



PROCEEDINGS OF THE DAY

Day and Date of 8th Hearing	Friday, 11.09.2020
Complaint No.	Complaint case No.2145 (earlier2031)of 2020 Deepak Chowdhary Vs PNB Housing Finance Ltd. & Ors.
Complainant	Deepak Chowdhary, represented through Advocate Sukhbir Yadav (counsel)
Respondent No.1	M/s PNB housing Finance Limited, represented through Advocate Venkat Rao (counsel)
Respondent No. 2	M/s Supertech Limited represented through Advocate Rishab Gupta (counsel)
Present on behalf of authority	Geeta Rathee Singh, Legal Officer, Shreya Gupta, ALE

PROCEEDINGS

1. Background of the project:

The project Supertech "Hues" is a group housing project, located in Sector 68, Gurugram, on a total area admeasuring area 27.49 acres, bearing license no. 106 of 2013 (13.74 acres) and license no.107 of 2014 (13.75 acres) which is being constructed/developed and marketed by M/s Supertech Limited. As per the record, the license no. 106 of 2013 was issued vide dated 26.12.2013 to M/s Sarv Realtor Pvt. Ltd, c/o MDLR House and license no.107 of 2014 was also issued to M/s Sarv Realtor Pvt. Ltd, c/o MDLR House.

The project "Hues" developed/ constructed on an area 27.49 acres is registered with Haryana Real Estate Regulatory Authority (interim HARERA, Panchkula) vide registration no.182 of 2017 on 04.09.2017, which is valid till 31.12.2021, wherein M/s Supertech Limited has been recorded as the promoter in the registration certificate. It is relevant to mention here that the application for registration was not made by the licensees, but by M/s Supertech Limited, who is neither the license holder nor the collaborator. The application for registration was made by M/s Supertech Limited. on the basis a jointed development





agreement dated 25.04.2014, without any prior approval from competent authority.

The entire land comprising of the area within the purview of the license no. 106 & 107 of 2014 and the additional land consisting of 5.84 acres coming within the purview of license no. 136 of 2014 has been mortgaged as collateral security with the lenders.

It is pertinent to mention that one of the lender i.e PNB Housing Limited being an "aggrieved person" filed a complaint before the Authority on 21.11.2019 vide complaint case no. 5802 of 2019 alleging that M/s Supertech Limited has illegally registered phase I of the project (Hues and Azalia), comprising of 23 towers, though the licenses for the construction and development of the project has been issued by the competent authority in the name of M/s Sarv Realtor Pvt. Ltd c/o MDLR House and M/s Supertech Limited is neither the licensee nor the collaborator for the sake of moving application for the registration of the project. The promoter M/s Supertech Limited approached PNB Hosing Finance Limited for a construction loan for ("Hues"), which was duly advanced to M/s Supertech Limited, with M/s Sarv Realtor Pvt. Ltd. as the confirming party, by way of loan agreement dated 10.03.2017. This loan was secured by the way of equitable mortgage of the project land admeasuring 33.33, by deposit of the title deeds along with receivables from the mortgaged properties. Taking cognizance of the matter the Authority passed order dated 29.11.2019, wherein it was directed that the registration of the project shall be amended to the extent of recognizing M/s Sarv Realtor Pvt. Ltd. as the promoter instead of M/s Supertech Limited. Further, the Authority with a view to safeguard the interest of the allottees and with the consent and concurrence of PNB Housing Finance Limited, directed the PNB Housing Finance Limited to shift, re-book and restructure loans specific to this project in the name of M/s Sarv Realtor Pvt. Ltd. and upon such re-booking or restructuring, lenders shall intimate to the Authority.

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Act No. 16 of 2016 Parliament

भू-संपदा (विनियमन और विकास) अधिनियम 2016 की धारा 20 के अंतर्गत गठित प्राधिकरण
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Subsequently, in the present the Authority received a complaint from Shri Deepak Chaudhary dated 18.07.2020 alleging that PNB Housing Finance Limited is e-auctioning the project "Hues", mortgages with them by M/s Supertech Limited. The complainant prayed for urgent intervention by the Authority by submitting that if the project is auctioned it shall jeopardize the fate of more than 900 allottees who have invested their hard earned money in the project. Taking into consideration the nature of complaint the Authority decided to hear the matter on priority.

2. Brief of the complaint:

1. Shri Deepak Chaudhary, one of the allottee, has filed a complaint with the Haryana Real Estate Regulatory Authority (hereinafter referred as Authority) wherein the complainant has pleaded that he booked a 2 BHK plus study unit bearing No.2201 measuring 1430 sq. ft. for a total sale consideration of Rs.33,17,654/- on 06.06.2017. Accordingly, a builder buyer agreement was executed on 23.11.2018 and possession of the mentioned unit was to be delivered to him on or before June, 2019. The respondent no. 2 i.e Supertech Limited. has represented to the complainant that the said project is free from any charge, encumbrances and lien and housing loan facility is available from several banks and NBFCs on project inventory, but to his utter surprise, he read e-auction notice of the project Hues in various newspapers on 08.06.2020 mentioning the schedule for e-auction of the project named above on 03.07.2020 from 11.00 am to 5.00p.m. When he contacted the promoter i.e. M/s Supertech Limited, no clear response was given and it was promised that the matter would be resolved soon. However, the complainant could only get a copy of order dated 29.11.2019 passed by the learned Authority in the suo moto complaint case no RERA-GRG-5802-2019 (*PNB Housing Finance Limited vs M/s Supertech Limited and other*) in the interest of allottees to ensure timely

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- completion of the project named Hues and no other information could be collected due to COVID-19 pandemic situation.
- II. It is his case that though learned Authority vide its order dated 29.11.2019 issued several directions to PNB Housing Finance Limited as well as M/s Supertech Limited i.e. respondent No. 1 & 2 with reference to the same project i.e "HUES", however the respondent no 1 and 2 failed to comply with the same.
- III. It transpired that M/s Supertech Limited sold approximately 950 units in the above mentioned project and collected huge amount towards sale consideration from the bonafide allottees. Further, the M/s Supertech Limited with the consent of the licence holders mortgaged the project land and subsequently allotted units to the prospective buyers by way of sale. It took construction loan of Rs.250 crores for the project showing the estimated costs of construction of the project as Rs.582.32 crores whereas the construction status of the project at the site is 26% and is nowhere near completion. Therefore, both the respondents are hand in glove and want to grab the project as well as the hard-earned money of the bonafide allottees.
- IV. Further, the complainant took the plea that PNB Housing Finance Limited is covered under the definition of the promoter as per clause 2(zk)(i) which is reproduced as under:
- "2(zk)(i) "promoter" means, - (i) a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees;*
- V. The complainant pleaded that as PNB Housing Finance Limited has sanctioned construction loan for the project and project land is mortgaged to them accordingly, PNB Housing Finance Limited shall have deemed to be the promoter on exercising its rights as assignee on the project. Further,

the construction loan sanctioned by it results in PNB Housing Finance Limited **causes to be constructed** this project.

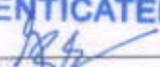
The counsel for the respondent No. 2 supported the plea of the complainant that PNB Housing Finance Limited has "cause to construct for sale" and is also an assignee in the project "Hues" by virtue of loan agreement dated 10.3.2017 whereby it has lent money for project construction and is therefore covered within the ambit of the definition of the promoter as provided under section 2(zk)(i) of the Real Estate (Regulation and Development) Act, 2016.

VI. The complainant has also mentioned in his complaint that an application dated 21.11.2019 was filed by PNB Housing Finance Limited i.e. respondent No.1 before the Authority against M/s Supertech Limited i.e. respondent No.2 as well as Industrial Finance Corporation Pvt Ltd for violating the provisions of Real Estate (Regulation and Development) Act, 2016. It was pleaded in that application of respondent No.1 that it has advanced construction finance loan for Hues project being developed by M/s Supertech Ltd. by way of loan agreement dated 10.03.2017. It was secured by way of mortgaging the project land measuring 33.33 acres by depositing of title deed. It was pleaded that M/s Supertech Limited indulged in gross violation of loan covenant and illegally diverted and misappropriated the funds from the project detailed as under:

A. Misappropriation of funds by respondent

(i) Illegal diversion: As per CA certificated dated 30.09.2018, the promoter contributions to the project is Rs. 337 cr whereas amount reported to authority in DPI is Rs. 15 cr.

Further, it is the case of PNB that respondent has availed Rs. 250 cr. as construction loans for the project and about 900 units have

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been sold and substantial customer advances have been generated to that extent.

- (ii) Non-routing of customer receipts through escrow mechanism, underreporting of customer receipts to the authority and non-operating of separate RERA account: Customer receipts as per information provided in the notice as on March 2019 were to the tune of Rs. 437.03 cr., whereas customer receipts to the as per DPI are Rs. 328.26 cr. Further, customer receipts as per CA certificate dated 30.09.2018 are to the tune of Rs. 369.91 cr.

B. Delay in execution of project:

The commencement date of the project was 15.05.2015 and date of completion of the project was given as 31.12.2021 to the Authority, yet even after the passage of 4 years, only 26% of the project has been completed and it is highly unlikely that the project would be completed in the given time.

C. Misinformation & misrepresentation:

The estimated land cost for the project was given to complainant was Rs. 444 cr. However, the estimated land cost provided to the authority for the project was Rs. 286.74 cr. Likewise, the estimated cost of construction and development as given Rs 582,32 cr whereas in the DPI it is Rs. 574.73 cr. The estimated EDC/IDC for the project was Rs. 28.35 cr as per information provided in the complaint whereas as per DPI it was shown as Rs. 143.92.

So, a request was made to pass suitable orders under section 7(3) of the RERA Act including identifying M/s Sarv Realtors Pvt Ltd. as promoter of the project. After hearing both the parties and perusal of the record, the Authority vide its order dated 29.11.2019 issued following directions:



reports to the project monitoring company as well as to the authority for taking any future action as required.

- (viii) Sarv Realtors Pvt. Ltd./DSC and others as the case may be are directed to file fresh DPI along with statutory affidavit under section 4 of the RERA, 2016 and to fill up form 'A to H'. Also quarterly report shall be submitted by the promoter online as well as hard copies.
- (ix) This order is not to be treated as an extension of the timeline originally provided for completion of the project at the time of registration.
- (x) All customer receipts and loans raised in relation to the project "Supertech Hues and Azalia" to be deposited in the separate RERA account and to be withdrawn only for the purpose of development of the project strictly in accordance with the banking directions notified by the authority in May 2019.
- (xi) The lenders i.e. PNBHFL and IFCI to shift, re-book, and restructure loans specific to this project in the name of promoter Sarv Realtors Pvt. Ltd./DSC and others, as the case may be. Upon such re-booking or restructuring, lenders shall intimate the same to the authority.
- (xii) Financial, engineering and sales audit report by both lenders to be made available to the Authority.

3. It is noted that in view of the directions contained above, the matter was referred to the Planning Branch of the Authority and M/s Sarv Realtor Pvt. Ltd./DSC was directed to submit complete relevant documents for amendment in registration of the project, namely, Supertech Hues and Azalia. The file remains pending with the planning branch for rectification of the registration of the project and until now the process could not be completed for non-submission of complete



information/documents on the part of the promoter i.e. M/s Supertech Limited Specific directions were also given to the lenders i.e. PNBHFL and IFCI to shift re-book and re-structure loans specific to this project in the name of the new promoter M/s Sarv Realtor Pvt. Ltd/DSC and others, as the case may be and upon such re-bookings or re-structuring of loans shall be intimated the same to the Authority. However, despite specific directions to the lenders compliance was not made by either of them, rather it is evident from the perusal of the complaint filed by Shri Deepak Chowdhary that a public notice for e-auction of the project "Hues" has been given in the daily newspapers and the auction was schedule for 30.07.2020 from 11.00am to 5.00p.m. This is how the matter is being taken by for urgent hearing.

Parties concerned have filed argument/reply/additional argument and reiterated their pleas orally as well through video conferencing.

4. Reply submitted by Respondent No.1:

I. Jurisdiction of the learned authority

That the Learned Haryana Real Estate Regulatory Authority, Gurugram by virtue of the provisions of the Real Estate (Regulation and Development) Act, 2016 exercises its power, control and jurisdiction in respect of the Real Estate project on the "Promoter", "Allottee" and "Real Estate Agent".

That this Learned Authority does not have the jurisdiction to entertain the present complaint against the Answering Respondent as a complaint under Section 31 of the Real Estate Regulation and Development Act, 2016 may be filed for any violation or contravention of the provisions of the Act or rules and regulations made thereunder against any Promoter, Allottee or Real Estate Agent and the Answering Respondent does not fall under any of those categories and consequently is incapable of committing any violation or contravention of the provisions of the Act as the provisions contain duties

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Act No. 16 of 2016 Passed by the Parliament
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After taking into consideration all the material facts as adduced and produced by the parties present, the Authority is of the view that a case made out by it against the respondent no.1 i.e. Supertech Ltd.

Under section 7 (1) of RERA, the Authority is empowered to de-register a real estate project on proof of various acts or omissions of the promoter of the project. However, the Authority is of the view that such a step would be unduly harsh in the present case and not in the interest of the allottees. The Authority has decided, in the interest of allottees and other stakeholders, that instead of revoking the registration under section 7(1), the registration will continue to remain in force subject to the terms and conditions and directions under 7(3) of RERA, 2016 as provided herein below:

- (i) The registration of the project "Supertech Hues and Azalia" be rectified and Sarv Realtors Pvt. Ltd./ DSC and others, as the case may be, be registered as promoter.
- (ii) M/s Supertech Limited, shall submit complete details of sold and unsold inventory (micro and macro details) and shall also provide all such information in format REP-I as is required to be provided for registration of an ongoing project by the promoter.
- (iii) Sarv Realtors Pvt. Ltd./DSC and others shall file complete application in form REP-I along with other relevant documents along with copy of valid licenses, environment clearance, valid building plans, service plans and estimates and fire approval, etc. in the authority immediately.
- (iv) Sarv Realtors Pvt. Ltd./DSC, and others, as the case may be step into the shoes of Supertech Limited in all buyer agreements in the project within two months, without in any manner diluting the buyers' interest or affecting the obligations of the promoter

towards the allottees and shall submit the compliance report in the authority.

- (v) All the assets and liabilities including customer receipts and project loans of whatsoever nature, in the Project "Supertech Hues and Azalia" in the name of Supertech Limited be shifted to Sarv Realtors Pvt. Ltd./DSC and others. However, even after the rectification, Supertech Limited will continue to remain jointly responsible for the units marketed and sold by it and shall be severally responsible if Sarv Realtors Pvt. Ltd./DSC and others fail to discharge its obligations towards the allottees.
- (vi) Supertech and Sarv Realtors Pvt. Ltd./DSC and others are directed to intimate all allottees and institutions in respect of the rectification of the name of promoter in the registration of the project "Supertech Hues and Azalia" and shifting of all the costs and liabilities from Supertech Limited. to Sarv Realtors Pvt. Ltd./DSC.
- (vii) A project monitoring company shall be engaged by the lenders, to periodically report on development of the project in order to ensure timely completion of the project. The name of the agencies to be provided by the lenders i.e. PNBHFL and IFCI. The authority further directs the future promoter i.e Sarv Realtors Pvt. Ltd./DSC and others to engage expert companies/firm in the field for forensic audit and quantum survey for this project. The promoter will bear the expenses for the audit companies. Report of the forensic auditor as well as that of quantum surveyor, with regard to the said project shall be submitted by the concerned agencies within the period of two months from the date of their appointment and shall handover the final

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and obligations only of the three entities mentioned above viz. , Promoters, Allottees and Real Estate Agents.

- II. In terms of Section 35 (1) of the Act, the Learned Authority, on a complaint or *suo motu*, by order in writing, call upon any *promoter or allottee or real estate agent* to give information or explanation in relation to its affairs and also appoint persons for inquiry in relation to the affairs of any *promoter, allottee or real estate agent*. Also, as per Section 35(2) of the Act, the Authority shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit. Therefore, the Learned Authority may summon and enforce the attendance of any person and examine them on oath. This is the limited purpose for which a person other than a promoter, an allottee or a real estate agent may be summoned by the Authority.

Any person other than these three entities cannot be made a party to a proceeding before the Learned Authority.

- III. Further, in terms of Section 37 of the Act, the *Authority is bestowed with power to issue directions to Promoter, Real Estate Agents and Allottee* for the purpose of discharging its functions under the provisions of this Act, Rules, and Regulations. Section 37 is reproduced herein below:

"The Authority may, for the purpose of discharging its functions under the provisions of this Act or rules or regulations made thereunder, issue such directions from time to time, to the promoters or allottees or real estate agents, as the case may be, as it may consider necessary and such directions shall be binding on all concerned."

- IV. The Authority is not empowered to issue directions to any other person and the words "*such directions shall be binding on all concerned*" cannot be construed to mean that the directions will be binding on all persons. Such a construction will not extend the jurisdiction of the Authority beyond the intendment of the Act. *Moreover according to the rule of construction*



"Ejusdem Generis", where a law lists specific classes of persons or things and then refers to them in general, the general statements only apply to the same kind of persons or things specifically listed.

- V. The Hon'ble Supreme Court in **M/s. Grasim Industries Limited vs Collector Of Customs, Bombay** made the following observations with regard to the rule of ejusdem generis:

"The rule is applicable when particular words pertaining to a class, category or genus are followed by general words. In such a case the general words are construed as limited to things of the same kind as those specified. The rule reflects an attempt to reconcile incompatibility between the specific and general words in view of the other rules of interpretation that all words in a statute are given effect if possible, that a statute is to be construed as a whole and that no words in a statute are presumed to be superfluous."

Therefore, the words "on all concerned" used in Section 37 cannot be taken to mean any and every person but the person subject to the jurisdiction of the Authority.

- VI. Also, Section 34(f) states one of the functions of the Learned Authority is to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.
- VII. A conjoint reading of the provisions of the above sections of the entire scheme of Act shows that the Authority is entrusted with the function to ensure the compliance of the obligations of Promoter, Real Estate Agents and Allottee in the overall promotion of Real Estate industry and is adequately empowered to issue directions to Promoter, Real Estate Agent and Allottee and to no other person. Further, it is also clear that it lacks the jurisdiction to issue any directions or orders to any other person or entity,

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who or which is not a Promoter, Real Estate Agent or Allottee. *The Promoter, Real Estate Agent and Allottee are defined under Section 2(zk), Section 2(zm) and Section 2(d) respectively and the Answering Respondent, being a lender does not fall under any of the aforementioned categories. It is a settled legal proposition that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior authority, and if the authority passes an order / decision having no jurisdiction over the matter, it would amount to nullity as the matter goes to the roots of the cause. The finding of a Court or Tribunal becomes irrelevant and unenforceable / inexecutable once the forum is found to have no jurisdiction.*

VIII. *Whether a bank/financial institution can be treated as a Promoter under the definition of Section 2(zk) of the Act?*

It is submitted that a Bank/ Financial Institution cannot be treated as a Promoter within the definition of Section 2(zk) of the Act.

The Respondent No.1 is not a Promoter as the Respondent No.1 is not "causing to construct" with an intention to sell. That the definition of promoter under Section 2(zk) indicates that the intention of "causing to construct" should be for the purpose of selling to the third party and thereby the business being that of real estate development. The Respondent No.1 had only advanced loan towards construction and the intention of the Respondent No.1 is not to sell the units which are completed. The Respondent No.1's intention is only to advance loan adhering to the NHB guidelines and supporting the construction industry and overall, the Real estate industry. The Respondent No.1's business is not constructing and selling or causing to construct and sell but is that of lending and collecting interest thereon. There is no question of the Respondent No.1 being categorized as Promoters and no such rights have been assigned for the completion/construction and sale of the project under Section 15. Section 15



is a specific provision in respect of assignment of rights and Section 2(zk), the assignee referred is to the buyer and his assignee. It does not mean the promoter creating a specific interest for repayment of loan and not assigning ownership or title rights under a mortgage.

Also, the Respondent No.1 does not fall under the category of Promoter under Section 2(zk) of the Act.

The Respondent No.1 is a lender and is merely proceeding to enforce its security as per the procedure established by law and has no obligations towards the Complainant under the Act.

That, had the legislature intended to cover a financial institution or a bank which had lends monies for the project, to be a part of a Promoter, they would not have made it separately mandatory on the part of the Promoter to disclose loans and any charges, mortgages, liens thereon while registration of the project. Section 4 (2)(I)(B) of the Act provides for details of such mortgages, encumbrances to be disclosed. Furthermore, under Section 11 of RERA it clearly provides for obligations of the promoter and it casts an obligation on the promoter to repay all outgoings including mortgage, loan, interest on mortgage etc. Further, Section 11(4)(g) is reproduced herein below for ready reference:

(g) pay all outgoings until he transfers the physical possession of the real estate project to the allottee or the associations of allottees, as the case may be, which he has collected from the allottees, for the payment of outgoings (including land cost, ground rent, municipal or other local taxes, charges for water or electricity, maintenance charges, including mortgage loan and interest on mortgages or other encumbrances and such other liabilities payable to competent authorities, banks and financial institutions, which are related to the project):

Provided that where any promoter fails to pay all or any of the outgoings collected by him from the allottees or any liability, mortgage loan and interest thereon before transferring the real estate project to such allottees,

or the association of the allottees, as the case may be, the promoter shall continue to be liable, even after the transfer of the property, to pay such outgoing and penal charges, if any, to the authority or person to whom they are payable and be liable for the cost of any legal proceedings which may be taken therefor by such authority or person;

It is pertinent to note that the proviso to the Section 11(4)(g) clearly casts a liability on the promoter not only of payment of mortgage loan etc. but also for the cost of any legal proceedings. Further, the Section 11(h) of Act, an obligation is cast on the promoter not to create charge on the apartment wherein an agreement to sale has been entered into on the said UNIT and it does not it does not put any restrictions upon the promoter from creating a charge on inventory wherein no sale agreement is entered into.

Expanding the definition beyond the actual intent of the Act will only defeat the real purpose for which the Act has been enacted.

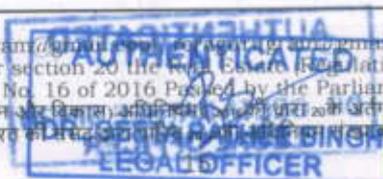
IX. Not bound by the Real Estate (Regulation and Development) Act, 2016

That the Complainant has placed his reliance on Section 15 of the Act, however, it is most humbly submitted that the Answering Respondent is not a promoter and therefore not bound by the provision of Section 15 of the Act.

The Answering Respondent is a lender and is merely proceeding to enforce its security as per the procedure established by law and has no obligations towards the Complainant under the Act.

X. Statutory bar under SARFAESI, 2002:

Background: That the Respondent No.2 along with Sarv Realtors Pvt. Ltd. and ASP Sarin Realty Pvt. Ltd. as Co-Borrowers (hereinafter collectively known as "**Borrowers**") had approached the Answering Respondent for construction finance loan, which was duly advanced by way of loan agreement dated 10.03.2017. The loan granted was secured by way of equitable mortgage of the 'Project Supertech Hues' being developed by Respondent No.2 and Sarv





Realtors Private Limited under the joint development agreement and an area of 5.843 acres in Gurugram along with the receivables from the mortgaged properties by the borrowers. Since the borrowers committed defaults in repayment of the loan, the Answering Respondent classified the loan accounts as non-performing assets in its books of accounts in accordance with the directives relating to the asset classification issued by National Housing Bank/Reserve Bank of India from time to time. Accordingly, the Answering Respondent issued a notice to the borrowers in terms of Section 13(2) of the SARFAESI Act, 2002. The borrowers, even after expiry of period of 60 days from the date of notice issued under Section 13(2) of the SARFAESI Act, 2002, failed to make payment. Hence, the Answering Respondent has proceeded against the borrowers for enforcing its security in the lawful exercise of its rights as per the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "SARFAESI Act").

a. Statutory Bar of Jurisdiction:

The SARFAESI Act clearly bars the jurisdiction of civil courts in matters which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under SARFAESI Act to determine. Hence, as the present complaint flows from the public auction notices of the Answering Respondent issued under the SARFAESI Act, the remedy open to him is to approach the Debts Recovery Tribunal or the Appellate Tribunal under Section 17 of SARFESI Act and not the Learned Authority. Section 34 of the SARFAESI Act substantiates the said stand.

b. Section 34 of the SARFAESI Act is reproduced as follows for ready reference:

"No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal 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 or under the Recovery of Debts due to Banks and Financial Institutions Act, 1993."

Also, Section 35 clearly states that SARFAESI Act shall override other laws. Section 35 is reproduced as follows:

"35. The provisions of this Act to override other laws: The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

XI. RERA ACT, 2016 VS SARFAESI ACT, 2002

Both SARFAESI Act, 2002 and RERA Act, 2016 are special central legislations. In such a situation, harmonious construction of laws to the extent possible need to be made. However, in the present situation, due to conflicting nature, the law which has come into effect later should prevail.

Originally, the SARFAESI Act came into effect in the year 2002. The Act was substantially amended in 2016 and was notified on August 12, 2016. Herein certain sections w.r.t priority to secured creditors were notified in 2016 but came into effect subsequently from 24.01.2020. Whereas RERA Act came into effect on 01.05.2016 wherein certain sections were notified. The relevant sections hereunder such as Section 3, 4, 11, 19 etc. came into effect subsequently w.e.f 01.05.2017.

It is clear that the SARFAESI Amendment Act came into effect subsequent to the notification of RERA Act i.e. on 12 August 2016. Further, the priority to secured creditors under Section 26 E was in fact notified in January 2020 much later to the notification of RERA coming into effect in 2017.

So, therefore, Parliament in its fullest wisdom has provided this priority to secured creditors, knowing fully well, that there is already a legislation in place





in the form of RERA Act for protecting allottees. Therefore, an act which has come into effect subsequent should prevail, in the instant case, SARFAESI Act.

XII. Loan agreement and buyer agreement:

That as the question with respect to the rights of the allottees/buyers under the buyer agreement and the rights of the answering respondent is raised, great importance behind such transactions as a whole having far reaching effect on the economy of the country and as public money is also involved, it cannot be ignored. It is submitted that the rights of the Answering respondent in any case cannot be subservient to the rights of the complainant as the answering respondent has followed the law by advancing the loan under valid agreements entered with the Borrowers.

It is pertinent to note that according to Section 58 of the Transfer of Property Act, 1882, mortgage is a transfer of interest in a specific immovable property for the purpose of securing the property.

However, in contrast to the same, a buyer agreement does not create any such rights or interest in the property. A buyer agreement is an intention of the parties to not to effect an immediate transfer of ownership but to agree to do the same in future on the terms settled between them.

XIII. Complaint before the learned authority:

That the answering respondent had already filed a complaint (Complaint No.5802 of 2019) against the respondent no.2 before this Learned Authority bringing out all the illegal diversion of project receipts, non-routing of customer receipts through escrow mechanism, underreporting of customer receipts to the Authority, non-opening of separate RERA account and delay in execution of the project with respect to the project "Supertech Hues".

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Furthermore, this Learned Authority took *suo-motu* cognizance on the complaint filed by the Answering Respondent, PNB Housing Finance Limited and passed an order dated 29.11.2019 directing that instead of revoking the project registration, the registration will continue to remain in force subject to various terms and conditions, one of them being , Sarv Realtors Pvt. Ltd./ DSC and others, as the case may be, be registered as promoter. The direction to the Answering Respondent is reproduced as follows:

"(xi) The Lenders, i.e. PNBHFL and IFCI to shift, re-book and restructure loans specific to this project in the name of promoter, SARV Realtors Pvt Ltd /DSC and Others, as the case may be. Upon such rebooking, or restructuring, the lenders shall intimate the same to the authority."

- XIV. That the answering respondent requested the borrowers to regularize the account and sought information/documentation etc. for enabling the answering respondent to be in compliance of the NHB/RBI guidelines and to enable the Answering respondent to comply with the orders of the Learned Authority. However, the borrowers utterly failed to do so which has also been brought to the notice of the Authority. That answering respondent is duty bound to comply with regulations /directions of banking regulator and without the compliance of the norms by the borrowers, the restructuring of Loans was not possible.
- XV. That despite various follow ups, the borrowers utterly failed to abide by the Orders of the Learned Authority, and failed to provide the necessary information/conclude the formalities for restructuring or rebooking of the Loans and continued to make default on repayment of Loan / interest thereon.
- XVI. That, Answering Respondent is subject to regulations of Banking Regulator and once a loan turns into non-performing asset (NPA), it is under

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obligation to initiate recovery proceedings including enforcement of security interest.

XVII. That the present complaint appears to be concocted complaint with the complainant being hand in glove with the Respondent No.2. It appears to be a last-ditch attempt on the part of the Respondent No.2 to get away with defaulting on its loan.

5. Reply submitted by Respondent No. 2 i.e M/s Supertech Limited

That according to Section 2 (zk) of the RERA Act, 2016, the PNB Housing Finance Limited covers under the definition of promoter as it has cause to develop the project Hues.

That according to section 2 (zk) of RERA Act 2016, it is clear that the PNB Housing Finance Limited, is a promoter and is intentionally creating the third party interest in the said RERA Registered project. They are under legal obligation to take first consent of two third allottees as well as also permission from the Hon'ble Authority before stepping forward to e-auction procedure. As per Section 15 (1) of RERA Act read with HRERA Rules, it is clear that 'the promoter shall not transfer or assign his majority rights and liabilities in respect of a real estate project to a third party without obtaining prior written consent from two-third allottees, except the promoter, and without the prior written approval of the Authority'

The Hon'ble Authority is empowered to protect the interest of all the allottees who have invested hard earned money in the said project with a dream to get flat with in the stipulated period mentioned in the RERA registration certificate. It is submitted on behalf of respondent no. 2, that if the respondent no. 1 succeeds with their ulterior motive, then there will be a gross violation of statutory provision of RERA Act as well as clause of registration certificate issued by the Hon'ble Authority.

6. Additional arguments submitted by Complainant

The complainant has submitted the following additional written arguments to reply/counter the objection and law points raised by the respondent no. 1.

A. Jurisdiction of the Authority:

- I. That subject matter of the case is a real estate project i.e. "Supertech - Hues", situated at Sector - 68, Gurugram and is situated within the territorial and subject matter jurisdiction of HARERA, Gurugram.
- II. That as per section 2(zn) of the Act, "real estate project" means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or (apartments), as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as case may be and includes the common areas, the developments works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto. **It is admitted fact that said the project is a real estate project and falls within the jurisdiction of this Hon'ble Authority.**

- III. That as per section 2(zk) (i) of the Act, "Promoter" means - a person who construct or causes to be construct and independent building or a building consisting of apartments, or converts and existing building or a part hereof into apartments, for the purpose of selling all or some of the apartments to other person and includes his assignees;

As it is evident from the bare reading of the definition that a person who causes to be constructed is a promoter and includes his assignees, in whose favor rights has been assigned.

And as per section 2(zk)(v) of the Act, "Promoter" means - any other person who acts himself as a builder, colonizer, contractor, developer, estate developer or by any other name or claims to be

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acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale.

In the subject case, the respondent No. 1 is pertaining itself as a power of attorney holder (loan agreement) from the landowner i.e. Sarv Realtors Pvt. Ltd. and acting as deemed owner of the land in the possession and wants to sell the project land to any third party.

B. Cause of Action

I. That the respondent No. 1 had put the real estate project land on auction and schedule the auction for 30.07.2020 from 11:00 AM to 5:00 PM.

II. That the respondent no. 1 has given a loan of Rs. 250 Crore as construction loans for the project. It is quite unbelievable when the estimated cost of construction for the project is 582.32 Cr and the project is constructed just 26%, then how and why the respondent no. 1 has given extra money to the respondent no. 2. **It is highly pertinent to mention here that said loan of Rs. 250 Crore is causing to construct and respondent no. 2 along with license holder has assigned the rights in favour of respondent no. 1.**

III. That as per section 58 of the Transfer of Property Act, 1882 mortgage is a transfer of an interest in a specific immovable property for the purpose of securing the payment. Section 58 of the Transfer of Property Act, 1882 is reproduced as follows:

"58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgage-deed" defined - (a) A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or

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future debt, or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee, the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected are called a mortgage-deed".

IV. That a bare perusal of section shows that respondent No. 1 with IFCI has stepped into the shoes of the respondent no. 2 and license holder on account of their failure to repay the loan.

V. That the respondent no. 1 is claiming the protection of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred as "SARFAESI Act") and the Complainant is claiming the protection of RERA Act. That the rights of both parties are interrelated.

VI. That the RERA Act, 2016 came into force on 25.03.2016 and respondent no. 1 has sanctioned a loan of Rs. 275 Cr. to Respondent No. 2 on 04.01.2017 and get enter into a loan agreement on 10.03.2017. Both the dates i.e. sanction of loan and execution of loan agreement are after the coming into force of RERA Act, 2016.

VII. That as per section 11(4)(h) of the RERA Act, 2016 - the promoter shall - after he executes an agreement for sale for any apartment, plot or building, as the case may be, not mortgage or create a charge on such apartment, plot or building, as the case may be, and if any such mortgage or charge is made or created then notwithstanding anything contained in any other law for the time being in force, it shall not affect the right and interest of the allottee who has taken or agreed to take such apartment, plot or building, as case may be.

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VIII. That the allottee has paid the sale consideration by considering the brand value of Supertech Limited. If the respondent no. 1, sell the project to any person who does not has expertise in the development of a residential building, the rights of the allottees will be hampered.

IX. That Hon'ble Supreme Court has observed in case **Bikram Chatterjee Vs Union of India (Writ Petition(s) Civil) No. 940 of 2017)** that "146. ... In view of the huge money collected from the buyers and comparable investments made in the projects, there was no necessity to obtain a loan from banks. The amount so obtained was not used in the projects. The mortgage deeds in favour of the banks were not permissible due to the non-payment of dues of the Noida and Greater Noida Authorities. The Noida and Greater Noida Authorities issued conditional NOC's to create mortgages subject to payment of dues which were not paid. They issued such NOC's in collusion with builders. ..."

"para 147. ...The money obtained from banks was diverted to unapproved uses such as for creation of personal assets of Directors, creation of assets in closely held companies by the Directors along with their partners and relatives, for personal expenses of Directors, to give advance without carrying interest for several years. There was total non-monitoring by the bankers."

"para 150 ... The banks have also failed to ensure that the money was used in the projects".

"para 153... We have also found that non-payment of dues of the Noida and Greater Noida Authorities and the banks cannot come in the way of occupation of flats by home buyers as money of home buyers has been diverted due to the inaction of Officials of Noida/Greater Noida Authorities. They cannot sell the buildings or demolish them nor can

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enforce the charge against homebuyers/leased land/projects in the facts of the case. Similarly, the bank cannot recover money from projects as it has not been invested in projects. Homebuyers' money has been diverted fraudulently, thus fraud cannot be perpetuated against them by selling the flats and depriving them of hard-earned money and saving of entire life. They cannot be cheated once over again by sale of the project raised by their funds.

C. Statutory bar under the RERA Act:

That as per section 15 of RERA Act, 2016, "15. Obligations of promoter in case of transfer of a real estate project to a third party. - (1) The promoter shall not transfer or assign his majority rights and liabilities in respect of a real estate project to a third party without obtaining prior written consent from two-third allottees, except the promoter, and without the prior written approval of the Authority:

Provided that such transfer or assignment shall not affect the allotment or sale of the apartments, plots or buildings as the case may be, in the real estate project made by the erstwhile promoter.

- I. That the allottee/Complainants wants the protection of his rights in the project. After obtaining consent from two-third allottees and the Hon'ble Authority, the Promoter (both respondent) can transfer the real estate project to a third party, keeping in view the rights of the allottees.
- II. Transfer of part and partial is not permitted (un-identified area).
- III. That as the Respondent No. 1 released a list of 950 allottees in the project, then how can he determine the remaining area.
- IV. That, when the Respondent No. 1 is acting as owner, he is deemed promoter of the Real estate project.

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V. Maxim - *Nemo dat quod non habet* - No one can transfer a better title than he himself possess.

In the landmark case of **V. Chandrasekaran and Another Vs. The Administrative Officer and Other (Civil Appeal No's 6342-6343 of 2012)** the Hon'ble Supreme Court has held that "23. The general rule of law is undoubted, that no one can transfer a better title than he himself possess; *Nemo dat quod non habet*. However, this Rule has certain exceptions and one of them is, that the transfer must be in good faith for value, and there must be no misrepresentation or fraud, which would render the transactions as void and also that the property is purchased after taking reasonable care to ascertain that the transferee has the requisite power to transfer the said land, and finally that the parties have acted in good faith, as is required under section 41 of the Transfer of Property Act, 1882."

- I. Section 41 of the Transfer of Property Act, 1882 "41..... Transfer by ostensible owner - Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transfer was not authorized to make it: Provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith".
- II. That total sanctioned FAR for the project is 42,02,647 Sq. Ft. (approx) out of total sanctioned FAR the respondent No. 2 has sold 11,40,000/- Sq. Ft. (approx) to the 950 allottees (950X1200) and the respondent has also recognized the rights of the 950 allottees. It is pertinent to mention here that the 950 allottees have first right on the said FAR, therefore the respondent No. 2 along with Sarv Realtors Pvt. Ltd. has the right to create

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charge on the balance FAR. Hence the respondent No. 1 can claim the right over balance FAR.

Current possession and interpretation It is most humbly submitted that there might be two interpretations in the present case:

- (i) **PNBHFL as a Promoter:** PNBHFL, who claims itself as the owner in possession of the project land has to take the permission of Learned Haryana Real Estate Regulatory Authority to take over the real estate project and gives an undertaking to complete the project and to protect the interest of allottees, and can recover the loan money by selling unsold inventory/FAR to prospective allottees/buyers.
- (ii) **PNBHFL as an allottee:** the PNBHFL can claim the right over unsold inventory/FAR and get allottee the inventory/FAR in its name and can become allottee at par with other allottees. The allottee has the right to transfer its right by selling the inventory/FAR in the open market to individuals or other than individuals.

7. Additional written submissions by Respondent No. 1 (PNB Housing Finance Limited)

a. No cause of action

That the complainant has not approached the Ld. Authority 'with clean hands and it is pertinent to note that the complainant, who is the allottee of the unit No. 2201 in Tower N, as mentioned in the complaint by the Complainant is excluded from the purview of the auction notices dated 08-06-2020, 12-06-2020, 13-07-2020 and Sale Notices dated 28-05-2020, 11-06-2020, 09-07-2020 of the respondent no.1. Hence, the complainant does not have any cause of action against the respondent no.1 for the present complaint and is making frivolous complaint against the respondent no.1 which is evident from the excluded units from the purview of auction as

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mentioned under the sale notices dated 28-05-2020, 11-06-2020 and 09-07-2020 and the present complaint shall be dismissed on this ground alone.

b. Not bound by Real Estate (Regulation and Development) Act, 2016

The complainant has placed his reliance on Section 15 and Section 4(2)(I)(D) of the Act and that the respondent no.1 is not a promoter and therefore not bound by the provision of Section 15 and Section 4(2)(I)(D) of the Act.

There is no question of the respondent no.1 being categorized as promoters and no such rights have been assigned for the completion/construction and sale of the project under Section 15. Section 15 is a specific provision in respect of assignment of rights. Also, the assignee referred in Section 2(zk) of the Act is to the buyer and his assignee. It does not mean the promoter creating a specific interest for repayment of loan and not assigning ownership or title rights under a mortgage.

Also, the Respondent No.1 does not fall under the category of Promoter under Section 2(zk) of the Act.

The respondent no.1 is a lender and is merely proceeding to enforce its security as per the procedure established by law and has no obligations towards the Complainant under the Act.

c. Not a promoter

The respondent no.1 is not a promoter as the respondent no.1 is not "causing to construct" with an intention to sell. That the definition of promoter under Section 2(zk) indicates that the intention of "causing to construct" should be for the purpose of selling to the third party and thereby the business being that of real estate development. The respondent no.1 had only advanced loan towards construction and the intention of the respondent no.1 is not to sell the units which are completed. The respondent no.1's intention is only to advance loan adhering to the NHB



guidelines and supporting the construction industry and overall, the Real estate industry. The respondent No.1's business is not constructing and selling or causing to construct and sell but is that of lending and collecting interest thereon. There is no question of the respondent No.1 being categorized as promoters and no such rights have been assigned for the completion/construction and sale of the project under Section 15. Section 15 is a specific provision in respect of assignment of rights and Section 2(zk), the assignee referred is to the byer and his assignee. It does not mean the promoter creating a specific interest for repayment of loan and not assigning ownership or title rights under a mortgage.

Also, the respondent No.1 does not fall under the category of promoter under Section 2(zk) of the Act.

d. Precedent to allottees and promoters:

The order dated 29.07.2020 shall be a bad precedent as it may give way to multiple litigation against the respondent no.1 as well as lenders all over the country. Also, it shall impact the financial position of the respondent no.1 and shall also be putting at risk, large scale investors. There is a threat that in all the measures taken by the respondent no.1 under SARFAESI Act, 2002, against various other defaulting borrowers, the allottees as well as promoters may take the plea as passed in the impugned order and drag the respondent no.1 into false and frivolous litigations and obtain stay thereby hampering the respondent no.1's business as well as recoveries.

Furthermore, the promoters of various projects who have availed project finance from the respondent no.1 who are defaulting in the repayment of their respective loans may take advantage of the order and instigate such kind of complaint from the buyers as in the present case.

In view of the above, it is most humbly submitted that the complaint ought to be dismissed against the respondent No.1 as it is devoid of any merits and the complainant has not approached the Ld. Authority 'with



clean hands as the complainant does not even have any cause of action against the respondent no.1. Also, the complainant and respondent no. 2 are hand in glove and shows the malafide intent of Complainant to protect the respondent no. 2 and delay the enforcement of legitimate right of respondent no.1.

Observation and Decision of the Authority

8. The factual position is not disputed between the parties. It is a fact on record that M/s Sarv Realtors Pvt Ltd. was issued a license for group housing project by DTCP, Haryana, vide licence No.106/2013 and 107/2013 for an area measuring 27.49 acres. However, later on M/s Supertech Limited entered into a joint development agreement dated 25.04.2014 with M/s Sarv Realtors Pvt Ltd. without getting any approval of DTCP, Haryana and applied for registration on behalf of M/s Sarv Realtors Pvt Ltd. and others without its being the licensee or a collaborator and its request in this regard vide application dated 31.07.2017 was allowed by the learned Authority (interim), Panchkula while registering this property in the name of M/s Supertech Limited vide letter dated 04.09.2017 bearing memo no. HARERA 279/2017/873 treating them as promoter. It has also come on record that M/s Supertech Limited sold 770 units in the project (as per the affidavit submitted to the Ld. Authority in 27.08.2020 whereas PNBHFL in its affidavit dated 28.08.2020 has submitted that 950 units have been sold) in Hues without keeping M/s Sarv Realtors Pvt. Ltd. as confirming party and collected considerable sale consideration from the bonafide allottees. It is also evident that taking the benefit of its unregistered development agreement dated 25.04.2014 with M/s Sarv Realtors Pvt. Ltd. as well as registration certificate from HARERA(Interim), Panchkula it succeeded to obtain a construction loan to the tune of Rs.425 crores against the project by way of mortgage. It is an undisputed fact that construction of the project is not complete more than 26% despite the fact that more than Rs. 250 cr has been disbursed to M/s Supertech Limited by respondent no.1 i.e. PNBHFL.

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9. In the Hon'ble Supreme Court case, Bikram Chatterjee vs. UOI, WP (Civil) 940 of 2017, it has been observed that
"para 150 ... The banks have also failed to ensure that the money was used in the projects".

"para 153... We have also found that non-payment of dues of the Noida and Greater Noida Authorities and the banks cannot come in the way of occupation of flats by home buyers as money of home buyers has been diverted due to the inaction of Officials of Noida/Greater Noida Authorities. They cannot sell the buildings or demolish them nor can enforce the charge against homebuyers/leased land/projects in the facts of the case. Similarly, the bank cannot recover money from projects as it has not been invested in projects. Homebuyers' money has been diverted fraudulently, thus fraud cannot be perpetuated against them by selling the flats and depriving them of hard-earned money and saving of entire life. They cannot be cheated once over again by sale of the project raised by their funds.

10. Given the fact that large amount deposited by the allottees and loan disbursed by the banks is at stake in the project, it is important to draw attention to the RBI Circular no. 2010-11/368 dated January 14, 2011 issued to all scheduled commercial banks. The operative part of the circular is reproduced as hereunder:

"The Reserve Bank of India, as a part of ongoing supervision, had undertaken an assessment of the practices in vogue at certain banks for ensuring the use of funds. The review revealed that the expected level of due diligence had not been exercised in some cases facilitating diversion of funds by the borrowers.

..2. In the context of above, it is advised that the efficacy of the existing machinery in your bank for post-sanction supervision and follow-up advances may please be evaluated and made robust, wherever considered necessary. Illustratively, the systems and procedures may broadly include the following:



....(iii) periodical scrutiny of the books of account of the borrowers.

....(v) obtention of certificates from the borrowers that the funds have been utilized for the purposes approved and in case of incorrect certification, initiation of prompt action as may be warranted, which may include withdrawal of the facilities sanctioned and legal recourse as well. In case a specific certification regarding diversion/siphoning of funds is desired from the auditors of the borrowers, a separate mandate may be awarded to them and appropriate

(vi) examination of all aspects of diversion of funds during internal audit/inspection of the branches and at the time of periodical reviews.

3. As would be appreciated, effective monitoring of the end use of funds lent is of critical importance in safeguarding a bank's interest. Further, this would also act as a deterrent for borrowers to misuse the credit facilities sanctioned, and in the process build a healthy credit culture in the Indian banking system.

11. Respondent no. 2 has not been able to show how the loan amount, customer receivables has been applied by it as is also the case in the diversion of funds proceedings which are pending against it in another matter in suo motu complaint case no. RERA-GRG-2503 of 2020. A similar proceeding was also initiated in complaint case no. 5802 of 2019, in which suo motu cognizance was taken up on complaint by PNBHFL and a detailed order was passes by the Authority on 29.11.2019, giving directions to M/s Supertech Limited as well as PNB Housing Finance Limited (details of the order dated 29.11.2019 available at para no. 2, page 5-9 of this order). As has been held in the aforementioned Supreme Court judgment, if there has been diversion of funds, banks cannot be allowed to sell the flats and deprive the allottees by depriving them of their life time savings. The rights of the allottees are not subservient to those of the bank & therefore, in case of failure of the banks to ensure that the funds were applied for the purpose they were granted, banks cannot be allowed to supersede the rights of allottees.

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भारत की संसद द्वारा पारित 2016 का अधिनियम संख्यांक 16

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Keeping in view the status and viability of the project the Authority vide its order dated 29.11.2019 gave specific directions with regard to rectification of the registration of the project as well as re-structuring of loans specific to the project, namely, Hues in the name of M/s Sarv Realtors Pvt Ltd. and Others, as also suggested by the PNB Housing Finance Limited. M/s Sarv Realtors & Ors have submitted the DPI and other required documents for rectification of the registration of the project but several deficiencies had been pointed out whose rectification is under process.

12. The respondent no. 1 also pleaded that this Authority lacks jurisdiction to issue any directions or orders to any other person or entity who is not a promoter, real estate agent or allottee. The promoter, real estate agent and allottees are defined under section 2(zk), section 2(zm) and section 2(d) respectively of the Real Estate (Regulation and Development) Act, 2016 and respondent no.1 further pleaded that being the lender does not fall under any of the aforementioned categories. However, the Authority is of a considered view that **respondent no.1 is an assignee of the respondent no. 2** and falls within the ambit of the definition of promoter as provided under section 2(zk) of the RERA Act 2016 and the same is reproduced below:

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

The principle of assignment as recognized under Indian law and affirmed and applied by Indian courts derives its origin from English law. In simple parlance, assignment means transfer of rights or obligations held by one party to another party. The Black's Law Dictionary has defined the word "assignment" to mean "a transfer or making over to another of the whole of any property, real or personal in possession or in action, or if in estate or in rights



therein". Assignment of rights under a contract is the complete transfer of rights to receive benefits accruing to one party to that contract.

According to definition provided in law lexicon Assignees means: One to whom an assignment has been made, one to whom rights have been transmitted, by particular title, such as conveyance, gift, legacy or other transfers.

"Assignee" includes any person to whom or in whose favour, by the directions of the person liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interest was created, but does not include an assignee for valuable consideration, not including consideration by way of marriage of marriage, given in good faith and without the notice of any of the matter on the ground of which the declaration is made.

The lender 'caused the project to be constructed' by giving construction loan to develop the project which in turn would be sold and the receivables would generate revenue with which the loan of the lender could be repaid. The borrower i.e. the respondent no. 2 assigned its rights in the projects to consolidate the lender's risk. This assignment is done by way of proper documentation as is provided under the Transfer of Property Act, 1882. Though it works in equity, as the rights which are assigned uncertain but the form in which it takes place is couched in as a legal or statutory assignment. It is noted that generally in practice in order to exclude the astronomical stamp duty the lenders prefer not to execute a separate deed of assignment but join it together with the deed of registered mortgage it executes over the immovable property of the borrower. Therefore, the respondent no 1 (lending bank) is an assignee of the respondent no. 2. i.e M/s Supertech Limited, who is a promoter for the project "Hue". Accordingly, it is established that being a competent assignee, respondent no.1, consequently falls within the definition of promotor and is well within the ambit of RERA Act, 2016.

This is further emphasized by the definition of mortgage in the Transfer of Property Act, 1882 i.e.

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"58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgage-deed" defined – (a) A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

By the very definition, vide a mortgage, a transfer of interest in specific immovable property is created for the purpose of securing payment of money. Therefore, by virtue of the definition of the word "assignment" as per Black's law Dictionary, it includes any person on whom interest is transmitted by a transfer which could include vide mortgage. The definition of the promoter which includes the word "assignee" will therefore take in its purview a bank/financial institution on whom an interest is created by way of transfer i.e. mortgage.

This is further reiterated by the compliances required by the promoter at the time of registration. Under section 4(2)(I)(B), the promoter is required to submit on affidavit the details of any encumbrance on such land along with details. This requirement has been inserted in the Act so that if any enforcement of security is made by a bank/financial institution on the real estate project, the entity on whom the assignment is made is already in the knowledge of the Ld. Authority. The insistence of disclosure and that too in the form of affidavit only fortifies the stand of the Ld. Authority that if such bank/financial institution was to put to auction the real estate project, it would stand in the shoes of the promoter by virtue of the inclusive definition of the promoter which includes in its scope an assignee. Moreover, this does not create an adverse precedent for the banking sector w.r.t. other industries, as the banker is deemed to be assignee by virtue of the statutory definition of the promoter, in the absence of which, it cannot be held accountable in all sectors.

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Besides, respondent 1 cannot be allowed to approbate and reapprobate. It had itself submitted to the jurisdiction of the Hon'ble Authority, as an aggrieved person, in pursuance of which the directions for change of promoter were passed on 29.11.2019, It cannot now be allowed to say that it is outside the purview of RERA.

Next, with reference to the e-auction notices issued by respondent no. 2, as was submitted by the complainant, with reference to the properties mentioned, the same was mentioned in the schedule. The schedule was not annexed to the complaint. The schedule of the property mortgaged was only submitted vide the written arguments of respondent no.2 wherein it is clearly stated that the land admeasuring 13.743 acres and land admeasuring 5.84 acres were put up for auction. It is only during the course of the hearing that the respondent no. 1 clarified that the auction was w.r.t. only the unsold units and that it would exercise no charge over sold units wherein rights of the buyer had been created. As per their affidavit dated 28.08.2020 submitted before the Ld. Authority has stated that, *"the auction will exclude 950 units which are in the knowledge of the respondent no.1 of having been sold and respondent no. 1 undertakes to assure that any units that may have been sold as of date and not forming part of the above referred units and the interest of such allottees shall be suitably taken care by the respondent no. 1."*

Now, that the respondent no 1 is an assignee of the respondent no. 2 and enjoying symbolic possession, accordingly, PNBHFL will become promoter by operation of law for the limited purpose of mediating the transfer by virtue of falling under the definition of promoter as an assignee and will be bound also to comply with the procedure mentioned in the circular no. 01/RERAGGM Circular 2020, dated 29.06.2020.

13. It is observed that if the auction is allowed and a third party is allowed to take over the project, the fate of the allottees of the sold inventory will be left in

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lurch. As the new promoter will only be liable towards the allottees of the unsold inventory and many deny its accountability for the already sold stock. PNBHFL, has vide its own affidavit dated 28.08.2020 submitted before the Ld. Authority that, *"the auction will exclude 950 units which are in the knowledge of the respondent no.1 of having been sold and respondent no. 1 undertakes to assure that any units that may have been sold as of date and not forming part of the above referred units and the interest of such allottees shall be suitably taken care by the respondent no. 1."*

Therefore, vide its own admission, the consequence of the auction would to cause a bifurcation in the project between the sold and unsold units. Howsoever, the common areas and facilities are intended to be divided is not clear and is likely to cause conflict of interest between the original and transferee promoter. This may also be in violations of the conditions of license which may not allow bifurcation of the same.

Moreover, as the project is proposed to be auctioned to third party for which prior approval of the authority and 2/3rd allottees is mandatorily required as per the provisions of section 15 of the Real Estate (Regulation and Development) Act, 2016 Act. Section 15 of the Act is reproduced below for ready reference:

"The Promoter shall not transfer or assign his majority rights and liabilities in respect of a real estate project to a third party without obtaining prior written consent from two-third allottees, except the promoter, and without the prior written approval of the Authority.

Provided that such transfer or assignment shall not affect the allotment or sale of the apartments, plots or buildings as the case may be, in the real estate project made by the erstwhile promoter."

14. However, it is now an undisputed fact that the respondent no. 1 is entitled under section 13(4) of SARFAESI to enforce its security for recovery of its dues. This,



being in compliance of a Central Act and other banking regulations, will be given weightage and accordingly the auction of the property will be permitted. Yet, as is the purview of the Regulatory Authority of the real estate, the interest of the allottees must be duly protected & safeguarded. In the interest of the allottees, as their interest is likely to get substantially affected by such auction, it is to be ensured that the respondent no. 1 i.e. PNBHFL shall make all necessary disclosures with respect to the outstanding liabilities in the real estate project. The incumbent promoter i.e. the incoming promoter who may buy the real estate project in such auction shall have full and complete knowledge about all liabilities associated with the project and therefore, an obligation is cast on PNBHFL to make full and complete disclosure regarding the same in the its auction notice.

15. Having made the incumbent promoter step into the shoes i.e. the rights and liabilities of the M/s Supertech Limited, it will in no way absolve them of their liabilities w.r.t. real estate project. Reliance is placed on section 11(g) of the Real Estate (Regulation & Development) Act, 2016,

Section 11(g).....*"Provided that when any promoter fails to pay all or any of the outgoing collected by him from the allottees or any liability, mortgage loan and interest thereon before transferring the real estate project to such allottees, or the association of the allottees, as the case may be, the promoter shall continue to be liable even after the transfer of the property, to pay such outgoing and penal charges, if any, to the authority or to the person to whom they are payable and be liable for the cost of any legal proceedings which may be taken therefor by such authority or person."*

Therefore, a clear and unequivocal statutory responsibility is cast on the promoter that even if after transfer of the physical possession of the real estate project, the erstwhile promoter will continue to pay outgoing and penal charges, which were outstanding against the promoter at the time of transfer.

16. So, keeping in view the factual as well legal position stated above, the following directions are issued:



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- a. The respondent no. 1 i.e. PNBHFL will be considered a promoter, by operation of law, may be for the limited purpose of mediating the transfer in the interim period by virtue of falling under the ambit of "assignee" under section 2(z)(k) of the Act.
- b. The respondent no. 1 i.e. PNBHFL will be required to make a full and complete disclosure, to the best of its knowledge, of all outstanding liabilities associate w.r.t. the "Hues" project in its auction notice.
- c. As it is practically not feasible to exactly demarcate between sold and unsold units of an incomplete project, PNBHFL as first option, shall consider re-booking and re-structuring of loan for the project as has been ordered by the Authority vide its order dated 29.11.2019. It is clarified here that the **Authority is in no way against the auction of the project by the lender.** Nevertheless, in case PNBHFL intends to proceed with the auction proceedings, it shall first submit all relevant document before the Authority and undertake to satisfy the Authority to the extent that interest of all the allottees who have invested their hard earned money in the project shall not be jeopardized. Thereafter, at the time of transferring the project to a third party, it being the promoter, shall take prior permission from the Authority as per provisions of section 15 of the Real state (Regulation and Development) Act, 2016.
- d. The respondent no.1 will be required to engage a forensic audit firm and a quantum surveyor for the auditing the project, so that in case of an eventuality wherein the project is auctioned in future the prospective bidder may take an informed decision regarding his scope of work and future statutory liabilities/obligations.
- e. The respondent no. 1 i.e. PNBHFL, respondent no. 2 i.e. M/s Supertech Ltd., the landowner i.e. Sarv Realtors Pvt. Ltd. and the incumbent promoter i.e. the purchaser in the auction will be liable to comply with circular no. dated 01/RERAGGM Circular 2020.



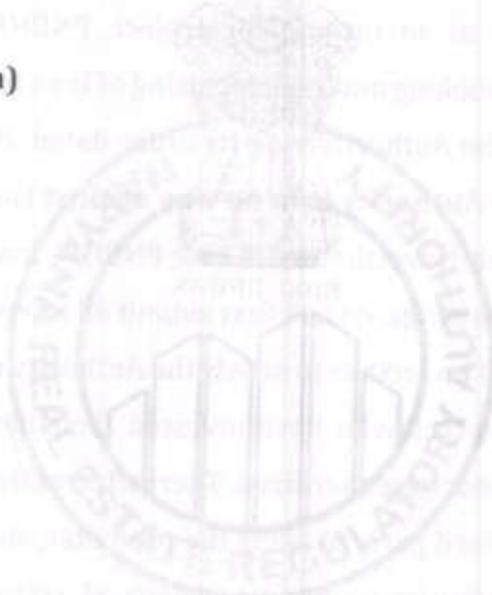
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- f. Respondent no. 2 i.e. M/s Supertech Ltd. will continue to be held liable in respect of its outstanding liabilities by virtue of section 11(g) of the Act.
- g. The incumbent promoter will be responsible for all obligations under the Real Estate (Regulation & Development) Act, 2016.
- h. The incumbent promoter and respondent no. 2 are directed to co-operate for the completion of the project in the overall interest of the allottees.

Order pronounced. File be consigned to registry.

(Subhash Chander Kush)
Member

(Dr. K.K. Khandelwal)
Chairman



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