respondent no.1 to 5 who have allegedly failed to deliver its commitments for delayed handling over of possession of flat. The Complainant along with Respondent no.2/3 had entered into a tripartite agreement with the Respondent no. 6 and according to which it is obligation of the Complainant to repay the loan.
13. 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.

14. 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*.

15. Coming to the question that whether the Complainant is entitled for the relief of refund of amount of Rs. Thirty Eight lakhs, seventy seven thousands six hundred and sixty along with interest and compensation, under provisions of the Act and the Rules made there under. The Complainant Shri Kanwarjeet Singh in the present case had booked a residential apartment with the Respondent's promoters. 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 promoters were under a contractual obligation 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 flat buyers agreement, the Respondent Promoters have failed to do so and none of the reasons given by the Respondent promoters are justified.

16. Before this Authority to 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 falls within the ambit of definition of promoter under Section 2 (zk) of the Act ibid or not?

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

"Promoter" means,—

(i) a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees; or

(ii) a person who develops land into a project, whether or not the person also constructs structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon; or

(iii) Any development Authority or any other public body in respect of allottees of—

(a) Buildings or apartments, as the case may be, constructed by such Authority or body on lands owned by them or placed at their disposal by the Government; or

(b) plots owned by such Authority or body or placed at their disposal by the Government, for the purpose of selling all or some of the apartments or plots; or

(iv) an apex State level co-operative housing finance society and a primary co-operative housing society which constructs apartments or buildings for its Members or in respect of the allottees of such apartments or buildings; or

(v) any other person who Acts himself as a builder, colonizer, contractor, developer, estate developer or by any other name or claims to be Acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale; or



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(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 substantiate 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.

17. 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 even before entering into agreement on 1st October 2010 with Respondent no.2/3 for the sale and purchase of flats as he has brokered the deal between the Complainant and the Developer, Respondent no 2/3 and accepted two cheques, each amounting to Rs. Six lakhs Forty thousand (Rs. 6, 40, 000/-) each in the name of his company M/s. Unimexx Builders and Developers Pvt. Ltd., making it clear that he was one of the beneficiary of revenue sharing. The Respondent no. 1, pursuant to the signing of the agreement dated 1st October' 2010 with Respondent no 2/3, booked 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 Crores and Forty Six Lakhs, for the purpose of further selling at a premium. Not ignoring the fact that the aforesaid Respondent no.1 is the person who has played the role of a broker between the Complainant and the Respondent no.2/3. The claim is further supported by the fact that the amount of Rs. Thirteen Lakhs and forty thousands, by way of two cheques, were advanced by the Complainant to the Respondent no.1 initially. The Respondent number 1, is covered under the explanation mentioned in Section 2 (zk), which reads—

'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 the expiry of the date of the possession to the Complainant , subsequent to signing of compromise Agreement with Respondent No 2/ 3

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with land owner, Respondent no 5 being the confirming party in the said agreement, dated 31st October' 2017, 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 who was, initially, a marketing partner/ Associate of Respondent no 1, took over as developer too in the later run of the project. 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.

18. That the role of Respondent no.2/3 in the present case is of utmost importance regarding the sale of the flats including that of the Complainant. 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 decision that Respondent no.2/3 are promoters in view of Section 2 (zk) of the Act *ibid*.

19. 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 has been proved beyond reasonable doubts in the instant case that Respondent no.4 was involved in

profit and revenue sharing of the project with Respondent no.2/3. The clauses 2, 10 & 11 of the PMC agreement as detailed in para 20 of the order supra clearly indicates 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.

20. That the Respondent no 5, Sh. Bharat Vaidya S/o Late Sh ArunVaidya, 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 DisttKullu 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 name of the Complex later changed to The Himalayan Habitat) himself as a promoter in individual capacity 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 Respondent no 5 is still registered as a promoter with this Authority for the project named as "The Himalayan Habitat."

21. That it is admitted by the contesting parties, more particularly Respondent no. 2/3 & 5 that 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
- i) Rs. 25.00 lacs each year for loss due to discontinuation of agricultural Activities starting from
- 25 lacs-1st July 2010,
- 25 lacs- 10 June 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 Statute. 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.

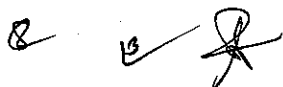
22. This Authority is rather concerned with the protection of the interests of the Complainant/ Allottee and not the ongoing dispute between the Respondent parties either over the monetary issues or over the suit land and construction of the aforesaid real estate project thereof .Importantly, the land owner was party to the developments and revenue sharing along with Respondent nos. 1, 2/3 and 4 till the time of possession of the flat to the Complainant. 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, as a Promoter.

23. 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.

24. Coming to the question that whether the Complainant is entitled for the relief of refund of amount of Rs. Thirty Eight lakhs, seventy seven thousands six hundred and sixty along with interest and compensation, under provisions of the Act and the Rules made there under. The Complainant Shri Kanwarjeet Singh in the present case had booked a residential apartment with the Respondent promoters. 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 promoters were under a contractual obligation 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 flat buyer's agreement, the Respondent Promoters have failed to do so and none of the reasons given by the Respondent promoters are justified.

25. In the present case there exist clear and valid reasons for holding down that the Complainant is entitled to refund the entire amount. 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 within a period of thirty-six months of the date of the agreement as stipulated in the flat buyer's agreement dated 18.10.2011. The failure of the Respondent no. 1 to 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 he has 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 being not on fault. 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 timely possession of the flat which is the subject matter of present case.

26. 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 has been allotted under the terms of the Flat Buyer's agreement. 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.

27. In the present case the Complainant has paid Rs. Thirty Eight lakhs, seventy seven thousands six hundred and sixty 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 5 have objected to the refund, sought by the Complainant.

28. In the present case there is an inordinate delay of 9 years in the delivery of the flat whereas in accordance with the terms and conditions of the flat buyer's agreement, the possession was to be delivered in 36 months i.e. from the date of agreement dated 18th October 2011 whereas, as per the report of the Town & Country Planner, Divisional Town Planning Office, Kullu, showing the physical status of the building/flats clearly indicates 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, seventy seven thousands six hundred and sixty.

29. The issue is about the interest that the Complainant has sought @ 24%. The Hon'ble Bombay High Court in the landmark judgement of "*Neel Kamal realtors*" in para 261 of judgment has held 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.

30. 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 allottee has suffered being on no fault.. He has in fact suffered on more than one grounds by investing his hard earned money and making regular payments of the home loan instalments for a flat which has not been delivered to him on one count and involving himself with a prolonged legal dispute on the second count, not to mention about the humiliation that he has faced in requesting the Respondent promoters 1 to 5 for completing the construction and giving him possession of his promised flat. The Respondent promoters 1 to 5 have not shown any sincerity in delivering to him possession of flat while all promoters were busy in protecting their commercial interests to satisfy their greed for more money. The

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Authority is of this firm view that the Respondent promoters 1 to 5 have done an act of fraud on him and forced him to run from pillar to post to recover his hard earned amount and for the same these Respondent 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 promoters 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 promoters 1 to 5 that calls for imposition of a penalty under Section 61.

31. This Authority confers itself no powers under the provisions of the Act and Rules ibid to pass order against the Respondent No. 6 for restraining him to recover the EMI from the Complainant against the said loan till the time the Respondent No. 1 to 5 did not pay/return the entire amount with interest and compensation.

32. 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:

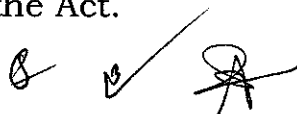


- i. The Complaint is allowed and the Respondents no. 1 to 5 are directed to refund a sum of Rs. Thirty Eight lakhs, seventy seven thousands six hundred and sixty along with interest at the SBI highest marginal cost of lending rate plus 2 % as prescribed under Rule 15 of the Himachal Pradesh Real Estate (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. fifteen 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 lakhs in case of any 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.

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- 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 from today onwards, till the compliance of this order. Further the bank accounts of the Respondent no. 1 to 5 pertaining to this project shall remain freezed/ unusable till payment as ordered is made to the Complainant and Authority. There shall not be any sort of alienation of any movable or immovable assets of the project till time the amount along with interest is refunded to the Complainant and penalty amount deposited in the account of the Authority.
- vi. The Complainant shall be at liberty to approach the Adjudicating Officer for compensation under Section 71 of the Act *ibid*.

Shrikant
Dr. Shrikant Baldi
CHAIRPERSON

Bhadale
B.C. Badajia
MEMBER

21.09.2020
Rajeev Verma
MEMBER