

**HARYANA REAL ESTATE REGULATORY AUTHORITY,  
PANCHKULA.**

1. **Complaint No.381/2018** – Chetan Verma &Anr. Vs. M/s ABW Infrastructure Pvt. Ltd. & Ors.
2. **Complaint No.382/2018** – Vipin Kahushal & Anr. Vs. M/s ABW Infrastructure Pvt. Ltd. & Ors.
3. **Complaint No.383/2018** – Gurbaskh & Anr. Vs. M/s ABW Infrastructure Pvt. Ltd. & Ors.
4. **Complaint No.384/2018** – Janak Malik & Anr. Vs. M/s ABW Infrastructure Pvt. Ltd. & Ors.
5. **Complaint No.444/2018** – Rakesh Kumar Agarwal & Anr. Vs. M/s ABW Infrastructure Pvt. Ltd. & Ors.
6. **Complaint No.445/2018** – Anurag Jain & Anr. Vs. M/s ABW Infrastructure Pvt. Ltd. &Ors.

**Date of Hearing: 30.10.2018**

**Coram: -** Shri Rajan Gupta, Chairman.  
Shri Anil Kumar Panwar, Member.  
Shri Dilbag Singh Sihag, Member.

**Appearance: -**

1. Shri Siddharth Gosain, Counsel for Complainant.
2. Shri Abhayveer Sharma, Counsel for Respondent No.3.
3. None for Respondent no. 1 & 2.

**ORDER:**

1. The facts of the lead case Complaint No.383 of 2018, Gurbaksh Singh Vs. M/s ABW Infrastructure Pvt. Ltd., are being taken into consideration for disposal of this bunch matter.



2. In brief, the complainants' case is that they entered into a memorandum of understanding dated 31.03.08 with Respondent No.1 under which the respondent No.1 agreed to allot an office space measuring tentative super area of 1035 sq. ft. @ Rs. 4612/- per sq. ft. to be developed in Sector M-1, Manesar, Gurgaon. For this, complainants made lump-sum payment of the total sale consideration of Rs.47,74,000/-. At the time of execution of the said MOU, Respondent No.1 undertook to give monthly assured return @ Rs 60/- per sq. ft. per month amounting to Rs.62,100/- w.e.f. 03.04.08 till completion of the Project. Further, post completion of the unit it was to be leased out by the Respondent No.1 at his own cost at a minimum rate of Rs 60 per sq. ft., and in the event the lease was less than Rs 60/- per sq. ft. i.e. the assured return, Respondent No.1 would compensate the complainant as per rates agreed in the MOU.

3. The complainants received monthly assured return up to December, 2010. However, in December 2010, the complainant wrote a letter dated 21.12.2010 to the respondents requesting that their earlier MOU should be cancelled and in lieu they may be allotted 1300 sq. ft. super area in another project "Gateway Towers", Faridabad belonging to the respondents. Following the said letter dated 21.12.2010 of the complainants, a cancellation agreement was made between both the parties on 28<sup>th</sup> December, 2010 in which the earlier allotment was cancelled and a fresh agreement was signed by both the parties under which 1300 sq. ft. super area in the project "Gateway Towers" at Village Anangpur, Faridabad,



Haryana was allotted to the complainants for a total consideration of Rs.47.74 lakhs. Other terms & conditions were also settled between the parties through a revised agreement including that the developer will give assured investment return @ Rs.50/- per sq. ft. per month amounting to Rs.65000/- per month w.e.f. 1<sup>st</sup> January, 2011. A unit buyer agreement was executed on 23.04.2011 by which Unit No. 804A measuring 1300 sq. ft. was allotted to the complainant in the said project.

4. The project "Gateway Towers" is being developed on a land area measuring 8.50 acres owned by the Respondent No.2. The Respondent No.1 had entered into a collaboration agreement dated 12.11.2006 with Respondent No.2 for development of the project including selling and disposal of the built-up area. According to the complainants, they continued to receive monthly assured return up to the year 2015. However, for the month of July 2015, two cheques were issued by the respondent no. 1 in September, 2015 but both the cheques got dishonored. The complainants demanded issuance of fresh cheques but their request was not accepted by the respondent. Thus, the complainants have received the assured monthly returns only for 7 months in whole of the year 2015. They have not received any cheques thereafter.

5. It has been alleged by the complainant that despite lapse of seven years from the date of execution of unit buyer's agreement the project is far from complete. In fact, it has been abandoned for the last over two years. The complainant had approached the Town & Country Planning



Department, Haryana for cancellation of the licence of the Project and completion of the units by the Town & Country Planning Department but no action has been taken. The allottees/complainants also filed a civil writ petition before the Punjab & Haryana High Court, Chandigarh. Further, in the **FIR No.165 of 2016** filed against the respondent, it has been reported that there are other 133 similar complaints pending against Respondent No.1 before the Economic Offences Wing in which investigations are going on for the allegations of siphoning off of funds etc. The complainants have alleged cheating, misrepresentation and fraud by respondents No.1 and 2 and seek the relief of payment of assured investment return; completion of the project; and handing over of possession of completed/constructed units. Alternatively, they have sought refund of their money together with interest at the rate 24%.

6. The complainants have also become aware of an order dated 12.12.2017 passed by District Magistrate, Faridabad whereby in a loan default committed by respondent No.1, possession of project properties together with other rights have been handed over to respondent No.3. The Respondent no. 3 i.e. Alchemist Asset reconstruction Company Ltd. had sanctioned a loan to Respondent no. 1 and the said property was mortgaged as a security by Respondent no. 2 in favor of DMI Finance Limited, a financial Institution, which in turn has assigned the debt in favor of the Respondent no. 3 vide registered assignment deed dated 30.12.16. When Respondent no. 1 failed to repay the said loan, their account was classified



as a Non-performing asset on 17.1.16 by DMI Finance Limited. In order to recover the said loan amount, respondent No.3 had moved to the District Magistrate, Faridabad under SARFAESI Act, 2002 for recovery of the loan and taking over of possession of the property. The District Magistrate, Faridabad vide his order dated 05.12.2017 has allowed Respondent No.3 to take possession of the said property.

Respondent No.3 further states that the District Magistrate, Faridabad has now passed an erroneous order to attach and vest the property in 'competent Authority' under "Haryana Protection of Interest of Depositors in the Financial Establishment Act, 2013", and has also handover the same to the competent authority. The Respondent No. 3 has requested that this order of the District Magistrate cannot be enforced because the property has already been attached under SARFAESI Act, 2002 of which the possession has already been handed over to the Respondent No. 3.

7. The Authority has given a thorough consideration to the facts of the matter. The Authority observes as follows: -

- (i) The Authority in a similar complaint no. **98/2018- Ms. Rekha Chandra Vs. M/s ABW Infrastructure Limited** has passed an order dated 23.07.18, the operative part of which is reproduced below:

*"The Hon'ble High Court of Delhi has appointed an official liquidator and has authorized him to take over all*



*the assets of respondent/promoter with a view to complete the liquidation proceedings. So, the present applicant is required to approach the said Liquidator for laying his claims and redressal of grievances. Accordingly, the complaint is no more maintainable and disposed of with a direction that the complainant can seek redressal of his grievances by filing an appropriate application before the Official Liquidator."*

- (ii) It is evident from the face of record that complainants have made full payment of the sales consideration to the respondent No.1. The Respondent No.1 ought to have delivered possession of the property by April, 2014 but despite lapse of many years, possession has not been offered. Some photographs produced by the complainants make it amply clear that the project has been abandoned and no development work is going on at the site. Now in view of the facts narrated above and that several legal and criminal proceedings are going on against the project as well as against the project developers, the project is unlikely to be completed in near future. Thus, the respondents have miserably failed to discharge their obligations of paying monthly assured return as well as completing the project even after taking full sale consideration from the



complainants. Therefore, legal rights of the complaints have been seriously jeopardized.

- (iii) It is also clear from the facts narrated above, that the respondents are serious defaulters in repayment of their loans to the financial institutions. Accordingly, District Magistrate, Faridabad vide his order dated 05.12.2017 has attached the property of the project in question and has allowed the assignment of the debt in favour of Respondent No.3 and has also allowed the Respondent No. 3 to take over possession of the property. For this reason also, there appears little scope for completion of the project by the Respondent No.1.
- (iv) As is made out from the report submitted by the Police, 133 criminal complaints have been received by the Economic Offences Wing against respondents No.1 and 2 and those complaints are under investigation.
- (v) Parallel proceedings are also going on before 'appropriate authorities' under the "Haryana Protection of Interest of Depositors in the Financial Establishment Act, 2013". The outcome of these proceedings alongside the proceedings going on under SARFAESI Act, 2002 is uncertain. This matter may go before the higher courts also. This will put further question marks on completion of the project by Respondent No.1. or any other agency in foreseeable future.



- (vi) As observed in complaint case No.98 of 2018 Hon'ble Delhi High Court has also appointed an Official Liquidator and has authorized him to take over of the assets of the respondents with a view to complete liquidation proceedings.

8. In the light of above facts, there is no doubt that the complainants deserve relief by way of refund of the money paid by them along with interest prescribed in Rule 15 of HRERA Rules. The main question is, however, against whom will this order be directed because assets of the project have been attached; recovery proceedings are going on and the respondent No.1 is in jail in multiple criminal matters. This Authority is duty bound to provide effective relief to the complainants. When assets of project and also that of the promoters have been attached, how will this order be implemented is a question. The complainants may have to approach multiple forums/authorities and may have to compete with multiple claims under variety of laws.

It is also possible that the money to be realized from the assets of the project may be less than the total claims against the property. Those claims may relate to the financial institutions, depositors or other creditors. Different laws of the land will be applicable in this situation for satisfying those claims. There may be competition amongst various claims. This matter may even reach higher courts and take long time to attain finality.

9. At this point of time it is relevant to take note of the system by which the real estate projects are usually developed in the State of Haryana.





Prospective developers of the real estate project arranges land at their own level by way of out right purchase from the original landowners or by way of allotment from other developers or by way of entering into collaboration agreement with the original landowners for development for a real estate project. The original landowners himself or the landowners in collaboration with a developer apply to the Town & Country Planning Department of the Government of Haryana for grant of licence for development of real estate colony. The Town & Country Department carries out requisite due diligence about the project, applicable laws, probability of linking the essential services with the town level infrastructure and financial strength of the applicant developer. They also examine the title of the land of the applicant. After due diligence, Director, Town & Country Planning takes a decision to grant licence for development of colony subject to fulfilment of prescribed conditions.

10. Apart from other requirements, the developer of Real Estate Project in Faridabad, Haryana is supposed to pay EDC which at present is Rs. 93.68 lakhs and Rs. 3.74 crores per acre of land for Residential and Commercial Project respectively. These EDCs are chargeable from the allottees of the real estate project. With this money collected by the State Government, the State agencies are supposed to provide town level infrastructure facilities.



After obtaining licence, several plans also have to be got approved from the Town & Country Planning Department and other State Government agencies. These plans includes estimates in respect of plans relating to provision of services like water supply, sewerage, storm drainage water, road infrastructure, fire escape and electricity supply etc. layout plans of the apartments, architectural plans of the apartments, Zoning plans etc. are also approved by the State Government.

After approval of the plans and payment of specified amount of EDC etc. the developers usually advertise the project and seek booking from prospective allottees. Plots/apartments are booked in the real estate projects on the basis of variety of payment plans which usually are comprised of 10-20 per cent as booking amount followed by payments as per plan. The payments are either construction linked or time linked. Thereafter, agreements are made between the parties and usually full amount of money is received from the allottees within 1-3 years of launching the project. The developer is supposed to develop the project and handover the plots/apartments to the allottees in a time bound manner. It is mandatory that after completion and handing over of the plots/apartments conveyance deeds are executed in favour of the allottees.

By way of conveyance deed, the ownership of the apartment or the proportionate share in the piece of land under the apartments and the land under the plot comes into the ownership of the allottee. Thus, eventually, the allottee becomes owner of the plot or the apartment and



proportionate share of the land under the apartment complex. The State Government in turn puts various conditions while granting licence and while approving development plans.

The State is also supposed to closely monitor the progress of the project and grant approvals of various stages of development of the project. The district level machinery of the State is supposed to visit the project site on a regular basis to ensure that slippages do not happen.

If above concept of Project development is understood in a logical manner, then when an allottee books an apartment or plot he is deemed to have acquired a stake in the proportionate part of the land of the project. Further, when he pays full or substantial part of the consideration to the developer, he has to be considered a deemed owner of the proportionate piece of land of the project. He acquires a valuable interest in the Project which cannot be alienated by anybody other than himself. Further, this presupposes that his right is considered superior to any other right over the land including that of lenders of money. Nobody can lawfully alienate his right in the Project.

More impactfully, the allottees pay money to the promoter on the strength of a sovereign assurance granted by the Town & Country Planning Department announcing to the public at large that the promoter is a bona fide person; he has financial means to execute the project; he has technical capability to develop the project in a time bound manner; the project has legitimate licence; it is approved in accordance with the sanctioned plans



and all services will be provided in the project including the external services which will be connected with the town level services etc. The allottee, on the strength of the licence and the aforesaid sovereign assurances, is given a confidence that his money is safe and the State takes responsibility to safeguard his interest. It is this base and theory on which entire economic system of the Country rests. This confidence of the public and ordinary citizens cannot be allowed to erode, otherwise it will have disastrous economic and social consequences.

11. At this stage, in view of foregoing facts, circumstances and legal arguments, a question arises that in a project of which deemed owners are allottees of the apartments/plots, whether a promoter is entitled to alienate the land of the project to a third party, including a banking or a financial institution, to the prejudice of rights of the allottees? Further, if any banking/financial institutions lends money to the promoter against physical assets of the project without seeking consent of the allottees, whether the rights of the allottees in the project can be said to also have been alienated without their consent?

Another question that needs to be answered is, if there are multiple claims on the assets of the project as well as on the other assets of the promoter, whether claims of the allottees should be considered superior to that of the other claimants in respect of the assets of the real estate project concerned?



12. It may be relevant here to make a mention of the **'Insolvency and Bankruptcy (Amendment) Ordinance, 2018** which came into force on 6<sup>th</sup> June, 2018. The related provision of the ordinance is reproduced below:-

*"In section 5 of the principal Act,—*

*(ii) in clause (8), in sub-clause (f), the following Explanation shall be inserted, namely:—*

*'Explanation. —*

*For the purposes of this sub-clause,— (i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and*

*(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016"*

As a result of the aforesaid provisions incorporated by the ordinance, home buyers have been brought within the definition of "financial creditors under the insolvency and bankruptcy code". As a result of the amendments, the amounts received from the allottees by the promoters of the real estate projects shall be deemed to be the amounts having a commercial effect of a borrowing. Therefore, the amounts received from the allottees shall be regarded as financial debts and the allottees shall be deemed to be the financial creditors. Under the Insolvency



and Bankruptcy Code, 2016, their claims can be pressed at par with the other financial creditors.

13. We are of the considered view that the right granted to an allottee by the amendment ordinance of 2018 is a value-able right and that right can be pressed before the appropriate forum/authority for satisfaction of their claims against the promoters/debtors.

However, we are of the further view that the rights guaranteed by the RERA Act, 2016 for protection of allottees are very wide in nature and must be interpreted accordingly. As already stated in the arguments listed in Para 10 above, the allottees of a project after having paid the EDC to the State Government and substantial amount of money to the developer should be treated as deemed owners of the proportionate piece of the land and assets of the project and their rights cannot be alienated by way of an agreement made between the promoter and the lending financial institution. Rights of the allottees must be treated superior to the rights of the lending financial institutions. The financial institutions, in so far as the assets of the related real estate project are concerned, are free to satisfy the claims from the remainders of the assets of the project after satisfaction of the claim of the allottees, and in addition they are free to get their claim satisfied from other assets of the promoters. They can press their claim even against the sureties and guarantees offered by the promoters.

13. The aforesaid conclusion that the rights of the allottees should be treated superior to those of other financial creditors are also supported by



the principles of natural justice and the express provisions of RERA Act, 2016. In support of these arguments it is observed as follows:-

- (i) The financial institutions are expert agencies which carry out due diligence about the promoter as well as his project before deciding to lend money. They have expert manpower and machinery to adjudge viability of the project and creditworthiness of the promoters. They have capability to understand risk factors involved. Accordingly, at the stage of lending, either they are fully aware of the facts that full or a portion of the project has been allotted to the allottees, thus creating third party rights; or they are fully aware that the allotments will be made by the promoters in future, thereby creating third party interests in the assets hypothecated or kept with them as security. It is to be presumed that lenders factors-in these facts at the time of lending.

Lending institutions are also supposed to monitor progress of the project in order to ensure that money lent by them is safe and is invested properly in the project. If the money lent by them is diverted or siphoned away, they must also share burden for the same for the purpose of protecting the rights of ordinary citizens. If the lenders fail to monitor the Project closely and if their loan is not repaid in time, they themselves also must share the blame. The allottee, however,



must not suffer on behalf of the promoter or the financial institution.

- (ii) On the other hand, an allottee typically is a middle-class person who harbours the dream of owning plot, house or an apartment. Savings of two or three generations usually have to be mobilized to own a house. He invests money on the basis of assurances held out to him by the promoters and the State Government agencies. He cannot access or understand the accounts of the project nor does he have any power to monitor progress of the project on day-to-day basis.

The principles of natural justice, therefore, dictate that the rights of the allottees should be treated superior to those of the financial institutions.

- (iii) It is relevant to quote here the provisions of Section 18(1), Section 19(3) and (4), Section 79 and Section 89 of the Real Estate (Regulation & Development) Act, 2016.

***Section 18: Return of amount and compensation-*** (1) *If the promoter fails to complete or is unable to give possession of an apartment, plot or building,— (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or (b) due to discontinuance of his business as a developer on account of*





*suspension or revocation of the registration under this Act or for any other reason, he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act: Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.*

**Section 19(3): Rights and Duties of allottees-** *The allottee shall be entitled to claim the possession of apartment, plot or building, as the case may be, and the association of allottees shall be entitled to claim the possession of the common areas, as per the declaration given by the promoter under sub-clause (C) of clause (I) of sub-section (2) of section 4.*

*(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 thereunder.*

***Section 79: Bar of Jurisdiction-*** *No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.*

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

It is observed that Section 89 explicitly mandates that provisions of RERA Act shall have effect notwithstanding



anything inconsistent therewith contained in any other law for the time being in force. Further, Section 18 guarantees that in the event of a project not being completed he shall have a right to seek refund of his money along with interest without prejudice to any other remedy available. Similarly Sub Section 3 and Sub Section 4 of Section 19 assure the allottee that he will be given refund of the money deposited by him in the event of default in completion of the project by the promoters.

This Authority is, therefore, of the considered opinion that since these rights of the allottees have been held superior to any other law for the time being in force, the rights of the allottee, therefore, shall be treated superior to that of the rights of other creditors including the financial institutions.

14. It has been discussed in detail in foregoing paras that when complex legal proceedings are going on against a project and against the promoters of the project, it may take long time for it to get resolved. Accordingly, it is ordered that whenever such resolution happens, the rights of the allottees shall be treated superior most. The money paid by the allottees shall be refunded before entertaining claim, if any, of the commercial creditor.

15. Another question that arises at this juncture is whether by granting a superior right to the allottees compared with other creditors, whether



purposes of the RERA Act are fully served or not? This Authority observes that RERA Act is supposed to provide expeditious remedy to the allottees and also ensure that real estate sector develops in a systematic manner and ongoing projects are completed within a time bound manner. This necessarily brings us to the question of responsibilities of the State Government, through the Town & Country Planning Department, which is the license/approving authority for development of a real estate project.

16. In a situation like the facts of the case, it must be determined whether the State Government and its agencies have faithfully discharged the duties cast upon them by law? Have the State agencies monitored the project in a proper manner through the course of its development? Why did they allow the project to slip in the manner that it has become a stuck project to the prejudice of the allottees as well as society in general?

17. It can be safely said that there must have been failure of some organs of the machinery of the State which resulted into the state of affairs that are being faced here. The promoters have been defaulting in payment of dues to the Government. In this situation, especially when the project promoters have turned serious defaulter of other financial institutions and criminal cases are pending against them, the Town & Country Planning Department should have taken timely steps to safeguard interests of the allottees. The allottees purchased the apartments on the basis of the sovereign assurances held out to them by the State Government. Now, it is an equal duty of the State Government to come to their rescue and take all



steps necessary to get the project completed by taking it over or in any other manner considered appropriate. The Town & Country Planning Department cannot allow a licensee to collect money from the allottee and abandons the project. The Department is duty bound to take coercive action.

We hereby direct that for safeguarding interests of the allottees, Director, Town & Country Planning Department, Haryana shall immediately make an assessment of the assets of the project and take appropriate decision for getting the project completed by taking it over themselves or through any other appropriate agency. They shall take these steps regardless of the claims of the other financial creditors against the project promoters or the project land. After cancellation of the licence, once the project is taken over by the Town & Country Planning Department, the rights of the allottees can be secured. The financial institutions or other creditors, however, may get their claims satisfied from the remaining assets of the project or from the other assets and properties of the promoters or by involving guarantees and securities. It is only by taking over of the project by Town & Country Planning Department that the purposes of the RERA Act will be served and interest of the allottees can be protected.

18. The directions issued in the foregoing Paras are summarized as follows:-

- (i) The allottees of the project in question shall be treated as deemed owners of the project. The promoters of the project




and the lending financial institutions cannot alienate the ownership rights of the allottees at their own level without their consent. Therefore, the claim of the allottees against the assets of the project shall be treated superior to any other right of any other person or entity including the financial institutions and/or other creditors.


- (ii) If claims of the allottees are not satisfied fully from the assets of the project in question, they shall be treated creditors of the promoters at par with other creditors for satisfaction of their claims from the assets of the promoters other than the assets of the project in question.
- (iii) The Director, Town & Country Planning Department, Haryana is duty bound to protect interest of the allottees and to ensure that the project on the licenced land is completed in accordance with sanctioned plans. The Director shall immediately take steps to take over the project and get it completed in the manner considered appropriate. The Director shall take over the project regardless of any other proceedings pending against the project assets including under the SARFAESI Act, 2002 or the "Haryana Protection of Interest of Depositors in the Financial Establishment Act, 2013".



- (iv) While all the captioned complaints are being disposed of by this final order, Executive Director shall file a suo-moto complaint against respondents No.1 & 2 and also implead Director, Town & Country Planning Department, Haryana as a respondent for monitoring of follow up actions taken on these directions.
- (v) The complainants and other similarly placed allottees may present this order before any authority dealing with liquidation of assets of the Project, or the respondents and seek satisfaction of their claims on priority. It is, however made clear that the claims of the allottees shall be restricted to the refund of the money paid by them to the respondents along with interest as provided for in rule 15 of the HRERA Rules, 2017.
16. **Disposed of** accordingly. File be consigned to the record room and these orders be uploaded on the website of the Authority.

  
**Dilbag Singh Sihag**  
Member

  
**Anil Kumar Panwar**  
Member

  
**Rajan Gupta**  
Chairman