REAL ESTATE REGULATORY AUTHORITY,
HIMACHAL PRADESH

In the matter of:-

Shri Vivek Gupta, S/O Shri Gurdev Gupta, R/O Near Naveen Pustak Bhadar, Sarkaghat, District Mandi, Himachal Pradesh.

.....Complainant

Versus

1. M/s Rajdeep & Company Infra Pvt. Ltd. through its Director Shri Rajdeep Sharma, S/O Shri Sansar Chand having its registered office at SCO 12, 1st Floor, Hollywood Plaza, VIP Road, Zirakpur, Punjab.

2. Sh. Rajdeep Sharma, S/O Shri Sansar Chand Sharma, R/O Tower no.A-2, Pent House no.1, Nirmal Chhaya, VIP Road, Zirakpur, Punjab.

3. Smt. Shakuntala Devi, W/O Shri Sansar Chand Sharma, R/O Village Jhakar, Tehsil Rohru, District Shimla, Himachal Pradesh,

.....Non-Complainant/ Respondent

Complaint no. RERA/HPMACTA/ 06200026

Present: - Shri Ajay Chandel Advocate for Complainant Shri Vivek Gupta,

Shri Rishi Kaushal, Advocate for respondent Rajdeep & Company Pvt. Ltd.

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

Final Date of Hearing (Through WebEx): 19.11.2020.

Date of pronouncement of Order: 17.12.2020.

ORDER

CORAM: - Chairperson and both Members

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

   The present matter refers to an Complaint filed under the provisions of the Real Estate (Regulation and Development) Act, 2016(herein after referred to as the Act)

2. That the Complainant Shri Vivek Gupta has filed an online Complaint dated 23rd February, 2020 before this Authority under 'Form-M' bearing Complaint no. RERA/HPMACTA/ 06200026 of the HP Real Estate (Regulation & Development) Rules' 2017. As per the Complaint it has been alleged that the Complainant had invested a sum of Rs. Nine Lakhs Seventy five thousand (Rs. 9, 75, 000/-) for booking a 2BHK flat 1st Floor, D block measuring approximately 960 sq.fts.in Rajdeep & Co. Pvt. Ltd housing project named as 'Claridges Residency' at Bharari, Shimla-

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171001 on dated 29th May, 2014 and allotment letter was issued by the respondent. It has been alleged by the Complainant that the respondent promoter had assured that allotment of the said flat shall be made available to the Complainant at its earliest once the phase wise construction commences. Even after the repeated requests made by the Complainant to the respondent to deliver the possession of the flat in question till date. The Complainant has sought this Authority to pass necessary orders either for the allotment of the aforesaid flat within the time limit for the refund of entire amount of Rs. Rs. Nine Lakhs Seventy five thousand (Rs. 9, 75, 000/-) along with interest and compensation. The complainant in support of his complaint has annexed copy of brochure, allotment letter, copies of receipt for payments advanced to the respondent promoter and demand letter.

3. During the course of hearing on 18th June, 2020, the Ld. Counsel appearing for the respondents have submitted that the complaint filed by the Complainants is not in accordance with the HP Real Estate (Regulation & Development) Rules, 2017 as the same has not been submitted on 'Form-M' and there are defects relating to paging and making of index. The Authority affording an

opportunity of being heard in view of *"Audi alteram partem"* had directed the Complainants vide its order dated 18th June, 2020 to submit complaint in prescribed 'Form-M" and accordingly the complaint under 'Form-M' bearing Complaint no. RERA/HPSOCT/ 04190016 of the HP Real Estate (Regulation & Development) Rules' 2017 have been re-filed before this Authority. As per the contents of revised complaint, similar facts in issue has been reiterated by the Complainant along with copy of receipts, allotment letter, demand letters, brochure and communication by way of letters issued to the respondent no.1. Likewise, the Complainant have sought the refund of amount of Rs. Rs. Nine Lakhs Seventy five thousand (Rs. 9, 75, 000/-) along with interest and compensation.

4. **REPLY TO THE COMPLAINT.**

The respondent(s) have filed a detailed reply to the Complaint on 19th August, 2020. It has been contended in the reply by the respondent(s) that to strike a balance between the interests of home buyers and builders, the RERA Act lays down duties under Section 19 under Chapter 5 of the Act ibid upon the allottees regarding duty to research, duty to make payments and duty to pay interests. It has been further submitted in the reply that the present

compliant is not maintainable before this Authority as the power to adjudicate lies with the Adjudicating Officer and therefore this Authority lacks jurisdiction to decide the matter. The respondents have taken plea that vide demand letter dated 25th October, 2017 & 13th August, 2018, the Complainant was asked to make the pending payments of the flat allotted to him but the Complainant miserably failed to reply to any of the legitimate demands. The respondents have submitted further vide Annexure R-5 at page 27-28 of his reply that vide clarification dated 24th October, 2019 issued by the Secretary (Town & Country Planning) to the Government of Himachal Pradesh in O.A. 121/2014- **Yogendra Mohan Sen Gupta vs Union of India and others** dated 16.11.2017 whereby it has been clarified that, *" the operation of the judgment dated 16.11.2017 is in form of directions to the State Government and its instrumentalities and hence are to be followed in future. The most of the directions especially to the extent of regulation of construction plans appears to have applications to future cases/transactions i.e. which will take place after 16.11.2017, the date on which the "Said Judgment" has been passed. Thus, it can be inferred that the aforesaid directions do not appear to be attracted in such cases as*

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such all pending applications qua approval/revision/sanction of map/plans prior to passing of the " Said Judgment" can be considered/processed accordingly with due deliberations in accordance with the Law/Rules occupying the field before 16.11.2017. Regarding cases where completion plans with certain deviation are under consideration, the same can be considered for approval with the compounding charges as per the existing Bye Laws. Also cases where construction is going on as per plan sanctioned before 16.11.2017. In those cases the deviation up to the extent of permissible limits are also required to be considered at the relevant point of time as per bye laws prevalent before 16.11.2017. Regarding construction plans which are sanctioned and the sanction has been conveyed before the judgment and construction has been completed partly, in such cases the judgment does not appear to be attracted. The cases, where construction has not yet been started at the site and the building owners are citing various reasons as such cases construction can be allowed to be continued/started". The respondents have further contented that the construction at the site could not be commenced due to "Force Majeure" condition. Therefore,

in view of the aforesaid submissions, the Complaint is liable to be dismissed.

5. **REJOINDER TO THE REPLY.**

The Complainant has responded to the reply so filed by the respondent(s) by filing a detailed para-wise rejoinder on 20th October, 2020. It has been submitted in the rejoinder by the Complainant that the entire contents of the reply is wrong, contrary and have been denied. It has been submitted in the rejoinder by the Complainant that the entire contents of the reply is wrong, contrary and have been denied. It has been further submitted that the project of the respondent(s) is held up on account of their own acts of omission and commission and till date the flat which was allotted to the Complainant does not lawfully exist. The Complainant cannot be asked to wait for eternity for completion of the project and therefore is entitled to withdraw from the project and claim refund of the amount paid to the respondent(s) along with interest @ 24 % along with compensation and additional cost of Rs Three Lakhs be imposed on the respondents for unnecessarily harassing the Complainant as per the Act.

6. **WRITTEN SUBMISSIONS AND SYNPOSIS ON BEHALF OF THE RESPONDENTS.**

The respondents have placed on record written submissions and synopsis before this Authority on 26th October, 2020 As per the contents of the synopsis and written submissions the respondents have submitted the brief background of the case referring to sale deed (Annexure R/A) dated 9th May, 2014 executed between the respondent no.2 and one Smt. Jaswant Kaur for sale purchase of the property in question, copy of joint development agreement dated 16th June, 2014 (Annexure R/B) executed between Rajdeep & Company and agreement between respondent no. 2 & 3 dated 11th August, 2016 (Annexure R/C). The synopsis further provides the objections in shape of non-applicability and lack of jurisdiction of this Authority, applicability of Section 71 of the Act ibid, rate of interest and duties of the allottees, therefore the present Complaint is liable to be dismissed. The synopsis further contemplates the judicial pronouncement on the issue of compensation and rate of interest by referring to "***Wg. Cdr. Arifur Rahman Khan and Aleya Sultana & ors. Versus DLF Southern Homes Pvt. Ltd. & Ors***"

7. The parties to the Complaint have filed their written submissions/ replies/ rejoinder before this Authority after issuance of notice for hearing along with additional

documents written synopsis which has been taken on record for proper adjudication of the present Complaint.

8. After perusing the entire record in shape of pleadings and documents placed on record before this Authority by the Complainant and Respondent, the following additional facts transpires in the present case:-

i) That it is submitted by the Complainant that the Respondent had issued the letter of allotment dated 29th May, 2014 in favour of the Complainants for selling of a 2BHK flat 1st Floor, D block measuring approximately 960 sq.fts.in Rajdeep & Co. Pvt. Ltd housing project named as ' Claridges Residency' at Bharari, Shimla-171001.

ii) That it is per se admitted by the contesting parties, more particularly by respondent that a sum of Rs. Nine Lakhs Seventy five thousand (Rs. 9, 75, 000/-) have been paid to the respondent by the Complainant in view of the sale of the flat in question.

iii) That it is submitted by the respondent in their written submissions and synopsis that the land in question, where the proposed flats were to be constructed at Block D has been purchased by the respondent from one Smt. Jaswant Kaur vide sale deed dated 09th May, 2014 comprised in Khata Khatoni no. 151/ 186 , Khasra no. 5, measuring

1416.80 sq. mtrs. situated at Up-Mohal Kaleston, Tehsil Shimla (U) District Shimla, Himachal Pradesh. It is a proven fact that at the time of execution of the aforesaid sale deed, the seller was approved three maps for development/ construction upon the said land approved by the Municipal Corporation, Shimla vide order no. 320 (AP) dated 17th November, 2003, vide order no. 35 (AP) dated 6th February, 2003, vide order 171 (AP) dated 21st July, 2003. It is further admissible that the seller has contracted the four storeyed building upon the part of the said land and the seller has obtained the completion certificate of the said building from the M.C. Shimla vide order no. 105 (AP) dated 07th March, 2012 against the proposed approval map vide order no. 106 (AP) dated 21st July, 2003.

iv) That the respondent has entered into a joint development agreement on 16th June, 2014 between himself and the Company, i.e. M/s Rajdeep & Company Infrastructure Private Ltd. Significantly to mention herein that as per the contents of the very joint development agreement all the corresponding issues of property in question have been alienated in the name of the respondent Company along with the entire project, consideration, obligations, warranties, transfer of rights, assets etc., i.e. from the owner

of the property to its developer, which is reflected in the written arguments/ submissions of the respondent.

v) That the respondent executed a family settlement deed with her mother Smt. Shakuntala Sharma, W/O Shri Sansar Chand on 3rd May, 2016 transferring the land 38000/ 141680 share measuring 380.00 sq. mtrs. (vacant land only) out of comprised in Khata Khatoni no. 151/ 86, khasra no.5, measuring 1416. 80 sq. mtrs. Situated at Up-Mohal Kaleston, Tehsil Shimla (U) District Shimla, Himachal Pradesh along with all rights of easement, paths, drainages, air, light, water, sunlight.

vi) That the respondent(s) has categorically stated to have admitted herein further in his reply to the Complaint that he has applied for the regularization of unauthorized construction in question, where the flat to the Complainant was to be constructed under the impugned amendment Act of 2016, whereby Section 30-B to the Himachal Pradesh Town & Country Planning Act (retention policy) which has been quashed by the Hon'ble High Court of Himachal Pradesh vide its order dated 22nd December, 2017 and is pending for adjudication in review petition before the Hon'ble High Court.

vii) It is per se evident that after the site inspection carried out at the instance of this Authority on dated 17th February, 2020 by Municipal Corporation, Shimla, following factual position has emerged, "That proposed plan for residential building was approved vide order No. 331 (AP) dated 11th August, 2017 for three storeys plus parking floor in favour of Smt. Shakuntala. Parking floor was approved at road level and three nos. were approved below the road level. At site, R.C.C. framed structure has been raised up to the road level. The R.C.C. slab has been laid at the parking floor level, i.e. road level and above it, but the structure below it consists of 3 levels R.C.C. columns and beams and no slab has been laid. The height of these levels from the lowermost level is 3.20 mtrs, 2.40 mtrs and 2.10 mtrs respectively. It is pertinent to mention here that the height of the top two levels is not as per the minimum height, i.e. 2.70 mtrs. prescribed as per the regulations for habitable floor."

9. **ARGUMENTS ADVANCED**

The final arguments in this case were heard on 19.11.2020. Shri Ajay Chandel, Ld. Counsel representing the Complainant has argued before this Authority that the contentions of the Complainant are specific. It has been argued by the Ld. Counsel representing the Complainant

that his client has booked a 2BHK flat 1st Floor, D block measuring approximately 960 sq.fts.in Rajdeep & Co. Pvt. Ltd housing project named as 'Claridges Residency' at Bharari, Shimla-171001 in May, 2014 for a selling price of Rs. Thirty Lakhs (Rs. 39, 00, 000/-) which was to be paid in different stages as per the conditions of the aforesaid allotment letter dated 29th May, 2014 issued by the respondent. It is averred by the arguing Counsel for the Complainant that a sum of Rs. Nine Lakhs Seventy five thousand (Rs. 9, 75, 000/-) was advanced by the Complainant to respondent, the details of which stands mentioned in the Complaint/ application under "Form-M". The aforesaid amount of Rs. Nine lakhs Seventy Five thousand (Rs. 9, 75, 000/-) has been paid by the Complainant by way of two installments by paying Rs. Three Lakhs ninety thousand (Rs. 3, 90, 000/) on 29th May, 2014 and Rs. Five lakhs Eighty five thousand (Rs. 5, 85, 000/-) subsequently. The Ld. Counsel for the Complainant has argued before this Authority that the respondent promoter had assured that the possession of the said flat shall be made available to the Complainant at its earliest once the phase wise construction commences. Even after the repeated requests made by the Complainant to the

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respondents for delivering the possession of the flat in question till date, the respondents have miserably failed to do so. Since the respondents have failed to provide the lawful possession of the flat allotted to the Complainant, it has been argued herein that the Complainant may be allowed a refund of entire amount of Rs. Nine lakhs Seventy Five thousand (Rs. 9, 75, 000/-) along with interest @ 24 % (as submitted in the relief clause of the rejoinder from the date of its payment till its realization. The Ld. Arguing Counsel for the Complainant has reasoned for the withdrawal from the present project and is seeking return) of his amount so advanced for the reasons that the respondents have applied for regularization of this property in question under the impugned retention policy quashed by the Hon'ble High Court and secondly due to strict implications of the judgment of the Hon'ble National Green Tribunal in the area under reference, which is evident from the plea taken by the respondents in their reply to the complaint specifically at page no.8.

10. The Ld. Counsel for the Complainant has further invited our attention to the repeated demand letters issued by the respondents vide Annexure R-3 (at pages 24-25) and Annexure R-4 (at page 26) of the reply filed by the

respondents, whereby it has been specifically provided therein that the respondents have time and again demanded amount as installments against allotment of flat on 25th October, 2017 and then on 13th March, 2018 to which the Complainant has duly replied to the respondents vide communication letter through e-mail dated 20th March, 2018 (at page 46-47 of the case file appended with copy of Complaint) that the Complainant had visited the site on 16th December, 2017 and again on 1st March, 2018 and it was found that there was negligible construction at the site and in view of the demand for the next installment to be paid, the construction targets for the amount as per allotment letter were not met. Similar communication vide letter through e-mail dated 3rd December, 2019 (at page 48 of the Case file) were made to the respondent no.1 in particular.

11. 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 and this Authority is vested with powers under Section 38 to impose penalty or interest, in regard to any contravention of obligations cast upon the

promoters. Further the Authority has the jurisdiction to order refund of money along with interest thereof.

12. The Ld. Counsel Shri Rishi Kaushal for the respondent has presented his case before this Authority by way of filing written submissions arguing that this Authority has no jurisdiction to adjudicate upon the present complaint as the same is beyond the scope of Section 3 (1) of the Act ibid. It has been argued herein that since the owner of the property in question is Smt. Shakuntala Devi has received the aforesaid plot in question, which is around 380 sq. mtrs by way of family settlement dated 03rd May, 2016. Therefore, the provisions of the Real Estate (Regulation & Development) Act, 2016 cannot be made applicable to the respondent. Moreover, the numbers of units as per approved plan are less than eight. Also there is no requisite need for registration of the said property in terms of the Act.

13. Further, the Ld. Counsel has contended specifically that in terms of the claim of the Complainant under Section 14 & 18 of the Act, whereby the refund has been sought from this Authority, the Complainant is himself at default for making payments timely to the respondent and such their claim is barred in view of proviso appended to Section 71 (1) of the Act. The Arguing Counsel has reiterated herein that

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the jurisdiction to adjudicate the present matter in respect of rate of interest lies with the Adjudicating Officer and not before this Authority.

14. In order to substantial claims over the issue deliberated upon, the Ld. Arguing Counsel have relied upon following judicial pronouncements, here as under:-

a. That in the matter of ***"Bikramjeet Singh versus State of Punjab & ors."*** Dated 13th December, 2017 passed by the Real Estate Regulatory, Authority, as relied by the respondent vide Annexure R-3 at page 26 of the reply to the complaint that, *" Firstly, the alleged violations though commencing before the enforcement of the RERA Act, must be continuing till date; secondly, the alleged violations must also constitute a contravention of the RERA Act and the rules and regulations made thereunder; and thirdly, the issue should not have been decided or be pending in any forum/ Court before approaching this Authority.* The order reciprocates as under, "Only, *if all the three conditions are fulfilled, and the onus would be on the Complainant to prove these, would any alleged violations, that took place before the coming into force of this Act be considered by this Authority."*

b. "***Wg. Cdr. Arifur Rahman Khan and Aleya Sultana & ors. Versus DLF Southern Homes Pvt. Ltd. & Ors.***" Decided on 24.08.2020 held that, *"The impugned NCDRC's judgment and Order dared 02.07.2019 was erroneous and thereby set aside. The Court directed the respondents to pay an amount calculated @ 6 % simple interest per annum to each of the appellants as compensation."* The Ld. Counsel for the respondent promoter has further and more submitted that qua the refund of amount with in principal as of rate of interest @ 18 %, the same is inadmissible in view of the aforesaid judicial pronouncement passed by the Hon'ble Apex Court.

15. The Arguing Counsel for the respondent has then specified the duties of the home buyers under Section 19 of the Act, as specifying that, "*i. Duty to research: - A smart homebuyer is fully aware, conducts full research and background checks on projects and is not easily swayed by market trends and other marketing tactics. Due Diligence even on projects registered by RERA is a must as RERA has definitely brought in more accountability and transparency but precaution is always better than regret later.*

ii. Duty to make payments: Every homebuyer, who has entered into an agreement for sale to take a property, has the responsibility to make necessary payments within the specified time and place in the agreement for sale which includes registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent etc.

iii. Duty to pay interest:- The homebuyers have the duty to pay interest for any delay in payment towards any amount to be paid."

16. Thus the entire issue in matter has been vehemently argued by the contesting parties. The Ld. Counsel for the Complainant has rebutted the stance of the respondent by arguing before this Authority that his case is fairly governed under the statutory provisions of Section 18 and not under Section 71. Therefore, the provisions of Section 71 of the Act are not attracted in the present case. The Ld. Counsel for the Complainant has further submitted that there is no possibility of the completion of the project at Block-D. Therefore, the complainant is duly entitled for the refund of the entire amount along with interest.

17. Countering the issue of jurisdiction of this Authority, the Ld. Counsel has further rebutted to the submissions of the respondents Counsel, while arguing that the present project

being an outgoing project is substantially covered under the aspects of the provisions of Section 3 of the Act ibid. Further, on the issue of refund and payment of interest, the Ld. arguing Counsel for the Complainant submitted that as per Section 18 (1) of the Act, 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. The same Section is invokable by affording ample powers under Section 38 of the Act which states that 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 thereunder."

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

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

A. Applicability of the Act.

B. Jurisdiction of the Authority.

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

D. By whom the refund of money along with interest is to be paid?

E. Other Issues and directions including imposition of Penalty.

19. **A. Applicability of the Act.**

The Ld. Counsel for the respondents have made a written submissions and while making arguments, have stressed that in the present case the plot size is 380 sq. mtrs., which is less than 500 sq. mtrs, therefore, the Real Estate

(Regulation Development) Act 2016 is not applicable in this case. He based his arguments, in view of the provisions of Section 3 of the Act. Section 3 of the Act provides that no registration of a Real Estate project will be required where the area of land proposed to be developed does not exceed 500 sq. mtrs. In the present case, respondent no. 2 Shri Rajdeep Sharma, one of the promoter owned 1416 sq. mts. of land in up Muhal Kallestan ,as per revenue record of 2013-14. However, later on, in the family settlement he has transferred a part of this land to his mother, respondent no.3 in the present case. This is clear from the copy of agreement dated 11th August, 2016, supplied by the respondent with his written submissions at pages 28 to 305. At page 2 of the agreement, it is mentioned that:-

"And whereas the first party was the owner of land comprised in Khata Khatoni No 151/186, Khasra No-5, measuring 1416.80 Sq. Mts situated at Up Muhal Kalleston, Tehsil Shimla (U),District Shimla Himachal Pradesh and at the time of ownership the first party has executed Joint Development agreement with M/S RAJDEEP AND COMPANY INFRSTRUCTURE PRIVATE LIMITED (PAN No. KAAFCR67444Q) a Private Limited Company having its registered office at 2694, Sector-23 Chandigarh".

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Thus, in the present case, it is very clear that respondent no.2, Shri Rajdeep Sharma, being owner of 1416 sq. mtrs. of land at up Muhal Kellastan had executed a joint development agreement with respondent no.1, i.e. Rajdeep and Co. The joint development agreement dated 16th June, 2014 is registered in the office of Sub Registrar, Solan and copy is placed as Ann-R-A of the written submissions, filed by the respondent. The respondent Company has developed Block A, B, C and D of this project. The only change that has taken place later on is that respondent no2. Sh Rajdeep Sharma has transferred ownership of some part of land to his mother and wife.

20. The proviso to Section 3 (2) (a) of the Act reads as follows:

"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".

Thus, any project which has an area more than 500 sq. mtrs. including of all phases is to be registered under RERA. It does not matter whether the ownership of land of the project, belongs to one person or more than one person. In the present case, the total area of full project being developed by respondent no.1 M/S Rajdeep and Company

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Infrastructure Ltd is 1416 sq. mtrs. Therefore, the project is fully covered under the provisions Act. This is also clear out of the fact that respondent no.2 Shri Rajdeep Sharma has applied for the registration of the project with the Authority on 10th February 2020. Even till today the observations conveyed to the respondent(s) by this Authority remains unattended, for which the Authority finds willful default at the end of the respondent and in contravention of Section 3 of the Act ibid for which suitable action is warranted against the respondent as per the provisions of the Act ibid. Thus, the Act is applicable on the present project and Complainant is fully authorized to file the present complaint. The respondent Company M/S Rajdeep and Co. Infrastructure Ltd as well as the owners of the land is jointly promoters in the present case.

Further, the respondent in para-5 of his reply has stated as follows:

"That present case is squarely covered by the findings of this present Authority in the Bikramjit and ors. (Complainants) versus M/s H.P. Singh and ors., in which it has clearly laid down three conditions that must be fulfilled for such complaints to be considered by it".

We have gone through the above cited order, which has been enclosed with the reply. Firstly, the order is not of Himachal RERA but of the RERA Punjab. Secondly, the facts of that case are very different then of the present case. In that case, the allegation was about the violation of provisions of Punjab Apartment and Property (Regulation ACT) 1996. Thus, that case is not relevant in adjudicating the present case.

21. The respondent in his written submission has argued that the claim of the complainant is under section-18 of the Act, hence the Authority does not have jurisdiction in the case. The case is to be decided by the Adjudicating Officer.

22. This Authority after examining the enabling provisions of the Act, which confers this Authority ample jurisdiction to adjudicate the present case by making reference to the relevant provisions of the Act to encompass itself the requisite jurisdiction under the Act itself. Section 31 of the Act prescribes that any aggrieved person can file a Complaint before the Authority or the Adjudicating Officer as the case may be for any violation of the provisions of the Act. Thus this Section provides that a separate Complaint be lodged with the Authority and the Adjudicating Officer, "as the case may be." Accordingly Rule 23 of the Himachal

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

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

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

Section 11(4) (a) of the Act prescribes as follows:

The promoter shall—

"be responsible for all obligations, responsibilities and functions under the provisions of this Act or the Rules and regulations made there under of allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings as the case may be to the allottees, or the common areas to the association of allottees or the competent Authority as the case may be: Provided that the responsibility of the promoter, with respect to the structural

defect or any other defect for such period as is referred to in sub-Section (3) of Section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed."

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

"The allottee shall be entitled to claim the refund of amount paid along with interest at such rate as may be prescribed and compensation in the manner as provided under this Act, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be in accordance with the terms of agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of his registration under the provisions of this Act or the Rules or regulations made there under."

Further Section 38 (1) of the Act says

"The Authority shall have powers to impose penalty or interest, in regard to any contravention of obligations cast upon the promoters, the allottees and the real estate agents, under this Act or the Rules and the regulations made there under."

Thus the Section 34(f) of the Act empowers the Authority to ensure compliance of the obligations cast upon the promoters and Section 11(4) (a) (Supra) cast obligation on the promoter to implement "agreement for sale". Further, Section 37 of the Act empowers the Authority to issue directions in discharge of its function provided under the Act. The Authority also has power to impose penalties under Section 59 to 63 for various contraventions of the provisions of the Act. Moreover, Section 38 (1) of the Act in unambiguous terms empowers the Authority to impose 'penalty or interest.'

Thus from the reading of the above provisions of the Act, it is very clear that the Authority has power to adjudicate various matters, including refund and interest under Section 18 of the Act whereas the compensation is to be adjudged by the Adjudicating Officer under Section 71 of the Act ibid.

23. **C. <u>Whether the Complainant is entitled to get the refund of the money along with interest or not</u>**

Coming to the question that whether the Complainant is entitled for the relief of refund of amount of Rs. Nine lakhs and Seventy five thousand (Rs. 9, 75, 000/-)along with

interest, under provisions of the Act and the Rules made there under. The Complainant in the present case had booked a residential apartment with the respondent no.1. It is *per se* admissible from the perusal of the record placed before us in shape of pleadings including the copy of Complaint, application for filing additional documents, reply on behalf of respondent promoter and rejoinder thereof that the respondent bounded himself to complete the construction work and hand over possession of the apartment to the Complainant in a phased manner from the date of issuance of the allotment letter dated 29th May, 2014, the respondents has failed to do so and none of the reasons given by the respondent promoter are justified.

24. This Authority while adjudicating upon the issue of refund is guided by the judgment of the Hon'ble Apex Court in Civil Appeal nos. 3207-3208 of 2019 titled as "Marvel Omega Builders Pvt. Ltd. versus Shrihari Gokhale and 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 is therefore entitled to refund of amount in the present case due to delayed delivery of possession. The arguing Counsel for the Complainant has further argued and submitted before this Authority that the payments that were advanced to the respondent have not been denied by the respondent.

25. In the present case, there exist, clear and valid reasons for holding down the flat buying Complainant are entitled to refund. There has been a breach on the part of the developer/promoter/ respondent in complying with the

contractual obligation to hand over possession of the flats after issuance of allotment letter dated 29th May, 2014. The failure of the respondent promoter to hand over possession amounts to contravention of the provisions of the Real Estate (Regulation & Development) Act, 2016.The respondent promoter failed miserably in fulfilling all obligations as stipulated in Section 11 read with Section 14 of the Act ibid. There has been a gross delay on the part of the Respondent promoter in completing construction for almost six years. Having paid a substantial amount of the consideration price to the respondent being required to service the debt towards loan installments the purchaser is unable to obtain possession of that flat as the same has not been constructed even after such a long period which is the subject matter of present case.

26. The flat purchaser/ Complainant invested hard earned money. It is only reasonable to presume that the next logical step is for the purchaser to perfect the title to the premises which have been allotted under the terms of the allotment letter dated 29th May, 2014. But the submission of the respondents jointly and severally due to their own issues cannot abrogate and take away the rights of the Complainant under the Act ibid. We do not find any

substance in the pleas raised by Ld. Counsel for the respondent thereof.

27. In the present case the Complainant has paid Nine lakhs and Seventy five thousand (Rs. 9, 75, 000/-) and has asked for the refund due to inordinate delay of possession of the flat. The Hon'ble Supreme Court in case *"Pioneer Urban Land and Infrastructure Ltd. versus Govindan Raghavan, 2019 SCC Online SC 458*, has held that the inordinate delay in handing of the flat clearly amounts to deficiency of service. The Apex Court further held that a person cannot be made to wait indefinitely for possession of the flat allotted to him and is entitled to seek refund of the amount paid by him.

28. In the present case there is an inordinate delay of 6 years in the delivery of the flat. Further, as per the site inspection report of the Municipal Corporation, Shimla dated 17th February, 2020 carried out at the instance of this Authority showing the physical status of the building/flats clearly show that the construction activities at the site are almost negligible. Therefore, there is no option with the Authority but to order the refund of the amount of Rs. Nine lakhs and Seventy five thousand (Rs. 9, 75, 000/-)

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29. The issue is about the interest that the Complainant has sought before this Authority in addition to refund of amount. The Hon'ble Bombay High Court in the landmark judgement of *"Neel Kamal realtors"* in para 261 of judgment has held that *"In my opinion Section 18 is compensatory in nature and not penal. The promoter is in effect constructing the apartments for the allottees. The allottees make payment from time to time. Under the provisions of RERA, 70% amount is to be deposited in a designated bank account which covers the cost of construction and the land cost and has to be utilized only for that purpose. Interest accrued thereon is credited in that account. Under the provisions of RERA, 30% amount paid by the allottees is enjoyed and used by the promoter. It is, therefore, not unreasonable to require the promoter to pay interest to the allottees whose money it is when the project is delayed beyond the contractual agreed period....."* The Hon'ble Supreme Court in *"Pioneer urban land & infrastructure case" has also held that the flat purchaser is entitled to get refund of the entire amount deposited by him with interest."* Thus, the Complainant is entitled to get interest as prescribed as per the Section 18 of the Act read with rule 15 of Himachal Pradesh Real Estate (Regulation and Development) Rules, 2017 that clearly

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states that the rate of interest payable by the promoter to allottee or by the allottee to the promoter, as the case may be, shall be the highest marginal cost of lending rate of SBI, plus two percent.

30. This Authority while considering the implication of the judgment of the Hon'ble Apex Court in the matter of ***"Wg. Cdr. Arifur Rahman Khan and Aleya Sultana & ors. Versus DLF Southern Homes Pvt. Ltd. & Ors."*** As relied upon by the respondents Counsel during his course of arguments, it is clearly provided by the aforesaid judgment that the payment of amount was calculated @ 6 % simple interest per annum to each appellant as compensation. In the present case this Authority is not concerned about the issue of compensation but the refund of amount along with interest. Therefore, the present judgment is not applicable under the present set of facts and circumstances.

31. **D. <u>By whom the refund of money along with interest is to be paid?</u>**

In order to provide refund along with interest as claimed by the Complainant, it becomes important to adjudicate the fact that whether respondent fall within the ambit of definition of promoter under Section 2 (zk) of the Act ibid or not?

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

"Promoter" means,—

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

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

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

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

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

(*iv*) an apex State level co-operative housing finance society and a primary co-operative housing society which

constructs apartments or buildings for its Members or in respect of the allottees of such apartments or buildings; or

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

(*vi*) Such other person who constructs any building or apartment for sale to the general public.

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

This Authority is primarily concerned with the protection of the interests of the Complainant/ Allottee. Thus keeping in view all the above facts, particularly that the respondent has declared himself as promoter of the project registered

with the Authority, we have no reasons, not to accept that Respondent no.1 & 2 are Promoters.

32. The Authority, on the basis of the documents, pleadings and contents of the definition of promoter as detailed in Section 2 (zk), is of firm opinion that the Respondent fall under the ambit of "Promoter" and all obligations as prescribed in Section 11 of the Act read with other relevant provisions of The Real Estate (Regulation & Development) Act 2016 read with the Himachal Pradesh Real Estate (Regulation & Development) Rules 2017, are to be fulfilled jointly and severally by them.

33. That the respondent No. 1 M/S Rajdeep & Company Infra Private Limited and respondent No. 2 Shri Rajdeep Sharma had vested interest in the project by entering into an Joint Development Agreement dated 16.5.2014, whereas the owner Shri Rajdeep Sharma as represented and warranted to the developer the company mentioned above who is developing the said property and has a clear and unencumbered title to the said property measuring 1416.80 sq. meters at Bharari situated at Upmohal Kaleston under the ownership of respondent No. 2. As per following clauses:-

"(B) Further the owner Shri Rajdeep Sharma represented, confirmed and assured to the developer the respondent No. 1 the entire payment of the said property has been made by it while purchasing and he has not entered into any agreement to sell or joint venture or Joint Development Agreement or agreement of any kind in respect of the said property.

(E) The developer shall have the absolute rights to deal with the said property without any difference there in by the owner and developer shall be fully competent to take decision in respect of the present transaction.

(F) The owner has further granted and assigned in perpetuity all its rights to develop and construct and sell flats on the said property.

(2.2) In pursuance of having developer being granted absolute rights of development of the project as aforesaid the developer shall also be entitled to execute the sale deeds in respect of all said flats in favour of the respective allottees.

(2.3) The income tax including any capital gains or loss shall be accounted individually from both the parties out of their share of revenue itself.

(2.5) All the payments from the allottees of the flats in respect of the flats in respect of project will be taken by the developer in their bank account number 3342843393 with Central Bank of India Dera Bassi.

(2.7) The consideration from the grant of the present development and sale rights have been settled amongst the parties as owner has become 30% shareholder in the developer company.

(4.1) Thus the entire land has been transferred to company respondent no 1 for consideration of 30% shareholding of the company by respondent no 2."

The respondent no. 1 is a developer of the project including block D as per the clauses mentioned in the joint development agreement dated 16.05.2014 entered into between respondent No. 1& 2. Respondent No. 1 through is authorized signatory has issued allotment of apartment unit in Claridges Residency Shimla regarding the flat in question. In view of the Authority the respondent no 1 is the promoter and the developer as well and respondent no 2 also is a promoter as he has purchased land of measuring 1416 sq.ft. for the development of the project and has been developing the project including block-D. In view of the Authority, respondent no.1 is a promoter under Section 2

(zk) of the Act as respondent no.1 & 2 intended to develop the project for the purpose of selling second floor (3 BHK) flat to the Complainant in the instant case in the said project whether with or without structures thereon. The expression for the purpose of selling with or without structures' encompasses respondent no.1 as the Land developer and duly covered under the definition of Section 2 (zk) and promoter as well as respondent no. 2 also. Thus all dealing of respondent no 1 & 2 in the light of definition of the promoters as prescribed in section 2 (zk) (i) (ii) & (v) read with the explanation in Real Estate (Regulation & Development) Act, 2016 clearly put them as promoters in the present complaint.

Therefore, all the respondents are liable to refund the amount along with interest to the Complainant, being promoters under the purview of the definition of the Act, the liability of which is joint and several.

34. That the role of respondent no. 3 Smt. Smt. Shakuntala Devi, W/O Shri Sansar Chand Sharma, who is mother of respondent no.2 also holds herself liable as promoter. As per the agreement dated 11th August, 2016 (appended at Anexure R/C at page 26 of the written synopsis of the respondent), it is clearly provided that, " After execution of

the Joint Development Agreement, the respondent no.2 has transferred the land comprising in Khasra no. 5/ 2 measuring 380 sq. mtrs. in the name of respondent no.3, i.e. Smt. Shakuntala Devi, land comprised in Khasra no. 5/4, measuring 380 sq. mtrs. and Khasra no. 5/3 measuring 190 sq. mtrs. at Mohal Keleston, Tehsil and District Shimla, HP by way of family settlement." The respondent no.3 further by way of family settlement transferred 190 sq. mtrs. of land in favour of her son Shri Manoj Kumar, she became the absolute owner of Khasra no. 5/2/2 measuring 190 sq. mtrs. Interestingly, the aforesaid agreement dated 11th August, 2016 have been made in addition to joint development agreement dated 16th June, 2016 whereby the respondents bounded themselves to revenue sharing for construction and selling of apartments.

35. Keeping in view the above said developments it is evident that respondent no 3 comes under the ambit of definition of promoter of the project in block D. Therefore in light of the definition of the promoter, as prescribed in section 2(zk) of the Act. Smt. Shakuntala Devi, respondent no 3 is also a promoter in respect of Block C of the project.

36. **E. Other Issues and directions including imposition of Penalty.**

The Respondent Promoters have not shown any sincerity in delivering to them possession of the flat booked by the Complainant and all these while were busy protecting their commercial interests to satisfy their greed for more money. The Authority is of this firm view that the Respondents have done an Act of fraud on them and forced them to run from pillar to post to recover their hard earned money and for the same these Respondent Promoter must be held accountable and penalised under Section 61 of the Act ibid for their failure to fulfil their obligations as promoter as prescribed in Section 11 and 14 of the Act ibid which should Act as a deterrent for all the Respondent Promoter for repeating such Act with any other allottee/ prospective buyer in future in any of their existing or proposed real estate projects in future. In this case, there are glaring violations of Section 11 & 14 of the Act ibid, committed by the Respondent Promoter that calls for imposition of a penalty under Section 61.

37. The plea that the respondent promoter is squarely covered by 'force *majeure*' on the account of dismissal of retention policy by the Hon'ble High Court of Himachal Pradesh in

CWP no. 612 of 2017 vide its judgment dated 22nd December, 2017, whereby the respondent had applied for regularization of block D and pending approvals with the Municipal Corporation, Shimla and further matter being sub-judiced before the Hon'ble High Court in a review petition, this Authority declines to agree with the respondent. This Authority has already sought a query regarding the plea of *'force majeure'* from the respondent in view of terms of explanation appended to Section 6 of the Act ibid, which defines the expression *' force majeure'*. The plea that the project of the respondent could not be completed on account of pending permissions with the competent authority cannot be said to construe as *'force majeure'* as the same is beyond the scope and purview of the aforesaid expression. Further the respondents have expressly violated the statutory provisions of Section 14 of the Act ibid, which clearly postulates that, *"the proposed project shall be developed and completed by the promoter in accordance with the sanctioned plans, layout plans and specifications as approved by the competent authorities."*

38. The Hon'ble Apex Court in ***Writ Petition (C) no. 940 of 2017 along with connected matters titled as "Bikram***

Chatterji & ors. Versus Union of India & ors." Vide its judgment dated 23rd July, 2019 has observed as under:-

"Para 141. It goes to indicate how at large-scale middle-class home buyers have been defrauded of their hard-earned money, taken away by the affluents and the officials in connivance with each other. Law has to book all of them. We are hopeful that law will spread its tentacular octave to catch all culprits responsible for such kind of fraud causing deprivation to home buyers. It is shocking and surprising that so many projects have remained incomplete. Several lakhs of home buyers have been cheated. As if there is no machinery of law left to take care of such situation and no fear left with the promoters/builders that such acts are not perceivable in a civilised society. Accountability is must on the part of everybody, every institution and in every activity. We fail to understand the standard of observance of the duties by public authorities has gone so down that such frauds take place openly, blatantly, and whatever legal rights exist only on papers and people can be cheated on such wide scale openly, brazenly and with the knowledge of all concerned. There is duty enjoined under the RERA, there has to be a Central Advisory Council as well as the role of the State Government is not ousted in order to protect against

such frauds. We direct the Central Government and the State Government to take appropriate steps on the time-bound basis to do the needful, all other such cases where the projects have remained incomplete and home buyers have been cheated in an aforesaid manner, it should be ensured that they are provided houses. The home buyers cannot be made to suffer when we are governed by law and have protective machinery. Question is of will power to extend the clutches of law to do the needful. We hope and trust that hope and expectation of home buyers are not going to be belied."

39. **RELIEF:-**

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

i. The Complaint is allowed and the Respondent promoters are directed to refund a sum of Rs. Nine Lakhs and seventy five thousand (Rs. 9, 75, 000/-)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 no. 1 to 3.

ii. The refund along with interest is to be paid by the respondent promoters' no.1 to 3 jointly and severally to the Complainant within 60 days from the date of this order.

iii. Section 61 of the Act prescribes the maximum penalty that could be imposed for the contravention of any other provision of the Act other than Section 3 and 4, as five percent of the total cost of the project. The total estimated cost of the project in this case, when calculated on the basis of average price of Rs. Forty lakhs for the six flats on the lower three floors of the block 'A', average price of Rs. 80 Lakhs for the two flats on the top floor with attic of block A', four flats of block 'C' at an average price of Rs. 68 Lakhs and approximately Rs. Thirty Two Lakhs for the RCC frame and site development of Block 'D' comes to approx. Rs. 7.04 Crores and a penalty at a rate of five percent of the total estimated cost works to Rs. Thirty five lakhs and twenty thousand. The Authority, considering all facts of the case, deems appropriate to impose a penalty amounting to Rs. Three Lakhs under Section 61, 69 read with Section 38 of the Real Estate (Regulation & Development) Act, 2016

on the respondent promoters 1 to 3 for failing to meet their obligations as prescribed under Section 11 and 14 of the Act ibid. The penalty imposed shall be borne jointly and severally by the respondent promoters 1 to 3 and shall be deposited in the bank account of this Authority, operative in the name of "Himachal Pradesh Real Estate Regulatory Authority Fund" bearing account no. "39624498226", in State Bank of India, HP Secretariat Branch, Shimla, having IFSC Code SBIN0050204, within a period of two months failing which the amount of penalty shall be enhanced to Rs. Six lakhs.

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

v. It is further ordered that the respondents are barred from selling/leasing/allotting/booking any remaining flats/land in the present project or any of their projects in Himachal Pradesh, till the compliance of this order. Further, no withdrawal from the bank account of the projects to be made till payment as ordered is made to the complainant

and penalty is deposited into the account of Authority. Further, there shall not be any alienation of any movable and immovable assets of this project and any other project of the respondents in HP, till compliance of this order.

vi. All the respondent promoters are directed to intimate the details of their bank accounts pertaining to this project within fifteen days.

vii. The Complainant shall be at liberty to approach the Adjudicating Officer for compensation under Section 71 of the Act ibid.

B.C. Badalia	**Dr. Shrikant Baldi**	**Rajeev Verma**
MEMBER	**CHAIRPERSON**	**MEMBER**

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