



**KERALA REAL ESTATE REGULATORY AUTHORITY  
THIRUVANANTHAPURAM**

Complaint No. 1/2021

Dated 6<sup>th</sup> July 2021

Present: Sri. P H Kurian, Chairman.  
Smt. Preetha P Menon, Member

**Complainant**

Siji Jacob & Aisle Isac  
Peediyakal House,  
Kaviyoor Village,  
Thiruvalla Taluk  
Pathanamthitta District

**Respondents**

1. Ultima Builders & Developers Private Ltd,  
Rep: by its Director, M.C.M Najeeb  
Nilampathinjamugal, MLA Road  
Rajagiri Valley, Kakkanad  
Ernakulam
2. M.C.M Najeeb  
Director,  
Nilampathinjamugal, MLA Road  
Rajagiri Valley, Kakkanad  
Ernakulam

The above Complaint has come up for final hearing today. The Complainant along with his Counsel Adv. Ranji George Cherian and Respondent's counsel Adv. A. Sunil Shanker attended the virtual hearing today.

## ORDER

1. The Complainants and the Respondents entered into an agreement for purchase/sale of the Apartment No:12G, on 04-01-2011 which is having super built up area of 1187 sq. ft in 12<sup>th</sup> floor of Aero Sky Apartments along with parking area for a total consideration of Rs.35,00,000/- of which 2,25,000/- was given as the value of the undivided share in the property having an extent of 43.76 cents comprised in Re-survey No: 514/25 and 514/13 of Vazhakala Village. The Respondents had given the plan of the allotted parking area along with the agreement and the total consideration was based on the said agreement. The Complainants were prompt in payments and all the things which are to be done from their part. The Respondents made believe the Complainants that all amenities will be provided, including car park and believing the words of the respondents, the complainants entered into the agreement, and also paid the amount in time. In the meanwhile, the respondents informed that the apartment is ready to occupy and the complainant agreed for the sale deed after paying the balance sale consideration, believing that all the clauses of the agreement will be fulfilled, as promised. After the sale deed, the 1<sup>st</sup> Complainant had sent a mail to the office of the Respondents on 07/06/2011 and specifically suggested regarding the demarcation of the car parking area to be allotted to the Complainant. The sale deed was registered on 10/06/2011 vide sale deed No. 1597/2011 of the SRO Thrikkakkara. After several repeated requests the respondents were not ready to comply with provisions in the agreement. The sale deed dated 10/06/2011 was prepared by the Respondent's lawyer, which is a clear cheating, as the clauses in the agreement were not incorporated in the sale deed. The Complainants fully believed the Respondents, as the Complainants thought that all the matters will go as per the agreement. But the car parking was not allotted to the Complainant and car has to be parked outside the premises. Thereby the Respondents deliberately cheated the complaints. There were several e-mail communications



and telephone conversations between the Complainants and the Respondent representatives.

2. On 07/11/2018, the 1<sup>st</sup> Respondent's Marketing Manager issued a letter to the Complainants stating that the Complainants can use the adjacent land for temporary car parking, and further stated that once the Respondents construct car parking building in that land, they will permanently mark the parking for the complainants, and also stated not to fix any name boards in the said property. A covered safe park has to be provided as per the agreement, hence there is a clear violation against the agreement. It was learnt that the apartment project has finished without ample car parking. The reliefs sought in the complaint is to direct the Respondents to allot the car parking area as mentioned in the agreement, for which the total amount was received by the Respondents and allow to realize the cost of the proceedings. The Complainants produced the copies of agreements for sale, Sale deed and cash receipts, copy of D.D, copy of Cheque issued to Ultima Builders & Developers Pvt.Ltd and email receipt.

3. The Respondents have filed their Counter Statement dt 26-03-2021, in which they submitted that the Complaint is not maintainable and is barred by limitation. The agreement between the parties was executed on 04-01-2011. The occupancy certificate had been obtained and building numbered on 08-09-2010. Prior to the agreement, the Complainants had inspected the completed apartment complex and satisfied themselves about the same. The sale deed was executed in their favour on 10-06-2011. The possession was handed over on 17-05-2011 to the Complainants. Therefore, since the project is completed and occupancy certificate issued in 2010, there is no requirement to register with this Authority presently. Hence, the Complaint is barred by limitation. It is also submitted that

after execution of agreement, there arose difficulties in accommodating all Allottees car parking within the apartment complex. This fact was made known to the Complainants by the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent after discussions with the Allottees had purchased adjacent land for a sale consideration of Rs. 48,40,440 under sale deed No: 2004 of 2013, Thrikkakara S.R.O to provide sufficient car parking to the allottees who could not be accommodated within the apartment complex. The Respondents had decided to convey the said property without any additional consideration, in favour of Apartment Owners Association, to facilitate car parking by its members. It is submitted that the allottees are using the said land for car parking. The Respondents had also requested that the sale deed to be executed of the adjacent extent in favour of the Association, should also be having the allottees who could not get parking in the main Apartment complex as parties, since their rights have to be specifically reserved. It is submitted that the Complainants are presently using the adjacent plot provided by these Respondents for their car parking requirement. Therefore, the Respondents have provided additional car parking by 2013 itself after purchasing the adjacent plot. The draft of the proposed sale deed for the additional land area was forwarded to the Complainants by the Owners Association vide email dated 10-04-2020. The Complainants vide email dated 14-04-2020 had wanted confirmation that all the affected owners had been included. At the time of execution of Sale deed, it was informed to the Complainants that the car parking cannot be provided in the main apartment complex. It was for this reason that the car parking was not referred in the Sale deed. The draft of the sale deed was provided to the Complainants by email dated 16-05-2011 copy of which is produced. The efforts of the Respondents have been to provide additional car parking space and have not sought any consideration for transfer of additional land, and is being used for the last several years by majority of allottees, including the Complainants. It is also submitted by the Respondents that this Complaint is only an experimental one, without any merit and is liable to be dismissed with



costs. The Respondents submitted the copies of receipt dated 17-05-2011 and copies of email dated 14-04-2020 and 16-05-2011.

4. The Complainants have filed Replication to the Statement filed by the Respondents, in which they stated that the statement filed by Respondents are against true facts and it lacks bonafides. It is submitted that in the agreement entered on 04-01-2011, the facility for covered car parking is specifically stated and in the draft sale deed also the said facility was specifically mentioned and the final sale deed was executed on 10-06-2011 wherein no such facility is mentioned. When the Complainants have enquired about the same, the Respondents assured to provide the same on the back of the main building or in the adjoining land. The Complainants trusted the said words, firstly because the builder assured that the car parking will be provided at the earliest and separate documentation will be made for the same. Secondly the entire amount had been paid to the builder and he would have found some reason not to return the money, if the Complainants had withdrawn from the agreement at that stage. Thirdly it was the lifetime savings of the Complainants that was invested into this property. Hence the Respondents have failed to comply with the terms and conditions as agreed between the parties in the agreement. It is also alleged that the sale deed for the purchase of land for providing alternative car parking area by the Respondents was executed in the year 2013, but the said matter was conveyed to the Complainants only in the year 2018 by issuing a letter to the Complainants copy of which is produced. Thus, the cause of action arose and from the year 2011 onwards, the Complaints were registering for the same and the Respondents were kept on assuring that they will provide the same and thereby also the cause of action is continuing and hence there is no time bar or not barred by limitation. It is also submitted that the agreement is between Complainants and Respondents and not between the Apartment owners Association and the Respondents. Thus, the Owner's Association cannot step into the shoes of the Complainants and cannot take decision on behalf of the Complainants. So, the Respondents cannot

drag the Owners Association into the case. The subsequent proposal of Respondents was agreed by the Complainants only because of the reason that the Respondents have agreed to provide a permanent car parking for the Complainants. Once the structure is built in the adjacent land in a short duration of time, they will provide a permanent car parking which is very clear from the letter issued by the Respondents on 07-11-2018. Till now the Complainants are facing several difficulties in parking their vehicles and the vehicle is parked without any covering and sometimes by the side of the road. Moreover, the adjacent land is not sufficient for parking 26 vehicles, as the land has the provision to house around 20 vehicles only. The draft of proposal of sale deed for purchasing adjacent land was forwarded to the Complainants later on 10-04-2020 and that too by Owners Association, and not by Respondents.

5. When the Complainants came to know about non-availability of car parking area in the main apartment complex on the day of execution of the sale deed, the Respondents fully assured the Complainants that they will provide a car parking on the back of the building in the main apartment complex itself. Later they have backed out from their word without providing car parking clause in the sale deed executed in favour of the Complainants. The Respondents are duty bound for all the obligations and functions under the Real Estate (Regulations and Development) Act 2016 made there under, to the Allottees as per the agreement for sale as per Section 11(4) of the said Act and the Complainants are entitled to get compensation from the Respondents as per Section 14(3) & 18(3) of the said Act as the Complainants were forced to park their vehicles in the open space without any covering and caused much mental agony and suffering to the Complainants. It is also pointed out that during the hearing, the Respondent counsel put a proposal that a commercial complex is being built in the adjoining land after it is acquired by the Association and that car parking will be provided in the ground floor, it is a new contention and not contended in the statement filed



by Respondent. It is submitted that no such proposal has been finalized by the Association to the Complainant in the communication dated 20-04-2021 and the copy of the same is produced. Another contention raised during hearing is there is delay in filing the case, if it was known that the car parking was not being provided as per the agreement. It is to be noted that the Complainants persuaded it constantly with the builders from 2011 onwards and the builder keeps on assuring verbally as well as through letters and mails that covered car parking would be provided, when a permanent structure would be constructed in the adjoining land. But there was no written communication from the builder regarding the said aspect. The Complainants submits that the written statement filed by the Respondent are without any basis and is having no legal footing. Thus, the Respondents are bound to provide a standard size covered car parking to the Complainants with no additional expenditure and without any blockage of entry of a fire engine, etc. in case of emergency. The Complainants also pray for compensatory cost of Rs. 5 Lakhs from the Respondents. The Complainants produced more documents along with the Replication such as copies of mail communications between them and the Respondents and draft of sale deed sent by the Respondent before registration and copies of Cheques given to the Respondents.

6. We heard the learned counsels on either side, gave careful consideration to their submissions, perused the material documents available on record. After detailed hearing and perusal of pleadings and documents submitted by both the parties, following points came up for consideration:

- 1) Whether the above complaint is maintainable before this Authority?
- 2) Whether there occurred any failure on the part of the Respondents in complying with the terms of the agreement entered into between them and the Complainant?

3) What order as to costs?

7. **Point No. 1:** The learned Counsel appearing for the Respondents argued that the Complaint is not maintainable and is barred by limitation. He took contentions as follows: The agreement between the parties was executed on 04-01-2011. The occupancy certificate had been obtained and building numbered on 08-09-2010. Prior to the agreement, the Complainants had inspected the completed apartment complex and satisfied themselves about the same. The sale deed was executed in their favour on 10-06-2011. The possession was handed over on 17-05-2011 to the Complainants. Since the project is completed and occupancy certificate issued in 2010, there is no requirement to register the project with this Authority. Hence, the Complaint is barred by limitation. But the only case of the Complainants is that the Respondents had given the promise of a covered car parking space along with the apartment purchased by them, as per the agreement for sale, and the total consideration was based on the said agreement. The copy of price split up sent by the Respondents to the Complainants, marked as Exbt.A7 shows that the Complainants had given Rs. 1,50,000/- for the car parking along with the total amount of consideration. It is further alleged by the Complainants that even though the covered car parking was specifically mentioned in the agreement for sale (Exbt. A1) as well as the draft of the sale deed (Exbt. A3) sent by the Respondents, it was intentionally omitted in the original sale deed. The sale deed was executed on 10.06.2011. But on 07.06.2011 the Complainant No. 1 sent an email to the office of the Respondents regarding demarcation of car parking area allotted to the Complainants. Whenever the Complainants demanded since 2011, the said covered car parking facility, as promised in the agreement, the Respondents kept on assuring that it will be provided at the earliest and separate documentation will be made for the same. The



Complainants have produced copies of several mail communications between them and the Respondents from 03.01.2011 to 20.04.2021, marked as Exbt. A6 series which shows that the Complainants have been continuously following up their demand all these years, right from the period of execution of sale deed for which the Respondents were responding to the Complainants and the mail No.4 dated 07.11.2018 among the abovementioned mails is clearly an admission from the part of the Respondents that they were not able to provide the car parking to the Complainants whereby the Respondents suggest them to use the adjacent land for temporary car parking and assure to give the permanent car parking space after constructing the car parking building in the said land. The mails sent by the Complainants on 25.11.2019 & 20.02.2020 to the Respondents and many subsequent mails till 27.10.2020 addressed to the Respondents reveals the serious concern of the Complainants about obtaining the permanent covered car parking from the Respondents as per the terms of the agreement and also for which an amount of Rs. 1,50,000/- was remitted by them to the Respondents. All these communications substantiate the contention of the Complainants that they persuaded the said issue constantly with the Respondents from 2011 onwards and the Respondents kept on assuring that the covered car parking would be provided.

8. Moreover, as expressed by this Authority through many of its previous orders, obtaining Occupancy certificate or the registrability of a Project as per Section 3 of Real Estate (Regulation & Development) Act, 2016 cannot be linked with the question of maintainability of a complaint related to the said project before this Authority. As per **Section 2(zf)** of the Act, "occupancy certificate" means the occupancy certificate, or such other certificate by whatever name called, issued by the competent authority permitting occupation of any building, as provided under local laws, which has provision for civic infrastructure such as water, sanitation and electricity. **Section 31(1)**

stipulates that “Any aggrieved person may file a complaint with the Authority or the adjudicating officer, as the case may be, for any violation or contravention of the provisions of this Act or the rules and regulations made thereunder against any promoter allottee or real estate agent, as the case may be.” In our State, as per the Kerala Municipality Building Rules/Kerala Panchayath Building Rules, ‘Occupancy Certificate’ is being issued by the Local Authority for a building on receipt of the ‘Completion Certificate’ from the owner certifying that “the Building has been completed on . . . . . as per the approved plan and permit number . . . . . dated. . . . .” Then the “Occupancy Certificate” which is also named as “Use Certificate” issued in Appendix F2 annexed to said Rules in the following format:

“Certified that the construction or reconstruction or addition or alteration of building or erection of telecommunication tower or pole structure or work under the permit No . . . . . dated . . . . . issued to . . . . . and supervised by . . . . . has been inspected by me and that the work executed is in accordance with the permit and the building/ tower or pole structure is now fit for occupation/use.”

In such context, how could these certificates be considered to satisfy with the requirements/ terms and conditions of the agreement for sale executed by a Promoter of a real estate project with the allottees therein? Hence by obtaining such an occupancy certificate, we cannot conclude that the Project is completed in all respects as promised by the Promoter to the Allottees. The unfortunate fact is that our Building Rules are not in consonance with the provisions of Real Estate (Regulation & Development) Act, 2016 and it is to point out that the said disharmony comes in the way of successful implementation of the Act 2016.

9. According to **Section 11 (4)(a)** of the Act, *“the promoter shall be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the*



*allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be: Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed.”* But we observed in many cases before us, the general practice of the promoters in our State, executing the sale/conveyance deeds in favour of the allottees even for a building of which only a simple structure is completed and showing in the Deed as ‘under construction’. It reveals that the execution of conveyance deed of a unit also cannot be associated with terms and conditions of the agreement for sale executed between the promoter and the allottee with respect to a real estate project. Then, how could the interest of allottees be protected, in the present scenario, on the basis of the period of execution of conveyance/sale deeds? So only by obtaining an occupancy certificate for or by executing a sale deed of an apartment, we cannot conclude that the Project is completed and handed over as promised by the Promoter. On the basis of the above facts and circumstances, and as it is clear from the documents placed on record that the Complainants have been consistently persuading the issue regarding the violation of terms of the agreement executed with the Respondents as to non-providing of the covered car parking, it is found that the above complaint is not barred by limitation and the complaint is maintainable before this Authority. The Point No. 1 is answered in favour of the Complainants.

**10. Point No. 2:** The Exbt. A1, agreement for sale explicitly mentions the provision for a covered car parking to the Complainant and the Schedule of Exbt A3 draft sale deed which is sent to the Complainant by the

Respondents also show that the car parking area is marked to the Complainants along with the apartment. The Complainants have paid Rs. 1,50,000/- for the said car parking which is evident from the Exbt. A7, split up of consideration sent by the Respondents themselves. So undoubtedly, the Respondents have the responsibility to provide one separate covered car parking to the Complainants and it is not for the Respondents to shift this obligation to the shoulders of the Association of allottees or some one else. Section 2(y) of the Act, defines the car parking, using the term "garage" as "*a place within a project having a roof and walls three sides for parking any vehicle, but does not include an unenclosed or uncovered parking space such as open parking areas;*". As this Authority found lack of clarity in the said provision, a Public Notice was issued on 22.02.2022 as clarification on allottable parking spaces as follows:

*"As per Section 2(n)(iii) of the Act, open parking areas shall be considered as 'common areas' and hence the promoter shall not allot such areas to individual allottees. Enquiries are also being received on the applicability of stilt parking, mechanised parking and basement parking which are covered. The Kerala Real Estate (Regulation & Development) Rules 2018 though uses terminologies like 'enclosed parking' and 'covered parking' does not define these terms. As per Rule 17(1)(e)(ii) of the Rules also asked to upload the details of garages/covered parking booked. Hence in the interest of allottees, in addition to garage, other **covered parking spaces** such as basement parking, stilt parking and mechanised parking arrangements will also be considered as parking space allottable to allottees by the Promoter."*

**11.** Hence it is clear that the Respondents/Promoters are not able to sell the open parking area as it is a part of the 'common area' of the real estate project as defined in the Act, 2016 and the Respondents are permitted to allot only a covered parking area to the Complainants. In this case, the Complainants were entitled to get the covered parking space in the Project land itself along with his apartment and all the amenities and facilities offered by the Respondent as per the terms of the Exbt. A1 agreement for sale, within the period specified therein or at least on the date of taking possession of the



apartment. But the Respondents have failed pathetically in allotting a separate covered parking area to the Complainants even after a long period of 10 years. Hence it is found that the Respondents have violated the terms of the agreement for sale entered into between them and the Complainants and the Point No. 2 is answered in favour of the Complainants.

12. In view of the above facts and circumstances and the whole factual matrix, we hereby direct the Respondents No. 1 & 2 to provide a separate covered and marked car parking space to the Complainants **within One month** from the date of receipt of this order.

13. No order as to costs.

This order is issued without prejudice to the right of the Complainants to approach the Authority with claims for compensation in accordance with the provisions of the Act and Rules, for any loss or damage sustained to them due to the default from the part of the Respondents.

Sd/-

Smt. Preetha P Menon  
Member

Sd/-

Sri. P H Kurian  
Chairman



Secretary (legal)

True Copy/Forwarded By/Order/

**APPENDIX****Exhibits on the side of the Complainants**

- Exhibit A1 : True Copy of agreement for Sale made between Ultima Builder and Developers Pvt Ltd.
- Exhibit A2 : Attested copy of Sale deed No: 1597/1/2011 dated 10-06-2011 Of S.R.O Thrikkakara.
- Exhibit A3 : Copy of draft sale deed handed over to the Complainants
- Exhibit A4 : E-mail dated 07-11-2018 sent by Respondent's to the Complainant
- Exhibit A5 : E-mail dated 20-04-2021 sent by Respondents to the Complainants.
- Exhibit A6 series : E-mail sent by the Respondents during the period 03-01-2011 to 20-04-2021 (21 No's.)
- Exhibit A7 : E-mail regarding price split sent by Respondents on 03-01-2011

**Exhibits on the side of the Respondents**

- Exhibit B1 : Copy of the Receipt dated 17-05-2011
- Exhibit B2 : Copy of email dated 14-04-2020
- Exhibit B3 : Copy of email dated 16-05-2011