

RESERVED JUDGMENT/ORDER
THE U.P. REAL ESTATE APPELLATE TRIBUNAL
AT
LUCKNOW.

Appeal No. (D) 337 of 2023

M/s. Alpha Corp Development Private Limited Through its Authorized Signatory
..... Appellant.

Versus

Hridesh Durga and others.Respondents.

Hon. Mr. Justice (Dr.) D.K. Arora, Chairman
Hon. Mr. Kamal Kant Jain, Technical Member

1. Heard Sri Abhishek Khare, learned counsel for the applicant and Sri Amit Yadav, learned counsel for the respondent No.1 on the compliance of Section 43(5) of the Act, 2016 by the applicant.
- 1.1 The counsel for the applicant submitted that applicant is not a promoter and applicant M/s. Alpha Corp Development Private Limited (hereinafter referred to as the 'ACDPL') is merely a development manager of the promoter respondent No.2 i.e. M/s. Abet Buildcon Private Limited. The counsel for the applicant mentioned that the complaint No. NCR144/12/87212/2021 dated 28.12.2021 was filed by the complainant against M/s. Abet Buildcon Private Limited mentioning as Eminent Phase-1 while praying for "*Immediate refund of total paid amount with interest @ MCLR+1 percent from the date of initial payment made till total refund of amount.*"
- 1.2 The counsel for the applicant further argued that the agreement between allottee and respondent No. 2 was entered on 12.06.2018, much prior to the arrangement dated 15.05.2019 between the promoter M/s. Abet Buildcon Private Limited and the applicant M/s. Alpha Corp Development Private Limited.

- 1.3 Counsels for the parties during the course of argument drawn our attention towards Development Agreement dated 15.05.2019.
- 1.4 We deem it proper to extract relevant clauses of the said agreement between M/s. Alpha Corp Development Private Limited, M/s. Abet Buildcon Private Limited, Saha Infratech Private Limited, Mr. Aniel Kuumar Saha and M/s. Elicit Realtech Private Limited.

WHEREAS :-

Clause (B) :- The Project Land is zoned for creation of a sports city for recreational, commercial and residential purposes including group housing, subject to the terms and conditions contained in the Sub-Lease Deed and the Promoters intends to undertake its development as mutually agreed, under the expertise and management of the Development Manager (“Project”).

(C) :- Pursuant to mutual discussions, it is now intended that the Company appoint and engage the Development Manager to provide development management services as set out in Schedule 2 (the “Development Management Services”) for the execution of the Project and to carry out branding, marketing and facilitating sales of the Project, in accordance with the terms of this Agreement and the Business Plan which is annexed hereto as Schedule 3.

NOW THEREFORE, in consideration of the mutual covenants, terms and conditions herein contained and for other good and valuable consideration the receipt and sufficiency of which are hereby mutually acknowledge, the parties hereby agree as follows:-

1. DEFINITIONS AND INTERPRETATION

11 Definitions

In this Agreement, unless the context otherwise requires, the following words and expressions shall have the following meanings:
 "Action" shall mean all claims, demands, notices and proceedings made, initiated, commenced, continued and/or issued by any Government Authority or person(s);

"Affiliate" means with respect to any Party, any other Person that directly, or indirectly (through one or more intermediaries), Controls, is Controlled by, or is under common Control with, such Party;

"Agreement" shall mean this Development Management Agreement;

"Applicable Laws" shall mean any statute, legislation, treaty, code, law, regulation, ordinance, rule, notification, judgment, orcer, decree, bye-law, approval, order or judgment of any competent authority, directive, guideline, policy, requirement, or other governmental restriction or any similar form of decision of, or determination by, or any interpretation or adjudication having the force of law in India, of any of the foregoing, by any competent authority/Government Authority having jurisdiction over the matter in question;

"Approval(s)" means any and all approvals, authorizations, permits, licenses, registrations permissions, consents, clearances, no objection certificates, entitlements, licenses, rulings, exemptions, declarations or regulations etc., required to be obtained including from the Authority les (defined hereunder) for the Project including designing, developing, constructing and completing the Project and any clearances and conversions that may be necessary for such sanction but including the approval/permission from the Union Ministry of Environment, Forest and Climate Change ("MOEF") and/or the Pollution Control Board ("PCB") clearances for the commencement of the development and construction on the Project Land including without limitation environmental clearances, temporary and permanent power connections and all other approvals and/or permissions from any other statutory or governmental or semi-governmental Authority whether state or central, required for the purposes of commencing construction and development activity;

"Authority/ies" means any concerned authority that may/shall grant Approvals in connection with the Project Land and/or the Project and/or any transaction contemplated herein as also any government, including but not limited to Central Government or Government of Uttar Pradesh, or other political subdivision thereof, any entity exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to government, or any other government

authority including but not limited to NOIDA, Panchayat, other local or public bodies and planning authorities, State PC3, Central PCB, MOEF, Union Ministry of Urban Development, State Fire and Emergency Services Department and any other bodies, relevant statutory, State and Central Government Authorities, agencies, departments, boards, commissions or any political subdivisions thereof, and any court or tribunal of competent jurisdiction and any governmental agency or authority; having jurisdiction over the Project, or any of the transactions contemplated hereby,

"Development Manager Brand" means the brand name (word/logo/trademark/label mark as the case maybe) identified by the Development Manager in its sole discretion for the Project, whether owned by the Development Manager and/ or licensed by the Development Manager or the Company,

"Company" shall mean Abet or Elicit, as the context may require;

"Completion of the Project" shall mean the stage at which the construction of the Project has been completed and furnished in terms of specifications agreed by the MRC, including but not limited to obtaining the occupation certificate, for the building(s) constructed on the Project Land, as part of the Project;

"Control", in relation to any Person, means (i) the beneficial ownership, directly or indirectly, of more than 50% (fifty per cent.) of the voting rights or paid-up share capital of such a Person, (ii) the right to nominate a majority of the directors or members on the board of directors or other such governing body of that Person, and, or, (iii) the possession of power to cause direction of the management or policies of such a Person; Correlative terms such as "controlling" and "controlled" shall be construed in accordance with this definition;

"Encumbrance" means any kind of security interest of whatsoever nature including (i) any mortgage, charge (whether fixed or floating), pledge, lien, hypothecation, assignment, deed of trust, title retention, or other encumbrance of any kind securing or conferring any priority of payment in respect of any obligation of any person, including without limitation any right granted by a transaction which, in legal terms is not the granting of security but which has an economic or

financial effect similar to the granting of security under Applicable Laws; (ii) any proxy, power of attorney, voting trust agreement, option, right of first offer or refusal or transfer restriction in favour of any person; and (ii) any adverse claim as to title, possession of use:

“Project Cost” shall mean the sum total of the following:

- (i) **Development Cost:** In relation to the Project Land and the Project shall include but not be limited to the cost and expresses with respect to the following activities :

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- (d) Purchase of material;

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- (j) Development Management Fees, Development Manager’s Expenses as agreed in this Agreement alongwith relevant taxes. The salaries, bonuses, incentive, etc of the employees engaged and any other costs incurred by the Development Manager to carry out its responsibilities and obligations are to the cost of the Development Manager. Provided that, Promoter’s employee and other costs related to the Promoters shall be to the relevant Promoter’s account;

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(j) :- Development Management Fees, Development Manager’s Expenses as agreed in this Agreement along with relevant taxes. The salaries, bonuses, incentives, etc. of the employees engaged and any other costs incurred by the Development Manager to carry out its responsibilities and obligations are to the cost of the Development Manager. Provided that, Promoter’s employee and other costs related to the Promoters shall be to the relevant Promoter’s account;

Marketing & Brokerage Cost :- Which shall include cost of all marketing related activities in any form whatsoever, which will facilitate in benefiting the Project and in helping the ultimate objective of the Development Manager’s scope of marketing and sale of the project including but not limited to costs and expenses incurred on following marketing activities :

- (a) Advertisement cost including creative charges in press or in any medium whatsoever along with agency fees;
- (b) PR Activities;
- (c) Website development and various promotional activities on the internet;
- (d) Customer relationship activities;
- (e) Participation in road shows, seminars, exhibitions in India and abroad;
- (f) Publicity and information material like models, audio-visual displays/films, brochures, pamphlets, and forms, etc;
- (g) Rent/operational expenses of marketing office setup exclusively at locations where the Development Manager does not have existing office. Expenses incurred on postage, communication, cartage & conveyance required for marketing activities;
- (h) Purchase of marketing vehicle purchase and its running and maintenance cost including driver's salary for purposes of site visits of customers, visits of clients, visits to courts etc. for registration etc., (i) Brokerage and incentives whether in cash or in kind payable to real estate agents/consultants;
- (j) Cost of model, walkthroughs, perspectives and other similar expenses;
- (k) Cost of air-conditioned sample built-up structure if any, interiors furnishing, furniture/equipment including electricity, water, security, housekeeping, repair and maintenance cost of the same.

2. APPOINTMENT OF DEVELOPMENT MANAGER

2.1 The Company hereby appoints the Development Manager to provide the Development Management Services in relation to the Project as described in this Agreement: and the Development Manager hereby accepts such appointment.

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2.4 Each Party acknowledges, agrees, accepts and confirms that during the term of this Agreement, no other Person shall be, appointed or agreed to be appointed other than the Development

Manager to provide any of the Development Management Services.

5. DEVELOPMENT MANAGER'S OBLIGATIONS

5.1. The Development Manager shall perform the Development Management Services in consideration of the Development Management Fees payable in accordance with this Agreement subject to the fulfilment of the Company's obligations and Company's Conditions Precedent. The broad development management responsibilities to be undertaken by the Development Manager include taking commercially reasonable endeavours in respect of the following:

- (i) **Design:** Coordinating for all design development including master planning, detailed architectural, engineering drawings, EDC;
- (ii) **Constructions and Project Management:** To construct, supervise and coordinate execution of the Project in accordance with sanctioned building plans and in terms of Business Plan and administration of all contracts, through the appointment of the consultants (Quality Surveyor, Project Management Consultant, and/or Internal Auditor) and management of all Third Party advisors, agents and contractors to the extent reasonably possible;
- (iii) **Sale and Marketing Management:** Coordination of sales and marketing services including site marketing office. The Development Manager shall have the full right to market and sell the Project Saleable Area, in accordance with the Business Plan; The Company too shall, with intimation to the Development Manager, have the right to sell the Project saleable area, at agreed prices. The Development Manager may appoint such other outside consultants as it may deem fit for the purpose of sales and marketing of the Project, at the cost of the Company which will be part of Project Cost, and
- (iv) **Miscellaneous:** Any other related or ancillary activities pertaining to the management and development of the Project

which are typically considered to be part of the scope of the Development Management activities and have been mutually agreed between the Parties.

- 5.2** The Development Manager shall ensure the quality controls as per specifications approved by MRC and standards set by ISI (Bureau of Indian Standards) and NBC (National Building Code). The Development Manager shall also make commercially reasonable endeavours to ensure adherence to the terms and conditions in this respect as recorded in the construction contract documents of various agencies employed for the Project.

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- 5.4** It is clarified, agreed and acknowledged by each of the Parties that any loan or financial assistance and documents executed thereto shall be solely in the name of, and binding on the Company, and the Development Manager shall have no obligation towards repayment of any loans obtained for the purpose of the Project, or to provide any security or other interest to secure such loans.

- 5.5** The Project shall be exclusively developed by the Development Manager. It is agreed between the Parties that the development of the Project will be carried out as per the mutually agreed Business plan and design, which is approved by the competent Authority, and in case of any deviation in design of the Project or the Business Plan or any other material term agreed between the Parties is required, the same shall be jointly reviewed and approved by the Parties.

- 5.6** It is agreed by and between the Parties hereto that the following, except as stated otherwise in this Agreement, shall be the obligations and responsibilities of the Development Manager, and the Development Manager shall make commercially reasonable efforts to perform these obligations and responsibilities:

- (a) To allow the use of the Development Manager Brand that they normally use for similar projects in accordance with the terms hereof,

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- (c) To provide marketing expertise and promote sale of the Project;
- (d) To ensure minimum sales price/ lease rent (along with permissible deviations) and minimum sales volume and velocity as agreed in the Business Plan;
- (e) Development Manager will be responsible for selling, marketing and leasing the Project within the mutually agreed parameters;
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- (h) Direct, coordinate and monitor the performance of the Third Party contractors/ consultants and other professionals providing services in connection with the development of the Project, and, and in accordance with the Drawings, the project contract(s), the project construction schedule and the project budget,

6.2 Other Covenants and Obligations

- (i) To ensure at its own cost that it shall keep the title of the Project clear and marketable, free from all Encumbrances (except for finances taken for the Project including in favour of the Lenders), from the date of launching of the Project in the market and during the currency of the Project, so as to get funding facility for development, pre-approval by financial institutions for loan (if applicable) and conveyance of clear & marketable title to the prospective buyers.
- (ii) The Promoters/Company shall not, without the written consent of the Development Manager, use the Project Land / Project or allow the use of the Project Land / Project or any part thereof for any purpose other than execution and Development of the Project.
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- (ix) The Company shall be solely liable for all responsibilities as 'Promoter' under RERA, and shall ensure that the Development Manager shall not, under any circumstances, be deemed to be a promoter/ co-promoter under any Applicable Laws including the Uttar Pradesh Apartment (Promotion of Construction, Ownership

and Maintenance) Act, 2010, Real Estate (Regulation and Development) Act, 2016 and rules thereunder ("RERA"). Company shall be exclusively liable for and shall bear all claims and liabilities that may arise in this regard which shall be part of Project Cost/ Development Cost. Provided that in the event the Development Manager is construed as the promoter/ co-promoter by virtue of anything contained in this Agreement, the Parties shall suitably modify this Agreement to ensure that the Development Manager is not construed as the promoter/ co-promoter of the Project in terms of any Applicable Laws. Provided further that in the event the Development Manager would be deemed a 'promoter' under RERA irrespective of any amendments, then the Parties shall in good faith mutually discuss and agree on the necessary amendments that may be required in order to comply with the RERA.

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(xvii) To execute the Power of Attorney in favor of the Development Manager ("POA"), to inter alia enable the Development Manager to act for and on behalf of the Company for commencing and completing construction, to apply for various permissions, to sell including making or receiving bookings for advance sale or ready sale of various units or other facilities to the prospective buyers and to receive payments by cheque /pay orders/demand drafts in the name of the Project, from the prospective buyer(s) to be deposited in the designated project sales account and for doing various other incidental acts. However, the final documents of transfer of title in favor of the prospective buyer(s) with regard to the relevant Unit shall be executed by the Company, as intimated by the Development Manager from time to time. Further, the Company shall issue requisite board resolutions authorizing the managing director, the chief financial officer and such other officers of the Development Manager as may be specified by the Development Manager for performance of Development Management Services by the Development Manager under this Agreement. Execution of any such POAS or board resolution shall not be deemed to shift any

obligations from the Promoters/Company to the Development Manager.

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- (xix) To authorize the Development Manager to adhere on behalf of the Company/Promoters to all statutory requirements as principal employer as proscribed by the relevant and applicable statutory requirements.
- (xx) To handover possession of the respective Premises to the purchasers of Premises;
- (xxi) To ensure that the Company shall;
 - (a) obtain such facilities as may be required for the purposes of the Project including but not limited to providing and facilitating adequate electricity connection, water and other basic requirements in order to facilitate construction;
 - (b) pay any and all amounts required to be paid to any Government Authority in respect of the Project and/or the Land; and
 - (c) pay all amounts in accordance with this Agreement and endeavour to undertake all actions for obtaining any future additional FAR/FSI that is required for the Project.

7.6 Marketing of the Project

- (i) The Development Manager shall have the exclusive and absolute right to market and sell the Project Saleable Area, in accordance with the Business Plan.
- (ii) All marketing collaterals including the finalisation of hoardings, brochures, pamphlets, website content, etc. to be used for the marketing of the Project shall be decided by the Development Manager.
- (iii) The Development Manager shall ensure that the sale of units is in line with the business plan in terms of volume, pricing and velocity.

8. DEVELOPMENT MANAGEMENT FEES

8.1 In consideration for providing the Services, the Development Manager shall charge "Development Manager Fees" equivalent to

the sum of: (a) fixed fee amount of INR 1,35,00,000 (Indian Rupees one crore thirty five lakh) plus applicable GST ("Fixed Fee") payable per annum irrespective of sales; and (b) at least 10% of the Gross Revenue plus applicable GST, as applicable and approved project cost expense that shall be payable by the Company to the Development Manager.

8.2 The 10% of Gross Revenues shall be computed in terms of the following:

- (i) 10% of the sales realization (excluding the realization of Pass Through Expenses);
and
- (ii) Unsold Project Saleable Area: Any unsold Project Saleable Area post the Closing Date ("Unsold Inventory") shall be valued at the average price per square feet of the last 25 sold units of the Project Saleable Area ("Unsold Inventory Valuation"). In respect of the Unsold Inventory, the Company shall pay the Development Manager, 10% of the Unsold Inventory Valuation.

For the purpose of this Clause, "Gross Revenue" means and includes all forms of consideration/charges collected at any time whatsoever including cash inflows accrues, received or due from, partial or entire transfer and/or sale of the Project Saleable Area. Gross Revenue shall also include non-refundable deposits, money collected towards car parking spaces, preferential location charges, floor rise charges, garden and infrastructure development charges, including EDC/IDC (except Pass Through Expenses and maintenance deposit), forfeiture amounts & cancellation charges, interest on delayed payments and all other proceeds, accrued accruing and received, from the commercial exploitation of the Project Land as well as revenues receivable on the Unsold Inventory.

10. MASTER ESCROW

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10.2:- The marketing of the Project will be done by the Development Manager being the authorized representative, vide POA for and on behalf of the Company. All Receivables and revenue including receipts upon marketing of the Project shall be kept deposited by the Development Manager in the escrow account ("Master Escrow Account"). This Master Escrow Account shall be opened in the

books of the Company and shall be jointly operated by the nominated representatives of the Company and the Development Manager in terms hererof.

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11. MAINTENANCE OF BANK ACCOUNTS FOR THE PROJECT

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11.2 :- The nature and operating mechanism of the bank accounts shall be as follows:

- (I) Project Expense Account -This account shall be opened in the books of the Company and shall be operated by the Development Manager. The Company understands and agrees that this account is most important for the successful Completion of the Project and therefore during the currency of the Project, the Promoters shall not do any act which may result in change in the operation of this account. All Development Costs shall be disbursed from the Project Expense Account. The Parties shall not utilise the funds from this Project Expense Account for any purpose other than as provided in this Agreement. The Project Expense Account shall have standing instructions for transfer of funds in the following manner-
 - (a) payments of all costs, charges, fee and expenses & statutory dues including GST, TDS etc;
 - (b) interest payment on interest payment date towards loan in connection with the Project;
 - (c) meeting the construction & development expenses for the Project,
 - (d) Development Manager Fees (5% of Gross Revenues) in terms hereof,
 - (e) principal repayment on repayment date towards loan in connection with the Project;
 - (f) balance Development Manager Fees (5% of Gross Revenues) in terms hereof;
 - (g) Fixed Fee amount of Rs 1,35,00,000 per annum to be paid to Development Manager; and
 - (h) any other amount payable to any other Person entitled to receive any amounts from the Company including the Promoters in respect of any inter-corporate deposit given by the Promoters or its Affiliates that will remain unpaid

till all the aforementioned payments are made by the Company.

- (II) Other Expense Account - This account shall be opened in the books of the Company and shall be operated by the Development Manager for any and all payments.

All Project Costs apart from the Development Costs shall be disbursed from the Other Expense Account. The Parties shall not utilise the funds from this Other Expense Account for any purpose other than as provided in this Agreement.

- (III) Development Manager’s Account- This account shall be opened in the books of the Development Manager and shall be operated solely by the Development Manager for its own purposes.

16.14 **Limitation on Authority of Development Manager**

The Development Manager shall have no right to (i) mortgage, pledge or grant a Security Interest or otherwise encumber the Project or the site or any portion thereof, (ii) except as otherwise provided herein, enter into, modify or terminate any lease, agreement, license or concession agreement which respect to the Project or the subject lands; (iii) incur any liabilities or obligations of Promoters to Third Parties including any Governmental Authorities; (iv) consent to any condemnation award or participate in any condemnation proceeding relating to the subject lands; (v) settle any insurance claims or tax claims on behalf of Promoters; (vi) incur debts or liabilities of Promoters or the Project unless specifically provided in this Agreement, or (vii) except as expressly provided in this Agreement bind the Promoters in any way under any contract or other commitment with any Third Party/Consultant; or (vii) undertake any action not specifically contemplated in this Agreement.

Schedule 2

Development Management Services

The board Development Management Services to be undertaken by the Development Manager include the following :

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- (iv) **Sale and Marketing Management:** Coordination of sales and marketing services including site marketing office. The Development

Manager shall have the right to market and sell the Project Saleable Area, in accordance with the Business Plan; The Development Manager may appoint such other outside consultants as it may deem fit for the purpose of sales and marketing of the Project, at the cost of the Company which will be part of Project Cost;

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- (vi) To provide their brand equity to the Project and allow the use of the Development Manager Brand name that they normally use for similar projects;

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- (x) Development Manager will be responsible for selling, marketing and leasing the Project within the mutually agreed parameters;

1.4 The learned counsel for the applicant submitted that M/s. ACDPL had been appointed as Development Manager of the promoter M/s. Abet Buildcon Private Limited w.e.f. 15.05.2019 after execution of the agreement between M/s. ACDPL, M/s. Abet Buildcon Private Limited and other promoters, though there are few clauses in the agreement which may be interpreted against M/s. ACDPL after reading in isolation, but after reading the entire agreement it cannot be said that M/s. ACDPL was promoter, M/s. ACDPL was merely a project manager on a fix fee and share of 10% of the gross revenue was only incentive to the project manager. The revenue is to be owned by M/s. Abet Buildcon Private Limited and its associates and expenses were also to be incurred by M/s. Abet Buildcon Private Limited and its associates as per Clause Nos. 10 & 11 of the agreement. The authority of the Development Manager was again restricted By Clause No. 16.14 of the agreement.

1.5 That learned counsel for the applicant further drawn our attention towards Clause No. 6.2 (ix) of the agreement wherein Development Manager's scope of work exclude it from all the responsibilities of promoter under RERA and the parties shall in good faith mutually discuss and agree on the necessary amendments of the agreement. He also submitted that after reading the provisions of the agreement in its entirety and intends of the parties to the agreement M/s. ACDPL was only acting a Development Manager and not as a promoter. He further submitted that power of attorney

as per Clause No. 10.2 of the agreement could not be provided to the Development Manager.

1.6 Learned counsel for the respondent drawn our attention to the Clause No. 8.2 of the agreement between M/s. Alpha Corp Development Private Limited, M/s. Abet Buildcon Private Limited, Saha Infratech Private Limited, Mr. Aniel Kuumar Saha, M/s. Elicit Realtech Private Limited regarding sharing of 10% of the gross revenue by M/s. ACDPL and Clause 7.6 & 10.2 with respect to marketing of the project and depositing the receipt in Master Escrow Account to be jointly operated by the M/s. ACDPL and M/s. Abet Buildcon Private Limited and submitted that M/s. ACDPL has taken over the project w.e.f. 15.05.2019 without taking permission from 2/3rd allottees as prescribed under Section 15 of the Act, 2016, therefore, M/s. ACDPL is promoter as per definition of the promoter under Section 2(zk).

1.7 Heard both the counsels for the parties.

1.8 Before proceeding further in this case, we have to decide whether the applicant is a promoter as per Section 2(zk) of the Act, 2016, and whether applicant has to comply the requirement of Section 43(5) of the Act regarding deposit of amount in case promoter files an appeal before the Appellate Tribunal. The provision of Section 2(zk) with respect to definition of promoter are as follows :

Section 2 (zk) "promoter" means.-

- (i) a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees; or
- (ii) a person who develops land into a project, whether or not the person also constructs structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon; or
- (iii) any development authority or any other public body in respect of allottees of-

- (a) buildings or apartments, as the case may be, constructed by such authority or body on lands owned by them or placed at their disposal by the Government; or
- (b) plots owned by such authority or body or placed at their disposal by the Government,

for the purpose of selling all or some of the apartments or plots; or

- (iv) an apex State level co-operative housing finance society and a primary co-operative housing society which constructs apartments or buildings for its Members or in respect of the allottees of such apartments or buildings; or
- (v) any other person who acts himself as a builder, coloniser, contractor, developer, estate developer or by any other name of or claims to be acting as the holder of a power attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale; or (vi) such other person who constructs any building or apartment for sale to the general public.

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

1.9 As per Section 2(zk) (v) any other person who acts himself as a builder, coloniser, contractor, developer, estate developer or by any other name or claims to be acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale shall be promoter.

1.10 We have examined the agreement dated 15.05.2019 between M/s. Alpha Corp Development Private Limited, M/s. Abet Buildcon Private Limited, Saha Infratech Private Limited, Mr. Aniel Kuumar Saha, M/s. Elicit Realtech Private Limited, and Section 2(zk) of the Act, 2016 regarding definition of promoter. As per explanation of Section 2(zk) where the person who constructs or converts a building into apartments or develops a plot for sale and the person who sells apartments or plots are different

persons, both of them shall be deemed to be promoters and shall be jointly liable, as such for the functions and responsibilities specified under this Act, Rules and Regulations made there under.

- 1.11 In the present case, as per Clause No. 7.6 of the agreement read with respect to the Marketing of the Project, the Development Manager has been given exclusive and absolute right to sell the project saleable area even the original promoter could have sold the project saleable area at agreed price under intimation to Development Manager. The clause 6.2 (xix) of agreement provides that the Development Manager, on behalf of company/promoter authorised to adhere to all statutory requirements as principal employer as prescribed by relevant and applicable statutory requirements and clause 6.2 (xx) of the agreement, the Development Manager was also authorised to handover possession of respective premises to the purchaser of the premises and further, as per Clause C of the agreement the execution of the project branding, marketing and facilitating sales of the project would be responsibility of the Development Manager. Moreover Development Manger has been given authority to operate, Master Escrow Account in pursuance to clause No. 10.2 of the Agreement.
- 1.12 In our considered view when any project is being sold using brand name of any person/organisation, the buyers/allottees take a decision to buy the unit in the project on the goodwill of the brand. If any person is allowing using its brand name for selling a project, he/it shall be deemed promoter under Section 2(zk) of the Act, 2016, as he/it shall be deemed to be acting as holder of a power of attorney from the owner of the land and as per Section 2(zk) (i) the promoter also includes assignee of a person who construct 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 apartment to other person.
- 1.13 After analysing the relevant clauses of the agreement between M/s. ACDPL and M/s. Abet Buildcon Private Limited and other promoters, we are of the opinion that the agreement between M/s. ACDPL and original promoters of the project is not an agreement which restrict the scope of M/s. ACDPL

only as Development Manager. In fact, this agreement extends scope of M/s. ACDPL beyond Development Manager or project management consultant and M/s. ACDPL was acting as a co-promoter after entering into agreement dated 15.05.2019.

- 1.14 In our considered view M/s. ACDPL is promoter of the project in question w.e.f. 15.05.2019 by entering into an agreement. M/s. Abet Buildcon Private Limited and other promoter and M/s. ACDPL. Section 15 of the Act, 2016 further provides that 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. By entering the agreement with M/s ACDPL, the existing promoters M/s. Abet Buildcon Private Limited and others promoters also cannot run away from their liabilities of being promoters, therefore w.e.f. 15.05.2019 M/s. ACDPL alongwith M/s. Abet Buildcon Private Limited, Saha Infratech Private Limited, Mr. Aniel Kuumar Saha, M/s. Elicit Realtech Private Limited are promoters/co-promoters of the project in question. Therefore, the applicant is required to comply with the provisions of Section 43 (5) of the Act 2016 before filing the appeal. The applicant is directed to deposit the amount as required under Section 43 (5) of the Act 2016 within 10 days of the date of uploading of this order. On compliance of the Section 43 (5) of the Act 2016, the Registry will immediately list this case for orders / hearing failing which the instant defective appeal will be dismissed without reference to the Court.

Dated : 05.09.2023
Shakir

(K.K. Jain)

(D.K. Arora)