REAL ESTATE REGULATORY AUTHORITY,
HIMACHAL PRADESH

In the matter of:-

Sh. Ramesh Chandra Saxena son of Uma Charan Saxena through his authorized representative Sh. Rahul Saxena Resident of village- Tharu Near Cold Store, Tehsil- Nagrota Bagwan, District- Kangra, H.P. Pin -176047

.....Complainant

Versus

1. M/s Shri Builders through its proprietor Uday Swaroop Bhardwaj resident of shop no. 122, First floor Old Bus Stand Market, Tehsil- Nagrota Bagwan, Distict- Kangra, H.P. Pin- 176047
2. Dr. Naresh Virmani son of Sh. Dayal Dass along with Smt. Kalpna Virmani wife of Dr. Naresh Virmani, resident of Panchsheel, Upper Nagrota Bagwan, District- Kangra, H.P.

.....Non-Complainants/ Respondent promoters

Complaint no. RERA/HP/KACTA0718006

Present: - Shri Ramesh Chandra Saxena with Rahul Saxena for the complainant

Sh. Uday Swaroop Bhardwaj prop. M/s Shri Builders, respondent no. 1 with Sh. Munish Kaotch Advocate.

Sh. Naresh Virmani and Kalpna Virmani with Sh. Kunal Dawar Ld. Advocate.

Sh. Abhishek Sood, Assistant District Attorney, RERA Himachal Pradesh.

Final date of hearing (Through WebEx): 29.10.2021.

Date of pronouncement of Order: 29.11.2021.

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ORDER

CORAM: - Chairperson and both Members

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

A complaint was filed by Sh. Ramesh Chandra Saxena against M/s Shri Builder through proprietor Sh. Uday Swaroop Bhardwaj under Section 31 of the Real Estate (Regulation & Development) Act, 2016. Brief facts of the case are the complainant filed the present complaint bearing complaint No. RERA/HP/KACTA-07180006. According to the complaint the complainant pleaded that he booked a Flat No. S-10 measuring 1093 Sq fts situated in 2nd floor in Shri Panchsheel Complex situated at Palampur, District- Kangra on National Highway 22 and paid Rs.2,00,000 out of the total consideration of Rs23,00,000/- as the booking amount and requested him for execution of agreement for sale. The builder/ respondent no. 1 kept postponing the execution of the agreement for sale deliberately on one pretext or the other till 18.10.2010 (more than 3.5 month after booking date). By this time the complainant had already paid a sum of Rs. 15.5 Lakhs in advance. On 18.10.2010 the respondent no. 1/builder called the complainant to his office to execute the agreement for sale which was prepared by the

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respondent no. 1/builder without consulting the complainant. It was pleaded by the complainant that he objected to certain clauses of the agreement for sale which were totally in favour of respondent no. 1/builder and further there was no penalty clause against the builder in the agreement for sale. Despite repeated objections by the complainant, the respondent no. 1/ builder did not change the clauses but orally assured him that no problem will arise in future and possession will be delivered within nine months. The builder being in dominant position had already accepted Rs. 15.5 Lakhs from the complainant before the signing of the agreement for sale which was against the provisions of the Real Estate (Regulation and Development) Act, 2016 (here in after referred as 'Act') but the complainant had no option but to sign the agreement for sale. Full consideration of Rs.23 Lakh was paid within one year of the signing of the agreement for sale but the possession was not handed over to him within the time stipulated in the agreement for sale. The complainant also pleaded that he has not received the possession of the flat till the filing of the complaint though more than eight years have elapsed since booking of the flats. It has been pleaded that complainant has heard other people say that a huge amount collected by the respondent no. 1 /builder from the allottees has been diverted by him to construct a Hotel named Citadel Resorts at

Village Jia, Tehsil Palampur, Distrcit Kangra, HP. It was further pleaded that the project being an ongoing project has not been registered with this Authority as per the provision of the Act.

2. REPLY TO THE COMPLAINT BY RESPONDENT NO. 1

Respondent no. 1 M/S Shree Builders through proprietor Uday Swaroop Bhardwaj has filed reply and taken the preliminary objections of estoppel and maintainability. The complainant has not approached the Authority with clean hands and that the complaint is time barred. On merits, it has been admitted that the Flat in question was booked by the allottee. The total cost of flat has been denied to be Rs Twenty Three Lakhs. It has been further pleaded that cost of the flat and payment schedule has been mentioned in the agreement for sale and both the parties being signatory to it are bound by it. It has been pleaded that there was no delay in the completion of the flat as per the time schedule mentioned in the agreement for sale and the brochure issued by the builder for the sale of flats. It was pleaded that possession of the flat was to be delivered after receipt of the balance payment of 7.5 Lakhs in time. It was pleaded that the complainant failed to make the payment in time and it was for this reason that the delivery of possession of the flat to the complainant was delayed. It was pleaded that the replying

respondent has delivered the possession of flats to other allottees on time. It was pleaded that the complainant was blackmailing the respondent/builder by making concocted stories and filing false complaints. It was pleaded that the complainant had filed Consumer Complainant before the Consumer Court at Dharmshala in the year 2013 and the same stands dismissed. It was pleaded that despite default on the part of complainant, the respondent no. 1/builder has not imposed/ levied any penal charges on complainant for breach of conditions of the agreement for the sale. It was further pleaded that respondent never objected to the quality of construction at any point of the time. It was further pleaded that the complainant got sale deed registered in the name of his wife Meera Saksena to evade the stamp duty. The respondent no. 1/ builder also executed a sale deed of covered car parking in favour of Smt. Meera Saxena on the assurance of complainant without she not being party to the agreement for sale. It was further pleaded that disputes between the parties arose only when respondent no. 1/ builder asked for extra charges amounting Rs. 2.5 Lakh for the extra work done and Rs. 4 Lakh for providing the covered parking space to the complainant which he had not opted earlier. It was further pleaded that the respondent/builder was forced to get extra work done in the Flat which included wood work of the Bedroom, wardrobes, kitchen

cabinet, lattice door extra. The expenses for doing this additional work was borne by the respondent no. 1/builder out of his own pocket whereas these expenses were to be borne by the complainant. It was pleaded that in order to evade the making of extra payment for the extra work done, the complainant had filed this false Complaint before the Authority with the sole purpose to wriggle out of his liability of making payment and cause harassment to the respondent no. 1/builder.

3. **REPLY TO THE COMPLAINT BY RESPODENT NO-2 (Impleaded by order of this Authority dated 04.03.2021)**

The landowner Sh. Naresh Virmani and Kalpna Virmani were impleaded as respondent no. 2 (Collectively) by the Hon'ble Court vide its order dated 04.03.2021. He has put in appearance and filed reply. He has submitted that no cause of action has ever accrued to complainant against the replying respondent. He submitted that it is upon land of respondent no. 2/ landowners that M/s Shri Builders respondent no. 1/ builder had raised construction of the project, and the unit in question has been sold to the complainant by respondent no. 1/builder as has been stated in the complaint itself. Thus he submitted that so far as respondent no. 2/ landowner is concerned he has no privity of contract with the complainant and

he has not made even a single averment against respondent no. 2/ landowner. It was further pleaded that no amount has been received by respondent no. 2/ landowner nor are they party to the agreement for sale. It was pleaded that respondent no. 2/ landowner has no concern with the averments made in the complaint, perusal of which goes to show that they have only been directed against the respondent no .1/ builder and relief, if any, has to be granted against the respondent no. 1/ builder. Further it was pleaded that respondent no. 2 was owner of the land measuring 5 kanals 12 Marlas, situated at Main Bazaar Road Palampur, District Kangra, Himachal Pradesh via registered sale deed no. 10.2.2005 & 04.01.2006 executed in their favour. The builder /respondent no. 1 approached the respondent no. 2/landowner for developing the said land into a residential/ commercial complex. The landowners are practicing medicine and are working professionals who have their clinic in Nagrota Bagwan, District Kangra, H.P. therefore, neither did they have the knowhow of the construction work nor did they have any requisite finances to develop the land. A memorandum of understanding dated 21.8.2006 was executed inter se respondent no. 2/landowners with respondent no.1 M/s Shri Builders through its proprietor Uday Bhardwaj. As per the conditions stated in the MOU, M/s Shri Builders was to construct the commercial cum

residential complex over the land of respondent no. 2/landowners and it was the obligation of respondent no. 1 M/s Shri Builders to get the commercial cum residential plans sanctioned from local Authority and to carry out the construction/ development of the complex. It was pleaded that respondent no. 2/ landowners are in no manner concerned with the construction/ development of the complex. Respondent no. 2/Landowners as per the terms of the MOU were only to be given 35% of the total developed area being their allotment and had absolutely no profit sharing with the respondent no. 1/ builder. He pleaded that in this manner the respondent no. 2/landowner is himself an allottee in the project being developed by Respondent no. 1/builder. It was further pleaded that all the obligations to construct and develop the said land was upon respondent no. 1/builder who was to apply for approvals, permissions, sanctions from the competent Authority and complete the construction as per the prevalent rules and bye laws, at its own cost and expenses and respondent no. 2/landowners had no concern/ obligation with regard to the same. It was further pleaded that the respondent no. 1/builder had complete rights to book, sell lease or mortgage or dispose his allocation of the project to any person of its choice on such rates as he may consider appropriate for the purpose of sale and respondent no. 2/landowner had no concern

with the same. In terms of the MOU, respondent no. 1/builder had allotted the unit in question to complainant. All the documents/ agreements/ receipts were entered into between respondent no. 1/builder and the complainant. It was further pleaded that complete sale consideration from the complainant was received by respondent no. 1/ builder and respondent no. 2/landowner had no share in the same. Therefore it was pleaded that respondent no. 2/landowner had no privity of contract with the complainant. Further it was pleaded that it was the sole duty of the petitioner to proceed with corporate drawings, layout, designs necessary for the construction and development of the said site by submitting the same to the local Authority for obtaining approval and sanction. The respondent no. 1/builder as per the agreement for sale was given a free hand in making alterations in the building. It was further pleaded that as per clause 7 of the MOU it was the sole responsibility and liability of the respondent no. 1/ builder to supply and obtain all the required permissions and sanctions of the plan for the development of the property for the Government and all concerned Authorities at his own expense. It was further pleaded that respondent no. 2/ landowners were at the receiving end as by entering into an MOU with respondent no. 1/ builder not only the utilization of land was blocked but despite the MOU providing delivery of possession of

their share within a period of 36 months from the approval of building plans, the respondent no. 2/land owner were handed their share only in the end of year 2016-17 that too after repeated requests. It was further pleaded that complete liability to develop, construct etc was solely of the said respondent no. 1/builder. It was further pleaded that obligation to register the project under provisions of the Act is of Respondent no. 1/builder as per the MOU. Further it was pleaded on behalf of respondent no. 2 that the obligation to complete the project in time was of respondent no. 1/builder as per the agreement for sale. It was further pleaded that the MOU between the respondent no. 1 and 2 is on principle to principle basis and it has been expressly written in the MOU that the MOU shall not be considered a partnership between them because the said clause does not provide for any profit sharing in the project by the respondent no. 1/builder with respondent no. 2/landowner. It was further pleaded that land owners in the form of sale consideration were only receiving specific share in the project and thus would rather fall within the category of an allottee. Thereafter an additional reply was also filed by respondent no. 2. It was pleaded that the intention of the respondent no. 1/ builder from the very inception was to cheat and defraud respondent no.2/ landowner as under the agreement for sale respondent no. 1/

builder was obliged to complete the project and take necessary and mandatory approvals for the same and provide a concrete structure to all the residents of the project including the landowner/ respondent no. 2 whereas respondent no. 1 has abandoned the project. It was further pleaded that the construction of the project was to complete within 36 months from the date of signing of this MOU whereas the same is still incomplete. It was further pleaded that the entire money has been received by respondent no. 1/ builder from all the allottees but the project is not complete. It was further pleaded that it has come to the knowledge of the respondent no. 2/ landowner that after receipt of entire money from all the allottees, respondent no. 1 has diverted the entire money to build a resort namely CITADEL RESORT, PALAMPUR, HIMACHAL PRADESH. It was further pleaded that it has come to the knowledge of respondent no. 2 that the respondent no. 1/ builder has sold half constructed shops and plots in the market on the basis of which respondent no. 2 /landowner has been dragged into or implicated in a lot of litigation which is causing great mental agony and loss to respondent no. 2/landowner. The respondent no. 1/ builder by selling half constructed plots and shops has committed a fraud with the allottees. Aggrieved by the acts of respondent no. 1/builder in duping all the allottees and also respondent no. 2 landowner,

respondent no. 2 has filed criminal case in the Police Station, Palampur and an FIR has been registered under Section 406 & 420 Indian Penal Code. It was further pleaded that respondent no. 2/ landowner had sent a legal notice to respondent no. 1/ builder asking him to complete the project and handover the same. It was further pleaded that in order to ascertain the structural stability of the project a Local Commissioner may be appointed by the Authority as in order to defraud respondent no. 2/ landowner and other allottees, respondent no. 1/ builder has used sub standard material in the construction of the project. Therefore he prayed to the Authority to direct respondent no. 1/builder to complete the project as per the sanctioned plan so as to avoid any difficulties being faced by allottees and respondent no. 2/ landowner.

4. <u>REJOINDER TO THE REPLY OF RESPONDENT NO. 1/ BUILDER.</u>

The preliminary objections raised by respondent no.1/ builder were denied. It was asserted that the final payment of Rs 23 lakhs was paid by complainant which is evident from hand receipts signed by respondent no.1/ builder and are appended with as annexures to the complaint. It was pleaded that prior to booking the total consideration agreed upon was Rs 23 lakhs to be paid within a year. The formalized consideration was Rs 14 lakhs, the payment schedule and other clauses were incorporated in the sale agreement afterwards by

respondent no. 1/ builder as per his convenience. The respondent no. 1/ builder is guilty of demanding huge some of money even before the signing of agreement of sale which was executed three and half months after booking, just to preclude legal challenges and with bad intention to get the complainant to sign the one sided terms which were completely in favour of respondent no. 1/ builder. It was pleaded that as per sub section 1 of section 13 of RERA Act, a promoter cannot accept an advance of more than 10 percent of the cost of the apartment without first entering into an agreement for sale with the purchaser. It was further pleaded that construction of the flat was not completed in time and the construction of entire project is still far from complete and moving at snails pace. It was pleaded that there is no delay on the complainants side in making payments to respondent no.1/builder and it was pleaded that all payments were made by the complainant as per the agreement for sale and the full payment of Rs 23 Lakhs has been paid within a year. Many of the flat owners have issues with the builder on account of non-completion of works or works executed of poor quality. This is apparent from the copy of proceedings of flat owners meetings some of which have been signed by the respondent no. 1 himself and are annexed as Annexure-2 to the rejoinder. The respondent no. 1/ builder has been extending the dates of delivery possession with respect to all the allottees and there

is evidence of new dates having been committed by respondent no. 1/ builder to individual flat owners in his own handwriting. During the meeting held on 10.8.2020 the residents have complained about inadequate roofing over the building due to which rainwater was falling in the exposed areas of the building. In the same meeting, the respondent no. 1 had committed to complete works in all apartments by 15.10.2020 which promise was not committed by the respondent no. 1. In a meeting held on 20.12.2020, the respondent no. 1 declined to make any commitment regarding the completion of project. It was pleaded that penal provisions in clause 6 is deceitful clause totally in favour of the respondent no. 1. The complainant cited a judgment of the Hon'ble Supreme Court in Pioneer Urban Land and Infrastructure Ltd. vs Govindan Raghawan (Civil Appeal no. 12238 of 2018) on the issue that one sided sale agreement that complainant was forced to sign in, is untenable in the law. It was then re-iterated that the issue of poor quality of construction has been raised at various occasions but remains unresolved and example of such poor construction is leaking plumbing inside the flat directly above the complainant's flat due to which water leaks through the roof of the complainant's flat which is evident from Annexure -4 to the rejoinder. In response to the plea of the respondent that sale deed has been registered in the name of wife of the complainant, it has been submitted that the same

has been done in accordance with the provisions of law. It has been denied that the complainant owes any additional amount for extra/ additional work done by the respondent no. 1. It was submitted that there was no agreement interse the parties towards additional work to be done by the respondent no. 1. It has been denied by the complainant that this complaint has been filed to avoid making payment to the respondent no. 1 for doing additional works. It was submitted that complaint was filed before Consumer Court in the year 2013 and with this Authority it was filed on 24.7.2018 while possession of the flat was given and registration done on 9.9.2019. It was further pleaded that complainant has made all payments to the carpenter and painter for getting the additional work/finishing done in the flat which was necessitated due to the original work being inadequate or of poor quality. The complainant in rejoinder admitted that initially he did not opt for covered car parking. However later on when it was found that there is no proper parking space the complainant requested the respondent no. 1 to allot covered car parking to him. The respondent no. 1 asked the complainant to pay a sum of Rs 2.25 lakhs in advance for which he shall neither be issued any receipt nor an allotment letter. This demand by respondent no. 1 came along with the express exigency that there was only one car parking slot available and that it would get allotted to someone else,

hence complainant was left with no choice but to pay full amount to the respondent no. 1 as demanded. It was further denied that the complaint has become infructuous on account of possession having been delivered to the complainant. It was further submitted that the project is not complete, there is no regular electricity connection, the quality of the flat is very poor and defective. It was further pleaded that accepting possession does not bar a complainant from filing a complainant as elucidated in order of the National Consumer Dispute Redressal Commission in the matter of Ghaziabad Development Authority vs Gurudutt Pandey (RP no. 152 of 2000). He further argued that in Ghaziabad Development Authority vs Yashpal Singh Chabra [1(2003)CPJ165(NC)], Girdhari Lal Mohan Lal Gangani vs Sanjay Sudhankar Urchul [III(2001)CPJ 31 (NC)], and Arun Mahadev Naik vs Shashi Nand Julka [I(2003) CPJ22(NC)] ruled that the customer is entitled to an interest of 18% on the amount of money paid for the apartment.

5. **REJOINDER TO THE REPLY OF RESPONDENT NO. 2/ LANDOWNER.**

The Complaint filed rejoinder to the reply filed by land Owner/Respondent No. 2

It was submitted that Respondent No. 2 highlighted the bad intention and wrong doings of the builder and requested the Authority to pass appropriate order on account of harassment cause by the Respondent No.1 . It was further submitted that intention of the builder from the very inception of the project was to cheat and defraud the allottees by giving false impression that he will develop the project with state of the art structure. It was further submitted the project is still incomplete though the memorandum of understanding was signed in 2016 and the project was to be completed with a period of 36 month. It was submitted that the Respondent No.2 kept on requesting the builder to complete the project and handover the same to the allottees but the same was never completed and is still incomplete. It was further submitted that the Builder/Respondent No.1 after receiving the money form the allottees kept the amount in his personal account, instead of the keeping the same separately for the construction of the project. The amount so collected form the allottees was stiffened for the construction of the Citadel Resort, thus cheating and defrauding the allottees. It was further submitted that the document

executed by Respondent No. 1 and allottees show that developer had malafide intention form the very inception of the commencement of the transaction in order cause wrongful gain to himself and wrongful loss to the others. The builder /Respondent No. 1 abandoned the project and Respondent No. 2 had to file a complaint with S.H.O, Palampur for registration of F.I.R under Section 406 and 420 I.P.C against the Respondent No.1 for his acts of cheating, criminal breach of trust, fraud and misappropriation of property of Respondent No.2. It was further submitted that Respondent No.2 has also issued a legal notice to Respondent No.1 to complete the project and handover the same to the allottees. It was also submitted that Respondent No. 1 in order to defraud the allottees and Respondent No. 2 has used sub-standard construction material and has compromised the structural integrity of the project. It was at last also submitted that the construction of project is far from over and there are many construction quality issues in the same. It is also submitted that possession of the apartment has have been given after inordinate and unjustifiable delay causing harassment and agony to the Complainant.

6. ARGUMENTS ON BEHALF OF COMPLAINANT -

It was argued that one agreement for sale between the complainant and respondent no. 1 was signed on 18th October,2021 and an amount of Rs 15,00,000/- was given as advance prior to the signing of the afore mentioned agreement for sale, the receipt of which are appended along with complaint. It was further argued that it was mentioned in the agreement for sale that possession of the flat/ apartment was to be handed over within 9 months of the signing of the aforesaid agreement. There is penalty clause in the agreement which said that if the builder failed to give possession to the allottee within six months the allottee was entitled to claim damages at the rate of Rs2000/- per month and beyond the period of six months the allottee will build the flat and bill t he expenses to the respondent on. 1. This one sided clause had to be agreed by the complainant because the complainant had already invested a huge amount in the project and despite the protest there was no option but to sign the agreement for sale. It was further also argued that there has been delay in the execution of agreement for sale. It was further argued that the agreement for sale also mentions that there is MOU between respondent no. 2 and respondent no. 1 which was never shown to the allottee. The possession was given to the allottee after nine years and

even then the project was not complete and the possession was taken under protest. It was further argued that the main point of contention is that the builder may be asked to complete the remaining work in the project and hand over the completion certificate of the project to the complainant. It was further argued that there are many works that are pending in the building such as the roof work which is incomplete and also there is an issue of dampness in the building especially in the flat of the complainant. There are issues of drainage and construction in the building. There is no boundary wall. The photographs to demonstrate the same have been appended along with the rejoinder. The complainant has also included in the rejoinder minutes of meetings wherein it has been mentioned that some of the flat buyers have not been handed over the possession even till today. The prayer of the complainant was that there has been delayed possession on account of the defaults committed by respondent on.1. The builder may be directed to complete all the works and submit completion certificate. The complainant also prayed for interest on the delayed possession at the rate of 18 % from the date of first payment till the date of possession was delivered by the builder to the complainant. A further payment of 5 lakhs on account mental harassment and agony be also paid by the respondent no. 1 to the complainant.

7. ARGUMENTS ON BEHALF OF RESPONDET NO. 1

It was argued on behalf of respondent no. 1 that the project was started in the year 2006 when the MOU was signed between respondent no. 1 and respondent no. 2. The title to the land was not clear so some of the left over formalities were completed in the year 2007 whereas they were to be completed within a period of 30 days. The plan of the project was sanctioned in the year 2008. The project was named as 'Shri Panchsheel Complex'. Respondent no. 1 completed the construction work of framework i.e. column, beam and brick structure as per the sanction plan approved by the competent Authority by the end of year 2009. Thereafter respondent no. 1 started executing agreement with prospective buyers such as the complainant. The complainant never he opted for car parking as per agreement for sale but had later opted the same free of cost. There has been delay/ default on the part of complainant to make the balance payments and therefore the possession was delayed to him. There was a penalty clause in the agreement according to which in case the builder defaults in delivering possession within the stipulated period, the builder as per clause 6 of the agreement for sale was to pay Rs 2,000/- for six months and then in case there is further delay then the flat buyer shall complete the project and raise

the bill to the buyer. In case flat buyer wants to get extra work done as per agreement for sale, then advance payment has to be made by the flat buyer for getting the work done. There is no delay in the execution of agreement for sale. It was argued that the complainant has been shown the flat and only after his satisfaction he gave the booking amount and builder has given proper receipts for it. It was argued that the builder has handed over the possession of the flat much prior to the filing of the complaint. It was further argued that the complainant has got done the interiors of the flat from respondent no. 1 as per his desire but the payment has not been given by him and to shun his liability, he has filed this false complaint. A complaint was also filed in the consumer court on similar lines merely to harass the respondent no. 1 on 18th December 2012 and the same was dismissed on 17th June 2013. No appeal has been preferred against that order. The builder/ respondent no. 1 has done extra work in the flat of the complainant to the tune of Rs 2 lakh. Therefore it was argued that the complaint has been filed without merits with sole purpose to harass the complainant. The complainant is hand in glove with respondent no.2/ landowner and collectively they are trying to harass respondent no. 1. The building was ready in the year 2009 as is mentioned in the sale deed executed in the year 2019 wherein it is mentioned that the building is more

than 10 years old. It was further argued that the total cost of the project was denied to be 23 lakhs and was Rs 14 lakhs according to agreement for sale and the sale deed. The respondent no.1 admitted that there is delay in the execution of agreement for sale of 4 months. It was further argued that complainant has not paid any thing extra than 14.00 lakhs and the complainant still has to make the balance payment for extra work done. It was further argued that relief sought by the complainant is infructuous as possession has already been delivered to him and the sale deed has also been executed.

8. ARGUMENTS ON BEHALF OF RESPONDENT NO. 2-

In support of his reply, respondent no. 2 has pleaded that he was impleaded by the Learned Authority being landowner of the project in question. He further argued that there is no averment in the complaint against the respondent no. 2 and therefore his impleadment in the case was done only to facilitate the registration of the project under the Act with the Authority. He further argued that his plight is similar to that of the allottee as he has not received his share in the developed project as per the MOU signed between the parties. It was further argued that there is no privity of contract between the allottee and the respondent no. 2 and he has invested his land in the project. He further argued that qua the liability of delayed

possession he has no role to play as according the MOU it was respondent no. 1, being builder, who was to deliver the possession of the flats to the allottees on time and he had invested his land into the project. For this he also relied on the judgment of the Hon'ble Bombay High Court in Vaidehi Akash Housing Pvt Ltd vs New D.N. Nagar Co-op Housing Society Union Ltd. & others decided on 1st December, 2014. He further argued that he did not receive any money from the allottees and the entire sale consideration was received by the respondent no. 1 therefore liability to pay interest on delayed payment if any shall be imposed on the respondent no. 1 being builder and developer. It was further argued that respondent no. 2 gained title to the land of the project in the year 2005 when the sale deed took place and thereafter respondent no. 1 approached respondent no. 2 /landowner with a proposal to develop the project and in return as consideration the landowner will get 35% share in the developed project. Further he relied upon para 2 of the memorandum of understanding wherein it is mentioned that the respondent no. 1 will develop the said property by erecting a commercial and residential complex at his own cost and expense. He further relied on para no. 4 of the MOU wherein it is mentioned that the respondent no. 1 will prepare drawings, layout, designs necessary for construction and development on the said site & shall submit the

same to the local authority for approval. He further relied on para no. 7 of the MOU where in it was mentioned that it is the sole responsibility and liability of respondent no. 1 to supply and obtain all the required permissions or sanctions from the government and other concerned authorities. He also relied upon para 13 of the MOU wherein it was mentioned that respondent no. 1 shall have full right to book, sell, lease or mortgage or dispose of 65 % share in the project along with proportionate share of land to any person of its choice on such rates as respondent no. 1 may consider for sale. It was further mentioned that consideration of sale of 65% share shall exclusively belong to respondent no. 1 and respondent no. 2 shall have no right in the same. It was further argued that respondent no. 2 himself was a sufferer in the case as he was to be delivered 35 % share in the developed project within 36 months of the execution of the MOU but the same has not been delivered even till today. He further relied on para 20 of the MOU wherein it was mentioned that respondent no. 1 and respondent no. 2 have entered into this agreement on principal to principal basis only and nothing contained in the MOU shall be construed as partnership or a joint venture or association of persons between the parties. It was then argued that delivery of possession was not the responsibility of respondent no. 2 and there may be some cases where as per agreement landowner had some share in the

consideration received by the builder from the allottee but in the present case no such amount has been received by the landowner therefore he is not a promoter.

9. FINDINGS AND CONCLUSION 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 issues that requires the consideration and adjudication, namely:-

A. Jurisdiction of the Authority?

B. Whether the Act of 2016 is retrospective or retroactive in its operation?

C. What was the due date of delivery of possession and when possession was offered/ given?

D. What was the consideration of the flat on which interest for delayed has to be paid?

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E. Whether the complainant has waived his right to file and maintain the present complaint in view of the subsequent taking over of possession of the flat by him from the respondent no. 1?

F. Who are the promoters and by whom the interest on delayed possession is to be paid?

This Authority after careful examination of the statutory provisions of the Real Estate (Regulation & Development) Act, 2016 along with judicial pronouncements of various Courts including the Hon'ble Apex Court, deliberates on the different issues one by one by taking into consideration facts as well as law applicable to the present case.

A. Jurisdiction of the Authority?

Section 31 of the Act prescribes that any aggrieved person can file a Complaint before the Authority or the Adjudicating Officer as the case may be for any violation of the provisions of the Act. Thus this Section provides that a separate Complaint be lodged with the Authority and the Adjudicating Officer, "as the case may be." Accordingly Rule 23 of the Himachal Pradesh Real Estate (Regulation and Development) Rules 2017 provides the procedure of filing Complaint with the Authority and prescribes 'Form M' for filing a Complaint. In this case, the Complainant has filed the Complaint in 'Form-M.'

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

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

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

> The promoter shall—
>
> *"be responsible for all obligations, responsibilities and functions under the provisions of this Act or the Rules and regulations made there under 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 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.'

Section 11(4)(a) of the Act provides that the promoter shall be responsible to fulfill the obligation towards the allottee as per the terms and conditions of the agreement for sale. Once this obligation has been incorporated in the substantive provision of the Act, its non-compliance may invite the violation of the provision of the Act. As per section 34(f) the Authority is competent to ensure the compliance of the obligations casted upon the promoter under this Act and the Rules and Regulations made there under. Thus for

awarding the interest under Section 18(1) proviso of the Act due to non-fulfillment of the obligations/responsibilities as per the terms and conditions of the agreement by the promoter, the Authority will be competent to award interest simplicitor by taking the aid of the provision of section 11(4)(a), 34(f) and 37 of the Act. .

Section 13 of the Act provides for an obligation on the promoter qua the different specifications to be mentioned in an agreement for sale and the section is reproduced herein below:

> "13. No deposit or advance to be taken by promoter without first entering into agreement for sale.—
> (1) A promoter shall not accept a sum more than ten per cent. of the cost of the apartment, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force.
> (2) The **agreement for sale** referred to in sub-section (1) shall be in such form as may be prescribed and **shall specify** the particulars of development of the project including the construction of building and apartments, along with specifications and internal development works and external development works, the dates and the manner by which payments towards the cost of the apartment, plot, or building, as the case may be, are to be made by the allottees and **the date on which the possession of the apartment**, plot or building is to be handed over, the rates of interest payable by the promoter to the allottee and the allottee to the promoter in case of default, and such other particulars, as may be prescribed."

Section 17 of the Act provides for an obligation on the promoter qua transfer of title and possession and reads as

"17. Transfer of title.—

(1) The promoter **shall execute a registered conveyance deed in favour of the allottee** along with the undivided proportionate title in the common areas to the association of the allottees or the competent authority, as the case may be, and **hand over the physical possession of the plot, apartment of building, as the case may be, to the allottees** and the common areas to the association of the allottees or the competent authority, as the case may be, in a real estate project, and the other title documents pertaining thereto within specified period as per sanctioned plans as provided under the local laws:
Provided that, in the absence of any local law, conveyance deed in favour of the allottee or the association of the allottees or the competent authority, as the case may be, under this section shall be carried out by the promoter within three months from date of issue of occupancy certificate."

On the above backdrop let us turn to Section 18 of RERA Act, 2016 which reads as under.-

18 : Return of amount and compensation.

(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.

Provided that where an allottee does not intend to withdraw from the project he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

After carefully reading of the above provision, it is revealed that it consists of three different clauses. At first let us see clause No. (1). If the promoter fails to complete or is unable to give possession of an apartment, plot or building in accordance with the terms of agreement for sale or as the case may be, duly completed by the dates specified therein or due to discontinuance of his business on account of suspension or revocation of registration under this Act or for any other reason, then it is the obligation on promoter to return the amount received from complainant with interest at such a rate as may be prescribed including the compensation, in case complainant wishes to withdraw from the project. Now, proviso says that if complainant does not intend to withdraw from the project then, promoter shall pay interest for every month of delay till the handing over of possession of the flat to the complainant at a such rate as may be prescribed.

Now the case of complainant falls under option second as he decided to continue with the project. So, as per proviso of Section 18, interest is to be calculated for every month of delay till the possession is handed over to the complainant. Thus, the moment due date for handing over possession is over the claim of interest for delay of every month is accrued to the complainant as per Section 11 of RERA Act, 2016. Right to claim interest is statutory right once it is accrued it lasts till the possession is handed over. Once delay is caused in handing over possession, it is continuous cause of action to get possession and consequently interest on period of delayed possession. It is further obligation and duty of the promoter to pay the interest for the period of delayed possession.

Section 34(f) of the Act provides that it is the function of the Authority to ensure the compliance of the obligations casted upon the promoter, allottee and the real estate agent under the Act, rules and regulations made there under. Section 37 of the Act authorises the Authority to issue certain directions for the purpose of discharging its functions.

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.

B. WHETHER THE ACT OF 2016 IS RETROSPECTIVE OR RETROACTIVE IN ITS OPERATION?

This 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.

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 and to regulate, administer and supervise the unregulated real estate sector within the fold of the real estate authority.

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 manifest 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 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.

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.**"

In the instant case, though the agreement for sale between the parties was executed on 18th Day of October, 2010 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. 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 to the case before the coming into operation of the Act.

It is an admitted fact that the present project is an ongoing project. The promoter/ respondent no. 1 has initiated the process of registration of the real estate project and has uploaded the

application on the web portal of the Authority for getting the project registered.

C. WHAT WAS THE DUE DATE OF DELIVERY OF POSSESSION AND WHEN WAS POSSESSION OFFERED/ GIVEN?

The complainant submitted that the possession was to be delivered within nine months from the execution of agreement for sale. The agreement for sale between the parties was executed on 18th October, 2010. Clause 4 of the agreement for sale that deals with delivery of possession is as under

> *" 4. That the possession of the above said Flat no. S-10 (3 B.R.M. Unit) of Shri Panchsheel Complex shall be given to the second party by the first party within 9 months from the date of agreement"*

Therefore in the present case, in view of clause 4 of the agreement for sale executed interse the complainant and respondent no. 1, the execution of which has been admitted by both of them, the due date of possession was nine month from the date of execution of agreement for sale. Agreement for sale was executed on 18th Day of October, 2010. Nine months from this date would be July, 2011. So the due date of delivery of possession was by the end of July 2011 i.e. 31st July, 2011. During arguments, on the query of the Authority, about the actual date of possession of the flat, both the

parties failed to give the date of possession. Since the sale deed has been executed on 09.09.2019, the Authority holds that the date of possession will be considered as the date of the sale deed.

D. WHAT WAS THE CONSIDERATION OF THE FLAT ON WHICH INTEREST FOR DELAYED HAS TO BE PAID?

It was contended on behalf of the complainant that a total of Rs 23 lakhs was fixed as sale consideration for the execution of sale deed. It was further pleaded that entire consideration of Rs.23 Lakh was paid within one year of the signing of the agreement for sale but the possession was not handed over to him within the time stipulated in the agreement for sale. It was contended that the agreement for sale was executed on 18.10.2010 and by this time the complainant had already paid a sum of Rs. 15.5 Lakhs in advance. It was pleaded on behalf of the complainant that possession of the flat was to be delivered after receipt of the balance payment of 7.5 Lakhs in stipulated time. It was contended that the formalized consideration was Rs 14 lakhs, the payment schedule and other clauses were incorporated in the sale agreement afterwards by respondent no. 1 as per his convenience. On the other hand, respondent no. 1 has contended that complainant has not paid anything extra than amount of Rs 14 lakhs and rather has

submitted that the complainant still has to make the balance payment for extra work done by respondent no. 1 in the premises of the allottee. It was further contended on behalf of the builder that the total sale consideration as per the agreement for sale and the sale deed is Rs 14 lakhs.

There is no discrepancy or confusion with respect to the total consideration agreed upon by the parties and it was Rs 14,00,000/- which was mentioned in the agreement for sale which also was the final sale consideration amount as mentioned in the sale deed. The sale deed being the best evidence available with the Authority says that the total sale consideration of Rs 14,00,000/- has been received by seller i.e. respondents and there is nothing due to be paid on the part of the complainant. From the aforesaid it is clear that the total consideration mentioned in the sale deed is Rs 14,00,000/-.

E. WHETHER THE COMPLAINANT HAS WAIVED HIS RIGHT TO FILE AND MAINTAIN THE PRESENT COMPLAINT IN VIEW OF THE SUBSEQUENT TAKING OVER OF POSSESSION OF THE FLAT BY HIM FROM THE RESPONDENT NO. 1?

According to Ld. counsel of the Promoter, principle of Waiver applies to the present case and the complainant by taking possession of the flat has waived his right to file and maintain the

present complaint. It was submitted on behalf of respondent no. 1 that complainant accepted the possession of the flat out of his free will and volition and without any protest. The Ld. advocate for the respondent no. 1 submitted that in view of the principle of waiver as well as the concept to discharge of contract by performance, the complainant is not entitled to claim interest on the delayed period of possession as complainant received the possession without any protest and thereby waived his right of interest and also discharged the contract by his performance.

The Learned **Maharashtra Real Estate Appellate tribunal in case tilted Rekha Sinha Vs Larsen and Turbo Ltd. MANU/RT/0047/2019** in para no. 26 has held that :

> "26. In view of above discussion I am of the opinion that allottee not only demanded the possession of the flat from time to time by pursuing the said matter with promoter but also claimed the recovery of compensation and promoter had not denied such claim in reply to the mail of allottee. So it cannot be said that there was a waiver of the right to claim interest on the part of allottee in the present case. There is no authenticate document to show that allottee waived the right to claim interest on delayed possession or while making the last payment of the price at the time of getting the possession. **Whenever, allottee has paid life earnings and hard money and some time also borrowed money as loan for purchasing his home, allottee will give first preference for getting the possession of the home and thereafter, allottee will pursue his right in respect of any monetary relief such as interest for which allottee is entitled on account of**

delay in handing over the possession. If we apply the principle of waiver on the basis of facts and circumstances of the case and in absence of any authenticate evidence of Allottee of waiver to that effect on record, the very object of enactment of RERA Act particularly Section 18 for awarding interest to the allottee for delayed period of possession will be frustrated. It is not expected that, once there is a delay allottee should take the possession at belated date and always waived his right to claim the interest an the period of delay in possession. In ordinary course of nature every allottee will prefer to accept the possession of the flat at first and thereafter, allottee will proceed to exercise his right for getting interest on the delayed period if any. So, the ratio laid down in above referred case laws are not attracted to the present matter and it cannot be said that allottee has waived The right to claim interest on delayed period of possession."

In the present facts, the complainant has paid hard earned money for purchasing the flat and he will obviously give first preference for getting the possession of the home and thereafter, complainant will pursue his right in respect of any monetary relief such as interest for which complainant is entitled on account of delay in handing over the possession. If we apply the principle of waiver on the basis of facts and circumstances of the case and in absence of any authenticate evidence of complainant of waiver to that effect on record, the very object of enactment of RERA Act particularly Section 18 for awarding interest to the complainant for delayed period of possession will be frustrated. It is not expected that, in case of delay allottee who takes possession at belated date

will always waive his right to claim the interest on the period of delay in possession. In ordinary course of nature every allottee will prefer to accept the possession of the flat at first and thereafter, allottee will proceed to exercise his right for getting interest on the delayed period if any. The execution of conveyances or settlement deeds would not operate to preclude the flat buyers from claiming compensation. So in view of the present facts and the ratio laid down in above referred case law principle of waiver is not attracted to the present matter and it cannot be said that complainant has waived his right to claim interest on delayed period of possession. There is no authenticate document to show that complainant waived the right to claim interest on delayed possession or while making the last payment of the price or at the time of getting the possession. Therefore his complaint before the Authority qua interest on delayed possession even after taking over of possession is maintainable.

F. WHO ARE THE PROMOTERS AND BY WHOM THE INTEREST ON DELAYED POSSESSION IS TO BE PAID?

It becomes important to adjudicate the fact that whether Respondent no.1 & 2 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**, colonizer, contractor, developer, estate developer or by any other name or claims to be Acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale; or

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

Explanation.—For the purposes of this clause, where the person who constructs or converts a building into

apartments or develops a plot for sale and the persons who sells apartments or plots are different persons, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified, under this Act or the rules and regulations made there under."

To substantiate the fact that whether Respondent no. 1 &2 are promoters within the definition under the Act, this Authority has deliberated upon the issue one by one.

Now so far as respondent no. 1 is concerned he being the developer/ builder in the present case, is certainly a promoter for the propose of the Act as per clause (v) of Section 2 (zk) of the Act which says that any person who acts himself as builder is also a promoter for the purpose of the Act.

Now the Authority has to discuss whether respondent no. 2 being landowner falls with the definition of the word promoter or not.

The landowner Sh. Naresh Virmani and Kalpna Virmani were impleaded by the Hon'ble Court vide its order dated 04.03.2021. After putting in appearance they filed reply. He contended that it is upon land of respondent landowners that M/s Shri Builders respondent no. 1 had raised construction of the project, and the unit in question has been sold to the complainant by the respondent no. 1 as has been stated in the complaint itself.Further it was contended that respondent no. 2 was owner of the land

measuring 5 kanals 12 Marlas, situated at Main Bazaar road Palampur, District Kangra, Himachal Pradesh via registered sale deed no. 10.2.2005 & 04.01.2006 executed in their favour. He contended that the builder/ respondent no. 1 approached the landowner/respondent no. 2 for developing the said land into a residential/ commercial complex. The landowners are practicing medicine and are working professionals who have their clinic in NagrotaBagwan, District- Kangra, therefore, neither did they have the knowhow of the construction work nor did they have any requisite finances to develop the land. A memorandum of understanding dated 21.8.2006 was executed inter se landowners/respondent no. 2 with M/s Shri Builders respondent no. 1 through its proprietor Uday Bhardwaj. As per the conditions stated in the MOU, M/s Shri Builders was to construct the commercial cum residential complex over the land of respondent no. 2/landowners and it was the obligation of respondent no. 1 M/s Shri Builders to get the commercial cum residential plans sanctioned from local Authority and to carry out the construction/ development of the complex. It was contended that respondent no. 2/landowners are in no manner concerned with the construction/ development of the complex. It was further contended that Landowners as per the terms of the MOU were only to be given 35%

of the total developed area in the project being their allotment and had absolutely no profit sharing with the respondent no. 1. He contended that in this manner the respondent no. 2 is himself an allottee in the project being developed by Respondent no. 1. It was further contended that all the obligations to construct and develop the said land was upon respondent no. 1 who was to apply for approvals, permissions, sanctions from the competent Authority and complete the construction as per the prevalent rules and bye laws, at its own cost and expenses and landowners/respondent no. 2 have no concern/ obligation with regard to the same. Respondent no. 2 has submitted that no cause of action has ever accrued to complainant against the respondent no. 2. He further contended that his relation with respondent no. 1 was on principle to principle basis and he had no privity of contract with the complainant. It was further contended on his behalf that no amount has been received by the respondent no. 2 nor are they party to the agreement for sale. It was further contended that respondent no. 1 had complete rights to book, sell, lease, mortgage or dispose his allocation of the complex to any person of his choice on such rate as he may consider appropriate for the purpose of sale and respondent no. 2 had no concern with the same. All the documents/ agreements/ receipts were entered into between respondent no. 1 and the

complainant. It was further contended that complete sale consideration from the complainant was received by respondent no. 1 and respondent no. 2 had no share in the same. Further it was pleaded that it was the sole duty of the respondent no. 1 to proceed with corporate drawings, layout, designs necessary for the construction and development of the said site by submitting the same to the local Authority for obtaining approval and sanction. It was contended that the respondent no. 1 as per the agreement for sale was given a free hand in alterations as per site situation in the building. It was further contended that as per the agreement for sale, as per clause 7 of the MOU it was the sole responsibility and liability of the respondent no. 1 to supply and obtain all the required permissions and sanctions of the plan for the development of the property from the Government and all concerned Authorities at his own expense. It was further contended that landowners/respondent no. 2 were at the receiving end by entering into an MOU with respondent no. 1 as not only the utilization of land was blocked but despite the MOU providing delivery of possession of their share within a period of 36 months from the approval of building plans, the land owners/ respondent no. 2were handed their share only in the end of year 2016-17 that too after repeated requests. It was further contended that complete liability

to develop, construct etc was solely of the said respondent no. 1. It was further contended that obligation to register the project under provisions of the Act was of Respondent no. 1 as per the MOU. Further it was also contended that the obligation to complete the project in question in time was of respondent no. 1 as per the agreement for sale. It was also contended that the MOU between respondent no. 1 and 2 is on principle to principle basis and it has been expressly written in the MOU that it is not a partnership between them as the said clause does not provide for any profit sharing in the project by the respondent no. 1 with respondent no. 2. It was further contended that land owners in the form of sale consideration were only receiving specific share in the project and thus would rather fall within the category of an allottee. It was further contended that the respondent no. 1/ builder by selling half constructed plots and shops has committed a fraud on the allottees. It was contended that aggrieved by the acts of respondent no. 1 in duping all the allottees and also respondent no. 2, respondent no. 2 has filed criminal case in the Police Station Palampur and an FIR has been registered under Section 406 & 420 Indian Penal Code. It was further contended that the respondent no. 2 had sent a legal notice to respondent no. 1 asking him to complete the project and handover the same.

To further delve into the matter as to whether respondent no. 2 is a promoter or not and jointly liable along with respondent no. 1 under the Act for interest on delayed possession it becomes necessary to discuss in detail the various clauses of the MOU signed between them wherein inter se liability of respondent no. 1 & 2 is spelt out. The contents of the MOU are reproduced herein below

"1.That the subject matter of Memorandum of Understanding is a freehold plot measuring 2150 sq mts (5 Kanal 12 mulra) more specifically defined at the foot of this agreement and shown (Red)."

2. *That in consideration and subject to the terms and conditions hereinafter specified the second party shall and hereby agrees to develop the said property by erecting a Commercial and Residential complex at its own cost and expenses thereon subject to approval of plans and designs by the concerned authorities as specified hereinafter.*
3. *That the first party shall handover possession to second party soon after the execution of this agreement and approval of the map/ plan by the local Authority.*
4. *That simultaneously with the signing of this agreement, the second party will proceed with the preparation of corporation drgs, layout, designs necessary for construction and development of the said site & shall submit the same to the local authority at Palampur for obtaining approval and sanction and the entire cost incurred thereof shall be borne by the second party.*
5. *That the plans design vide Annexure (no. 1,2,3,4) (pages no. 13, 14, 15 and 16) specification vide annexure (no. 5 & 6) (pages no. 17 & 18) and proportionate share division on each floor have prepared by Second Party and have been acknowledged and agreed upon by First Party all cost to be incurred in respect thereof shall be borne and met by the second party. Further second party shall have free hand in alterations as per site situation in the building considering the validity of project.*
6. *That the said proposed design drawing prevailing by law of Local Authority i.e. maximum coverage on each floor 55% and 175% FAR with provision maximum 4 stories and parking facility on stilts. Land use commercial/ residential.*

7. *That it shall be the sole responsibility and liability of the second party to supply and obtain all the required permissions or sanctions of the plan for the above property from the Government and all concerned authorities and department and such further permission which may be required from time to time under any law, rule and regulation for the time being in force, at its own cost and expenses. The first party shall co-ordinate with the second party for its representations being owner of the said land as and when informed by second party.*
8. *That the first parry undertakes to execute all documents/ applications/ affidavits etc which may be necessary for the construction of the proposed complex at the cost and expense of the second party.*
9. *That the second party shall be entitled to apply for and obtain, temporary and permanent connection of water and electricity for the said complex at the site of the said premises. The cost of same shall be proportionately shared y both parties.*
10. *That the total cost of construction of the proposed commercial cum residential complex, including the parking lot, water supply system, sanitary and plumbering, landscaping, boundary wall, lift, if installed, water storage tanks as per requirement, shall be borne and paid by the second party. It is further agreed that incase any penalty is imposed by the local authorities for excess coverage beyond the permissible limit, the same shall be brone by second party and the first party in the ration of 50%-50% respectively.*
11. *That as a consideration for the second party agreeing to develop and raise the said commercial cum residential complex in the manner specified herein, the second party shall be entitled to retain 65 % of the total built up area and the first party shall be entitled to retain the remaining 35% the built up area and every floor at pro rata basis as shown in them map annexed to this agreement deed. However, if the total area of the shops on ground floor & first floor and flats on second floor and third floor as shown in the aforesaid map coming to the share of first party falls short of his 35% share, the second party in that event shall compensate by making payment at the market rare prevailing at the time when the entire building is ready for occupation, at the price of the area falling short of 35% and vice- versa. While setting final accounts, where aswhat ever is decided on the annexed maps mentions nos of shops/ flat stand final.*

    The aforesaid ration will also apply to parking lots, common areas ext except the space left for common privileges. Further, the second party shall make constructions as per the specifications detailed in the schedule to this agreement (Annexure no. 5.6 page no., 17, 18).

12. *That the second party on the said premises shall construct, parking lost ground floor, first floor, second floor and every built up area shall be of similar make, pattern, design and workmanship and similar material and accessories shall be used in making the entire complex. All these acts shall be essential and performed by the second party at its expense and cost and further the first party or his representatives shall at all time be entitled to inspect the work.*
13. *That the second party shall have full right to book, sell, lease or mortgage or dispose as and when desired the 65 % share as indicated in the map annexed to this agreement relating to the proposed complex, in part or as whole, alongwith proportionate share of land to any person / persons of its choice on such rate or rates as the second party may consider for the sale. Consideration of such position shall exclusively belong to the second party and the first party shall have no share or right in the same. Further the first party shall have no right to interfere in the rights of the second party to dispose of its 65% share as aforesaid. However the first party shall in no way be responsible for any liability of the second party.*
14. *That the first party shall also have the right to sell, lease mortgage or transfer as and when desired, his share of 35% as aforesaid, in the proposed complex in part or as a whole, to any person(s) of his choice on such rates or terms as he may consider and the sale proceeds of his share of 35% will exclusively belong to his and the second party shall have no right or share in the same.*
15. *That all agreements/ contracts which may be entered with by the second party with regard to the constructions and sale in respect of the 65% share (or as shown in the map) of the second party, in the proposed complex shall always be attorned by the first party as and when desired by the second party after laying hands on this agreement and shall be binding on the first party provided that the first party shall never be deemed to attorn any financial or other liability imposed upon such agreement or contracts the responsibility of the payment of which may be fastened on the first party.*
16. *That it is agreed and convented by the parties hereto that the second party shall commence start construction of the said complex within six months of the approval and release the building plans accorded by the local authority and/or all the other concerned authorities and shall complete the entire structure or the share of the first party in accordance with this agreement within a period of 36 months of the approval of the said building plan/map of the local development authority/ other concerned authorities*

subject to occurrence of any natural calamity making execution either slow or impossible or delay caused due to official restrictions and circumstances entirely beyond the control of the second party and any loss of time caused by such unknown/ unexpected reasons in continuing the construction shall be sell off from aforesaid time period. It is further agreed that in case the second party fails to deliver possession of his share (the first party) within the stipulated period, the second party shall pay to the first party damages @ Rs 15,000/- per month for a period of six months. In case after six months the second party still fails to hand over possession to the first party share of the constructed area, the first party shall have the right to take possession of his share and impose charges to complete his share on second party.

17. *That the first party shall not interfere or, obstruct in any, manner in the execution, construction and completion of the development of the said property in accordance with terms of the agreement.*
18. *That the first party agrees and undertakes to execute all documents and agreements in connection with the sale of the share of the second party as and when requested by the second party. All expenses incurred in execution of these documents shall be paid by the purchasers or transferees and in no manner the same shall be recoverable from the first party. It is made clear that the first party shall have right to retain or sell his share of the property and second party shall have no concern with it other than sharing Lift equipment (if proposed) the common maintenance, installation of electric and water supply etc in proportion of shares.*
19. *That all persons, workers and labour etc employed or engaged by the second party in the construction of the said proposed complex shall be entirely under the control of the second party and shall always and at all times and for all purposes be deemed to be the employees of the second party and the first party shall have no concern with them in any manner whatsoever. The first party shall under no circumstances be deemed to be the employer of the workers/ laborers / employees etc of the second party engaged in the said construction work. It is also clearly agreed between the parties thereto that the second party shall keep the first party fully indemnified and harmless of any mishap or accident against any demand or claim by any workman/labour or employee engaged by the second party, in the construction of the building at the site by any contractor/ sub- contractor appointed by the second party to construct the proposed building.*
20. *That the first party and the second party have entered into this agreement on a principal to principal basis only and nothing contained herein shall be deemed or construed as constituting a*

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partnership between them or as a joint venture between them nor the second party and the first party in any manner shall constitute as association of persons.

21. *That the first party undertakes that except what is expressly provided herein, he shall not in any way transfer encumber or mortgage his rights, title or interest in the said land in whole or in part, which may cause interruption in the construction of the said complex."*
22. *That the proposed name of the said commercial cum residential complex a "SHRI PANCHSHEEL COMPLEX".*
23. *That the first party undertakes at all times to attorn the proportionate land share (65%) for and on behalf of second party relating to particular project in favour of any individual/ institution, the second party desires.*
24. *That all the common portions exterior to the building and common services shall be maintained and provided by the second party in the said complex for which the second party shall be entitled to collect or charge the said expenses from the owners/occupiers of the said complex at such rates as may be considered just and proper.*
25. *The first party hereby authorizes the second party that if during the course of construction of the proposed complex any alteration, changes, deviations from the sanctions pplan become necessary, desirable or convenient, the same may be carried out by the second party after notice to the first party alongwith his consent.*
26. *That all disputes and differences touching or arising in connection with this agreement or interpretation of the provisions of this agreement shall be subject to the Arbitration and Conciliation Act 1997 and subject to the jurisdiction of District Courts and the reference shall be made to any arbitrator jointly names by both parties and in case of disagreement one nominated by the court.*
27. *That the owner undertakes that except what is expressly provided herein shall not in any way transfer encumber or mortgage his Rights, title or interest in the said land in whole or in part which may cause interruption in the construction of the project.*
28. *That this deed is being executed in two parts one to be retained by the first party and the other by the second party and both parts shall be deemed to be the original agreement.*

IN WITNESS WHEREOF the parties hereto have set their respective hands on the day, month and year first mentioned above."

To summarize and concluded the various relevant clauses of the MOU it is clear that respondent no. 1 shall develop the said project

by erecting a commercial and residential complex at his own cost and expense and the possession of the property shall be with the respondent no. 1 after execution of the MOU. The respondent no. 1 will prepare drawings, layout, designs required for construction and development of project and submit the same for obtaining approvals and sanction from the local authority at his own cost. Total cost of construction of the project shall be borne by respondent no. 1 and any penalty imposed by the local authorities for excess coverage beyond the limit shall be borne by both the parties in equal ratio. Respondent no. 1 shall be entitled to retain 65% of the total built up area and respondent no. 2 as consideration for giving land to the project shall be entitled to 35 % of the total built up area in each and every floor. Respondent no. 1 shall construct the entire project as per the specifications at his owns cost and expenses. Respondent no. 1 shall have full right to book, sell, lease or mortgage or dispose his 65% share in the project to any person of his choice and on such rate as respondent no. 1 may consider deem fit. Consideration received from disposal of his share of 65% shall exclusively belong to respondent no.1 and respondent no. 2 has no share in the same. Further any liability with respect to disposal of 65 % share of respondent no. 1 in the project shall also be of respondent no. 1 and respondent no. 2 shall

have no responsibility in the same. All the transaction with respect to 65 % percent of the share belonging to respondent no. 1 shall attorned by respondent no. 2 but it was also agreed by this clause that respondent no. 2 shall not bear any financial or other liability imposed for such transaction. Further respondent no. 1 will commence construction within six months of the execution of the MOU and the project shall be completed within 36 months of the approval of the plans by the competent authorities. Respondent no. 2 shall not interfere or obstruct in the execution, construction and completion of the development of the project by the respondent no. 1. The MOU entered between the parties shall be on principal to principal basis and there is no partnership, joint venture or association of persons between them. All common services shall be maintained by respondent no.1 at such rates from the owners/ occupiers as he deems fit.

As per the definition under Section 2 (zk) of the Act a promoter is any person who constructs or causes to be constructed a building or building consisting of apartment, etc with the purpose of selling . Any person who just constructs a building or building consisting of apartments etc without the purpose of selling, will not fall within definition of promoter. Further more, even if some of the apartments are not sold, such person who is constructing the

apartments shall fall within the definition of promoter. The test here is of the intent to sale and not actual sale.

The definition of promoter is extremely relevant for the determination of who is going to be a promoter in case when the land is owned by one person and the construction is carried out by someone else. In most joint development agreements, the owner pools in the land, while the builder constructs the apartments which are then sold in a particular ratio of the total number of apartments. The explanation to the definition clearly provides that when the person constructing and the person selling apartments or plots are two separate persons, then both of them shall be jointly liable for the function and responsibilities of the promoter as provided under the Act and shall be considered as co- promoter.

In the present case, the Respondent no 2 is the Lawful "Owner-in-possession" of land measuring 5 kanals 12 Marlas, situated at Main Bazaar road Palampur, District Kangra, Himachal Pradesh via registered sale deed no. 10.2.2005 & 04.01.2006 executed in their favour .

Respondent no. 2 is a promoter as the consideration for the conveyance of possession to respondent no. 1 and development of entire project at the cost and expense of respondent no. 1, respondent no. 2 was getting 35% share in the developed project

and had liberty dispose of the same in the manner he wants which means that revenue sharing was involved. Therefore respondent no 2 was to get revenue share in the shape of 35 % share in developed project. Respondent no. 2 has constructed a commercial block adjoining to the land of the project under reference therefore he will be equally liable along with respondent no. 1/ builder in case there is ever any issue of approval of completion/ issue of NOC of service connections as in case of deviations in the project. Meaning thereby that in case there is any deviation in the project beyond what is sanctioned then as per the MOU both the parties have undertaken themselves to be equally liable therefore in case a complaint is made for any deviations in the project or qua issue of NOC for services, in that case as per clause 10 of the MOU respondent no. 2 shall also be held liable along with respondent no. 1 in the project. Thus all dealings of Respondent no 2 in the light of definition of promoter, as prescribed in Section 2 (zk) (ii) and (v) read with Explanation in the Real Estate (Regulation and Development) Act 2016, clearly put him as "Promoter " in the present complaint matter.

So far as liability for delayed delivery of the project is concerned the liability is solely of respondent no. 1 as the complainant had booked the flat by signing an agreement for sale with the

respondent no.1/ builder and the time for delivery of possession was 9 months from the execution of the said agreement. As per the MOU particularly the second clause, it was respondent no. 1 who shall develop the said property by erecting a commercial and residential complex at his own cost and expense. As per the MOU total cost of construction of the project shall be borne by respondent no. 1 he shall be entitled to retain 65% of the total built up area and he shall have full right to book, sell, lease or mortgage or dispose his 65% share in the project to any person of his choice and on such rate as respondent no. 1 may consider deem fit in the interest of justice and consideration received from disposal of his share of 65% shall exclusively belong to respondent no.1 and respondent no. 2 has no share in the same. Further in the MOU clause thirteen it was also agreed between both the parties that any liability with respect to disposal of 65 % share of respondent no. 1 in the project shall also be of respondent no. 1 and respondent no. 2 shall have no responsibility in the same and as per clause Fifteen qua sale of 65 % share in the project belonging to respondent no. 1, respondent no. 2 shall not bear any financial or other liability imposed for such transaction. From the perusal of the above it is clear that it is respondent no. 1 is responsible for delay in the delivery of possession and respondent no. 2 though

held to be promoter in para, had no concern with issue of delayed possession and liability with respect to same had to be borne by respondent no. 1 alone.

10. RELIEF:-

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

i. The Complaint is allowed and the Respondents no. 1 (M/s Shri Builders through its proprietor Uday Swaroop Bhardwaj) is directed to pay the delayed possession charges in the form of simple 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% per annum on the amount paid by the complainant i.e. 14,00,000/- for every month of delay from the date of possession till the date when possession was delivered (09.09.2019), total 73 months as per the proviso of section 18(1) of the Act read with Rule 15 of the Himachal Pradesh Real Estate (Regulation & Development) Rules 2017 within a period of 60 days.

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ii. Non- compliance or any delay in compliance of the above direction by respondent no. 1 shall attract a penalty of Rupees one lakh 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.

iii. That the penalty imposed 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 60 days from the passing of this order.

iv. It is further ordered that no withdrawal from the bank accounts of the Respondent no. 1/ promoter pertaining to this project shall be made till the direction no. 1 passed by this Authority in para supra is fully complied with.

v. 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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