REAL ESTATE REGULATORY AUTHORITY,
HIMACHAL PRADESH

In the matter of :-

1. **Complaint No. HP RERA/OFL/2020-09**

Ms. Ashima Sharma .....Complainant

Versus

Shri Deepak Virmani & Shri Datta Ram

.....Non-Complainants/ Respondents

2. **Complaint No. HP RERA/OFL/2020-10**

Shri Pawan Wasant Borle .....Complainant

Versus

Shri Deepak Virmani & Shri Datta Ram

.....Non-Complainants/ Respondents

3. **Complaint no. HP RERA/ OFL/ 2020-11**

Shri Saket Lakhotia .....Complainant

Versus

Shri Deepak Virmani & Shri Datta Ram

.....Non-Complainants/ Respondents

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4. **Complaint no. HP RERA/ OFL/ 2020-12**

Shri Sandeep Ahuja & Smt. Vinita Ahuja.....Complainant(s)

Versus

Shri Deepak Virmani & Shri Datta Ram

.....Non-Complainants/ Respondents

5. **Complaint no. HP RERA/ OFL/ 2020-13**

Shri Deepak Kumar Puggal & Smt. Davinder Puggal

.....Complainant(s)

Versus

Shri Deepak Virmani & Shri Datta Ram

.....Non-Complainants/ Respondents

Present: - **Shri Ashwani Kumar Dhatwalia, Advocate for the Complainant(s),**

Shri Bipin C. Negi, Sr. Advocate assisted by Shri Rajat Chopra, Advocate for respondent(s)

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

Final Date of Hearing (Through WebEx): 04.02.2021.

Date of pronouncement of Order: 26.02.2021.

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ORDER

CORAM: - Chairperson and both Members

1. The present matter refers to five number of Complaints filed under the provisions of the Real Estate (Regulation and Development) Act, 2016(herein after referred to as the Act) against the respondents namely Shri Deepak Virmani & Shri Datta Ram (AOP), herein referred to as the respondent promoters who are in process of development of proposed retirement community Housing project under the project name of "Aamoksh @ Kasauli" situated at Mohal Joul, Tehsil Kasauli, District Solan, Himachal Pradesh. This Authority had also carried out a site inspection of the aforesaid real estate project on 9th November, 2020 and heard the final arguments on 4th February, 2021. Since the cause of action in all the complaints is common in nature hence all these complaints were taken up together as the reliefs sought are also identical and hereby decided along herewith.

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2. BRIEF FACTS OF THE CASE: - COMPLAINT NO. HP RERA/OFL/2020-09 titled as "Ms. Ashima Sharma versus Shri Deepak Virmani & Shri Datta Ram."

i. Ms. Ashima Sharma filed the complaint before the Authority on 5th August, 2020 in "form-M". It has been stated in the complaint that in the year 2013, the respondent promoters conceived the retirement community housing project under the project name "Aamoksh @ Kasauli. It was represented that the promoter had all the requisite permissions from the competent authorities to develop the project including approval to set up a housing colony issued by the Department of Town & Country Planning, Himachal Pradesh.

ii. That acting upon the aforesaid representation, the Complainant vide booking form dated 23rd August, 2013 had booked an apartment and had advanced a sum of Rs. Two lakh vide cheque no. 602462. It has been alleged further in the complaint that the respondents have issued the letter of allotment dated 8th October, 2013 confirming the allotment of unit/ apartment bearing number 1204 measuring 1014 sq.

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fts. comprising of one bed room with attached toilet, one drawing cum dining room, one pantry and one balcony for a total sale consideration of Rs Sixty Five lakhs. It has been alleged further in the complaint that at the time of allotment, the Complainant had further paid an amount of Rs. 3, 81, 737/- (Rs. Three lakhs, eight one thousand, seven hundred and thirty seven) vide cheque no. 602469 dated 8th October, 2013 to be adjusted against the earnest money amounting to 15 % of the total price/ cost of the apartment payable on or before execution of the agreement to sell in respect of the said apartment.

iii. That the agreement to sell was executed on 18th December, 2015, wherein it was confirmed that the promoter is the absolute owner in possession of the project land and as per Clause 19 of the aforesaid agreement it has been provided that The promoter shall hand over the possession of the said apartment by the end of December, 2016 with a grace period of 120 days. The Complainant had advanced a total amount of Rs. Twelve lakhs, seventy six thousand, six hundred and forty five (Rs. 12, 76, 645/-) to the respondent promoters.

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iv. That the respondents have failed to complete and hand over the possession of the aforesaid apartment to the Complainant, till date, therefore, the Complainant has requested this Authority to refund the amount of Rs. Twelve lakhs, seventy six thousand, six hundred and forty five (Rs. 12, 76, 645/-) along with interest @ 12 % from the date of payment till the date of actual refund.

v. **REPLY TO THE COMPLAINT.**

The respondent(s) have filed a detailed reply to the Complaint on 31st August, 2020. It has been contended in the reply by the respondent(s) that the present complaint is not maintainable and is liable to be dismissed. The respondent(s) have contended in specific that the respondents have already submitted application for registration before this Authority and in view of declaration made thereunder in consonance with Section 4 (2) (1) (C) they have already mentioned the time limit for the completion of the present project. In the present case, the respondents have made declaration in terms of the aforesaid Section of the Act ibid that they would complete the project within a period of five years from the date of

registration, i.e. 31st March, 2018. Since the application of the respondents is pending with the Authority and has not been rejected, no cause of action arises against them.

vi. That the respondents have further mentioned in their reply that the agreement for sale executed between the parties is prior to the commencement of the Act. Therefore, the Complainant is not entitled to any refund or interest. As per the covenants of the agreement to sell dated 18.12.2015, Clause 36 provides that, "That *any dispute arising out of the terms and conditions of this agreement to sell, including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties, shall be settled amicably by mutual discussion, failing which the same should be settled through Arbitration proceedings to be conducted by a sole arbitrator to be appointed by the respondent. The arbitration proceedings shall be conducted in accordance with the provisions of the Arbitration & Conciliation Act, 1996. The venue for arbitration proceedings shall be New Delhi. The arbitration award shall be final and binding on the parties."* In view of the aforesaid clause, the Complainant has to invoke

the dispute resolution mechanism as settled between the parties in the agreement to sell and the instant complaint under the provisions of the Act is not maintainable at this stage.

vii. That the reply of the respondents further provides that under Clause 20 of the agreement to sell, the respondents are duly entitled to a reasonable extension of time for delivery of possession of the said apartment, if the delay in delivering the possession occurs on account of delay due to force majeure circumstances. The State of Himachal Pradesh has filed a case against the respondents on 29th March, 2016 under Section 118 of the Himachal Pradesh Tenancy & Land Reforms Act, 1972 before the Court of Ld. Collector, District Solan pertaining to the purchase of the project land. The respondents have been restrained from carrying out construction activities at the site vide its interim order dated 17th March, 2017 passed by the Ld. District Collector, Solan. The aforesaid case of the State was finally allowed against the respondents on 14th February, 2019 by the Court of Ld. Collector, District Solan and it was directed and ordered that

the project land be vested with the State under Section 118 of the Himachal Pradesh Tenancy & Land Reforms Act, 1972. The respondent have then preferred an appeal against this order, which was dismissed by the Ld. Divisional Commissioner on 29th February, 2020. The respondents further challenged the order passed before the Ld. Financial Commissioner, Shimla, by filing an appeal, whereby the impugned order dated 29th February, 2020 has been stayed. The present appeal is pending for final adjudication. Therefore, in view of these circumstances, the construction/ development works of the apartment have come to halt since 17th March, 2017 due to aforesaid force majeure circumstances, i.e. order of the court. Thus, due to aforesaid circumstances the Complainant cannot ask for refund of the amount from the respondents. Therefore, in view of the submissions made in the reply, the present complaint is liable to be dismissed.

viii. **REJOINDER TO THE REPLY.**

The Complainant has responded to the reply so filed by the respondent(s) by filing a detailed para-wise rejoinder on 21st October, 2020. It has been submitted in the rejoinder by the

Complainant that the entire contents of the reply are wrong, contrary and have been denied. It has been further submitted that the project of the respondent(s) is held up on account of their own acts of omission and commission. The Complainant cannot be asked to wait for eternity for completion of the project and therefore is entitled to withdraw from the project and claim refund of the amount paid to the respondent(s) along with interest.

3. **BRIEF FACTS OF THE CASE: - COMPLAINT NO. HP RERA/OFL/2020-10 titled as "Shri Pawan Wasant Borle versus Shri Deepak Virmani & Shri Datta Ram**

i. Shri Pawan Kumar Borle, filed the complaint before the authority on 5th August, 2020 in "form-M". It has been stated in the complaint that in the year 2013, the respondent promoters conceived the retirement community housing project under the project name "Aamoksh @ Kasauli. It was represented that the promoter had all the requisite permissions from the competent authorities to develop the project including approval to set up a housing colony issued

by the Department of Town & Country Planning, Himachal Pradesh.

ii. That acting upon the aforesaid representation, the Complainant vide booking form dated 27th May, 2013 had booked an apartment and had advanced a sum of Rs. One Lakh & fifty thousand through electronic transfer. It has been alleged further in the complaint that the respondents have issued the letter of allotment dated 7th June, 2013 confirming the allotment of unit/ apartment bearing number 410 measuring 1342 sq. fts. Comprising of two bed rooms with attached toilets, one drawing cum dining room, one pantry and one balcony for a total sale consideration of Rs.Eighty eight lakhs (Rs. 88, 00, 000/-). It has been alleged further in the complaint that at the time of allotment, the Complainant had further paid an amount of Rs. 7, 30, 000/- (Rs. Seven Lakhs and thirty thousand) to be adjusted against the earnest money amounting to 15 % of the total price/ cost of the apartment payable on or before execution of the agreement to sell in respect of the said apartment. The Complainant had made a request for change of unit/ apartment no. 410 to 401 and the

said request was accepted by the respondents and confirmed vide letter dated 9th March, 2015.

iii. That the agreement to sell was executed on 26th May, 2015, wherein it was confirmed that the promoter is the absolute owner in possession of the project land and as per Clause 19 of the aforesaid agreement it has been provided that The promoter shall hand over the possession of the said apartment by the end of December, 2016 with a grace period of 120 days. The Complainant had advanced a total amount of Rs. Seventy eight lakhs, four hundred and ninety one (Rs. 78, 00, 491/-) to the respondent promoters.

iv. That the respondents have failed to complete and hand over the possession of the aforesaid apartment to the Complainant till date, therefore, the Complainant has requested this Authority to refund the amount of Rs. Seventy eight lakhs, four hundred and ninety one (Rs. 78, 00, 491/-) along with interest @ 12 % from the date of payment till the date of actual refund.

v. **REPLY TO THE COMPLAINT.**

The respondent(s) have filed a detailed reply to the Complaint on 31st August, 2020. It has been contended in the reply by

the respondent(s) that the present complaint is not maintainable and is liable to be dismissed. The respondent(s) have contended in specific that the respondents have already submitted application for registration before this Authority and in view of declaration made thereunder in consonance with Section 4 (2) (1) (C) they have already mentioned the time limit for the completion of the present project. In the present case, the respondents have made declaration in terms of the aforesaid Section of the Act ibid that they would complete the project within a period of five years from the date of registration, i.e. 31st March, 2018. Since the application of the respondents is pending with the Authority and has not been rejected, no cause of action arises against them.

vi. That the respondents have further mentioned in their reply that the agreement for sale executed between the parties is prior to the commencement of the Act. Therefore, the Complainant is not entitled to any refund or interest. As per the covenants of the agreement to sell dated 26.05.2015, Clause 36 provides that, "That *any dispute arising out of the terms and conditions of this agreement to sell, including the*

interpretation and validity of the terms thereof and the respective rights and obligations of the parties, shall be settled amicably by mutual discussion, failing which the same should be settled through Arbitration proceedings to be conducted by a sole arbitrator to be appointed by the respondent. The arbitration proceedings shall be conducted in accordance with the provisions of the Arbitration & Conciliation Act, 1996. The venue for arbitration proceedings shall be New Delhi. The arbitration award shall be final and binding on the parties." In view of the aforesaid clause, the Complainant has to invoke the dispute resolution mechanism as settled between the parties in the agreement to sell and the instant complaint under the provisions of the Act is not maintainable at this stage.

vii. That the reply of the respondents further provides that under Clause 20 of the agreement to sell, the respondents are duly entitled to a reasonable extension of time for delivery of possession of the said apartment, if the delay in delivering the possession occurs on account of delay due to force majeure circumstances. The State of Himachal Pradesh has filed a case

against the respondents on 29th March, 2016 under Section 118 of the Himachal Pradesh Tenancy & Land Reforms Act, 1972 before the Court of Ld. Collector, District Solan pertaining to the purchase of the project land. The respondents have been restrained from carrying out construction activities at the site vide its interim order dated 17th March, 2017 passed by the Ld. District Collector, Solan. The aforesaid case of the State was finally allowed against the respondents on 14th February, 2019 by the Court of Ld. Collector, District Solan and it was directed and ordered that the project land be vested with the State under Section 118 of the Himachal Pradesh Tenancy & Land Reforms Act, 1972. The respondent have then preferred an appeal against this order, which was dismissed by the Ld. Divisional Commissioner on 29th February, 2020. The respondents further challenged the order passed before the Ld. Financial Commissioner, Shimla, by filing an appeal, whereby the impugned order dated 29th February, 2020 has been stayed. The present appeal is pending for final adjudication. Therefore, in view of these circumstances, the construction/ development

works of the apartment have come to halt since 17th March, 2017 due to aforesaid force majeure circumstances, i.e. order of the court. Thus, due to aforesaid circumstances the Complainant cannot ask for refund of the amount from the respondents. Therefore, in view of the submissions made in the reply, the present complaint is liable to be dismissed.

viii. **REJOINDER TO THE REPLY.**

The Complainant has responded to the reply so filed by the respondent(s) by filing a detailed para-wise rejoinder on 21st October, 2020. It has been submitted in the rejoinder by the Complainant that the entire contents of the reply are wrong, contrary and have been denied. It has been further submitted that the project of the respondent(s) is held up on account of their own acts of omission and commission. The Complainant cannot be asked to wait for eternity for completion of the project and therefore is entitled to withdraw from the project and claim refund of the amount paid to the respondent(s) along with interest.

4. BRIEF FACTS OF THE CASE: - COMPLAINT NO. HP RERA/OFL/2020-11 titled as "Shri Saket Lakhotia versus Shri Deepak Virmani & Shri Datta Ram."

i. Shri Saket Lakhotia filed the complaint before the authority on 5th August, 2020 in "form-M". It has been stated in the complaint that in the year 2013, the respondent promoters conceived the retirement community housing project under the project name "Aamoksh @ Kasauli. It was represented that the promoter had all the requisite permissions from the competent authorities to develop the project including approval to set up a housing colony issued by the Department of Town & Country Planning, Himachal Pradesh.

ii. That acting upon the aforesaid representation, the Complainant on dated 27th April, 2013 had booked an apartment and had advanced a sum of Rs. Five lakhs vide cheque no. 000034. It has been alleged further in the complaint that the respondents have issued the letter of allotment dated 7th June, 2013 confirming the allotment of unit/ apartment bearing number 803 measuring 1342 sq. fts. comprising of two bed rooms with attached toilets, one

drawing cum dining room, one pantry and one balcony for a total sale consideration of Rs Eighty eight lakhs (Rs. 88, 00, 000/-).

iii. That the agreement to sell was executed on 6th January, 2014, wherein it was confirmed that the promoter is the absolute owner in possession of the project land and as per Clause 19 of the aforesaid agreement it has been provided that the promoter shall hand over the possession of the said apartment on or before 1st March, 2016. The Complainant had advanced a total amount of Rs. Sixty six lakhs, eleven thousand, nine hundred and eighty six (Rs. 66, 11, 986/-) to the respondent promoters.

iv. That the respondents have failed to complete and hand over the possession of the aforesaid apartment to the Complainant till date, therefore, the Complainant has requested this Authority to refund an amount of Rs. Sixty six lakhs, eleven thousand, nine hundred and eighty six (Rs. 66, 11, 986/-) along with interest @ 12 % from the date of payment till the date of actual refund.

v. **REPLY TO THE COMPLAINT.**

The respondent(s) have filed a detailed reply to the Complaint on 31st August, 2020. It has been contended in the reply by the respondent(s) that the present complaint is not maintainable and is liable to be dismissed. The respondent(s) have contended in specific that the respondents have already submitted application for registration before this Authority and in view of declaration made thereunder in consonance with Section 4 (2) (1) (C) they have already mentioned the time limit for the completion of the present project. In the present case, the respondents have made declaration in terms of the aforesaid Section of the Act ibid that they would complete the project within a period of five years from the date of registration, i.e. 31st March, 2018. Since the application of the respondents is pending with the Authority and has not been rejected, no cause of action arises against them.

vi. That the respondents have further mentioned in their reply that the agreement for sale executed between the parties is prior to the commencement of the Act. Therefore, the Complainant is not entitled to any refund or interest. As per

the covenants of the agreement to sell dated 06.01.2014, Clause 35 provides that, "That *any dispute arising out of the terms and conditions of this agreement to sell, including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties, shall be settled amicably by mutual discussion, failing which the same should be settled through Arbitration proceedings to be conducted by a sole arbitrator to be appointed by the respondent. The arbitration proceedings shall be conducted in accordance with the provisions of the Arbitration & Conciliation Act, 1996. The venue for arbitration proceedings shall be New Delhi. The arbitration award shall be final and binding on the parties."* In view of the aforesaid clause, the Complainant has to invoke the dispute resolution mechanism as settled between the parties in the agreement to sell and the instant complaint under the provisions of the Act is not maintainable at this stage.

vii. That the reply of the respondents further provides that under Clause 20 of the agreement to sell, the respondents are duly entitled to a reasonable extension of time for delivery of

possession of the said apartment, if the delay in delivering the possession occurs on account of force majeure circumstances. The State of Himachal Pradesh has filed a case against the respondents on 29thMarch, 2016 under Section 118 of the Himachal Pradesh Tenancy & Land Reforms Act, 1972 before the Court of Ld. Collector, District Solan pertaining to the purchase of the project land. The respondents have been restrained from carrying out construction activities at the site vide its interim order dated 17th March, 2017 passed by the Ld. District Collector, Solan. The aforesaid case of the State was finally allowed against the respondents on 14th February, 2019 by the Court of Ld. Collector, District Solan and it was directed and ordered that the project land be vested with the State under Section 118 of the Himachal Pradesh Tenancy & Land Reforms Act, 1972. The respondent have then preferred an appeal against this order, which was dismissed by the Ld. Divisional Commissioner on 29th February, 2020. The respondents further challenged the order passed before the Ld. Financial Commissioner, Shimla, by filing an appeal, whereby the impugned order dated 29th February, 2020 has

been stayed. The present appeal is pending for final adjudication. Therefore, in view of these circumstances, the construction/ development works of the apartment have come to halt since 17th March, 2017 due to aforesaid force majeure circumstances, i.e. order of the court. Thus, due to aforesaid circumstances the Complaint cannot ask for refund of the amount from the respondents. Therefore, in view of the submissions made in the reply, the present complaint is liable to be dismissed.

viii. **REJOINDER TO THE REPLY.**

The Complainant has responded to the reply so filed by the respondent(s) by filing a detailed para-wise rejoinder on 15th October, 2020. It has been submitted in the rejoinder by the Complainant that the entire contents of the reply are wrong, contrary and have been denied. It has been further submitted that the project of the respondent(s) is held up on account of their own acts of omission and commission. The Complainant cannot be asked to wait for eternity for completion of the project and therefore is entitled to withdraw from the project

and claim refund of the amount paid to the respondent(s) along with interest.

5. **BRIEF FACTS OF THE CASE: - COMPLAINT NO. HP RERA/OFL/2020-12 titled as "Shri Sandeep Ahuja & Smt. Vinita Ahuja versus Shri Deepak Virmani& Shri Datta Ram."**

i. Shri Sandeep Ahuja & Smt. Vinita Ahuja filed the complaint before the authority on 5th August, 2020 in "form-M". It has been stated in the complaint that in the year 2013, the respondent promoters conceived the retirement community housing project under the project name "Aamoksh @ Kasauli. It was represented that the promoter had all the requisite permissions from the competent authorities to develop the project including approval to set up a housing colony issued by the Department of Town & Country Planning, Himachal Pradesh.

ii. That acting upon the aforesaid representation, the Complainants submitted the expression of interest/ booking form for purchase of a residential unit/ apartment and deposited a sum of Rs. Five lakhs vide cheques no. 000003 for

Rs. Two Lakhs & cheque no. 000031 for Rs. Three lakhs dated 9th August, 2013. It has been alleged further in the complaint that the respondents have issued the letter of allotment dated 14th August, 2013 confirming the allotment of unit/ apartment bearing number 706 measuring 1342 sq. fts. Comprising of two bed rooms with attached toilets, one drawing cum dining room, one pantry and one balcony for a total sale consideration of Rs Seventy eight lakhs (Rs. 78, 00, 000/-). At the time of allotment, the Complainants have further paid an amount of Rs. Five lakhs to be adjusted against the earnest money amounting to 15 % of the total price/ cost of the apartment payable on or before execution of the agreement to sell in respect of the said apartment.

iii. That the agreement to sell was executed between the parties, wherein it was confirmed that the promoter is the absolute owner in possession of the project land and as per Clause 19 of the aforesaid agreement it has been provided that the promoter shall hand over the possession of the said apartment by the end of December, 2016 with a grace period of 120 days. The Complainant has advanced a total amount of Rs. Twenty

four lakhs, twenty thousand, four hundred and thirty seven (Rs. 24, 20, 437/-)to the respondent promoters.

iv. That the respondents have failed to complete the project and hand over the possession of the aforesaid apartment to the Complainant, till date, therefore, the Complainant has requested this Authority to refund an amount of Rs. Twenty four lakhs, twenty thousand, four hundred and thirty seven (Rs. 24, 20, 437/-) along with interest @ 12 % from the date of payment till the date of actual refund.

v. **REPLY TO THE COMPLAINT.**

The respondent(s) have filed a detailed reply to the Complaint on 31st August, 2020. It has been contended in the reply by the respondent(s) that the present complaint is not maintainable and is liable to be dismissed. The respondent(s) have contended in specific that the respondents have already submitted application for registration before this Authority and in view of declaration made thereunder in consonance with Section 4 (2) (1) (C) they have already mentioned the time limit for the completion of the present project. In the present case, the respondents have made declaration in terms of the

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aforesaid Section of the Act ibid that they would complete the project within a period of five years from the date of registration, i.e. 31st March, 2018. Since the application of the respondents is pending with the Authority and has not been rejected, no cause of action arises against them.

vi. That the respondents have further mentioned in their reply that the agreement for sale executed between the parties is prior to the commencement of the Act. Therefore, the Complainant is not entitled to any refund or interest. As per the covenants of the agreement to sell dated 18.12.2015, Clause 36 provides that, "That *any dispute arising out of the terms and conditions of this agreement to sell, including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties, shall be settled amicably by mutual discussion, failing which the same should be settled through Arbitration proceedings to be conducted by a sole arbitrator to be appointed by the respondent. The arbitration proceedings shall be conducted in accordance with the provisions of the Arbitration & Conciliation Act, 1996. The venue for arbitration proceedings shall be New Delhi. The*

arbitration award shall be final and binding on the parties." In view of the aforesaid clause, the Complainants have to invoke the dispute resolution mechanism as settled between the parties in the agreement to sell and the instant complaint under the provisions of the Act is not maintainable at this stage.

vii. That the reply of the respondents further provides that under Clause 20 of the agreement to sell, the respondents are duly entitled to a reasonable extension of time for delivery of possession of the said apartment, if the delay in delivering the possession occurs on account of force majeure circumstances. The State of Himachal Pradesh has filed a case against the respondents on 29thMarch, 2016 under Section 118 of the Himachal Pradesh Tenancy & Land Reforms Act, 1972 before the Court of Ld. Collector, District Solan pertaining to the purchase of the project land. The respondents have restrained from carrying out construction activities at the site vide its interim order dated 17th March, 2017 passed by the Ld. District Collector, Solan. The aforesaid case of the State was finally allowed against the respondents on 14th February,

2019 by the Court of Ld. Collector, District Solan and it was directed and ordered that the project land be vested with the State under Section 118 of the Himachal Pradesh Tenancy & Land Reforms Act, 1972. The respondent have then preferred an appeal against this order, which was dismissed by the Ld. Divisional Commissioner on 29th February, 2020. The respondents further challenged the order passed before the Ld. Financial Commissioner, Shimla, by filing an appeal, whereby the impugned order dated 29th February, 2020 has been stayed. The present appeal is pending for final adjudication. Therefore, in view of these circumstances, the construction/ development works of the apartment have come to halt since 17th March, 2017 due to aforesaid force majeure circumstances, i.e. order of the court. Thus, due to aforesaid circumstances the Complainant cannot ask for refund of the amount from the respondents. Therefore, in view of the submissions made in the reply, the present complaint is liable to be dismissed.

viii. **REJOINDER TO THE REPLY.**

The Complainants have responded to the reply so filed by the respondent(s) by filing a detailed para-wise rejoinder on 15th October, 2020. It has been submitted in the rejoinder by the Complainants that the entire contents of the reply are wrong, contrary and have been denied. It has been further submitted that the project of the respondent(s) is held up on account of their own acts of omission and commission. The Complainant cannot be asked to wait for eternity for completion of the project and therefore is entitled to withdraw from the project and claim refund of the amount paid to the respondent(s) along with interest.

6. BRIEF FACTS OF THE CASE: - COMPLAINT NO. HP RERA/OFL/2020-13 titled as "Shri Deepak Kumar Puggal & Smt. Davinder Puggal versus Shri Deepak Virmani & Shri Datta Ram."

i. Shri Deepak Kumar Puggal & Smt. Davinder Puggal filed a complaint before the authority on 5th August, 2020 in "form-M". It has been stated in the complaint that in the year 2013, the respondent promoters conceived the retirement

community housing project under the project name "Aamoksh @ Kasauli. It was represented that the promoter had all the requisite permissions from the competent authorities to develop the project including approval to set up a housing colony issued by the Department of Town & Country Planning, Himachal Pradesh.

ii. That acting upon the aforesaid representation, the Complainants submitted the expression of interest/ booking form dated 5th November, 2014 for purchase of a residential unit/ apartment and deposited a sum of Rs. Ten lakhs (Rs. 10, 00, 000/-) vide cheques no. 326696 for Rs. Six Lakhs dated 17th October, 2014 & cheque no.000084 for Rs. Four lakhs dated 5th November, 2014. It has been alleged further in the complaint that the respondents have issued the letter of allotment dated 14th April, 2015 confirming the allotment of unit/ apartment bearing number 702 measuring 1342 sq. fts. Comprising of two bed rooms with attached toilets, one drawing cum dining room, one pantry and one balcony for a total sale consideration of Rs. Eighty two lakhs. Later on, upon the request of the Complainants. The unit was changed

to 501, which was confirmed at the time of execution of agreement to sell. At the time of allotment, the Complainants have further paid an amount of Rs. Ten lakhs to be adjusted against the earnest money amounting to 15 % of the total price/ cost of the apartment payable on or before execution of the agreement to sell in respect of the said apartment.

iii. That the agreement to sell was executed on 26th May, 2015, wherein it was confirmed that the promoter is the absolute owner in possession of the project land and as per Clause 19 of the aforesaid agreement it has been provided that the promoter shall hand over the possession of the said apartment by the end of December, 2016 with a grace period of 120 days. The Complaints have advanced a total amount of Rs. Eighty two Lakhs (Rs. 82, 00, 000/-) to the respondent promoters.

iv. That the respondents have failed to complete and hand over the possession of the aforesaid apartment to the Complainant till date, therefore, the Complainant has requested this Authority to refund an amount of Rs. Eighty two Lakhs (Rs. 82, 00, 000/-) along with interest @ 12 % from the date of payment till the date of actual refund.

v. **REPLY TO THE COMPLAINT.**

The respondent(s) have filed a detailed reply to the Complaint on 31st August, 2020. It has been contended in the reply by the respondent(s) that the present complaint is not maintainable and is liable to be dismissed. The respondent(s) have contended in specific that the respondents have already submitted application for registration before this Authority and in view of declaration made thereunder in consonance with Section 4 (2) (1) (C) they have already mentioned the time limit for the completion of the present project. In the present case, the respondents have made declaration in terms of the aforesaid Section of the Act ibid that they would complete the project within a period of five years from the date of registration, i.e. 31st March, 2018. Since the application of the respondents is pending with the Authority and has not been rejected, no cause of action arises against them.

vi. That the respondents have further mentioned in their reply that the agreement for sale executed between the parties is prior to the commencement of the Act. Therefore, the Complainant is not entitled to any refund or interest. As per

the covenants of the agreement to sell dated 26.05.2015, Clause 36 provides that, "That *any dispute arising out of the terms and conditions of this agreement to sell, including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties, shall be settled amicably by mutual discussion, failing which the same should be settled through Arbitration proceedings to be conducted by a sole arbitrator to be appointed by the respondent. The arbitration proceedings shall be conducted in accordance with the provisions of the Arbitration & Conciliation Act, 1996. The venue for arbitration proceedings shall be New Delhi. The arbitration award shall be final and binding on the parties."* In view of the aforesaid clause, the Complainants have to invoke the dispute resolution mechanism as settled between the parties in the agreement to sell and the instant complaint under the provisions of the Act is not maintainable at this stage.

vii. That the reply of the respondents further provides that under Clause 20 of the agreement to sell, the respondents are duly entitled to a reasonable extension of time for delivery of

possession of the said apartment, if the delay in delivering the possession occurs on account of force majeure circumstances. The State of Himachal Pradesh has filed a case against the respondents on 29th March, 2016 under Section 118 of the Himachal Pradesh Tenancy & Land Reforms Act, 1972 before the Court of Ld. Collector, District Solan pertaining to the purchase of the project land. The respondents have restrained from carrying out construction activities at the site vide its interim order dated 17th March, 2017 passed by the Ld. District Collector, Solan. The aforesaid case of the State was finally allowed against the respondents on 14th February, 2019 by the Court of Ld. Collector, District Solan and it was directed and ordered that the project land be vested with the State under Section 118 of the Himachal Pradesh Tenancy & Land Reforms Act, 1972. The respondents have then preferred an appeal against this order, which was dismissed by the Ld. Divisional Commissioner on 29th February, 2020. The respondents further challenged the order passed before the Ld. Financial Commissioner, Shimla, by filing an appeal, whereby the impugned order dated 29th February, 2020 has

been stayed. The present appeal is pending for final adjudication. Therefore, in view of these circumstances, the construction/ development works of the apartment have come to halt since 17th March, 2017 due to aforesaid force majeure circumstances, i.e. order of the court. Thus, due to aforesaid circumstances the Complainant cannot ask for refund of the amount from the respondents. Therefore, in view of the submissions made in the reply, the present complaint is liable to be dismissed.

viii. **REJOINDER TO THE REPLY.**

The Complainants have responded to the reply so filed by the respondent(s) by filing a detailed para-wise rejoinder on 15th October, 2020. It has been submitted in the rejoinder by the Complainants that the entire contents of the reply are wrong, contrary and have been denied. It has been further submitted that the project of the respondent(s) is held up on account of their own acts of omission and commission. The Complainants cannot be asked to wait for eternity for completion of the project and therefore is entitled to withdraw from the project

and claim refund of the amount paid to the respondent(s) along with interest.

7.Site Inspection:

i. The Authority during the course of hearing on 22nd October, 2020 felt that in addition to the specific points raised by the complainants, the progress of the project along with the quantum of construction activities at the site needed a due inspection. This Authority, being vested with the powers to call for information, conduct investigations under Section 35 of the Act ibid, after due deliberation and discussion upon the governing facts and circumstances of the present project in question. Therefore, this Authority decided to carry out site inspection on 9th November, 2020. The site inspection report reads as under:-

ii. **"Site inspection report**

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

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

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

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

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

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The Authority, after taking the round of the site, interacted with the present parties and pursued the approved drawings and the revenue record of the project. The revenue record, latest Jamabandi dated 9th Nov, 2020 as produced by Tehsildar, Kasauli, was found to have an entry in the last column of Jamabandi stating that the case is sub judice for violation of Section 118 of the HP Tenancy and Land Reforms Act 1972 and restricted for all kind of further transactions ape report no. 326 dated 5.5.2016.

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

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execution of the agreement for sale, the Complainants are entitled for refund under Section 18 of the Act, which provides that, *"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." It has been argued herein that considering the facts and circumstances of the case, the provisions of Section 18 (1) of the Act are invokable to hold the respondent(s) liable for

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

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

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

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

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

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

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

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judicial forum pertaining to this real estate project, as conveyed by the promoter, Sh. Deepak Virmani.

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

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

8. <u>ARGUMENTS ADVANCED</u>

The final arguments in this case were heard on 04.02.2021. Shri Ashwani Kumar Dhatwalia, Ld. Counsel representing the Complainants has argued before this Authority that the complainants have booked different apartments/ units for different sale considerations with the respondent(s) in the year 2013-2014and money was paid by them in different stages. It is averred by the arguing Counsel for the Complainants that different amounts in all complaints were advanced by the Complainants to respondents), the details of which stands mentioned in the Complaints/ applications under "Form-M". Since the respondent(s) have failed to deliver the possession of the flat in question after expiry of five years from the date of

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that the plea of force majeure as contended by the respondents is not sustainable as the same has not been defined in the agreement to sell between the parties. Further addressing to the issue of force majeure, the Ld. Counsel for the Complainant has vehemently argued that the revenue proceedings under the provisions of Section 118 of the Himachal Pradesh Tenancy & Land Reforms Act, 1972 were initiated by the State of H.P on 29.03.2016 and the interim order restraining respondents to carry out construction activities at the site was passed on 17th march, 2017 by the Ld. Collector, District Solan, which was after the date of delivery of possession was over. Therefore, the respondents have intentionally and deliberately misled the Complainants about the same factum and with malafide intent executed the agreement to sell for the aforesaid apartments under question. The Ld. Counsel further argued herein that no notice/information regarding the revenue proceedings under Section 118 of the Himachal Pradesh Tenancy & Land Reforms Act, 1972 was ever conveyed to the complainants and it came to the knowledge of the Complainants, only at the time when reply was filed in consonance to the complaint by the respondents

before this Authority. Even otherwise, the Ld. Counsel for the Complainants has contemplated that the pending revenue proceedings before the Competent Authority has no bearings on the issue of refund of amount along with interest as the same are not governed by the provisions of the Real Estate (Regulation & Development) Act, 2016.

12. In order to substantiate that the Complainants are entitled for the return/ refund of respective amounts advanced to the respondents along with interest, the Ld. Arguing Counsel has made reference to the judicial pronouncements of Hon'ble Apex Court :-

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

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

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

9.That while arguing the matter further, the Ld. Counsel for the Complainants has referred to Section 31 of the Act ibid, which prescribes that any aggrieved person can file a Complaint before the Authority or the Adjudicating Officer as the case may be for any violation of the provisions of the Act. In the instant cases, the Complainants have only sought the refund of amount and not the compensation. Therefore, the complainants are legally entitled to claim refund of amount along with interest from the respondent(s). It has been further contended by the Ld. Counsel for the Complainants that a 12 % rate of interest shall be made payable to the Complainants in view of clause (8) of the agreement for sale executed between the parties, whereby it has been provided that in case the intending purchaser fails to pay installments due to the promoter, he/ she shall be liable to pay @ 12 % per annum on delayed amount from the due date of payment till the actual date of payment.

10. To support the claims as detailed in the complaints, the arguing Counsel has further argued that as per the clause 19 of

the agreement to sell, it has been provided that the promoter shall hand over the possession of the said apartment by the 31st March, 2016/ or by the end of December, 2016 with a grace period of 120 days, which they have miserably failed to do so till date.

11. Highlighting the issue of benami transactions over the project land and the plea of 'force majeure' taken by the respondents in their reply, the arguing Counsel for the Complainants has argued herein that it was confirmed by the promoter at the time of execution of agreement to sell, that they are absolute owner in possession of the project land, which has been misconceived and misrepresented by them. To substantiate the issue, the Ld. Counsel made reference to the final order dated 14.02.2019 passed by the Ld. District Collector, Solan, referring to para 67 of the aforesaid order, whereby the Ld. Collector has observed in its findings that, *"All the bank transactions of Sh. Deepak Virmani and Sh. Datta Ram have not been reflected in the Income Tax returns for the year 2007 to 2014 which makes it amply clear that the land purchased by respondent no.1 to 3 was 'Benami' as several non-agriculturists have invested their money for the same."* Arguing further, the Ld. Counsel for the Complainants has stated

amendments made to Section 8 of the Arbitration and Conciliation Act.

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

13. The Ld. Sr. Counsel Shri Bipin C. Negi for the respondents has presented his case before this Authority by arguing that that the respondents have not violated any statutory provisions of the Real Estate (Regulation &Development) Act, 2016. A bare perusal of Section 31 of the Act provides that the complaint before this Authority is only maintainable in case there is any violation or contravention of the provisions of the Act or the rules and regulations made thereunder against any promoter. Further, the Ld. Senior Counsel has argued that the Section 18 (1) (a) would apply only in a case, where the respondent promoter fails to complete or is unable to give possession of an apartment in accordance with the terms of the agreement for sale by the date

specified therein. To hold this contention, the Ld. Sr. Counsel has referred to clause no. (3) & (4) of the agreement to sell executed between the complainants and the respondents, which provides that, *" (3) That the intending purchaser has agreed to purchase the aforesaid unit/ apartment subject to full knowledge of all the laws, notifications, rules, bye-laws, etc. as are applicable to the area in general and the project in particular.*

(4) That the Intending purchaser prior to the execution of this agreement to sell has inspected the title deeds and construction plans of the project and has satisfied himself/ herself/ themselves about the title of the promoter to the said land and has accepted the same and shall not be entitled to any further investigations relating thereto or to raise any objections." Since the Complainants have executed the aforesaid agreement to sell with their free consent, consideration and without any undue influence, they cannot take the plea before this Authority that the title of the project land is defective as they are legally covered under the doctrine of "*Caveat emptor*", which provides that "Let the buyer be aware of. As the Complainants had satisfied themselves regarding the property in question, they had entered into the

agreement to sell with the respondent promoters. It has been vehemently argued by the Ld. Sr. Counsel that as a golden rule of interpretation of any legal document or instrument, the agreement to sell so executed has to be read word by word.

14. The ld. Sr. Counsel for the respondents has further argued that so far as the issue regarding defective title of the project land, the plea of the Complainants that there are revenue proceedings pending before the Competent Authority is destructive in nature. As per Section 19 (4) of the Act, *"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 thereunder."* In the present set of complaints, the complainants are duly governed by the agreement to sell executed between them and the respondent promoters and this Authority has a function to

protect the rights of the promoter as well. The aforesaid plea as submitted by the Ld. Counsel has been backed by the judgment of Hon'ble Apex Court in "***Bikram Chatterji v. Union of India, (2019) 19 SCC 161*, at page 380 at para 131.** "No doubt about it as submitted on behalf of Amrapali Group of Companies, that the provisions of RERA are for protecting the interests of promoters also. No doubt about it that RERA intends to protect the interests of the promoters and homebuyers both."

15. To substantiate further, the Ld. Sr. Counsel has countered the issue of defective title of the project land and benami transactions by arguing further that the revenue proceedings under Section 118 of the Himachal Pradesh Tenancy & Land Reforms Act, 1972 are pending in review petition no. 70 of 2020 before the Court of Ld. Financial Commissioner, Himachal Pradesh at Shimla, whereby the operation of order dated 29.02.2020 passed by the Ld. Divisional Commissioner, Shimla has been stayed. Therefore, in view of the pending legal proceedings, the Ld. Sr. Counsel has stated that the doctrine of res sub-judice applies in the instant complaints. The Ld. Counsel has made reference to the following

judicial pronouncements of the Hon'ble Apex Court regarding the doctrine of res sub-judice:-

a. ***Hindustan Petroleum Corpn. Ltd. v. Dilbahar Singh, (2014) 9 SCC 78 : (2014) 4 SCC (Civ) 723,* at page 97 (para 28) :**

> **"28.**Before we consider the matter further to find out the scope and extent of revisional jurisdiction under the above three Rent Control Acts, a quick observation about the "appellate jurisdiction" and "revisional jurisdiction" is necessary. Conceptually, revisional jurisdiction is a part of appellate jurisdiction but it is not vice versa. Both, appellate jurisdiction and revisional jurisdiction are creatures of statutes. No party to the proceeding has an inherent right of appeal or revision. An appeal is continuation of suit or original proceeding, as the case may be. The power of the appellate court is coextensive with that of the trial court. Ordinarily, appellate jurisdiction involves rehearing on facts and law but such jurisdiction may be limited by the statute itself that provides for the appellate jurisdiction. On the other hand, revisional jurisdiction, though, is a part of appellate jurisdiction but ordinarily it cannot be equated with that of a full-fledged appeal. In other words, revision is not continuation of suit or of original proceeding. When the aid of Revisional Court is invoked on the revisional side, it can interfere within the permissible parameters provided in the statute. It goes without saying that if a revision is provided against an order passed by the Tribunal/appellate authority, the decision of the Revisional Court is the operative decision in law. In our view, as regards the extent of appellate or revisional jurisdiction, much would, however, depend on the language employed by the statute conferring appellate jurisdiction and revisional jurisdiction."

The Ld. Counsel, while referring to the above judgment further mentioned that under Section 118 (3-C) H P Tenancy and land reforms Act, the respondents have filed a revision petition, which has been made without any delay and issue with the defective title of the project land is pending. Therefore, once the *lis-pendens* before the Ld. Financial commissioner ends, the present proceedings before this Authority may be deferred.

b. ***Canara Bank v. N.G. Subbaraya Setty, (2018) 16 SCC 228, at page 249 (para 24) :***

"24. If the period of limitation for filing an appeal has not yet expired or has just expired, the court hearing the second proceeding can very well ask the party who has lost the first round whether he intends to appeal the aforesaid judgment. If the answer is yes, then it would be prudent to first adjourn the second proceeding and then stay the aforesaid proceedings, after the appeal has been filed, to await the outcome of the appeal in the first proceeding. If, however, a sufficiently long period has elapsed after limitation has expired, and no appeal has yet been filed in the first proceeding, the court hearing the second proceeding would be justified in treating the first proceeding as res judicata. No hard-and-fast rule can be applied. The entire fact circumstance in each case must be looked at before deciding whether to proceed with the second proceeding on the basis of res judicata or to adjourn and/or stay the second proceeding to await the outcome in the first proceeding. Many

factors have to be considered before exercising this discretion — for example, the fact that the appeal against the first judgment is grossly belated; or that the said appeal would, in the ordinary course, be heard after many years in the first proceeding; or, the fact that third-party rights have intervened, thereby making it unlikely that delay would be condoned in the appeal in the first proceeding. As has been stated, the judicious use of the weapon of stay would, in many cases, obviate a court of first instance in the second proceeding treating a matter as res judicata only to find that by the time the appeal has reached the hearing stage against the said judgment in the second proceeding, the res becomes sub judice again because of condonation of delay and the consequent hearing of the appeal in the first proceeding. This would result in setting aside the trial court judgment in the second proceeding, and a de novo hearing on merits in the second proceeding commencing on remand, thereby wasting the court's time and dragging the parties into a second round of litigation on the merits of the case."

c. ***SCG Contracts (India) (P) Ltd. v. K.S. Chamankar Infrastructure (P) Ltd., (2019) 12 SCC 210*, at page 212:**

" **2.** Para 14 of the aforesaid order then reads as follows: [*SCG Contracts (India) (P) Ltd. case*[1], SCC OnLine Del]

"*14.* Subject to Defendant 1 paying costs of Rs 25,000 to the counsel for the plaintiff on or before 15-12-2017, the time for filing the written statement is extended till 15-12-2017. If either of the conditions is not complied with, the right of Defendant 1 to file written statement shall stand closed without any further order."

3. In obedience to this order, a written statement was filed on 15-12-2017 by Defendant 1. By a belated application dated 6-8-2018, it was averred that the recent changes that have been made in the Code of Civil Procedure were not

adhered to as a result of which the written statement which had yet to be taken on record could not so to be taken on record in view of the fact that 120 days had elapsed from the date of service of summons of this suit.

4. On 24-9-2018, another learned Single Judge took up this application and held that the 5-12-2017 order[1] being final, even though the provisions of law may provide otherwise, Defendant 1's written statement which was filed on 15-12-2017 should be taken on record. The petitioner has filed a special leave petition against the aforesaid two orders.

15. The learned counsel appearing for the respondents then argued that it cannot be assumed that the learned Single Judge did not know about these amendments when he passed the first impugned order dated 5-12-2017[1]. We do not wish to enter upon this speculative arena. He then argued that since this judgment permitted him to file the written statement beyond 120 days, it was an act of the court which should prejudice no man. This doctrine cannot be used when the res is not yet judicata. The 5-12-2017 order is res sub judice inasmuch as its correctness has been challenged before us.

16. The Ld. Sr. Counsel has contended further that the delay in handing over the possession of the flats/ apartments allotted to the Complainants is squarely governed by the issue of res sub-judice connected with force majeure. It is argued by the Ld. Sr. Counsel that the State of H.P had initiated proceedings under Section 118 of the HP Tenancy & Land Reforms Act, 1972 against the respondents and vide interim order dated 17th March, 2017 passed by the Ld. Collector, District Solan, the respondents were

restrained from raising construction activities at the site, which is still awaiting its finality in review petition pending before the Court of Ld. Financial Commissioner, Himachal Pradesh at Shimla. Therefore, due to pending revenue litigation against the respondents, the construction activities at the project site has been delayed, to which the respondent promoters cannot be attributed to and therefore is a force majeure condition as per the clause 20 of the agreement to sell executed between the contesting parties. The Ld. Sr. Counsel invited the attention of this Authority towards the clause 20 of the agreement to sell, which postulated the condition of force majeure as, " *(20) That the promoter agrees that the sale of the said Unit/ Apartment is subject to force majeure clause which inter alia includes delay on account of non-availability of steel, cement, other construction material, water or electric supply or slow down, strike or due to a dispute with construction agency employed by the promoter; war, civil commotion or act of God or any notice, order, rule, notification of the Government and/ or other public or competent authority or on account of non-issue of Project Completion Certificate/ Occupation Certificate or on account of any order of any Court affecting the*

construction work of the project or any reasons beyond the control of the promoter and in any of the aforesaid events the promoter shall be entitled to reasonable corresponding extension of time for the delivery of possession of the said Unit/ Apartment on account of force majeure circumstances." Therefore, in view of these circumstances, the construction/ development works of the apartment have come to halt since 17th March, 2017 due to aforesaid force majeure circumstances, i.e. order of the court. Thus, due to aforesaid circumstances the Complaints cannot ask for refund of the amount from the respondents and the Complainants were very much aware of this fact and have concealed this before this Authority while filing the present set of complaints. The Ld. Sr. Counsel has further referred to the judgment of Hon'ble Apex Court in the matter of ***Imperia Structures Ltd. v. Anil Patni, (2020) 10 SCC 783 : (2021) 1 SCC (Civ) 1*, at page 791 :**

5. Clause 41 of the agreement was as under:

> **"41. *Force Majeure***
>
> The Developer/Company shall not be held responsible or liable for not performing any of its obligations or undertakings provided for in this Agreement if such performance is prevented, delayed or hindered by an act of God, fire, flood,

explosion, war, riot, terrorist acts, sabotage, inability to procure or general shortage of energy, labour, equipment, facilities, materials or supplies, failure of transportation, strikes, lockouts, action of labour unions or any other cause (whether similar or dissimilar to the foregoing) not within the reasonable control of the Developer/Company."

11. Consumer Case No. 3011 of 2017 was allowed by the Commission by its judgment and order dated 12-9-2018[2]. It was observed: (*Anil Patni case*[2], SCC OnLine NCDRC paras 10-12)

"*10.* It is pertinent to note that the Developer has not filed any evidence to support his contention that the delay occurred due to *force majeure* events. In fact demonetisation, non-availability of contractual labour, delay in notifying approvals cannot be construed to be *force majeure* events from any angle.

11. The learned counsel for the Developer vehemently argued that the complainants were offered alternative accommodation vide letter dated 3-4-2017 which was not accepted by them. The said letter is reproduced as hereunder:

'Be that as it may, in view of your allegations of delay which we deny, we hereby offer that till we complete construction of your subject-matter flat we shall arrange alternative accommodation/flat for you in Group Housing Colony named "Takshila Heights" situated at Sector-37C, Gurgaon on lease/rent with immediate effect. We will bear the rent of alternative accommodation/flat at "Takshila Heights". However, you shall have to pay the common area maintenance charges and other user based charges like electricity, etc. which you would have done for your flat in "Esfera" as well.'

12. It is significant to mention that in the aforenoted letter there is an admission by the Developer that the construction is still not completed. Additionally, even the specific date of delivery of possession has not been mentioned anywhere either in the written version or in the affidavit or even in the letter dated 3-4-2017 which the counsel is relying upon."

15. The appeal memo also did not make any reference to the fact that the Project had been registered under the RERA Act. In the leading appeal, the following assertions were made in the list of dates and events

"2011-2017 The appellant was unable to hand over the possession to the respondents within the stipulated time as stipulated in Clause 10.1 due to reasons beyond control of the appellant viz. due to severe shortage of contractual labourers and delay caused in obtaining statutory requisite permissions for carrying on the construction of the said flats, failed to deliver possession of the subject flats to the respondents within the prescribed time-limit"

One of the grounds raised in the appeal memo was as under:

"C. Because the Hon'ble Commission failed to appreciate that the policy of demonetisation introduced by the Government of India constituted as an event of force majeure since as a consequence of the said event, numerous persons including the appellant suffered shortage of cash which resulted in delay in delivering possession to the respondent. It is humbly submitted that the shortage of cash ensuing as a result of the demonetisation policy resulted in the stopping of work since the process of construction requires many payments to be made in cash on a day-to-day basis, for example, wages paid to daily wage workers, payments made against delivery of construction materials, etc."

20. At the outset, we must deal with two factual issues. It was concluded by the Commission that; (*i*) all the complainants were "consumers" within the meaning of the Act and that; (*ii*) there was delay on the part of the appellant in completing the construction within time. The stand taken by the appellant at various stages, itself acknowledged that there was delay but the appellant tried to rely on certain events as mentioned in Ground 'C' quoted in para 15 (at p. 804*d-f supra*) hereinabove. In our view, the conclusions drawn by the National Commission in relation to these issues are absolutely correct and do not call for any interference.

17.<u>REBUTTAL:</u> The Ld. Counsel for the Complainants have rebutted the stance of the respondents by arguing before this Authority that the present complaints are fairly governed under the statutory provisions of Section 18 (1) and not Section 71 as the Complainant have not claimed any compensation. Further, he stressed that his claim is not based on defective title, as provided in section 18(2) of the Act. The Ld. Counsel has argued before this Authority that since the respondent promoters were to deliver the possession of the flats/ apartments allotted to them by on or before 31st March, 2016/by the end of December, 2016.The respondent promoters were expected to hand over the possession within a reasonable time, which they have miserably failed to do so. Furthermore, the Complainants are duly entitled to withdraw from the present project of the respondent promoters by virtue of Section 18 (1) (a) of the Act ibid. Also the promoter cannot compel the Complainants to take the delayed possession after the terms and conditions as enlisted in the covenants/ clause 19 & 20 of the agreement to sell has expired and that too beyond reasonable time. Therefore the Complainant is duly entitled for the refund of amount along with the interest from the

date on which different amounts have been advanced by the Complainants to the respondent promoters till its final realization.

18.CONCLUSION/ FINDINGS OF THE AUTHORITY:-

We have heard the arguments advanced by the Ld. Counsels for the Complainants & respondents and have perused the record pertaining to the case. We have also duly considered the submissions made before us in the form of complaint, reply and rejoinders as well as arguments adduced before us. This Authority is of the view that there are three issues that require the consideration and adjudication, namely:-

i) Whether this Authority has the jurisdiction to adjudicate upon the present Complaints or not?

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

iii) What are the implications in the present set of Complaints, of the on-going proceedings in the revision petition, pending before the Financial Commissioner (Appeal) Government of

Himachal Pradesh under the H.P. Tendency of Land Reforms Act 1972?

19. (i) Whether this Authority has the jurisdiction to adjudicate upon the present Complaints or not?

The Ld. Sr. Counsel for the respondents has argued that the revision petition before the Financial Commissioner, Himachal Pradesh is pending under the HP Tenancy and Land Revenue Act, 1972, therefore the present proceedings before the Authority should be kept pending till the decision in that case. He also pointed out that the Ld. Financial Commissioner, Himachal Pradesh has granted stay of the orders issued by the lower courts. He argued that the decision in the revision petition before the Financial Commissioner, Himachal Pradesh is directly connected with this case, therefore, his contention of pending the present hearing may kindly be considered. He cited the case of *Hindustan Petroleum Corpn. Ltd. versus Dilbahar Singh, (2014) 9 SCC 78: (2014) 4 SCC (Civ) 723, at page 97* in which the Hon'ble Apex Court discussed the scope of appellate and revisional jurisdiction of the Authority under Section 15 of

the Haryana Rent Control Act, Section 23 & Section 25 of the Tamil Nadu Rent Control Act & Section 18 & 20 of the Kerala Rent Control Act. He drew the attention of the Authority towards para 28 of the judgment in which it was held that the decision of the revisional Court is the 'operative decision in law'. Therefore, he contested that the Authority should wait till the Ld. Financial Commissioner; State of Himachal Pradesh decides the case. He also drew the attention of the Authority towards the case of *Canara Bank versus N.G. Subbarya Setty, (2018) 16 SCC 228, at page 249* in which the issue of res sub-judice and res judicata has been explained. The Supreme Court had held in that case, that if the appeal is pending then, the res will be considered sub-judice and not judicata. He also cited ruling in case of *SCG Contracts (India) (P) Ltd., versus K.S. Chamankar Infrastructure (P) Ltd., (2019) 12 SCC at page 212,* in which the Hon'ble Supreme Court held that when a case is pending in appeal the res is not yet judicata. Therefore, he contested that in the present case the matter regarding the title of the land is pending in revision petition before the Ld. Financial Commissioner;

State of Himachal Pradesh and hence the same is res sub-judice and it is not yet res judicata. Therefore, till the decision is pronounced by the Financial Commissioner Appeal; State of Himachal Pradesh, the present matter may not be decided.

20. The Counsel for complainants has argued that the Real Estate (Regulation and Development) Act, 2016 is an independent Act and the proceedings under this Act, cannot be stalled because the matter regarding the title of land ina Benami transaction is pending in the court of Financial Commissioner; State of Himachal Pradesh under the H.P. Tendency and Land Reforms Act 1972.

21. We have considered the points raised by Ld. Counsels for both the parties. The proceedings before the Ld. Financial Commissioner; State of Himachal Pradesh are pending to determine, whether the land transaction is Benami or not?Whereas, the complainants have filed the present complaints for refund of the amount paid by them to the respondents, for purchase of flats under the Real Estate (Regulation and Development) Act, 2016. This Act has been

passed by the Parliament to protect the interest of consumers in Real Estate Sector.

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

The promoter shall—

(a) "be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made there under or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be: Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed."

Section 18 (1)(a) of the Act reads as follows-

(1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,— (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or "Return of amount and compensation, he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to

any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act

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

(4) *"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."*

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 obligation cast upon the promoter, the allottee and the Real Estate agent under this act and the rules and regulation made their under".*

Further Section 38 (1) of the Act says

> "(1) *The Authority shall have powers to impose penalty or interest, in regard to any contravention of obligations cast upon the promoters, the allottees and the real estate agents, under this Act or the rules and the regulations made there under."*

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

unambiguous terms empowers the Authority to impose 'penalty or interest.'

Thus from the reading of the above provisions of the Act, it is very clear that the Authority has power to adjudicate various matters, including refund along withinterest and imposition of penalty under the Act. Further section 88 of the Act provides as follows:-

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

Thus it is clear that the provisions of the Act ibid are in addition to and not in derogation of provision of any other law. Further, the 'res' in present case is refund of money along with interest whereas, the 'res' before the Ld. Financial Commissioner, State of Himachal Pradesh is of Benami transaction of land of this project, and hence very different. Moreover, the Appellate Authority in the present case is Real Estate Appellate Tribunal, established under Section 43 of the Act, whereas Ld. Financial Commissioner, State of Himachal Pradesh has revisional powers under the H.P. Tenancy and Land Reforms Act 1972. Thus, the present

proceedings are independent of the other Laws and this Authority has full jurisdiction to decide the present complaints as per the provisions of the Real Estate (Regulation and Development) Act, 2016. Therefore, the proceedings under this Act for refund of amount cannot be kept pending, as some other proceedings pertaining to the project land are sub-judice in the court of FC Appeal.

23.(ii) Whether the Complainants are entitled to get the refund of the money along with interest or not?

The Ld. Counsel for the complainants has argued that the complainants have deposited huge advance amount to purchase flats in the project. However, the project has not been completed as per the provisions of agreement to sell. The para 19 of the agreement to sell provides that, the promoter shall deliver the possession of said unit of the apartment on or before 1st day of March,2016, in case of complainant Saket Lakhotia and on end of December, 2016, with a grace time of four months, in case of other complainants. The Section 18(1)(a) of the Act ibid clearly provide that if promoter fails to complete or give possession in

accordance with the terms of the agreement for sale then the complainant will be entitled to return of the amount along with interest. Similar provisions have been made in Section 19 (4) of the Act, which clearly provides that the allottee shall be entitled to claim the refund of amount paid along with interest, if promoter fails to comply with the terms of agreement for sale. In the present case, the possession of the flats was to be delivered in 2016, whereas, the flats are not complete, even as on today. He has cited the decision of Hon'ble Supreme Court in the case of *Imperia Structures Ltd. versus Anil Patni, (2020) 10 SCC 783: (2021) 1 SCC (Civ) 1, at page 791* in which under " para-13" the Hon'ble Apex Court has held that the allottees are entitled to seek refund if the project is not complete as per builder-buyer agreement. Thus he forcefully argued that complainants are entitled to refund along with interest.

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

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

He said that the clause 20ibid provides that, if the construction work of the project is affected by any order of any court then the promoter in the aforesaid event shall be entitled to reasonable corresponding extension of time for the delivery of possession of said unit/ apartment on account of force majeure circumstances.

He said in the present case the Ld. District Collector, Solan vide its interim order dated 17th March,2017 had stopped the construction of this project and till today the matter is sub-judice and further construction work cannot take place. Therefore, this is a 'force majeure' circumstance provided in para 20 of the agreement to sale. Hence, the period the matter is sub-judice and construction has been stayed, the corresponding period of delivery of possession should be extended. Accordingly, the complainants are not entitled for refund, as there is no delay in completion of apartments from the side of the respondents.

25. The Authority has gone through the provisions of agreement for sale. The para 20 provides that if the construction work is affected by an order of court then that would be considered as 'force majeure' circumstance. In the present case the Ld. District Collector, Solan vide its interim order dated 17th March,2017 had stopped the construction on the site and the matter is still sub-judice, therefore definitely the 'force majeure' circumstances are applicable in the present project, with effect from 17th March,2017. However, this is to be examined, whether due to that circumstances, the complainants are entitled to demand refund

of the amount paid or not? According to the clause 19 of the agreement to sale, the complainants were to get possession of their flats on or before 1st March,2016/ by the end of December, 2016. This period was over, prior to the enforcement of stay on construction issued by the Ld. District Collector, dated 17th March, 2017. Secondly, the respondents should have intimated about the 'force majeure' circumstances to the complainants immediately on its happening. However, from the record of this case, it does not appear that respondents have intimated to the complainants about the stay granted by the District Collector, Solan. The Ld. Counsel for the complainants has pointed out, that he came to know about the proceedings before the revenue courts about the Benami transaction of the project land, only during the proceedings of this case. Thus, there is nothing on record to show that the respondents have intimated about delay in construction due to stay by the District Collector, Solan. The Ld. Sr. Counsel for the respondents has also raised the issue of 120 days grace period. This Authority has inspected the project site on 9.11.2020, the details of which has been quoted earlier. From the spot visit it is evident that only 30-40% of the

construction work has been done on the spot. Obviously the remaining work could not have been completed within the grace period of 120 days.

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

"10. The facts on record clearly indicate that as against the total consideration of Rs.8.31 crores, the Respondents had paid Rs.8.14 crores by November, 2013. Though the Appellants had undertaken to complete the villa by 31.12.2014, they failed to discharge the obligation. As late as on 28.05.2014, the Revised Construction Schedule had shown the date of delivery of possession to be October, 2014. There was, thus, total failure on part of the Appellants and they were deficient in rendering service in terms of the obligations that they had undertaken. Even assuming that the villa is now ready for occupation (as asserted by the Appellants), the delay of almost five years is a crucial factor and the bargain

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

27. The Hon'ble Supreme Court in case "*Pioneer Urban Land and Infrastructure Ltd. versus Govindan Raghavan, 2019 SCC Online SC 458*, has held that the inordinate delay in handing of the flat clearly amounts to deficiency of service. The Apex Court further held that a person cannot be made to wait indefinitely for possession of the flat allotted to him and is entitled to seek refund of the amount paid by him.*T*

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

"In terms of Section 18 of the RERA Act, if a promoter fails to complete or is unable to give possession of an apartment duly completed by the date specified in the agreement, the

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

Thus, it is very clear that the promoters have failed to complete the project and give possession of apartments to the complainants in accordance with the terms of agreement to sale. Therefore, the complainants are entitled to claim refund of the amount paid along with interest as prescribed under section 18(1) (a) read with section 19 (4) of the Act. In the

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present case the respondents have not disputed the amount paid by all the five complainants.

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

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interest." Thus, the Complainants are entitled to get interest as prescribed as per the Section 18 of the Act read with rule 15 of the Himachal Pradesh Real Estate (Regulation and Development) Rules, 2017, that clearly states that the rate of interest payable by the promoter to allottee or by the allottee to the promoter, as the case may be, shall be the highest marginal cost of lending rate of SBI, plus two percent.

30. Thus, in the present case, there exist, clear and valid reasons for holding down that the flat buying Complainants are entitled for refund of total payment advanced to the respondent promoter along with interest. There has been a breach on the part of the respondents in complying with the contractual obligation to hand over possession of the flat either on or before 1st March, 2016 or by the end of December, 2016 plus a grace period of 120 days, as per the agreement to sell executed between the Complainants and the respondents. The failure of the respondent promoter to hand over possession in time, amounts to contravention of the provisions of the Real Estate (Regulation & Development) Act, 2016. The respondent promoter has failed in fulfilling his obligations as stipulated in

Section 11 read with Section 14 of the Act ibid. Having paid a substantial amount of the consideration price to the respondent, the purchaser is unable to obtain possession of that flat as the same has not been constructed, as per terms of agreement to sale.

31. (iii)What are the implications in the present set of Complaints, of the on-going proceedings in revision petition, pending before the Financial Commissioner (Appeal) Government of Himachal Pradesh under the H.P. Tenancy of Land Reforms Act 1972?

32. We have already held on point no. 1 that the present proceedings are independent of the revisional proceedings pending before the Ld. Financial Commissioner, State of Himachal Pradesh. However, it cannot be denied that the decision in that case will have repercussions on the project promoters as well as allottees. The revision petition pending before the Ld. Financial Commissioner, State of Himachal Pradesh is under a separate Act and we have no say, in what is going to be the decision in that case. The decision in that case may be in favour of the respondents or may go against them. Presuming, that the

decision comes in favour of the respondents, then there are chances, that the promoters may like to complete this project and hand over the apartments. We in normal cases are allowing the refund within two months from issue of our orders .However, considering the peculiarity of this case, we intend to provide a period of four months to refund the amount along with interest. If during this period the order if any, of FC(appeal)comes in favour of the respondents, then the complainants, if they wish so may continue with the project. However, even the order of FC appeal is passed in favour of respondents and respondents do not wish to continue in the project, then they shall be entitled to refund along with interest, on completion of period of four months. This will also be applicable, if no decision is passed by the Ld. Financial Commissioner, State of Himachal Pradesh within a period of four months.

33. The second circumstance may be that the order of Ld. Financial Commissioner, State of Himachal Pradesh goes against the respondents. Then obviously all the complainants are entitled to take refund along with interest.

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

"Article 254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States.—(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is

competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

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

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

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

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

36.<u>RELIEF:-</u>

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

i. The Complaints are allowed and the Respondent promoters are directed to return/refund the amount to the Complainants as under:-

a. *Ms. Ashima Sharma-* Rs. Twelve lakhs, seventy six thousand, six hundred and forty five (Rs. 12, 76, 645/-)

b. *Shri Pawan Wasant Borle-* Rs. Seventy eight lakhs, four hundred and ninety one (Rs. 78, 00, 491/-)

c. *Shri Saket Lakhotia* -Rs. Sixty six lakhs, eleven thousand, nine hundred and eighty six (Rs. 66, 11, 986/-)

d. *Shri Sandeep Ahuja & Smt. Vinita Ahuja-* Rs. Twenty four lakhs, twenty thousand, four hundred and thirty seven (Rs. 24, 20, 437/-)

e. *Shri Deepak Kumar Puggal& Smt. Davinder Puggal-* Rs. Eighty two Lakhs (Rs. 82, 00, 000/-)

In all these cases of refund, an 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 will be payable. The present highest MCLR of SBI is 7.3 %.Hence the rate of interest would be 7.3 %+2 % i.e. 9.3%. It is clarified that simple rate of interest shall

be payable from the dates on which different payments were made by the Complainants to the respondent promoters.

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

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

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

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

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