REAL ESTATE REGULATORY AUTHORITY,
HIMACHAL PRADESH

In the matter of :-

Complaint No. HP RERA/OFL/2020-19

Udayan Dutt through Power of Attorney Holder Rina Dutt resident of C-4/29, Safdarjung Development Area, New Delhi- 110016

.....Complainant

Versus

1. Shri Deepak Virmani resident of C-11, Chirag Enclave, New Delhi-110048
2. Shri Datta Ram resident of C-11, Chirag Enclave, New Delhi-110048

.....Non-Complainants/ Respondents

Present: - Shri Ashwani Kumar Dhatwalia, Advocate for the Complainant(s),
Shri Rishi Kaushal Advocate for respondent(s)

Final Date of Hearing (Through WebEx): 28.12.2021.
Date of pronouncement of Order: 20.01.2022.

ORDER

CORAM: - Chairperson and both Members

FACTS OF THE CASE

Facts in brief giving rise to the present case are

1. Brief facts in the complaint

The present complaint has been filed for refund of the amount of Rs.79,52,931/- paid by the complainant towards advance sale consideration to the respondents, along with interest @ 12% p.a. from

the date of payment till the receipt. It was pleaded by the complainant that in the year 2013, Sh. Deepak Virmani and Sh. Datta Ram entered into a partnership deed for the development of housing project under the brand name "Aamoksh @Kasauli" at Mohal Joul, Tehsil Kasauli, District Solan, Himachal Pradesh. Relying on the unequivocal representations made, the complainant booked Unit No.802 having total super area of 1, 342 sq.ft comprising of two bedrooms with attached toilets, one drawing cum dining room, one pantry and one balcony ("Residential Unit")for a total sale consideration of Rs.88 Lakhs. The complainant invested in the project by paying consideration to the respondent and the allotment letter and Agreement for sale was executed between the parties. It was pleaded that the complainant paid Rs.8,80,000/- (Rupees Eight Lakhs Thousand) vide Cheque no.166556 dated 30.05.2013 as part sale consideration and pursuance thereto, the respondent issued the letter of allotment dated 07.06.2013, thereby confirming the allotment of the residential unit. Thereafter, an agreement for sale was executed between the respondents and the complainant on 26.05.2015, wherein in Clause 19 of the Agreement for sale it was provided that respondent shall handover possession of the residential unit by the end of December, 2016. A copy of the Agreement for sale was annexed as annexure 4 with the complaint. It was further pleaded by the complainant that it was represented to him by the respondents as that they have requisite permissions and approvals from the competent authorities to set up a housing colony and it was further represented that the respondent had applied for approval under Section 118 of HP Land Tenancy & Land Reforms Act 1972 and the same is likely to be approved in the near future. It was further pleaded that the respondent represented that once approval is granted under the HP Land Tenancy & Land Reforms Act 1972, residential unit(s) would be transferred in the name of the allottees including the complainant. In addition to the part sale consideration paid on 30.05.2013, the complainant paid further installments as demanded

by the respondents and in total, the complainant pleaded that he has deposited Rs. 79,52,931/- towards the sale consideration. The details of part sale consideration paid by the complainant are the receipts issued by the respondent which are annexed with the complaint as annexure 5 to 13. Thereafter it was pleaded that the complainant received a demand Notice (Annexure 14) from respondent on 15.09.2016 wherein an amount of Rs.72,70,128/- is shown as received form the complainant and the complainant was asked to pay a further amount of Rs. 6,82,803/- which it has been pleaded by the complainant has been duly paid. Therefore it was pleaded that the total amount paid by the complainant to the respondent was Rs. 79,52,931/-. It was pleaded that respondent failed to complete the project and offer the possession of the Residential Unit to the complainant by the end of December, 2016 thereby violating the Agreement for sale. It was further pleaded that the Government of Himachal Pradesh initiated proceedings under Section 118 of HP Tenancy and Land Reforms Act, 1972 against respondent for violating the provisions of Section 118 of the Act. It was further pleaded that in February, 2020, the complainant came to know that the Court of District Collector, Solan HP, by its order dated 14.02.2019 held that the land for locating the Project along with other areas was acquired in violation of the said Act and ordered that the project land would vest in the Government of Himachal Pradesh, free from all encumbrances. It was further pleaded that thereafter an appeal was filed by respondents against the said order and the same was rejected. The project was not completed on the due date and thereafter the complainant demanded the refund of part sale consideration paid by him but the same was not refunded by the respondents. It was thus pleaded that respondents have acted in violation of the agreement for sale and failed to deliver possession as agreed for and therefore prayed for refund of amount of Rs.79,52,931/- along with interest @ 12% per annum from the date of deposit till refund. It was then pleaded that the complainant is residing

in UK and he is filing the present complaint through his mother and Power of Attorney Holder a copy of which was annexed with the complaint as annexure 15.

2. Reply

The respondent(s) in their reply contended that the present complaint is not maintainable and is liable to be dismissed. The respondent(s) have contended in specific that they have already submitted application for registration before this Authority and in view of declaration made there under in consonance with Section 4 (2) (1) (C) of the Act they have already mentioned the time limit for the completion of the present project. In the present case, the respondents have made declaration in terms of the aforesaid Section of the Act ibid that they would complete the project within a period of five years from the date of registration, i.e. 31st March, 2018. It was pleaded that since the application of the respondents is pending with the Authority and has not been rejected, no cause of action arises to the complainant against them. It was further pleaded that the agreement for sale executed between the parties is prior to the commencement of the Act and therefore, it was submitted that the complainant is not entitled to any refund or interest. It was further pleaded by the respondent that as per clause 36 of the agreement for sale, disputes interse the parties was to be resolved by taking recourse to arbitration proceedings and further as per clasue 37 of the agreement it was agreed between the parties that courts at New Delhi shall have exclusive jurisdiction in the present case and therefore it was pleaded that the instant complaint under the provisions of the RERD Act are not maintainable at this stage. It was further pleaded that as per Clause 20 of the agreement for sale, the respondents are duly entitled to a reasonable extension of time for delivery of possession of the said apartment, if the delay in delivering the possession on account of force majeure circumstances. It was then pleaded that State of Himachal

Pradesh had filed a case against the respondents on 29th March, 2016 under Section 118 of the Himachal Pradesh Tenancy & Land Reforms Act, 1972 before the Court of Ld. Collector, District Solan pertaining to the purchase of the project land. By its interim order 17.03.2017 the respondents were restrained from carrying out construction activities at the site by the Ld. District Collector, Solan. It was then pleaded that the aforesaid case was finally allowed against the respondents on 14th February, 2019 by the Court of Ld. Collector, District Solan and it was directed and ordered that the project land be vested with the State under Section 118 of the Himachal Pradesh Tenancy & Land Reforms Act, 1972. It was pleaded that the respondents preferred an appeal against this order, which was dismissed by the Ld. Divisional Commissioner on 29th February, 2020. This order was then further challenged before the Ld. Financial Commissioner, Shimla, by filing a revision. Therefore it was pleaded that delay in handing over possession was on account on account of force major clause due to litigation initiated by the State Government against the project land. It was further pleaded that it was for this reason that construction of apartments came to a halt on 17th March, 2017 and since then no construction is going on. Therefore it was prayed that due to aforesaid circumstances the complainant cannot ask for refund of the amount from the respondents and his complaint deserves to be dismissed at this stage. Further it was pleaded that the instant complaint is liable to be dismissed on the ground that Special Power of Attorney through which the present Complaint is filed is not attested by the Notary Public/Oath Commissioner. It was further pleaded that as per the law laid down by the various courts, the power of Attorney is required to be authenticated by the Notary Public as per section 85 of the Evidence Act. It was pleaded that purpose of authentication is necessary to ensure that the Notary Public satisfies himself regarding the identity of the executor as well as to the fact that the said person is executant of the Power of Attorney. It was further

pleaded that the complainant at present is residing in UK and as per section 33 of the Indian Registration Act, 1908 the case in which an Indian is residing abroad authorizes any person to file any case before any competent court through Power of Attorney that should be authenticated by a Notary Public. It was also pleaded that the Special Power of Attorney annexed with the present complaint as Annexure-15 case was neither notarized by any notary nor it was prepared on any stamp paper. Further it was also submitted that as per section 85 of the Evidence Act, signature of at least two witness was required to prove the execution of such Power of Attorney but in the present case no witness had signed the above said Special Power of Attorney to prove/authenticate that the same has been executed between Udayan Dutt and Smt. Rina Dutt. Therefore it was prayed that the complaint deserves to be dismissed on this ground alone. It was further submitted that before filling of the present complaint, members of Hon'ble RERA visited the project site and found that out of the 84 flats 32 have been constructed by the respondents along with parking floor, construction in Block 'A' and Block 'B' taken together and accordingly, the complaint needs to be rejected on this score too. Further an objection was also taken that the complainant has concealed the material facts form the Hon'ble Authority, regarding not impleading Aamoksh One Eighty Hospitality Pvt. Ltd. i.e. (A180) as party in array with the respondents as Aamoksh One Eighty Hospitality Pvt. Ltd. i.e. A180 had entered into Sales, Management & Service Agreement with Respondents (AOP) for selling the apartment & providing services to allottees. Therefore it was pleaded that the complaint deserves to be dismissed for non arraying of necessary parties to the case. On merits it was admitted by the respondent that the complainant was allotted Apartment No. 802 on 07.06.2013 and apartment buyer's agreement (agreement for sale) was executed with complainant on 26.05.2015 and in lieu of the same a sum of Rs 79,52,931/- was paid to the Respondents as part consideration.

The claim of complainant claiming 12% interest under clause 8 of the Agreement was denied being exorbitant and ex-facie unrealistic, unreasonable and unjustifiable. With these submissions respondents prayed for dismissal of the complaint.

3. Rejoinder

In rejoinder it was submitted that as per Form M read with rule 23(1) of HP RERA Rules 2017, the complaint is only required to be verified and such verification can be made either by the complainant or the authorized attorney of the complainant. It is further submitted that there is no specific mode prescribed for execution of power of attorney. Under Section 85 of the Indian Evidence Act, a power of attorney executed before and authenticated by Notary Public carries a presumption that it was properly executed. However, it was pleaded that the absence of such authentication would not render the document invalid and it is relevant to submit that the respondents have not disputed the execution of the power of attorney by the complainant (son) in favour of the attorney (his mother). In support of the aforesaid the complainant relied on the judgment passed by Hon'ble Delhi High Court in Grafitek International versus K.K. Kaura & Ors. (2002) 96 DLT 385) which held as under: *"Merely because the power of attorney is not duly notarized does not mean that the concerned person was not authorized to institute the suit. Notarization raises the presumption as to its authentication and no more. Notarization of power of attorney is a matter of procedure and raises the presumption of the authority of the person to institute the suit. In other words, it does not mean that power of attorney executed in favour of a particular person but not duly notarized does not confer pow*er upon the person to institute the suit." Therefore he submitted that merely because the notarized power of attorney not filed before this Hon'ble Authority, is not a fatal infirmity that would hit at the maintainability of the complaint itself. He further submitted that, in order to avoid any controversy, the complainant has got another Power

of Attorney authorising his mother Smt. Rina Dutt to file/ conduct the present proceedings. Thus he submitted that the objection qua power of attorney taken by the respondent is without any merits. It was further submitted that the complainant has cause of action under the provisions of Real Estate (Regulation & Development) Act, 2016. It was further reiterated that the respondents in terms of agreement for sale were to deliver the possession by the end of December, 2016 which they have failed to do so. It was further submitted that operation of the Act would apply to agreements executed prior to the coming into force of the Act where completion certificate has not been issued on the date of commencement of the Act. Thus it was pleaded that the operation of the provisions of the Act cannot be restricted only to the post-RERA agreement for sale. It was further submitted that registration of the project has nothing to do with its completion and for date of possession agreement for sale is the sacrosanct document. It was further submitted that the Authority under the provisions of the act has sufficient powers to order refund in terms of Section 18 & 19 of the Act. It was further submitted that jurisdiction to adjudicate disputes with the authority is alive despite arbitration clause in the agreement for sale as it was held that the provisions of this Act shall have effect, not withstanding anything inconsistent therewith contained in any other law for the time being in force. It was further pleaded that the Hon'ble Apex Court in the case of M/s Emaar MGF Land Ltd. & Anr. Vs AFTAB SINGH (2018 SCC online SC 2378) endorsed with the findings of NCDRC thereby holding that arbitration clause in buyers agreement cannot circumscribe the jurisdiction of a consumer courts. It was further submitted that it is settled law that the disputes which are to be adjudicated and governed by statutory enactments, established for specific public purpose to sub-serve a particular public are not arbitrable. The complainant further pleaded that in Ganesh Lonkar v DS Kuldarni Developers Ltd, the Maharashtra Real Estate Authority (Maha RERA) has taken the view

that, despite the existence of an arbitration agreement between the parities, it has the jurisdiction to adjudicate disputes that are the subject of the arbitration agreement. It was further submitted that respondents could not complete even 30 % of the total work. It was further pleaded that delay in handing over possession is not due to the force majure events and the litigation qua Section 118 of the HP Tenancy and Land Reforms Act pending against the respondent cannot be covered in force majure clause. It was further submitted that there are concurrent findings of various revenue courts while deciding proceedings under Section 118 that the property has been funded by non- agriculturist which is prohibited by law and this fact of funding by a non –agriculturist has been concealed from the complainant while entering into agreement for sale with him. It has further been submitted that stay was granted by the District Collector on 17.03.2017 which was beyond the date when possession was due i.e. by the end of December, 2016 and therefore it was submitted that the respondent cannot be permitted to take the benefit of stay orders of revenue court as they were passed beyond the agreed date of possession and possession was agreed to be delivered before the stay orders. It was further submitted that there has been a further delay of 4 years in delivering of possession and therefore it was prayed that the complaint may kindly be allowed.

4. <u>Site Inspection:</u>

The Authority during the course of hearing on 22nd October, 2020 felt that in addition to the specific points raised by the complainants, the progress of the project along with the quantum of construction activities at the site needed a due inspection. This Authority, being vested with the powers to call for information, conduct investigations under Section 35 of the Act ibid, after due deliberation and discussion upon the governing facts and circumstances of the present project in question decided to

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carry out site inspection on 9th November, 2020. The site inspection report reads as under:-

5. "Site inspection report

The Authority, as decided in the last hearing on 22.10.2020, visited the site of the project, "Aamoksh", a residential real estate on-going project, coming up at Mohal Joul, Tehsil Kasauli, District Solan on 09.11.2020. The Promoter has applied for registration of this project with HP, RERA.

The Authority led by Chairperson, Dr. Shrikant Baldi along with both members, Sh. Rajeev Verma ad Sh. Balbir Chand Badalia reached at the site along with Town Planner & other officials of the Divisional Town & Country Planning Office, Solan and Tehsildar Kasauli with other revenue officers of Kasauli Tehsil. The promoter/ respondent Sh. Deepak Virmani was present at site along with advocates Sh. Parveen Moudgil, Sh. Rajat Chopra and Ms. Ankita Malhotra. The complainants at the site were represented at the site by Advocate Sh. Ashwani Dhatwalia and Smt. Iti Sharma. The Authority proceeded to visit the premises along with all present and noted the following.

The property, an on-going real estate project, constructed on land comprised of khasra numbers 142/35/2, 143/35/2, 125/13/2 and 126/13/2 (old khasra numbers) that have since been changed to 129/1, 135, 128, 138/1, 146, 129, 136 (new khasra number) after settlement, at Mohal Joul, Tehsil Kasauli, District Solan, HP, which was purchased by the promoters in 2009. The property is approached from PWD road connecting Kasauli and Patta by way of an approach drive way that leads to lowest level of the property that has been constructed in steps. The lowest step, which is at the drive way level is named as Block "A", as per approved drawings. There are two semi finished sub blocks, out of total approved four sub blocks, constructed in Block "A", each having parking plus four storeys with parking floor being at the approach drive way level. The upper step/ level is at an approximate elevation of fifty feet from the

lower step/ level that comprises of Block B. There are two semi- finished sub blocks, out of total approved three sub blocks constructed in Block "B", each having parking plus four storeys with parking floor at the lowest level, which is proposed to be connected by way of car lift from the lowest approach level/ Block "A." There are 32 numbers of partly constructed flats/ apartments out of total 84 flats, along with parking floors, constructed at Block "A" and block "B" taken together. There is partly constructed block "C" constructed up to the plinth level and erected RCC columns above plinth of the block is constructed on the western side of the constructed block "B." The construction of the club building, proposed at the back of block "B" has not started. There are massive ashlar stone masonry retaining walls constructed in steps at the back of partly constructed Block "A" and Block B in such a way that every step becomes the approach passage to the respective floor of that block, which is proposed to be connected to the lift. There are no common staircases in the buildings.

The lower and upper steps/ levels having Block "A" and block "B" respectively have been connected by way of service steps constructed as part of retaining walls and site development on the extreme Western side, the only access presently available to reach the level of Block "B" and block "C" from block "A." The construction work of RCC Frame structure, concrete block masonry work, laying of electrical & sanitary piping & cement plastering work on internal and external walls of the sub blocks of Block "A" and block "B" has been completed in addition to the site development works.

The Authority, after taking the round of the site, interacted with the present parties and pursued the approved drawings and the revenue record of the project. The revenue record, latest Jamabandi dated 9th Nov, 2020 as produced by Tehsildar, Kasauli, was found to have an entry in the last column of Jamabandi stating that the case is sub judice for violation of Section 118 of the HP Tenancy and Land Reforms Act 1972

and restricted for all kind of further transactions as per report no. 326 dated 5.5.2016.

The Authority was informed about the above mentioned on-going proceedings, by the promoter in the first week of January, 2020 during the review of registration of the real estate projects. The Authority, after receiving five complaints from the allottees of the project, asked for the details of the violation of section 118, from the office of the Deputy Commissioner, Solan. The office of the Deputy Commissioner has informed that the proceedings in the case, titled as "State of Himachal Pradesh versus Sh. Datta Ram and others" for violation of the provisions of section 118 of the HP Tenancy and Land Reforms Act, in purchasing the said project land, were initiated and based on the investigation report received from the Supdt. of Police, Solan in 2015, stating that the land purchased being a benami transaction. The Deputy Commissioner, Solan passed an order on 14.02.2019 for vestment of suit land in the favour of State Government.

The aggrieved parties filed an appeal, 94/ 2019 before the Ld. Divisional Commissioner, Division Shimla. The Ld. Divisional Commissioner upheld the order dated 14.02.2019 passed by the Distt. Collector, Solan. Now the aggrieved party has preferred Revision Petition no. 72/ 2020 and 73/ 2020 before the Financial Commissioner (Appeals) Govt. of Himachal Pradesh.

The complainant Ashima Sharma was allotted unit no. 1204 which is in "C" block.

The complainants Devender Puggal and Deepak Kumar were allotted unit no. 501 which is in "B" Block.

The complainant Pawan Basant Borle was allotted unit no. 401 which is in "A" block.

The complainant Saket lakhotia was allotted unit no. 803 which is in "B" block.

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The complainants Sandeep & Vineeta Ahuja were allotted unit no. 706 which is in "B" Block.

As conveyed by the promoter, he has booked 16 units, out of which five are of the complainants, seven allottees are still willing to continue to be in the project and four allottees have been waiting for the decision from the Financial Commissioner (Appeals) Govt. of HP. There are no parallel proceedings going on in any court of judicial forum pertaining to this real estate project, as conveyed by the promoter, Sh. Deepak Virmani.

The Authority informed both the parties that the site visit report will be mailed to them and parties to file reply/ response to the submitted report, if any, to the authority within ten days with a copy to the opposite party.

The case is listed for arguments on 16th December at 11 am through Webex."

6. ARGUMENTS ADVANCED BY COMPLAINANT

Sh. Ashwani Kumar Dhatwalia, Ld. Counsel representing the complainant has argued that the complainant has booked flat no. 802 for a total sale consideration of Rs 88 lakhs out of which a sum of Rs 79,52931/- was paid and agreement for sale was executed on 26.05.2015 and in terms of clause 19 of this agreement possession was to be delivered by the end of December, 2016. It was argued that since the possession of the flat has not been delivered even after expiry of six years from the date of execution of the agreement for sale, the complainant is entitled for refund of the money paid, under Section 18 of the Act. It has been argued herein that considering the facts and circumstances of the case, the provisions of Section 18 (1) of the Act are invokable to hold the respondent(s) liable for refund of amount with interest. Further it was argued that the Authority has the jurisdiction to order refund of money with interest thereof.

7. That while arguing the matter further, the Ld. Counsel for the complainant has referred to Section 31 of the Act ibid, which 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. It has been further contended by the Ld. Counsel for the complainant that a 12 % rate of interest shall be made payable to the complainant in view of agreement for sale executed between the parties.

8. Highlighting the issue of benami transactions over the project land and the plea of 'force majeure' taken by the respondents in their reply, the arguing counsel for the complainant has argued herein that it was confirmed by the promoter at the time of execution of agreement for sale, that they are absolute owners in possession of the project land, which fact has been misconceived and misrepresented by them. To substantiate the issue, the Ld. Counsel made reference to the final order dated 14.02.2019 passed by the Ld. District Collector, Solan, referring to para 67 of the aforesaid order, whereby the Ld. Collector has observed in its findings that, *"All the bank transactions of Sh. Deepak Virmani and Sh. Datta Ram have not been reflected in the Income Tax returns for the year 2007 to 2014 which makes it amply clear that the land purchased by respondent no.1 to 3 was 'Benami' as several non-agriculturists have invested their money for the same."* Arguing further, the Ld. Counsel for the complainant has stated that the plea of force majeure as contended by the respondents is not sustainable as the same has not been defined in the agreement for sale between the parties. Further addressing to the issue of force majeure, the Ld. Counsel for the complainant has vehemently argued that the revenue proceedings under the provisions of Section 118 of the Himachal Pradesh Tenancy & Land Reforms Act, 1972 were initiated by the State of H.P on 29.03.2016 and the interim order restraining respondents to carry out construction activities at the site was passed on 17th March, 2017 by the Ld. Collector, District Solan, which was after the date of delivery of possession was over. Therefore, the respondents have intentionally and deliberately misled the complainant about the same factum and with malafide intent executed the agreement for sale for the aforesaid apartments under question. The Ld. Counsel

further argued herein that no notice/information regarding the revenue proceedings under Section 118 of the Himachal Pradesh Tenancy & Land Reforms Act, 1972 was ever conveyed to the complainant and it came to the knowledge of the complainant, only at the time when reply was filed by the respondents in consonance to the complaint filed before this Authority. Even otherwise, the Ld. Counsel for the complainant has contemplated that the pending revenue proceedings before the Competent Authority has no bearing on the issue of refund of amount along with interest as the same are not governed by the provisions of the Real Estate (Regulation & Development) Act, 2016.

9. In order to substantiate that the complainant is entitled for the return/ refund of amount advanced to the respondents along with interest, the Ld. Arguing Counsel has made reference to the judicial pronouncements of Hon'ble Apex Court :-

a. 'Prakash Nath Khanna versus C.I.T (2004) 9 SCC 686', whereby it has been laid down that the language implied in a statute is the determinative factor of legislative intent.

b. 'M/S Emaar MGF Land Ltd. & Anr. Versus Aftab Singh, 2018 SCC Online SC 2378, whereby the Hon'ble Apex Court had endorsed with the findings of NCRDC thereby holding that an arbitration clause in buyers agreement cannot circumscribe the jurisdiction of a Consumer fora, notwithstanding the amendments made to Section 8 of the Arbitration and Conciliation Act.

c. Order of Maharashtra RERA in ' Ganesh Lonkar versus DS Kulkarni Developers Ltd.' The Maharashtra Real Estate Authority (Maha RERA) has taken the view that, despite the existence of an arbitration agreement between the parties, it has the jurisdiction to adjudicate disputes that are the subject of the arbitration agreement.

10. Arguments and Written Submissions filed by Respondents

The respondents have filed written submissions in the case and also have argued that the project in question in the present case is an

ongoing project and the same was started much prior to the implementation/Adoption of Real Estate (Regulation and Development) Act, 2016 (RERD Act) in the State of HP. Application for registration of the said project namely *"Aamoksh @ Kasauli"* before this Hon'ble RERA was submitted on 31.01.2018 vide Ref No. RERAHPSOP01180024 and the same is still pending. It was argued that bare reading of section 3 of the Act along with the findings of the Hon'ble Apex court **M/s New Tech Promoters and Developers v. State of UP & Ors. Etc.,** it becomes absolutely clear that the provisions of the RERD Act are not applicable on the present ongoing project. It was argued that proviso to Section 3 of the Act clearly provides that the provisions of RERD Act or the rules and regulations made there under shall apply to such projects from the stage of registration and therefore in the instant case also, the real estate project started before the commencement of RERD Act and has not been registered till today and therefore the Authority has no jurisdiction to decide the present case. The Hon'ble Supreme Court in **M/s New Tech Promoters and Developers v. State of UP & Ors. Etc.** has in Para 54 further clarified the said issue by specifically holding that *"From the scheme of the Act, 2016, its application is retroactive in character and it can safely be observed that the projects already completed or to which the completion certificate has been granted are not under its fold and therefore, vested or accrued rights, if any, in no manner are affected.* ***At the same time, it will apply after getting the on-going projects and future projects registered under Section 3 to prospectively follow the mandate of the Act, 2016"*** It was argued on the basis of written submissions filed that provisions of the Real Estate (Regulation and Development Act), 2016 and Himachal Pradesh Tenancy and Land Reforms Act are in addition not in derogation with each other as is clear from Section 88 of the Real Estate (Regulation and Development) Act 2016. It was further argued on the basis of written submissions filed that Section 88 says that the provisions of Real Estate (Regulation and

Development) Act 2016 shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force. Furtherit was argued that Section 118 of the H.P. Tenancy and Land Reforms Act, 1972 deals with barring of transfer of land to non-agriculturists. It was further argued that in the instant case, the State of Himachal Pradesh on dated 29.03.2016 has filed a case against the respondents titled as **"State of Himachal Pradesh V. Datta Ram and Others"** under Section 118 of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 before the Hon'ble Court of District Collector, District Solan, pertaining to challenging the purchase of the project land. It was further argued that during the pendency of the aforesaid case the Hon'ble District Collector stayed the development/ construction works on the project site vide order dated 17.03.2017 and also restrained the respondents to carry out any further development works on the project site till further order. It was argued that the aforesaid case filed by the State of Himachal Pradesh has been allowed against the respondents by the Hon'ble Court of District Collector on dated 14.02.2019 directing the Government of Himachal Pradesh that there is a violation of section 118 of the Act and hence, ordered to vest the suit land so purchased by the respondents along with structures if any, standing upon it free from all encumbrances under section 118 of the H.P. Tenancy and Land Reforms Act, 1972. It was argued on the basis of written submissions filed that the construction/development works of the apartment has come to halt since 17.03.2017 due to the aforesaid force majeure circumstances i.e. the order of the court. The respondents filed an appeal before the Divisional Commissioner, Shimla challenging the aforesaid order passed by the Ld. District Collector. The Ld. Divisional Commissioner without considering the submissions made by the respondents dismissed the said appeal on 29.02.2020. Further aggrieved, from the aforesaid order passed by the Ld. Divisional Commissioner, Shimla the respondents again filed an appeal before the Hon'ble Court of Financial Commissioner, on dated

07.07.2020. The Hon'ble Court of Financial Commissioner after considering the submissions of the respondents found infirmity in orders passed by the courts below and remanded the matter to the Ld. Collector for adjudication afresh vide order dated 01.10.2021. Copy of the said order is annexed with the written submissions as annexure R-10. Therefore it was argued by way of written submissions that conjoint reading of section 88 of Real Estate (Regulation and Development) Act, 2016 (RERA Act) in harmony with the force majeure circumstances that arose due to proceeding and orders under Section 118 of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 provides sufficient reasons not to proceed further till the finalisation of the proceedings under Section 118 of the Himachal Pradesh Tenancy and Land Reforms Act, 1972. It was argued on the basis of written submissions filed that the intent of the statute in section 88 the RERD Act, 2016 very clear states that the provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force. It was argued on the basis of written submissions filed that since there is no inconsistency between the provisions of RERD Act, 2016 and the Himachal Pradesh Tenancy and Land Reforms Act, 1972 thus Section 88 of RERD Act and Section 118 of Himachal Pradesh Tenancy and Land Reforms Act, 1972 should be read together. It was argued that it is profoundly clear from the intent of Section 88 of RERD Act that the application of other laws is not barred. It was argued on the basis of written submissions filed that in view of provisions contained in Section 88 of the RERD Act the proceedings in the present case are liable to be stayed till the finalization of the proceedings under Section 118 of the Himachal Pradesh Tenancy and Land Reforms Act, 1972. It was further argued that so far as the provisions of Article 254 of The Constitution of India coming in to play as held in previous connected matters pronounced vide order dated 26.02.2021 are concerned, it is submitted that same does arise at all as in view of the submissions made above as

there is no inconsistency in between the provisions of RERD Act and of Himachal Pradesh Tenancy and Land Reforms Act, 1972 and hence the question of repugnancy does not arise. It was argued on the basis of written submissions filed that as there is no inconsistency between the Central Act and State Legislation so the very applicability of Article 254 of Indian Constitution in the instant case does not arise. It was further argued on the basis of written submissions filed that it is clearly provided in Deep Chand v. State of Uttar Pradesh AIR 1959 SC 648 that repugnancy arises between two statutes when they occupy the same field and are completely inconsistent with each other and have absolutely irreconcilable provisions. Further the Hon'ble Supreme Court held in the case of Bharat Hydro Power Corpn. Ltd. v. State of Assam, (2004) 2 SCC 553, as well as in the case of Central Bank of India v. State of Kerala, that every effort should be made to reconcile the two enactments and construe them both, in such a way, so as to avoid them being repugnant to each other. If the two enactments operate in different fields without encroaching upon each other, then there will be no repugnancy. It was then submitted that the broad majority of decided cases, as illustrated by the decision of the three judge bench of the Supreme Court in Vijay Kumar Sharma v. State of Karnataka, AIR 1990 SC 2072, have favoured the view that the inconsistency must arise in relation to matters in the Concurrent list. The court has declared that the question of repugnancy will arise only if one Act has been enacted by the Parliament and the other by the State and both the fields refer to subjects in List III. It was argued on the basis of written submissions filed that the question of repugnancy will not arise if the Parliament has enacted two separate Acts, one under the Central and the other under the Concurrent List. It was then argued that all the contracts in India are governed by the Indian Contract Act, 1872. The Act deals with the framing and validation of contracts or agreements and is the central legislation. It was submitted that in the present case following clauses of agreement to sell

dated 26.05.2015 are in question: *"20. That the Respondent agrees that the sale of the said Unit/ Apartment is subject to force majeure clause which interalia includes delay on account of non-availability of steel, cement, other construction material water or electric supply or slow down, strike or due to a dispute with construction agency employed by the Respondent, war, civil commotion or act of God or any notice, order, rule, notification of the Government and/ or other public or competent authority or on account of non-issue of Project Completion Certificate/ Occupation Certificate or on account of any order of any court effecting the construction work of the project or any reason beyond the control of the Respondent and in any of the aforesaid events the Respondent shall be entitled to reasonable corresponding extension of time for the delivery of possession of the said Unit/ Apartment on account of force majeure Circumstances."* *"36. That any dispute arising out of the terms and conditions of this this Agreement to Sell, including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties, shall be settled amicably by mutual discussion, failing which the same shall be settled through Arbitration proceedings to be conducted by a Sole Arbitrator to be appointed by the Respondent. The Arbitration proceedings shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996. The venue for conducting the Arbitration proceedings shall be New Delhi. The Arbitration Award shall be final and binding on the parties."* It was argued on the basis of written submissions filed that in the present case the agreement for sale is dated 26.05.2015 which is much prior to the implementation and adoption of the present Act. Secondly, in view of the discussion made above it was argued that the applicability of provision of RERD Act in case of ongoing projects will be after registration of the project; especially in the present case where the registration of the project in question is still pending since 2018 which makes it abundantly clear that the provision of RERD Act are not applicable and the agreement in question can only be governed by the

provisions of the Indian Contract Act. It was submitted that the intent of legislation while adding section 88 of RERD Act makes it crystal clear that by introducing the new law the effect and jurisdiction under the old and settled law cannot be taken away rather it says that the provisions of this Act (RERD Act) shall be in addition to, and not in derogation of, the provisions of any other law and it is not for the first time such provisions have been made in the statute and almost every major act carries this provision so as to secure the interests of justice can be secured. It was argued on the basis of written submissions filed that in the present case since necessary clarification has been provided in section 3 of the RERD Act reproduced (supra) further clarification by Hon'ble Supreme Court in **M/s New Tech Promoters and Developers v. State of UP & Ors. Etc.** has been provided in Para 54.In view of which it is settled that the Agreement in the present case is to be governed under the Indian Contract Act and Arbitration and Conciliation Act rather than new legislation i.e. RERD Act, especially when the said agreement as executed is much prior to the enactment of the said Act. It was argued on the basis of written submissions filed that the Honorable Supreme Court has in M/s New Tech Promoters and Developers v. State of UP & Ors. Etc. also clarified in its Para 54 (supra) holding that the said Act will apply only after getting the on-going projects and future projects registered under Section 3 of the Act and further proviso to section 3 of the Act itself also clarifies that the provisions of this Act or the rules and regulations made thereunder, shall apply to such projects from that stage of registration. It was argued on the basis of written submissions filed that it is an admitted position that the project in question is not registered in spite of the fact the same has been applied in 2018 and the said registration is still pending, hence it is clear that the present project does not even fall within the ambit of RERD Act and therefore the Authority lacks jurisdiction to try and adjudicate the present complaint. It was further argued that it is a general growing notion that this especial

enactment "The Real Estate (Regulation And Development) Act, 2016" is only created to protect the rights of the allottees/Consumers which is apparent from the various order passed in this regard. It was submitted that the said notion is very much against the object and purpose of the Act which is evident from its preamble. It was submitted that the very purpose and object of the Act clearly provides for regulation and promotion of the real estate sector in a transparent manner. It was submitted that the preamble clearly dispels the general notion that the act is meant only for the purpose of prosecuting and penalizing the real estate companies, Promoters, Developers and this object has been strengthened by Hon'ble Apex Court in the case of Bikram Chatterji v. Union of India, (2019) 19 SCC 161, at page 380 at para 131 holding that *"No doubt about it as submitted on behalf of Amrapali Group of Companies, that the provisions of RERA are for protecting the interests of promoters also. No doubt about it that RERA intends to protect the interests of the promoters and homebuyers both."* Further it was submitted that the different Authorities in order to implement this special enactment and strike a balance between different stakeholders under the Act created a threshold of 40%, and particularly Haryana Real Estate Regulatory Authority at Gurugram has refrained from allowing refund in cases where greater than 40% of the overall work on the project has been completed. The Authority has weighed in favour of interest of the allottees who wish to continue in the project, and upholding that the cases of refund entail withdrawal of funds from the account kept for finishing the work on a project, has indeed allowed interest on delayed possession, thereby ruling in favour of finishing of work on the project. This is more so particularly in cases where multiple buyers wish to withdraw from the project. In a recent case decided by the Haryana RERA Authority in Krishan Wats vs. CHD Developers Ltd. (Complaint No. 578 of 2019, MANU/ RR/0213/2019, decided on 30.05.2019, the Authority noted the report of the Local Commissioner regarding overall

progress of the project at approximately 40- 45%. It was held by the Authority in this case that, "keeping in view the interest of allottees and the completion of the project, the authority is of the view that rather than allowing the refund, the complainant is entitled to delayed possession charges." In Aman Sood vs. BPTP Ltd. (Complaint No. 1194 of 2018, MANU/ RR/0323/2019, decided on 13.03.2019.), the Haryana RERA Authority again appointed a Local Commissioner to report about the actual work competed on the project. Taking into consideration the physical completion of the project at 45%, refund was not allowed. In another case decided by the same Authority, Abhishek Agarwal and Ors. vs. Cosmos Infra Engineering India Pvt. Ltd. Complaint No.1834 of 2018, MANU/RR/0165/201, taking into consideration the report of the Local Commissioner, it was noted that the physical progress of the overall project was approximately 55-60 per cent, and the Authority refused to allow refund of the investment to the Allottee. It was argued on the basis of written submissions filed that it was opined by the Authority that allowing of refund of investment to the Alllottee would have an adverse overall impact on the completion of the project, and to the interest of other allottees as well who wish to continue in the project. However, the Authority did order delayed possession charges at prescribed rate of interest i.e. 10.70% per annum for every month of delay, from the due date of possession till the handing over of possession. It was argued on the basis of written submissions filed that State of Himachal Pradesh being a hilly state and it is an admitted position that the development and construction in hilly area is much difficult and harder, the threshold needs to be lesser than in the plain areas. It was argued by way of written submissions that in the present case, the site inspection conducted by this Hon'ble Authority itself suggests that development on site in spite of the force majeure circumstances is more than 40%, hence even apart from the submissions made above, the claim of the complainant for refund of amount does not sustain on this ground as

well. Further it was submitted by way of written submissions that the Hon'ble Apex court in M/s New Tech Promoters and Developers v. State of UP & Ors. Etc in para 85 of the jjudgement very unambiguously stated that; *"The provisions of which a detailed reference has been made, if we go with the literal rule of interpretation that when the words of the statute are clear, plain and unambiguous, the Courts are bound to give effect to that meaning regardless of its consequence. It leaves no manner of doubt and it is always advisable to interpret the legislative wisdom in the literary sense as being intended by the legislature and the Courts are not supposed to embark upon an inquiry and find out a solution in substituting the legislative wisdom which is always to be avoided."* Therefore in view of the above it was prayed that the complainant has no cause of action to file the instant Complaint under RERD Act and the complaint filed is not maintainable and the same deserves to be dismissed with exemplary costs, in the interest of justice.

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

We have heard the arguments advanced by the Ld. Counsels for the complainant & respondents and have perused the record pertaining to the case. This Authority is of the view that there are four issues that require the consideration and adjudication, namely:-

- Whether this Authority has the jurisdiction to adjudicate upon the present Complaints?
- Whether the subsequent filing of valid power of attorney ratifies the prior acts of holder of power of attorney to file and maintain the complaint on behalf of executant?
- Whether the complainants are entitled to get the refund of the money along with interest or not?
- What are the implications in the present Complaint, of the judgment in revision petition no. 70 of 2020 dated 1.10.2021 passed by the Ld. Financial Commissioner (Appeal) Government of

Himachal Pradesh under the H.P. Tenancy of Land Reforms Act 1972 whereby the matter was remanded back to Ld. Collector for adjudication?

12. Whether this Authority has the jurisdiction to adjudicate upon the present Complaints or not?

It was submitted on behalf of the complainant that the Authority in terms of Section 18 read with Section 31 of the Act has necessary jurisdiction to adjudicate the complaint filed by complainant for refund of the amount. It was further the case of the complainant that the project land is a benami transaction as held by the ld. Revenue Courts while adjudicating the issue of Section 118 of the H.P. Tenancy and Land Reforms Act 1972 and this fact was not disclosed to the complainant and he was made to understand at the time of execution of agreement for sale that the respondents are absolute owners of the project land. In reply the case of the respondents was that agreement for sale was executed much prior to the commencement of the RERD Act and the Act applies only to the projects that are registered with the Authority and as such the project in question being not registered with the Authority it was argued that Authority has no jurisdiction. It was submitted that the project proponent have applied for the registration of the project with the Authority but the registration is still pending therefore it was submitted that a complaint with respect to project in question qua which registration has been applied by promoter but the same has not been granted is not maintainable in view of section 3 of the Act along with the finding of the Hon'ble Apex Court in para 54 of the Judgment in M/s New Tech Promoters and Developers v. State of UP & Ors. Manu/SC/1056/2021. It was further the case of the respondents that proceedings qua 118 are pending before Ld. District Collector as the matter was remanded by the Ld. Financial Commissioner, Himachal Pradesh and therefore present proceedings before the Authority should

be kept pending till the decision in that case. Further it was the case of the respondent that in the present matter the issue regarding title of land is pending before the Ld. District Collector, Solan and hence this matter is subjudice before the other court and till then the proceedings in the present matter be stayed.

13. The Ld. Counsel for complainant argued that the RERD Act, 2016 is an independent Act and the proceedings under this Act, cannot be stalled because the matter regarding title of land on the issue of it being a benami transaction is pending before a revenue Court (i.e. ld. District Collector).

14. We have considered the points raised by Ld. Counsels for both the parties. 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 18 (1) of the Act reads as follows-

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

(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

(b) Due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building. as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act.

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

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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."

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...."

15. Section 34(f) of the Act empowers the Authority to ensure compliance of the obligations cast upon the promoters and Section 11(4) (a) cast obligation on the promoter to implement "agreement for sale". Further,

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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 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 and imposition of penalty under the Act whereas the compensation is to be adjudged by the Adjudicating Officer under Section 71 of the Act ibid.

16. Further Section 88 of the Act provides as follows:

"Section 88 Application of other laws not barred- The provision of this Act shall be in addition to, and not in derogation of, the provisions of any law for the time being in force".

Thus it is clear that the provisions of the Act ibid are in addition to an not in derogation of provisions of any other law. Further the 'res' in present case is refund of money along with interest whereas, the 'res' before the Ld. District Collector, Solan is of benami transaction of land of this project, and hence very different. The Act governing refund of money is the Real Estate (Regulation and development) Act 2016 whereas the one dealing with the issue if benami transactions is HP Tenancy and Land Reforms Act 1972. The two Acts are dealing in entirely different fields. RERD Act has been enacted by the Centre by the power vested in it by virtue of entries 6 & 7 & 46 in list III Concurrent list of the seventh schedule of the Constitution of India. Both centre and state governments can legislate on matters under concurrent list but Article 254 of the Constitution of India states that central laws will prevail over state laws on matters under this list. The proceedings are independent of the other laws and this Authority has full jurisdiction to decide the present

complaints as per the provisions of the Real Estate (Regulation and Development) Act, 2016. Therefore, the proceedings under this Act for refund cannot be kept pending for the reason that some other proceedings pertaining to the project under different Act dealing on different issue is pending before any other court/ Authority.

17. Now promoter has raised an issue that a complaint with respect to project in question qua which registration has been applied by promoter but the same has not been granted is not maintainable in view of section 3 of the Act along with the finding of the Hon'ble Apex court M/s New Tech Promoters and Developers v. State of UP & Ors. Manu/SC/1056/2021. For this purpose Section 3 of the Act is as under

> Section 3. Prior registration of real estate project with Real Estate Regulatory Authority-(1) No promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project or part of it, in any planning area, without registering the real estate project with the Real Estate Regulatory Authority established under this Act:
>
> Provided that projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act:
>
> Provided further that if the Authority thinks necessary, in the interest of allottees, for projects which are developed beyond the planning area but with the requisite permission of the local authority, it may, by order, direct the promoter of such project to register with the Authority, and the provisions of this Act or the rules and regulations made thereunder, shall apply to such projects from that stage of registration.
>
> (2) Notwithstanding anything contained in sub-section (1), no registration of the real estate project shall be required-

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(a) where the area of land proposed to be developed does not exceed five hundred square meters or the number of apartments proposed to be developed does not exceed eight inclusive of all phases:

Provided that, if the appropriate Government considers it necessary, it may, reduce the threshold below five hundred square meters or eight apartments, as the case may be, inclusive of all phases, for exemption from registration under this Act;

(b) where the promoter has received completion certificate for a real estate project prior to commencement of this Act;

(c) for the purpose of renovation or repair or re-development which does not involve marketing, advertising selling or new allotment of any apartment, plot or building, as the case may be, under the real estate project.

Explanation.-For the purpose of this section, where the real estate project is to be developed in phases, every such phase shall be considered a stand alone real estate project, and the promoter shall obtain registration under this Act for each phase separately.

18. From the plain reading of language used in Section 3 , it is clear that the registration of ongoing project is to be done within the period of three months from the date of commencement of the Act. Section 3 (1) sets out a disability that results from failure to register. It provides that promoters shall not advertise, market, book, sell or offer for sale any apartment or building in any real estate project without registering the real estate project with the Authority. Section 3 (2) is a non- obstante clause vis a vis Section 3 (1) and provides circumstances in which no registration of a Real Estate Project shall be required. Section 3 (2)(b) indicates one such circumstances where the promoter has received the completion certificate for real estate project prior to commencement of the Act. The issue concerns the retroactive application of the provisions of the Act 2016 particularly, with reference to the ongoing projects. Under Chapter II of the Act 2016, registration of real estate projects became mandatory and to make the statute applicable and to take its

place under Sub-section (1) of Section 3, it was made statutory that without registering the real estate project with a real estate regulatory authority established under the Act, no promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner a plot, apartment or building, as the case may be in any real estate project but with the aid of proviso to Section 3(1), it was mandated that such of the projects which are ongoing on the date of commencement of the Act and more specifically the projects to which the completion certificate has not been issued, such promoters shall be under obligation to make an application to the authority for registration of the said project within a period of three months from the date of commencement of the Act. With certain exemptions being granted to such of the projects covered by Sub-section (2) of Section 3 of the Act, as a consequence, all such home buyers agreements which have been executed by the parties inter se has to abide the legislative mandate in completion of their ongoing running projects.

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

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

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

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

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

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

20. A bare perusal of the object and reasons manifest that the Act does not take away the substantive jurisdiction, rather it protects the interest of homebuyers where project/possession is delayed and further that the scheme of the Act has retroactive application, which is permissible under the law. The literal interpretation of the statute manifests that it has not made any distinction between the "existing" real estate projects and "new" real estate projects as has been defined under Section 2(zn) of the Act. The key word, i.e., "ongoing on the date of the commencement of this Act" by necessary implication, ex-facie and without any ambiguity, means and includes those projects which were ongoing and in cases

where only issuance of completion certificate remained pending, legislature intended that even those projects have to be registered under the Act. Therefore, the ambit of Act is to bring all projects under its fold, provided that completion certificate has not been issued. The clear and unambiguous language of the statute is retroactive in operation and by applying purposive interpretation of Rule of statutory construction, only one result is possible, i.e., the legislature consciously enacted a retroactive statute to ensure sale of plot, apartment or building, real estate project is done in an efficient and transparent manner so that the interest of consumers in the real estate sector is protected by all means and Sections 13, 18(1) and 19(4) are all beneficial provisions for safeguarding the pecuniary interest of the consumers/allottees. In the given circumstances, if the Act is held prospective then the adjudicatory mechanism under Section 31 would not be available to any of the allottee for an on-going project.

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

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

22. In the instant case, though the agreement for sale between the parties was executed on 26.5.2015 i.e. prior to the Act came into force but the transaction is still incomplete and the contract has not concluded. The possession of the unit was not delivered and the conveyance-deed was also not executed on the date of filing of the complaint. It is an admitted fact that the present project is an ongoing project. The respondents have initiated the process of registration of the real estate project and applied

the same on 31 January, 2018 as per the record of the Authority the provisional registration number allotted to the applicant was RERAHPSOP01180024 and the office of the Authority on the issue of registration had reverted back to the promoters/ respondents with some objections/ observations on 21st March, 2018 but since the year 2018 the respondents/ promoters have not complied with the objections/ observations. The date of commencement of Section 3 of the Act was 1st May, 2017 and therefore all the projects that are ongoing had to apply within three months beyond the date of 1st May, 2017. The promoters of project in question had applied for registration only on 31st January, 2018 and thereafter when on 21st March, 2018 the application for registration of the project was reverted back to the promoter to deal with certain observations/ objections since then the same have not been complied with therefore they are to be dealt with separately under the provisions of Section 59 & 61 of the Act.

23. Looking at the background aims and objects to bring a new Act of 2016, it was realised that Consumer Protection Act and similar laws did not provide for effective, simpliciter and overall remedy for consumers in real estate sector, or that the possible remedy for consumers in real estate sector, or that the possible mischief or defects in meeting the needs of such consumers were required to be dealt with by the RERD Act of 2016 will have to be looked from that perspective and with harmony We would apply the "mischief rule" and "purposive construction" . In Heydon's case it was held that four matters are required to be taken into consideration in constructing an Act-

i. What was the law before making of the Act,
ii. What was the mischief or defect for which the law did not provide
iii. What is the remedy that the Act has provided, and
iv. What is the reason of the remedy

The rule also directs that the courts must adopt that construction which " shall suppress the mischief and advance the remedy"

The mischief for which this law was enacted was that allottees were duped into real estate transactions by the promoters and thereafter in case promoters defaulted in complying with the commitments, allottees were left in lurch and made to undertake the lengthy process of litigation in regular civil courts. The scheme of the Act and the judgment of the Hon'ble Supreme Court read in its entirety lead to the conclusion that complaints qua projects that are required to be registered but may or may not be registered, can be entertained and decided by the Authority.

24. To hold it otherwise would imply that if promoter does not register itself with the Authority then no complaint of an allottee could be entertained meaning thereby that the Authority has no jurisdiction to deal with same. This would be an absurd interpretation of the Act and the judgment as it would mean that if a promoter deliberately chooses not to get himself registered under the Act, the Authority cannot assume jurisdiction over the said project and entertain complaints with respect thereto or the allottee would be made to wait till the promoter is directed to register and the registration process is complete. Further there can be situation where the promoter who has accepted money from an allottee and neither registered the project nor completed the same either. In that case even if the Authority constituted under RERD Act directs it to initiate registration but subsequently due to various reasons such as non compliances under the Act or rules registration is not granted what would be the remedy and fate of the allottee who had invested hard earned money in the project.

25. The promoter in the aforesaid circumstances would take the defence that he had applied for registration but due to some reasons registration has not been granted therefore the authority has no jurisdiction to entertain or decide the present complaint. This interpretation would make Real Estate Regulatory Authority ineffective and the mischief under the Act

would not be taken care of. For the sake of repetition the mischief was that at times allottees were duped into transaction in real estate and thereafter when projects were not complete or there was default by the promoters, the allottee had to take recourse to lengthy process of litigation in regular civil courts to get the orders for refund where the entire burden to prove the case was on the allottee. The Act was created to redress this mischief and that is why the preamble of the Act reads as under:

An Act to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and ***to establish an adjudicating mechanism for speedy dispute redressal*** *and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto.* Therefore one of the basic purposes of the Act is to establish an adjudicating mechanism for speedy dispute redressal

26. To conclude, under the Act there are only two categories of projects. One category is the projects that fall within Section 3 (2) of the Act and have already received completion certificate prior to the date of commencement of the Act. No complaint against such projects can be entertained. But then there is second category where the project is required to be or liable to be registered under the Act but may or may not have been registered. In the second category there can be four different situations.

- Projects registered with the Authority having registration certificate
- Projects where registration has not been applied

- Projects where registration has been applied for but the process is not completed yet.
- Projects where registration has been applied for and the same was rejected or revoked or cancelled.

27. The Authority hereby holds that in all the aforesaid four conditions, the complaints by the allottees are maintainable and the Authority would have all the jurisdiction to try these complaints as any other interpretation would render the allottees remedy less for which Act was created defeating the purpose of the Act and would relegate them to other forums. Further even otherwise under Section 31 of the Act the word used is aggrieved person and section 31 nowhere says that aggrieved person has to be in relation to a registered real estate project only.

Section 31(1) of the Act reads as under:

> 1) Any **aggrieved person** may file a complaint with the Authority or the adjudicating officer, as the case may be, for any violation or contravention of the provisions of this Act or the rules and regulations made thereunder against any promoter allottee or real estate agent, as the case may be.

28. Thus, the concept of retroactivity will make the provisions of the Act and the Rules applicable to the agreements for sale entered into between the parties before the coming into operation of the Act and the Act will apply to projects that are ongoing or future projects that are required to be registered or are liable to be registered but may or may not have been registered under the Act as per Section 3 Therefore in view of the above in this case also the complaint with respect to project in question qua which registration has been applied by promoter .but the same has not been finally granted is maintainable and Authority has jurisdiction to try the matter, as on the issue of registration the application was reverted back to the promoter by the Authority with some observations/

objections but he has neither complied with the same nor contacted the Authority again thereafter.

29. **Whether the subsequent filing of valid power of attorney ratifies the prior acts of holder of power of attorney to file and maintain the complaint on behalf of the executant?**

The respondents raised an issue that the instant complaint is liable to be dismissed on the ground that Special Power of Attorney through which the present complaint is filed is not attested by the Notary Public/Oath Commissioner. It was further the case of the respondent that as per the law laid down by the various courts, the power of Attorney is required to be authenticated by the Notary Public as per section 85 of the Evidence Act. It was further the case of the respondent that for the purpose of authentication it is necessary to ensure that the Notary Public satisfies himself regarding the identity of the executor as well as to the fact that the said person is executant of the Power of Attorney. It was the case of the respondents that the complainant at present is residing in UK and as per section 33 of the Indian Registration Act, 1908 the case in which an Indian is residing abroad authorizes any person to file any case before any competent court through Power of Attorney that should be authenticated by a Notary Public. It is further the case of the respondents that the Special Power of Attorney annexed with the present Complaint as Annexure-15 was neither notarized by any notary nor it was prepared on any stamp paper. Further it was also submitted that as per section 85 of the Evidence Act, signature of at least two witness were required to prove the execution of such Power of Attorney but in the present case no witness had signed the above said Special Power of Attorney to prove that the same has been executed between Udayan Dutt and Mrs. Rina Dutt. Therefore it was prayed that the complaint deserves to be dismissed on this ground. The complainant submitted that as per the provisions of the Act and Rules, the complaint is only required to be verified and such varication can be made either by the complainant or

the authorized attorney of the complainant. It was further the stand of the complainant that there is no specific mode prescribed for execution of power of attorney. Under Section 85 of the Indian Evidence Act, a power of attorney executed before and authenticated by Notary Public carries a presumption that it was properly executed. It was submitted that the absence of such authentication would not render the document invalid and it is relevant to submit that the Respondent has not disputed the execution of the power of attorney by the Complainant (my son) in favour of the attorney (his mother). In support of the aforesaid, the complainant relied on the judgment passed by Hon'ble Supreme Court in Jugraj Singh and others versus Jaswant Singh and others AIR 1971SC 761, Varun Pahwa Vs. Renu Chaudhary AIR 2019 SC1186 and judgment of Hon'ble Delhi High Court in Grafitek International versus K.K. Kaura & Ors. (2002) 96 DLT 385). Therefore he submitted that merely because the notarized power of attorney was not filed before this Hon'ble Authority, it is not a fatal infirmity that would hit at the maintainability of the Complaint itself. He further submitted that, in order to avoid any controversy, the complainant has got another Power of Attorney authorising his mother Smt. Rina Dutt to file/ conduct the present proceedings . Thus he submitted that the objection qua power of attorney taken by the respondent is without any merits.

30. The Authority has gone through the contentions on behalf of both the parties and also perused the record. Any resident of India residing abroad shall for the purpose of execution of power of Attorney prepare it on stamp paper or plain paper. The Stamp duty should be paid in India within three months of receipt in India as applicable in the state where it is to be submitted. After affixing photographs it shall be signed by the executor and attested by witnesses in front of official of Indian Embassy/Consulate/High Commission in that country where the POA executant/maker resides. The official will also attest the signature of POA executants/maker. Section 3 of **The Diplomatic And Consular Officers (Oaths And Fees) Act, 1948** reads as under

3. Powers as to oaths and notarial acts abroad.—(1) Every **diplomatic or consular officer** may, in any foreign country or place where he is exercising his functions, administer any oath and take any affidavit and also **do any notarial act which any notary public may do** within 3 [a State]; and every oath, affidavit and notarial act administered, sworn or done by or before any such person shall be as effectual as if duly administered, sworn or done by or before any lawful authority in 4 [a State].

(2) Any document purporting to have affixed, impressed or subscribed thereon or thereto the seal and signature of any person authorised by this Act to administer an oath in testimony of any oath, affidavit or act, being administered, taken or done by or before him, shall be admitted in evidence without proof of the seal or signature being the seal or signature of that person, or of the official character of that person.

31. Therefore from the above it is certain that if a power of attorney has been signed by the executor and witnesses and it bears the seal and signature of diplomatic or consular officer it is sufficient proof of its execution. In the present case although the earlier power of attorney was not signed by two witnesses and there was no signature of notary or its equivalent a diplomatic or consular officer in foreign countries but when the rejoinder was filed, a power of attorney dated 12.7.2021 duly signed by executor and witnesses, was executed in front of consular Anita Kumari and bore the seal of High Commission of India in London in terms of Section 3 of The Diplomatic And Consular Officers (Oaths And Fees) Act, 1948. It was thereafter stamped in Delhi on 15.7.2021. This makes the second power of attorney valid and effective both under Section 85 of the Indian Evidence Act and Section 33 of the Indian Registration Act. The Hon'ble Supreme Court of India in **Jugraj Singh and others versus Jaswant Singh and others AIR 1971SC 761** has held as under

"6. It is plain that presentation for registration could be, either by the Principal or by a duly constituted attorney. **It is equally plain that a proper power of attorney duly authenticated as**

required by law had to be made before power could be conferred on another either to execute the document or to present it for registration. That indeed is the law.

7. The short question in this case is whether Mr. Chawla possessed such a power of attorney for executing the document and for presentation of it for registration. **Now, if we were to take into account the first power of attorney which was executed in his favour on May 30, 1963, we would be forced to say that it did not comply with the requirements of the law and was ineffective to clothe Mr. Chawla with the authority to execute the sale deed or to present it for registration. That power of attorney was not authenticated as required by Section 33 of the Indian Registration Act which in the case of an Indian residing abroad, requires that the document should be authenticated by a Notary Public.** The document only bore the signature of a witness without anything to show that he was a Notary Public. In any event there was no authentication by the Notary Public (if he was one) in the manner which the law would consider adequate. **The second power of attorney however does show that it was executed before a proper Notary Public who complied with the laws of California and authenticated the document as required by that law. We are satisfied that that power of attorney was also duly authenticated in accordance with our laws.** The only complaint was that the Notary Public did not say in his endorsement that Mr. Chawla had been identified to his satisfaction. But that flows from the fact that he endorsed on the" document that it had been subscribed and sworn before him. **There is a presumption of regularity of official acts and we are satisfied that he must have satisfied himself in the discharge of his duties that the person who was executing it was the proper person. This makes the second power of attorney valid and effective both under Section 85 of the Indian Evidence Act and Section 33 of the Indian Registration Act.**

8. **The only question is whether the second power of attorney was effective to render valid the transaction of sale and the registration of the document both earlier than the power of attorney.** In our judgment, it would be So. Mr. Hardev Singh does not read into this matter the fact of ratification by Vernon Seth Chotia of his earlier power of attorney. The second power of attorney states in express terms that the first power of attorney was defective and was being ratified. Vernon Seth Chotia also stated in the second power of attorney that the act of

Mr. Chawla would be his act which included not only the making of the document but also the presentation of that document. **Now the law is quite clear that ratification relates back to the original act** provided there is a disclosed principal and this has been stated nowhere better than by Lord Macnaughton in Keighley, Maxsted and Co. v. Durant [1901] A.C. 241 quoting Tindal, C. J. in Wilson v. Tumman, 1843 6 M. & . G. at p. 242.

That an act done, for another, by a person though without any precedent authority whatever, becomes the act of the principal, subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for the detriment or his advantage, and whether it be founded on a tort or on a contract, to the same effect as by, and with all the consequences which follow from, the same act done by his previous authority. And so by a wholesome and convenient fiction, a person ratifying the act of another, who, without authority, has made a contract openly and avowedly on his behalf, is deemed to be, in fact he was not, a party to the contract.

Relation back of an act of ratification was expressly accepted in this case. Other cases have been summarised in the manual of the Law and Practice of Powers of Attorney issued by the Council of the Chartered Institute of Secretaries; This follows from the maxim of law "Canis ratihabitio retrotrahitur at mandate priori aequiparatur"--that is to say, ratification is thrown back to the date of the act done, and the agent is put in the same position as if he had authority to do the act at the time the act was done by him. The learned authors quote the case of the House of Lords which we have above cited and add to it certain other cases with which we do not consider necessary to encumber this judgment.

9. **It therefore follows that the second power of attorney was a valid document and it authorised Mr. Chawla to execute the document as well as to present it for registration.** This being a document ratifying a former inconclusive act related back to the time when the first document was made and cured the illegality in the presentation for registration which had taken place.

10. The case of the Privy Council on which great reliance was placed, namely, 58 LA. 58 (cit. supra) no doubt states that presentation by a person who is not properly authorised by a

power of attorney is ineffective and the registration void, but there the Judicial Committee was not considering the case of a subsequent ratification. They were only concerned with an invalid document and nothing more. If there had been ratification, the other principle to which we have adverted here would have been taken note of and the decision would probably have been different.

11. **In these circumstances, we are satisfied that there was proper execution of the document and registration**. It is hardly necessary, in view of our decision, to say anything more about this case. We are also satisfied that the appellants were not entitled to a declaration. We have reproduced the paragraph in which the reliefs were asked in the plaint. It will be noticed that they neither asked for the cancellation of the order of the Collector nor for any injunction, two of the reliefs which they were entitled to ask in the case in addition to the declaration. Such a suit would be hit by Section 42 of the Specific Relief Act and we would be quite in a position to deny them the declaration without these specific reliefs. Indeed they had only to ask for the setting aside of the order.

Further the Hon'ble Supreme Court in Civil Appeal No. 2431 of 2019 (Arising out of S.L.P. (C) No. 2792 of 2019) **Varun Pahwa Vs. Renu Chaudhary AIR 2019 SC 1186** held that procedural defects and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice. Procedure should never be made a tool to deny justice or perpetuate injustice by any oppressive or punitive use. Thereafter the Hon'ble Delhi High Court in **Grafitek International Vs. K.K. Kaura and Ors** 96(2002)DLT385, 2002(62)DRJ72 held as under

"5. It is as settled law that power of attorney must be strictly perused and construed as giving only such authority as it confers expressly or by necessary implication. **However, in the instant case, though a fresh power of attorney ratifying the power to file the suit and all steps taken by Mr. Maggon was filed after two years of institution of the suit with the application seeking service of summons for judgment. In other words, defect was cured before summons for judgment were served upon the defendants."**

"7. The aforesaid suit was filed by a minor by his next friend, his aunt. The defendant had executed a promissory note in favour of a firm known as kisan Bai and Sukalchand Kanmal of which plaintiff claimed to be the owner. The plaint was signed and verified by one Saremal and it was presented by a pleader Mr. Thakor, whose vakalatnama had been signed by Saremal. The case of the plaintiff was that Saremal was the duly authorized agent of Bai Dhapu to present the plaint, to sign it and to appoint a pleader, Saremal being authorized so to act under the power of attorney. It was under these circumstances held that for the purpose of appointing a recognised agent to take some step in the suit, the next friend is to be regarded as a party to the suit within the meaning of Order 3 Rule 1 CPC. The next friend of a minor can appoint a recognised agent. The next friend has no right to execute a general power of attorney in respect of the minor's property. A general power of attorney would not enable the attorney to file suit in the name of unspecified minors using the guarantor's name as next friend. It was further observed that a person acting under such a power of attorney has no authority either to present the plaint or to sign it and if the plaint is presented by somebody who has no authority to present it, it is not a valid plaint and further that such a defect cannot be cured by amendment as the only course is to file a fresh suit.

8. **In the instant case, the crucial question that requires to be determined is whether Mr. Ravi K. Maggon has been authorised to file and institute the suit or not. The very fact that actions of Mr. Ravi K. Maggon were ratified by way of fresh power of attorney which was duly notarised shows that the earlier power of attorney was in order but for its notarization.**

9. **Merely because the power of attorney is not duly notarised does not mean that the concerned person was not authorised to institute the suit. Notarization raises presumption as to its authentication and no more. Notarization of power of attorney is a matter of procedure and raises the presumption of authority of the person to institute the suit. In other words it does not mean that power of attorney executed in favour of a particular person but not duly notarised does not confer power upon the person to institute the suit.** The objection taken by the learned counsel is that the said power of attorney does not bear any authentication by a Notary Public and Therefore Mr. Maggon had

no authority to file the present suit and as a consequence such a suit was never properly instituted.

10. **The importance of power of attorney without Notarization cannot be undermined but at the same time if such a defect is removed subsequently during the pendency of the suit and that too is followed by ratification of the authority of a person who has been authorized to institute the suit, it is not such a fatal infirmity that would hit at the maintainability of the suit itself.**

11. Mr. Kumar has also raised the objection that ratification should be done within a reasonable period but in the instant case, ratification of action of Mr. Ravi K. Maggon by way of fresh notarized power of attorney was done after a period of two years and thus, by no stretch of imagination can be termed as a reasonable period. In this regard reliance placed by Mr. Kumar upon Madura Municipality through Commissioner v. K. Alagirisami Naidu A.I.R. 1939 Mad 947 cannot come to the rescue as I do not find any substance in this contention. In the instant case which is suit under Order 37 CPC, ratification was carried out before the summons for judgment were to be duly served upon the defendants. **No substantial proceedings have commenced. The most material stage to defend the suit is when summons for judgment are ordered to be served upon the defendants.**

12. At this stage and for the purpose of granting leave to contest such an objection as raised by Mr. Kumar cannot be taken into consideration.

13. **However, any provision which governs the procedure should not be subjected to strict legal interpretation but should be interpreted in a manner so as to meet the interests of justice and not scuttle them.** In a suit for recovery, the objection taken by the defendant cannot form basis for granting leave particularly when defect is cured before defendant is given opportunity to disclose all those facts which according to him entitle him to contest the claims of the plaintiff."

32. It is settled law that a proper power of attorney duly authenticated as required by law had to be made before power could be conferred on another. The first power of attorney which was executed in favour of Rina

Dutt did not comply with the requirements of the law and was ineffective to clothe Rina Dutt with the authority to file and maintain the complaint on behalf of the executant. That power of attorney was not authenticated as required by Section 33 of the Indian Registration Act which in the case of an Indian residing abroad, requires that the document should be authenticated by a Notary Public or under Section 3 of The Diplomatic And Consular Officers (Oaths And Fees) Act, 1948 by a Diplomatic or Consular officer . The second power of attorney however does show that it was executed before a Consular of High Commission of Indian in England and thereafter stamped at Dehli. There is a presumption of regularity of official acts and we are satisfied that the consular officer must have satisfied himself in the discharge of his duties that the person who was executing it was the proper person and hence the document has been duly authenticated in accordance with the Laws of India. This makes the second power of attorney valid and effective both under Section 85 of the Indian Evidence Act and Section 33 of the Indian Registration Act. The only question is whether the second power of attorney was effective to renders valid the earlier filing of complaint by Rina Dutt on behalf of her son. Now the law is quite clear that ratification relates back to the original act. An act done, for another, by a person though without any precedent authority whatever, becomes the act of the principal, subsequently ratified by him, is the known and well-established rule of law. It therefore follows that the second power of attorney was a valid document and it authorised Rina Dutt to file and maintain the case before the H.P. RERA. In these circumstances, we are satisfied that there was proper execution of the document and procedural defects and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice. Further it is the law that procedure should never be made a tool to deny justice or perpetuate injustice by any oppressive or punitive use.

33. Whether the Complainants are entitled to get the refund of the money along with interest or not?

The Ld. Counsel for the complainant has argued that the complainant has deposited huge advance amount of Rs 7952931/- to purchase flats in the project. However, the project has not been completed as per the provisions of agreement for sale. Clause 19 of the agreement for sale provides that, the promoter shall deliver the possession of said unit by the end of December, 2016. The possession has not been delivered even after a lapse of five years from the due date of possession. Section 18(1)(a) of the Act ibid clearly provides that if promoter fails to complete or give possession in accordance with the terms of the agreement for sale then the complainant will be entitled to return of the amount along with interest. Similar provisions have been made in Section 19 (4) of the Act, which clearly provides that the allottee shall be entitled to claim the refund of amount paid along with interest, if promoter fails to comply with the terms of agreement for sale. In the present case, the possession of the flat was to be delivered by the end of December 2016, whereas, the flat is not complete, even as on today.

34. The Ld. Counsel for respondents drew the attention of the Authority towards the clause 20 of the agreement to sell executed between the complainant and respondents. Clause 20 reads as follows:-

" *(20) That the promoter agrees that the sale of the said Unit/ Apartment is subject to force majeure clause which inter alia includes delay on account of non-availability of steel, cement, other construction material, water or electric supply or slow down, strike or due to a dispute with construction agency employed by the promoter; war, civil commotion or act of God or any notice, order, rule, notification of the Government and/ or other public or competent authority or on account of non-issue of Project Completion Certificate/ Occupation Certificate or on account of any order of any Court affecting the construction work of the project or any reasons beyond the control of the promoter and in any of the aforesaid events the promoter*

shall be entitled to reasonable corresponding extension of time for the delivery of possession of the said Unit/ Apartment on account of force majeure circumstances."

He said that the clause 20 ibid provides that, if the construction work of the project is affected by any order of any court then the promoter in the aforesaid event shall be entitled to reasonable corresponding extension of time for the delivery of possession of said unit/ apartment on account of force majeure circumstances. He said in the present case the Ld. District Collector, Solan vide its interim order dated 17th March,2017 had stopped the construction of this project and till today the matter is sub-judice and further construction work cannot take place. Therefore it was submitted that this is a 'force majeure' circumstance provided in clause 20 of the agreement for sale. Hence, for the period the matter is sub-judice and construction has been stayed, the corresponding period of delivery of possession should be extended. Accordingly it was prayed that the complainant is not entitled for refund, as there is no delay in completion of apartments from the side of the respondents.

35. The Authority has gone through the provisions of agreement for sale. The clause 20 provides that if the construction work is affected by an order of court then that would be considered as 'force majeure' circumstance. In the present case the Ld. District Collector, Solan vide its interim order dated 17th March,2017 had stopped the construction on the site and the matter is still sub-judice, therefore definitely the 'force majeure' circumstances are applicable in the present project, with effect from 17th March,2017. However, this is to be examined, whether due to that circumstances, the complainants are entitled to demand refund of the amount paid or not? According to the clause 19 of the agreement for sale, the complainants were to get possession of their flats by the end of December, 2016. This period was over, prior to the enforcement of stay on construction issued by the Ld. District Collector, dated 17th March, 2017. Secondly, the respondents should have intimated about the 'force

majeure' circumstances to the complainant immediately on its happening. However, from the record of this case, it does not appear that respondents have intimated to the complainant about the stay granted by the District Collector, Solan. The Ld. Counsel for the complainant has pointed out, that he came to know about the proceedings before the revenue courts about the Benami transaction of the project land, only during the proceedings of this case. Thus, there is nothing on record to show that the respondents have intimated about delay in construction due to stay by the District Collector, Solan. The Ld. Counsel for the respondents has also raised the issue of 120 days grace period. This Authority has inspected the project site on 9.11.2020, the details of which has been quoted earlier. From the spot visit it is evident that only 30-40% of the construction work has been done on the spot. Obviously the remaining work could not have been completed within the grace period of 120 days.

36. Further even if it is assumed that the defence of force majure circumstances as mentioned in agreement for sale was applicable to the respondent beyond the date of 17th March, 2017 although possession was undertaken to be delivered by the end of December, 2016 even then in view of the law laid down by the Hon'ble Apex Court the promoter is under obligation to refund the money received by the him from the allottee. 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."

37. Drawing ratio for the aforesaid judgment, in the present case also the right for refund of the allottee is unconditional and absolute. The respondents failed to give possession within the time stipulated under the agreement for sale and the stay orders of the District Collector are not attributable to the allottee and therefore respondents cannot be permitted to take benefit of this litigation as held in the judgment of the Hon'ble Apex Court in Newtech Promoter's case and complainant has absolute right to refund of money where stays granted by court is not attributable to allottee .

38. 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 Shri Hari Gokhale and anr." Dated 30.07.2019, whereby the Hon'ble Court under para 10 has observed as under:-

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

interest on said deposited amount. The findings rendered by the Commission cannot therefore be said to be incorrect or unreasonable on any count." The Complainant are therefore entitled to refund of amount in the present case due to delayed delivery of possession.

39. 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.

40. The Hon'ble Apex Court in ***Imperia Structures Ltd. v. Anil Patni, (2020) 10 SCC 783 : (2021) 1 SCC (Civ) 1,* at page 791 at para 23** has observed as under:-

"In terms of Section 18 of the RERA Act, if a promoter fails to complete or is unable to give possession of an apartment duly completed by the date specified in the agreement, the Promoter would be liable, on demand, to return the amount received by him in respect of that apartment if the allottee wishes to withdraw from the Project. Such right of an allottee is specifically made "without prejudice to any other remedy available to him". The right so given to the allottee is unqualified and if availed, the money deposited by the allottee has to be refunded with interest at such rate as may be prescribed. The proviso to Section 18(1) contemplates a situation where the allottee does not intend to withdraw from the Project. In that case he is entitled to and must be paid interest for every month of delay till the handing over of the possession. It is up to the allottee to proceed either under Section 18(1) or under proviso to Section 18(1).

41. Further it was also the case of the respondent that the time to deliver the flat as mentioned in the agreement for sale has been altered and extended as in terms of Section 4 of the RERD Act when the respondents applied for registration of the project i.e. on 31.01.2018 it was mentioned that the project would be complete within 5 years from the date

registration is granted and therefore he submitted that the date of delivery of possession automatically stands extended. As per Section 13 read with Section 11 (4) (a) of the Act the date for delivery of possession given in the agreement is relevant as the agreement for sale is a sacrosanct document to see as to what was the date of delivery of possession agreed by both the parties. In the present case the date of delivery was by the end of December, 2016. This date cannot be altered by the time granted under registration certificate without express consent by the complainant. No evidence in the shape of any document or communication has been brought on record by the respondents to show that they sought consent from the complainant qua extending the date of delivery of possession.

42. 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 respondents in complying with the obligation to hand over possession of the flat to the complainant by the end of December, 2016. The failure of the respondents to hand over possession amounts to contravention of the obligations cast upon the promoter under the provisions of the Real Estate (Regulation & Development) Act, 2016 to honour the agreement for sale as per Section 13 of the Act. The respondent promoter failed miserably in fulfilling all obligations as stipulated in Section 11, 13 and 14 of the Act ibid. There has been a gross delay on the part of the Respondents in completing construction. A total of Rs 7952931/- was admittedly paid to the respondent out of the total sale consideration of Rs 88,00,000/-. Having paid a substantial amount of the consideration price to the respondents, 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.

43. The functions of this Authority established under the Act is to safeguard the interest of the aggrieved persons, may it be the allottee, the promoter or the real estate agent. The rights of the parties are to be balanced and must be equitable. The respondents 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 respondents are ex-facie one sided, unfair and unreasonable, which constitute the unfair trade practice on the part of the respondents. There is no denial to the fact that respondents were in a dominant position. The complainant on the contrary has already parted with his hard earned money, so in case there is cloud on the project land, if allottee opts out of the project his money is liable to be refunded along with interest.

44. Thus, it is very clear that the promoters have failed to complete the project and give possession of apartments to the complainant in accordance with the terms of agreement to sale. Therefore, the complainant is entitled to claim refund of the amount paid along with interest as prescribed under section 18(1) (a) read with section 19 (4) of the Act. In the present case the respondents have not disputed the amount paid by the complainant and rather in response to para 7 of the reply have admitted the payment of Rs 7952931/-.

45. About the interest that the complainants has sought before this Authority, on amount paid by him. 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 the 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. Thus, in the present case, there exist, clear and valid reasons for holding down that the flat buying complainant is entitled for refund of total payment advanced to the respondent promoter along with interest. There has been a breach on the part of the respondents in complying with the contractual obligation to hand over possession of the flat by the end of December, 2016 plus a grace period of 120 days, as per the agreement for sale executed between the complainant and the respondents. The failure of the respondents to hand over possession in time, amounts to contravention of the provisions of the Real Estate (Regulation & Development) Act, 2016. The respondent promoter has failed in fulfilling his obligations as stipulated in Section 11, 13 read with Section 14 of the Act ibid. 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 constructed, as per terms of agreement for sale.

46. **What are the implications in the present Complaint, of the judgment in revision petition no. 70 of 2020 dated 1.10.2021 passed by the Ld. Financial Commissioner (Appeal) Government of Himachal**

Pradesh under the H.P. Tenancy of Land Reforms Act 1972 whereby the matter was remanded back to Ld. Collector for adjudication?

We have already held in point no. 1 that the present proceedings are independent of the proceedings pending before the Ld. District Collector, Solan as the of Ld. Financial Commissioner, State of Himachal Pradesh had remanded the matter to decide it afresh. However, it cannot be denied that the decision in that case will have repercussions on the project promoters as well as allottees. The proceedings pending before the ld. District Collector, Solan is under a separate Act and we have no say, in what is going to be the decision in that case. This would be a second round of litigation as the matter under Section 118 of the H.P. Tenancy and Land Reforms Act, 1972 went right upto the court of Ld. Financial Commissioner and from there it was remanded again to Ld. District Collector to decide it afresh. The decision in that case may be in favour of the respondents or may go against them. Presuming, that the decision comes in favour of the respondents, then there are chances, that the promoters may like to complete this project and hand over the apartments. We in normal cases are allowing the refund within two months from issue of our orders. However, considering the peculiarity of this case, we intend to provide a period of four months to refund the amount along with interest. If during this period the order if any, of Ld. District Collector Solan comes in favour of the respondents, then the complainant, if they wish so may continue with the project. However, even if the order of Ld. District Collector is passed in favour of respondents and respondents do not wish to continue in the project, then they shall be entitled to refund along with interest, on completion of period of four months. This will also be applicable, if no decision is passed by the Ld. District Collector, Solan within a period of four months.

47. The second circumstance may be that the order of Ld. District Collector, Solan goes against the respondents. Then obviously all the complainants are entitled to take refund along with interest.

48. This Authority while passing the refund orders, generally attaches the project property, to ensure the recovery at the time of execution of its order. However, in the present case the court of the District Collector has already vested the land of the project, being Benami purchase in favour of the State Government vide its order dated 14th February, 2019. Now therefore, it is to be considered whether, this Authority can attach the project property in the present case or not? The Real Estate (Regulation and Development) Act, 2016 has been enacted to safeguard the interest of home buyers. Further, the Authority has been entrusted with the powers of Civil Court under section 40 (read with rules) for the recovery of amount of home buyers. The Act ibid has been enacted by the Parliament whereas, the H.P. Tenancy and Land Reforms Act, 1972 has been enacted by the State Legislature with the assent of the Hon'ble President of India. The Article 254 of the Constitution of India, provides as under:-

"Article 254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States.—(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

- *Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision*

repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State: Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State."

49. Further, Section 89 of the Act ibid provides as follows –

"*89.* ***Act to have overriding effect-- The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.***"

Thus, keeping in view the provisions of Article 254 of the Constitution of India and section 89 of the RERD Act, it is very clear that the provisions of Real Estate (Regulation and Development) Act, 2016 will prevail over the provisions of the H.P. Tenancy and Land Reforms Act, 1972. Therefore, it is held that irrespective of any orders passed by the Revenue Courts, under the HP Tenancy and Land Reforms Act 1972, the land and property of the present project will remain attached, till the home buyers get refund of their amount paid along with interest, as directed in this order.

50. **RELIEF:-**

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

I. The Complaint is allowed and the Respondent promoters are directed to refund a sum of Rs. Seventy Nine lakhs Fifty Two

Thousand Nine hundred Thirty one (Rs. 79,52,931/-) 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 respondents till date the amount and interest thereon is refunded.

II. The refund along with interest is to be paid by the respondent promoters jointly and severally to the complainants within four months from the date of this order.

III. Non-compliance or any delay in compliance of the above directions shall further attract penalty and interest on the ordered amount of refund under Section 63 and Section 38 of the Act ibid, apart from any other action the Authority may take under Section 40 or other relevant provisions of the Act.

IV. The District Collector Solan is directed to attach the land and property of the present project by making the necessary entries in the revenue record, till the complainant (home buyer) gets refund of the amount paid along with interest, as directed in this order.

V. The office of this Authority is directed to initiate proceedings under Section 59 and 61 of the Act for delay in applying for registration under Section 3 of the Act and for non compliance of the orders qua removal of objections/ observations reverted by the Authority in the application for registration.

skant

Dr. Shrikant Baldi
CHAIRPERSON

Rajeev Verma
MEMBER

REAL ESTATE REGULATORY AUTHORITY HP REP. ° H.P °